

**The harmonisation of good faith and ubuntu in the South African common
law of contract**

by

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I declare that **THE HARMONISATION OF GOOD FAITH AND UBUNTU IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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SUMMARY

The legal historical development of fairness in the South African common law of contract is investigated in the context of the political, social and economic developments of the last four centuries. It emerges that the common law of contract is still dominated by the ideologies of individualism and economic liberalism which were imported from English law during the nineteenth century. Together with the theories of legal positivism and formalism which are closely related to parliamentary sovereignty and the classical rule of law, these ideals were transposed into the common law of contract through the classical model of contract law which emphasises freedom and sanctity of contract and promotes legal certainty. This approach resulted in the negation of the court's equitable discretion and the limitation of good faith which sustain the social and economic inequalities that were created under colonialism and exacerbated under apartheid rule. In stark contrast, the modern human rights culture grounded in human dignity and aimed at the promotion of substantive equality led to the introduction of modern contract theory in other parts of the world. The introduction of the Constitution as grounded in human dignity and aimed at the achievement of substantive equality has resulted in a sophisticated jurisprudence on human dignity that reflects a harmonisation between its Western conception as based on Kantian dignity and ubuntu which provides an African understanding thereof. In this respect, ubuntu plays an important role in infusing the common law of contract with African values and in promoting substantive equality between contracting parties in line with modern contract theory. It is submitted that this approach to human dignity should result in the development of good faith into a substantive rule of the common law of contract which can be used to set aside an unfair contract term or the unfair enforcement thereof.

KEY TERMS

Bona fides; classical law of contract; contractual autonomy; equality; equity; fairness; freedom; good faith; human dignity; human dignity as empowerment, human dignity as constraint; Kantian ethics; modern theory of contract law; open norms; public policy; rule of law; sanctity of contracts; social justice and transformation; substantive equality; transformative constitutionalism; ubuntu.

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The values of *ubuntu* ... if consciously harnessed can become central to the process of harmonising all existing legal values and practices with the Constitution. *Ubuntu* can therefore become central to a new South African jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.

Mokgoro 1998 *PELJ* 11

Explanatory note on style and citations

In general, the house style of the *Journal for Contemporary Roman-Dutch Law* (*THRHR – Tydskrif vir Hedendaagse Romeins-Hollandse Reg*) is used. With reference to sources, the citations are given as follows:

- A book, thesis, dissertation, paper or report in the text is cited in a short form containing the surname of the author, editor and/or translator, an abbreviated title, the year in brackets and the relevant page number. For example: Allen *Law in the making* (1964) 33. The full reference is given in the bibliography after the short form. For example:
Allen Law in the making (1964)
Allen CK *Law in the making* 7 ed (Oxford University Press Clarendon 1964)
- A contribution in an edited book in the text is cited containing the author and title of the contribution followed by the short form for the relevant text. For example: Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 522.
- Old authorities are cited in the text according to the accepted convention. For example: Gaius *Inst* 4 11. The short form of the source from which the text is quoted is stated directly thereafter. For example: Gaius *Inst* 4 11 (quoted from De Zulueta (1958) *Institutes of Gaius part 1*).
- A journal article in the text is cited in a short form containing the surname of the author, the year of the publication, the abbreviated journal title and the relevant page number. For example: Bennett 2011 *PELJ* 30. The full reference is given in the bibliography after the short form, except for the journal title, which is also given in the abbreviated form (the full name of an abbreviated journal title is listed in the table of abbreviations at the end of the bibliography). For example:
Bennett 2011 *PELJ*
Bennett TW “Ubuntu: an African equity” 2011 14-4 *PELJ* 30-61.

- A court case in the text is cited in a shortened form containing the case name. For example: *Everfresh Market Virginia v Shoprite Checkers*. The full reference of the case is given in the footnotes and bibliography. For example: *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).
- A statute in the text is cited in full. For example: Consumer Protection Act 68 of 2008. Citation thereafter refers to the name of the statute or an abbreviated form indicated in the text itself. The full reference of the statute is given in the bibliography. For example: Consumer Protection Act 68 of 2008.

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CHAPTER 1 LEGAL HISTORICAL DEVELOPMENT OF THE SOUTH AFRICAN COMMON LAW OF CONTRACT

Anyone who wishes to describe the history of South African private law is inevitably confronted with the dilemma that this development occurred within the context of discrimination and oppression. For there can be no doubt that private law was a structural part of the system of domination in South Africa.¹

1 1 FIRST IMPORTANT QUESTION: WHY?

The research topic of this thesis was selected after reading Justice Yacoob's minority judgment in the constitutional court case of *Everfresh Market Virginia v Shoprite Checkers*. Specifically, his following remarks summarise the core issue to be addressed in this research project, and as I will return to it from time to time, I quote it in full below:

The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.²

The question I would like to address with this thesis is how the Africanisation (or decolonisation)³ of the common law of contract can be addressed, and more

¹ Zimmerman & Visser "Introduction: South African law as a mixed legal system" in Zimmerman & Visser (eds) *Southern Cross* (1996) 5.

² *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 23.

³ This process is described by Lemmer & Olivier 2000 *De Jure* 140 as follows:

specifically, how this can be accomplished through the harmonisation of ubuntu and good faith in the common law of contract. As will be illustrated throughout this chapter and the next,⁴ the most appropriate way to approach this issue is by investigating how ubuntu as an underlying constitutional value should inform the development of good faith in the common law of contract.⁵

First, however, it is necessary to address why this must be done. Why should a Western law concept rooted in Roman law be harmonised with an African one? What is the purpose of this harmonisation and what does this mean for the common law of contract?

These are complicated questions that require a good understanding of the legal historical development of fairness⁶ in the South African common law of contract

On liberation of the Other from political, economic and cultural oppression, the new system usually foregrounds the historically marginalised subject, their language, culture and values. The silent majority is empowered and the decolonisation of the mind (and rewriting history from the perspective of the Other) becomes a priority. In the current South African context this empowerment can be referred to as an African Renaissance ... In a nutshell, the aim of all post-colonial strategies is to empower those discourses which have historically been marginalised by various forms of political oppression.

⁴ The next chapter deals with the legal historical development of fairness in the South African common law of contract.

⁵ How ubuntu should be used to develop the concept of good faith in the common law of contract is addressed in ch 3 of this thesis.

⁶ Throughout this thesis the term “fairness” is used to denote the amorphous concept implied in legal principles ranging from *bona fides* to equity intended to realise justice in contract. This application is in line with the *communis opinio doctorum* (see Willett *Fairness in consumer contracts* (2016) para 1.1 who refers to Smith (ed) *Atiyah’s Introduction to law of contract* (2006) ch 12; Collins *Law of contract* (2003) chs 2, 12 & 13; Whittaker & Zimmerman (eds) *Good faith in European contract law* (2000); Brownsword *et al* (eds) *Good faith in contract* (1999); Forte *Good faith in contract and property law* (1999); Deakin & Michie (eds) *Contracts, cooperation and competition* (1997); Halson (ed) *Exploring boundaries of contract* (1996); Wightman *Contract: a critical commentary* (1996); Willett (ed) *Aspects of fairness in contract* (1996); Beatson & Friedman (eds) *Good faith and fault in contract law* (1995); Wilhelmsson *Social contract law* (1994); Brownsword *et al* (eds) *Welfarism in contract law*

with reference to the political, social and economic context in which these developments took place. Specifically, this investigation should take place against the backdrop of the general historical development of the South African law with specific emphasis on the general historical development of the common law of contract, the customary law in general and the respective underlying ideologies of both legal systems. This is the aim of this chapter.

In the next chapter, the historical development of fairness in the South African common law of contract will be discussed in order to elaborate on the outline created here.

Finally, this chapter does not constitute an exhaustive critical discussion of the issues raised, but rather aims to give an account of these developments to the extent necessary to address the research problem.

1 2 SOUTH AFRICA AS A MIXED LEGAL SYSTEM

From Justice Yacoob's remarks above,⁷ it can be deduced that the South African law of contract is part of a legal system that can be described as a mixed legal system.⁸ First, it is a mixture between Western and African law.⁹ In this context,

(1994)). This is also the position in the South African context (see Van Huyssteen *et al Contract* (2016); Bradfield *Christie's law of contract* (2016); Sharrock *Business transactions law* (2016); Eiselen & Naudé "Introduction and overview of the Consumer Protection Act" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (OS, 2014); Hutchison & Pretorius (eds) *Contract* (2012)). For an introduction of new terminology see Barnard 2006 *Law and Critique* 153-170; Barnard 2005 *SAJHR* 278-292; Barnard *Critical legal argument for contractual justice* (2005).

⁷ As quoted in the text at n 2 *supra*.

⁸ See also Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 12; Van Huyssteen *et al Contract law* (2010) 24-25; Church & Church 2008 *Fundamina* 1; Church *et al Human rights from a comparative perspective* (2007) 51; Hawthorne 2006 *Fundamina* 71; Thomas 2004 *Fundamina* 188; Du Bois 2004 *International Journal of Legal Information* 219; Zimmerman "Good faith and equity in modern Roman-Dutch contract law" in Rabello (ed) *Aequitas and equity* (1997) 517; Church 1996 *Fundamina* 309; Hahlo & Kahn *Union of South Africa* (1960) 41-42.

African law refers to what is usually called African customary or indigenous law.¹⁰ The concept of ubuntu originates from this source of law.¹¹ The Western law component is rooted firmly in the Romano-Germanic (civil law) tradition but has been influenced by the Anglo-American (common law) tradition as well.¹² The Roman and Roman-Dutch law traditions form part of the civil law tradition, while the English law is part of the common law tradition.¹³ Good faith originated in Roman law¹⁴ and arrived in South Africa as part of the Roman-Dutch law.¹⁵

Both these mixtures are relevant to the research topic. This chapter starts with a discussion of customary law as its history in South Africa predates the arrival of the two Western law traditions.¹⁶

⁹ Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 12; Himonga & Nhlapo (eds) *African customary law* (2014) 45; Van Huyssteen *et al Contract law* (2010) 24-25; Church *et al Human rights from a comparative perspective* (2007) 52, 54; Thomas 2004 *Fundamina* 188; Sanders 1981 *CILSA* 328.

¹⁰ The term “customary law” is used throughout this thesis except where the context requires otherwise (cf n 24 *infra*).

¹¹ See the discussion in para 1 3 2 2 *infra*.

¹² Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 12; Van Huyssteen *et al Contract law* (2010) 24; Church *et al Human rights from a comparative perspective* (2007) 54; Hawthorne 2006 *Fundamina* 71-72; Thomas 2004 *Fundamina* 188; Van Niekerk 1990 *Codicillus* 35; Sanders 1981 *CILSA* 328; Hahlo & Kahn *Union of South Africa* (1960) 41-42.

¹³ Church *et al Human rights from a comparative perspective* (2007) 54; Sanders 1981 *CILSA* 328.

¹⁴ For a discussion on the introduction and development of good faith (*bona fides*) in Roman law see ch 4 *infra*.

¹⁵ See the discussion in para 1 4 2 2 *infra*.

¹⁶ In the words of Church *et al Human rights from a comparative perspective* (2007) 58: “[i]f the indigenous system is to be regarded as part of South African legal history this is where one should begin”.

1 3 EARLIEST SOUTH AFRICAN INHABITANTS AND THEIR LAWS

1 3 1 Inhabitation of South Africa by the San, the KhoiKhoi and the Bantu speaking people

From what historians and archaeologists can gather from the scattered evidence available,¹⁷ hunter-gatherers (predecessors of the San) already populated various areas of Southern Africa 14 000 years ago.¹⁸ In addition, it would appear that predecessors of the KhoiKhoi obtained livestock from the Bantu speaking communities in northern Botswana and moved south into South Africa more than 2 000 years ago.¹⁹ There is further evidence which suggests that around 1 700 years ago Bantu speaking farmers moved into South Africa with their livestock.²⁰ Therefore, it is safe to assume that South Africa was populated by these people long before any Europeans settled in South Africa.²¹ As a result, their descendants are regarded as the indigenous people of South Africa.²² Today,

¹⁷ Berat (ed) *Thompson's history of South Africa* (2014) 2.

¹⁸ Swart "Die eerste mense" in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 6; Van Niekerk *Interaction of indigenous law and Western law* (1995) 11.

¹⁹ Berat (ed) *Thompson's history of South Africa* (2014) 11-12; Swart "Die eerste mense" in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 6; Van Niekerk *Interaction of indigenous law and Western law* (1995) 11.

²⁰ Whitelaw "Die oorsprong van boerdery in Suid-Afrika" in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 22; Van Niekerk *Interaction of indigenous law and Western law* (1995) 16. See also Berat (ed) *Thompson's history of South Africa* (2014) 12 who states that Bantu speaking tribes populated various areas of South Africa by AD 1 000.

²¹ Berat (ed) *Thompson's history of South Africa* (2014) 29; Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(a); Barnard-Naudé "Sources of law and legal authority" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 145; Devenish 2005 *TSAR* 547.

²² Bekker "Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 21-22. Various terms have been used to describe this group of people, including "natives", "black people" and "Africans". The term "indigenous people" is used throughout this thesis except where the context requires otherwise (see Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 10, 19-20 on the issues surrounding the different terms in this respect). Today, the Bantu (now referred to as "African") speaking peoples of South Africa can be sub-divided into main and sub-groups according to language and culture, namely the Nguni group (consisting of the Zulu, Xhosa, Swazi and Ndebele groups), the Tsonga group (also

the indigenous population of South Africa constitutes approximately 80% of the South African population.²³

1 3 2 Nature and characteristics, and underlying values of customary law

1 3 2 1 Nature and characteristics of customary law

Bennett explains that customary law²⁴ “derives from social practices that the community concerned accepts as obligatory”.²⁵ Thus, customary law refers to the indigenous legal systems which are followed by the indigenous people of South Africa.²⁶

Three features of customary law must be mentioned. First, customary law (in its original form) is an unwritten source of law that is passed from generation to generation and developed through oral tradition.²⁷ Secondly, the oral tradition

referred to as the Shangaan), the Sotho group (consisting of the Pedi, Sotho and Tswana groups) and the Venda group (Bekker “Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 22; Van Huyssteen *et al Contract law* (2010) 19).

²³ According to the most recent estimate the African population constitutes 80,8% of the South African population (Stats SA *Mid-year population estimates* (2016) 2).

²⁴ “Customary law” is the preferred term as it is used in ss 39(2) & 211(3) of the Constitution although the term “indigenous law” appears in s 1(4) of the Law of Evidence Amendment Act and is defined as “the law or custom as applied by the Black tribes in the Republic” (Bekker “Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 19; Bennett *Customary law* (2004) 34 n 1).

²⁵ Bennett *Customary law* (2004) 1-2. See also Du Plessis “The historical functions of law: developments after 1500” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 110.

²⁶ Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 5 n 1; Van Huyssteen *et al Contract law* (2010) 19. For a more in-depth critical discussion of the problems in defining the term “customary law” see Bekker “Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 18-19; Himonga & Nhlapo (eds) *African customary law* (2014) 27-32; Olivier *et al* “Indigenous law” in Joubert (ed) *LAWSA Vol 32* (2009) para 1; Thomas & Tladi 1999 *CILSA* 355.

²⁷ Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 9; Himonga & Nhlapo (eds) *African customary law* (2014) 27; Onyango *African customary law* (2013) 31; Barnard-Naudé “Sources of law and legal authority”

ensures flexibility in that customary law adapts to changes in the political and socio-economic sphere. As explained by Bennett:

[C]ustomary law is always up to date, because, ancient though it may seem, no custom is ever older than the memory of the oldest living person. Systems of custom therefore have the remarkable ability to allow forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place, always on the understanding that the new is old.²⁸

Thirdly, the rules of customary law are used as a general guide to make decisions within a specific factual matrix.²⁹ Bennett explains that once a general rule has been expounded upon and applied to the facts of the case, the rule returns to its general form.³⁰ As a result, the doctrine of *stare decisis*³¹ is unknown in customary

in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 145; Church *et al* *Human rights from a comparative perspective* (2007) 64; Bennett *Customary law* (2004) 2-4; Thomas & Tladi 1999 *CILSA* 356; Van Niekerk *Interaction of indigenous law and Western law* (1995) 14; Hahlo & Kahn *Union of South Africa* (1960) 317; Elias *Nature of African customary law* (1956) 2; Brookes *History of native policy* (1924) 172. Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 9 n 23 defines oral tradition as “unwritten communications of the past through legends, emblems, songs and poems”.

²⁸ Bennett *Customary law* (2004) 2. See also Bekker “Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 20-21; Himonga & Nhlapo (eds) *African customary law* (2014) 31; Du Plessis “The historical functions of law: developments after 1500” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 110; Van Niekerk *Interaction of indigenous law and Western law* (1995) 21; Gluckman *Judicial process among the Barotse* (1955) 24.

²⁹ Bennett *Customary law* (2004) 3. See also Berat (ed) *Thompson’s history of South Africa* (2014) 26; Gluckman *Judicial process among the Barotse* (1955) 24.

³⁰ Bennett *Customary law* (2004) 3.

³¹ The term *stare decisis* can be translated as “abide by, adhere to, decided cases” (Hiemstra & Gonin *Trilingual legal dictionary* (2008) 292). Barnard-Naudé “Sources of law and legal authority” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 134 explains that the doctrine means that “when a court hears a matter, it must take into account previous judgments in similar cases which other courts have already decided in the past”. See also Bennett *Customary law* (2004) 3; Hahlo & Kahn *Union of South Africa* (1960) 29.

law.³² Thus, customary law is regarded as a non-specialised legal system and the rules of customary law are not always clear-cut and immutable.³³

As a result of the oral tradition there is little written information available on the historical development of the customary law, especially for the period predating the arrival of the Dutch in 1652.³⁴ This is also true in respect of historical writings dealing with its underlying values.³⁵ Furthermore, although the oral tradition is still followed in present times,³⁶ the status, nature and application of the customary law were influenced by the arrival of the Dutch,³⁷ the colonisation by the British,³⁸ the unification of South Africa³⁹ and apartheid.⁴⁰ Consequently, the written sources that are available are at best interpretations of customary law and not necessarily a true reflection thereof.⁴¹

³² Bennett *Customary law* (2004) 3; Gluckman *Judicial process among the Barotse* (1955) 23.

³³ Bekker "Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 24; Church *et al Human rights from a comparative perspective* (2007) 64; Van Niekerk *Interaction of indigenous law and Western law* (1995) 39, 249; Sanders 1981 *CILSA* 334.

³⁴ Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 9; Du Plessis "The historical functions of law: developments after 1500" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 110; Church *et al Human rights from a comparative perspective* (2007) 58; Bennett *Customary law* (2004) 1-2; Thomas 2004 *Fundamina* 188.

³⁵ Himonga *et al* 2013 *PELJ* 376.

³⁶ Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 5 referring to the "living customary law" which she defines as "the law that is actually applied by indigenous people" and which "often conflicts with the official customary law that is applied by the State courts or entrenched in legislation" (at n 3). See also Himonga & Nhlapo (eds) *African customary law* (2014) 27-35; Church *et al Human rights from a comparative perspective* (2007) 64; Bennett *Customary law* (2004) 4; Van Niekerk *Interaction of indigenous law and Western law* (1995) 14, 37.

³⁷ Cf para 1 4 *infra* dealing with settlement of the Dutch at the Cape.

³⁸ Cf para 1 5 *infra* dealing with the colonisation of the Cape by the British.

³⁹ Cf para 1 6 *infra* dealing with the unification of South Africa.

⁴⁰ Thomas & Tladi 1999 *CILSA* 356 (cf para 1 7 *infra* dealing with apartheid).

⁴¹ Himonga & Nhlapo (eds) *African customary law* (2014) 24-25; Pieterse "'Traditional' African jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 440-441; Bennett

1 3 2 2 *Underlying values of customary law*

Despite the above problems and the fact that each community has its own laws, it is generally agreed that the laws of the different indigenous communities share the same broad principles.⁴² For that reason, the ideology of African customary law has been described as follows:

[I]ndigenous law is regarded as communal or socialist, and in this respect the emphasis is on the principle of social solidarity, the essence of which is the preservation of the group or community. This African ideology of communitarianism ... may be traced to the traditional society which is intrinsically group-oriented and sets great store by traditional African values such as religion and popular consensus in government.⁴³

In line with this ideology, dispute resolution in customary law aims and attempts to preserve and advance social harmony within relationships.⁴⁴

Customary law (2004) 5-7; Van Niekerk *Interaction of indigenous law and Western law* (1995) 22-23; Thomas & Tladi 1999 *CILSA* 356; Bennett & Peart *Sourcebook of African customary law* (1991) 1.

⁴² Himonga & Nhlapo (eds) *African customary law* (2014) 23; Bekker "Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 18; Bennett "Application and ascertainment of customary law" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 38; Church *et al Human rights from a comparative perspective* (2007) 63; Pieterse "'Traditional' African jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 441; Sanders 1981 *CILSA* 333; Brookes *History of native policy* (1924) 173. Cf n 22 *supra* for a summary of the various African communities in South Africa.

⁴³ Van Niekerk 1990 *Codicillus* 36. See also Bekker "Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 21, 27; Berat (ed) *Thompson's history of South Africa* (2014) 26; Du Plessis "The historical functions of law: developments after 1500" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 110-111; Church *et al Human rights from a comparative perspective* (2007) 64; Devenish 2005 *TSAR* 548-549; Pieterse "'Traditional' African jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 37; Van Niekerk *Interaction of indigenous law and Western law* (1995) 248-249; Sanders 1981 *CILSA* 333; Brookes *History of native policy* (1924) 175.

⁴⁴ Berat (ed) *Thompson's history of South Africa* (2014) 26; Du Plessis "The historical functions of law: developments after 1500" in Humby *et al* (eds) *Law and legal skills in South Africa*

It is important to note that although customary law is group-oriented the interests of the individual are still important in traditional African culture.⁴⁵ Specifically, the concept of ubuntu accentuates the relationship between the individual and the community.⁴⁶ The concept of ubuntu is regarded as an underlying value of all indigenous communities in South Africa and it is closely related to the ideologies referred to above.⁴⁷ The original meaning of ubuntu is difficult to determine as “it is impossible to trace the exact denotation of the term in its vernacular origins”.⁴⁸ This is especially due to the oral tradition followed by the indigenous communities and it is reflected in the saying that ubuntu is “shrouded in a ‘kaross of mystery’”.⁴⁹

It has been argued that the historical roots of ubuntu can be traced to small-scale societies in Africa⁵⁰ and that initially it applied to relationships between family and friends.⁵¹ It has also been proposed that originally ubuntu denoted the “essence of being human” which included both the positive and negative attributes of a person.⁵² In an attempt to construct some sort of written history of ubuntu, Gade

(2012) 111; Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 451; Bennett & Peart *Sourcebook of African customary law* (1991) 83.

⁴⁵ Church *et al Human rights from a comparative perspective* (2007) 64; Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 37; Van Niekerk 1998 *CILSA* 167; Sanders 1981 *CILSA* 333; Brookes *History of native policy* (1924) 175 quoting a memorandum by Mr T Shepstone Jr (dated 1880).

⁴⁶ Van Niekerk 1998 *CILSA* 167.

⁴⁷ Himonga *et al* 2013 *PELJ* 371; Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 441; Mokgoro 1998 *PELJ* 1-2; Van Niekerk 1998 *CILSA* 167; Van Niekerk *Interaction of indigenous law and Western law* (1995) 250.

⁴⁸ Bennett 2011 *Loyola Law Review* 711.

⁴⁹ Bennett 2011 *Loyola Law Review* 711.

⁵⁰ Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 441; Van Niekerk 1998 *CILSA* 168.

⁵¹ Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 31; Coertze 2001 *South African Journal of Ethnology* 113-114.

⁵² Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 31; Coertze 2001 *South African Journal of Ethnology* 113.

conducted an extensive literary survey of the use of the word in the available texts.⁵³ He found the earliest written reference to ubuntu dating to 1846.⁵⁴ He perused many of the texts and found that in the early texts (between 1846 and 1980) ubuntu was mostly described as “human nature”, “humanity” and “humanness”.⁵⁵ Sometimes it also denoted the following meanings: “goodness of nature”, “good moral disposition”, “virtue”, “sense of common humanity”, “true humanity”, “reverence for human nature”, “essential humanity”, “kindly simple feeling for persons as persons”, “liberality”, “a person’s own human nature”, “generosity”, “human feeling”, “humaneness”, “good disposition”, “good moral nature”, “personhood”, “kindness”, “humanity (benevolence)”, “personality”, “human kindness”, “the characteristic of being truly human”, “greatness of soul”, “a feeling of human wellbeing” and “capacity of social self sacrifice on behalf of others”.⁵⁶ From these descriptions it can be concluded that ubuntu emphasises the concepts of humanity and morality as an integral part of indigenous communities.

Today, it is usually expressed with reference to the Zulu proverb “umuntu ngumuntu ngabantu” or the Xhosa saying “ubuntu ungamntu ngabayne abantu”.⁵⁷ These expressions have been translated as “persons depend on persons to be persons”, “a person depends on other people to be a person” or “a person is a person by or through other people”.⁵⁸ Sometimes, the Sotho word “botho” is used

⁵³ Gade 2011 *SA Journal of Philosophy* 303-329.

⁵⁴ Gade 2011 *SA Journal of Philosophy* 306.

⁵⁵ Gade 2011 *SA Journal of Philosophy* 307.

⁵⁶ Gade 2011 *SA Journal of Philosophy* 307-308.

⁵⁷ Bekker “Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 29; Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 31; Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 441 n 14; Mokgoro 1998 *PELJ* 2.

⁵⁸ Bekker “Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 29 n 70; Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 31; Mokgoro 1998 *PELJ* 2.

which derives from the Sotho expression “motho ke motho ba batho ba bangwe”.⁵⁹ A more comprehensive explanation on the meaning of ubuntu and these expressions is provided by Van Niekerk:

[U]buntu can be understood only within the context of the world view of indigenous people. They regard the world as an integrated whole of nature, life on earth and the after-life. People on earth should live in harmony with each other, with nature, and with the gods and the ancestors. To maintain this harmonious state of affairs, the interests of the individual, as a component of the collectivity, should be looked after. The individual's dignity, health and social welfare should be protected. But her welfare is only one side of the coin, the other side being the welfare of the community. And in that lies the essence of *ubuntu*: the welfare of the individual is inextricably linked to the welfare of the collectivity and that, in turn, is inextricably linked to an harmonious relationship with the ancestors and with nature. Although man is at the centre of things, man can be defined only in relation to other men. And the community can likewise be defined only with reference to its individual members.⁶⁰

Therefore, ubuntu recognises the interdependence between the individual and the community and aims to achieve social harmony between community members. However, this social harmony does not come at the expense of the individual but rather exists because the individual is placed at the centre of the community and her dignity and welfare must be protected and promoted.

⁵⁹ Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 31; Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 441 n 14; Mokgoro 1998 *PELJ* 2. The term “ubuntu” is used throughout this thesis as it is the term used in most legal writings (cf the discussion on ubuntu as a legal concept in para 1 8 4 *infra*).

⁶⁰ Van Niekerk 1998 *CILSA* 168 (footnotes omitted). See also Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 444.

Consequently, ubuntu has been linked with the ideas of humanism⁶¹ and socialism,⁶² although this link should be made with reference to the intellectual tradition of African humanism and socialism.⁶³ Both these elements are captured by South African philosopher Mabogo More in his description of ubuntu:

In one sense, *ubuntu* is a philosophical concept forming the basis of relationships, especially ethical behaviour. In another sense, it is a traditional politico-ideological concept referring to socio-political action. As a moral or ethical concept, it is a point of view according to which moral practices are founded exclusively on consideration and enhancement of human well-being; a preoccupation with human welfare. It enjoins that what is morally good is what brings dignity, respect, contentment, and prosperity to others, self, and the community at large ... *Ubuntu* is a demand for respect for persons no matter what their circumstance may be.

In its political-ideological sense it is a principle for all forms of social or political relationships. It enjoins and makes for peace and social harmony by encouraging the practice of sharing in all forms of communal existence.⁶⁴

As the focus of this thesis is the harmonisation of good faith and ubuntu in the common law of contract, a detailed investigation into the specific rules and principles of the customary law of contract fall outside the scope of this thesis. As

⁶¹ Pieterse "'Traditional' African jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 445; Bekker 2006 *SAPL* 334; More "Philosophy in South Africa under and after apartheid" in Wiredu (ed) *Companion to African philosophy* (2004) 156; Mokgoro 1998 *PELJ* 2; Van Niekerk 1998 *CILSA* 167-168.

⁶² Cornell 2010 *SAPL* 383; More "Philosophy in South Africa under and after apartheid" in Wiredu (ed) *Companion to African philosophy* (2004) 156; Mokgoro 1998 *PELJ* 3.

⁶³ Cornell 2010 *SAPL* 383; Pieterse "'Traditional' African jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 445; More "Philosophy in South Africa under and after apartheid" in Wiredu (ed) *Companion to African philosophy* (2004) 156.

⁶⁴ More "Philosophy in South Africa under and after apartheid" in Wiredu (ed) *Companion to African philosophy* (2004) 156-157. See also the references to More's definition of ubuntu in Cornell & Van Marle 2015 *Verbum et Ecclesia* 2-3; Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 6-7; Cornell 2010 *SAPL* 396.

will be illustrated throughout this thesis, ubuntu's present contribution to the common law of contract lays in the values it encapsulates and how these values could be used to critique and develop the underlying values of the common law of contract. As stated by Pieterse:

Ubuntu indeed represents the crux of African philosophy and as such mandates closer scrutiny in the quest for extracting authentically African jurisprudential values. ... *Ubuntu's* contribution to South African jurisprudence lies in the theoretical values it embraces, and this is the context in which it should be studied.⁶⁵

Therefore, the discussions on ubuntu in this thesis will focus on these aspects in the following manner. The introduction and development of ubuntu as a legal concept in the South African common law is investigated later in this chapter.⁶⁶ The influence of ubuntu in the common law of contract is analysed in the next chapter.⁶⁷ In chapter three, the judicial descriptions of ubuntu are illuminated with reference to writings in African philosophy⁶⁸ and it is investigated how ubuntu, as an underlying constitutional value,⁶⁹ could be used to inform the expression of the founding constitutional values in the common law of contract.⁷⁰ Finally, the emerging role of ubuntu in the South African common law of contract is further illuminated by comparing its introduction and development in the South African law to that of good faith in the Roman law of contract.⁷¹

⁶⁵ Pieterse "Traditional' African jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 442.

⁶⁶ See para 1 8 4 *infra*.

⁶⁷ See para 2 3 3 *infra*.

⁶⁸ See para 3 2 5 *infra*.

⁶⁹ In this thesis, ubuntu is referred to as an underlying constitutional value and reference to the founding constitutional values refer to the constitutional values of human dignity, equality, freedom and the rule of law (see the discussion in para 1 8 2 *infra*).

⁷⁰ See ch 3 *infra*.

⁷¹ See ch 4 *infra*.

1 4 ARRIVAL OF THE DUTCH AND ROMAN-DUTCH LAW (1652-1795)

1 4 1 Activities of the Dutch East India Company

The Dutch were the first to settle in South Africa with the arrival of Jan van Riebeeck in April 1652.⁷² He was sent by the Dutch East India Company⁷³ with instructions to establish a refreshment station at the Cape of Good Hope⁷⁴ for the ships of the company headed from the Netherlands to the East Indies and back.⁷⁵ The Dutch East India Company was a private commercial entity owned by a number of shareholders with the aim to make profit⁷⁶ and was characterised by the monopolistic mercantilism prevalent at that time.⁷⁷ The intention of the Dutch East India Company was not to colonise South Africa but to run a safe

⁷² Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(b); Bennett *Customary law* (2004) 35; Thomas 2004 *Fundamina* 188; Terreblanche *History of inequality in South Africa* (2002) 153; De Vos *Regsgeskiedenis* (1992) 227; Hahlo & Kahn *South African legal system* (1991) 567; Boucher "The Cape under the Dutch East India Company" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 61; Hahlo & Kahn *Union of South Africa* (1960) 2. Prior to this period, various Europeans were active along the coast of South Africa but did not settle (Berat (ed) *Thompson's history of South Africa* (2014) 31-32; Church *et al Human rights from a comparative perspective* (2007) 55; Giliomee "In goeie geselskap" in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 40; De Vos *Regsgeskiedenis* (1992) 226-227; Boucher "The age of exploration" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 55-60; Walker *History of South Africa* (1947) ch 1).

⁷³ Originally known as the Vereenigde Geocroyeerde Oost-Indische Compagnie and abbreviated as "VOC" (Hahlo & Kahn *South African legal system* (1991) 534; Hahlo & Kahn *Union of South Africa* (1960) 10).

⁷⁴ Named by Van Riebeeck in accordance with his instructions from the Dutch East India Company (Hahlo & Kahn *South African legal system* (1991) 571; Hahlo & Kahn *Union of South Africa* (1960) 2). The term "Cape" is used throughout this thesis.

⁷⁵ Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(b); Bennett *Customary law* (2004) 35; Thomas 2004 *Fundamina* 188; Hahlo & Kahn *South African legal system* (1991) 567; Boucher "The Cape under the Dutch East India Company" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 61; De Wet *Ou skrywers in perspektief* (1988) 18; Hahlo & Kahn *Union of South Africa* (1960) 3.

⁷⁶ Schutte "Company and colonists at the Cape, 1652-1795" in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 284-285; Hahlo & Kahn *Union of South Africa* (1960) 11.

⁷⁷ Hahlo & Kahn *Union of South Africa* (1960) 3; Boucher "The Cape under the Dutch East India Company" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 62.

refreshment station to provide water and food to its ships at low cost.⁷⁸ Accordingly, its initial policy towards the indigenous people⁷⁹ was one of non-aggression and pro-trade.⁸⁰

In order to stimulate agricultural production, “letters of freedom” were given to certain employees of the company and they were encouraged to settle and farm in the Cape and given land for this purpose from 1657.⁸¹ They became known as *freeburghers*⁸² although all their commercial activities were strictly supervised and controlled through licences and supervision which was characteristic of the

⁷⁸ Berat (ed) *Thompson’s history of South Africa* (2014) 33; Thomas 2008 *Fundamina* 134; Giliomee “In goeie geselskap” in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 42; Schutte “Company and colonists at the Cape, 1652-1795” in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 285, 288ff; Boucher “The Cape under the Dutch East India Company” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 61; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 5; Kilpin *Romance of a colonial parliament* (1930) 5.

⁷⁹ Specifically, the Khoikhoi (called “Hottentots” by the Dutch) and the San (called “Bushmen” by the Dutch) (Berat (ed) *Thompson’s history of South Africa* (2014) 6; Thomas 2008 *Fundamina* 137 n 31; Elphick & Malherbe “The Khoisan to 1828” in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 4; Hahlo & Kahn *Union of South Africa* (1960) 4).

⁸⁰ Berat (ed) *Thompson’s history of South Africa* (2014) 37; Thomas 2008 *Fundamina* 134; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 5 quoting an early proclamation from Kilpin *Romance of a colonial parliament* (1930) 9-10: “It was recognised that collisions with the natives were not in the Company’s interest, and the Council strove its utmost to prevent them. One of its first acts was to proclaim that ‘should any one ill-treat, beat, or push a native – whether he be right or wrong – he shall in the presence of the latter receive fifty lashes’; and it even went so far so to prohibit any European from making ‘a sour face’ at a native”.

⁸¹ Berat (ed) *Thompson’s history of South Africa* (2014) 33; Woolman & Swanepoel “Constitutional history” in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(b); Guelke “Freehold farmers and frontier settlers, 1657-1780” in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 66; Schutte “Company and colonists at the Cape, 1652-1795” in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 289; Boucher “The Cape under the Dutch East India Company” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 62; Hahlo & Kahn *Union of South Africa* (1960) 3; Eybers (ed) *Select constitutional documents* (1918) xviii.

⁸² Also called free-men or burghers (Eybers (ed) *Select constitutional documents* (1918) xviii).

mercantilism of that time.⁸³ This was the beginning of the permanent settlement at the Cape.⁸⁴ In addition, the company imported slaves to provide a cheap and easily controlled labour force.⁸⁵

1 4 2 Introduction and characteristics of Roman-Dutch law

1 4 2 1 Introduction of Roman-Dutch law at the Cape

It was decided that the law of Holland (the main province in the United Provinces of the Netherlands) would be applied in the Cape.⁸⁶ Van der Linden describes the law of Holland as follows:

[A]ny general *law of the land*, or any local *ordinance* having the force of law, or any well-established *custom* [that] can be found affecting it (1).

⁸³ Hahlo & Kahn *Union of South Africa* (1960) 3. See also Berat (ed) *Thompson's history of South Africa* (2014) 35; Guelke "Freehold farmers and frontier settlers, 1657-1780" in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 70; Schutte "Company and colonists at the Cape, 1652-1795" in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 289.

⁸⁴ Church *et al Human rights from a comparative perspective* (2007) 55.

⁸⁵ Berat (ed) *Thompson's history of South Africa* (2014) 33. These slaves were imported from various places along the trade posts of the Dutch East India Company (Berat (ed) *Thompson's history of South Africa* (2014) 36; Boucher "The Cape under the Dutch East India Company" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 63, 70; Sachs *Justice in South Africa* (1973) 20; Hahlo & Kahn *Union of South Africa* (1960) 3). For a more detailed exposition on the slave trade and slavery in South Africa see Berat (ed) *Thompson's history of South Africa* (2014) 42-44; Armstrong & Worden "The slaves, 1652-1834" in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 109-183. For an analysis of the law of slavery in the Cape see De Beer 1996 *Fundamina* 222-235.

⁸⁶ Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(d); Thomas 2004 *Fundamina* 188-189 (referring to De Wet *Ou skrywers in perspektief* (1988) 5-6): "An earlier request by the Governor General of the Dutch East Indies, JP Coen, for instruction concerning what law to apply, was answered with the reply 'the law of Holland'". See also Fagan "Roman-Dutch law in its South African historical context" in Zimmerman & Visser (eds) *Southern Cross* (1996) 38-39; De Vos *Regsgesiedenis* (1992) 229-230; Hahlo & Kahn *South African legal system* (1991) 571ff; Visagie *Regspiegeling en reg aan die Kaap* (1969) 63-78; Visagie 1963 *Acta Juridica* 149; Hahlo & Kahn *Union of South Africa* (1960) 13; Lee *Introduction to Roman-Dutch law* (1953) 2.

The Roman law, as a model of wisdom and equity (2), is, in default of such a law, accepted by us through custom in order to supply this want (3).⁸⁷

This system of law was called Roman-Dutch law⁸⁸ since it constituted an amalgamation between “medieval Dutch law, mainly of Germanic origin, and the Roman law of Justinian, as adapted in the ‘Reception’”.⁸⁹ Thus, the Roman-Dutch law forms part of the Romano-Germanic (civil) law tradition.

1 4 2 2 *Characteristics and nature of Roman-Dutch law*

It is important to take note of the following characteristics of the Roman-Dutch law that arrived at the Cape. First, in Roman-Dutch law equity was part of the law and did not constitute a separate system of law apart from the common law.⁹⁰ The courts would have recourse to equity where Roman-Dutch law principles on the issue did not exist.⁹¹ Therefore, equity had a subsidiary function in the absence of

⁸⁷ Juta (tr) *Van der Linden's Institutes of Holland* (1897) 1 1 4. Cf Grotius *Inleidinge* 1 2 22 (as found in Lee (tr) *Grotius' Jurisprudence of Holland* (1926)). See further Thomas 2006 *Fundamina* 259; Hawthorne 2006 *Fundamina* 72; Thomas 2004 *Fundamina* 189.

⁸⁸ Apparently so named by Simon van Leeuwen who used it as a sub-title of his *Paratitula juris novissimi* (1652) and as the title of his *Roomsch Hollandsch Recht* (1664) (Hahlo & Kahn *South African legal system* (1991) 330; Lee *Introduction to Roman-Dutch law* (1953) 2).

⁸⁹ Hahlo & Kahn *South African legal system* (1991) 329. See also Woolman & Swanepoel “Constitutional history” in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(d); Hahlo & Kahn *Union of South Africa* (1960) 47; Lee *Introduction to Roman-Dutch law* (1953) 3.

⁹⁰ Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 519 where he states: “Roman-Dutch law was, in itself, inherently equitable; equity was not a body of rules outside of and apart from the ‘common law’, but thoroughly pervading and informing it”. See also Church *et al Human rights from a comparative perspective* (2007) 63; Devenish 2005 *TSAR* 552 esp n 42; Church 1996 *Fundamina* 310; Hahlo & Kahn *South African legal system* (1991) 136-137; Erasmus 1989 *SALJ* 671-672; Hahlo & Kahn *Union of South Africa* (1960) 48 n 28.

⁹¹ Van der Keessel *Th* 24: “In the total absence of local law, of custom and of the subsidiary law of which we have spoken, we ought to have recourse to Natural Equity” (quoted from Lorenz (tr) *Select theses of the Laws of Holland by Van der Keessel* (1855)); Van der Keessel *Praelectiones* ad 1 2 22 (as found in Van Warmelo *et al* (eds) *Van der Keessel Voorlesinge* (1961)); Voet *Commentarius* 1 1 6 (as found in Gane (tr) *Selective Voet* (1955)); Huber

clear laws.⁹² Furthermore, Grotius defined equity as a virtue that can be used to correct deficiencies resulting from the universality of laws.⁹³ It had a regulatory or corrective function and was used to intervene where adherence to the strict rules of the law would result in injustice.⁹⁴ Grotius' views were adopted by other Roman-Dutch writers like Paulus Voet,⁹⁵ Ulrik Huber,⁹⁶ Johannes Voet,⁹⁷ Dionysius van der Keessel⁹⁸ and Johannes van der Linden.⁹⁹ Consequently, this regulatory and

Heedensdaegse Rechtsgeleertheyt 1 1 17, 18 & 21 (as found in Gane (tr) *Huber's jurisprudence of my time* (1939)); Grotius *Inleidinge* 1 2 22 (as found in Lee (tr) *Grotius' Jurisprudence of Holland* (1926)). See also Hawthorne 2013 *Fundamina* 301-302; Du Plessis 2002 *THRHR* 405.

⁹² Hawthorne 2013 *Fundamina* 301-302; Du Plessis 2002 *THRHR* 405.

⁹³ Du Plessis 2002 *THRHR* 406 referring to Grotius *Prolegomena juri Hollandico praemittenda* 3 as contained in Feenstra 1967 *TR* 444. The relevant text reads as follows: "Proprie vero et singulariter *aequitas* est virtus voluntatis correctrix ejus in quo lex deficit propter universitatem; aequum autem est ipsum quo lex corrigitur" (Feenstra 1967 *TR* 479). It was later discovered that the *Prolegomena juri Hollandico praemittenda* was nothing other but Grotius' much published work *De Aequitate* (Scholtens & Feenstra 1974 *TR* 202). The corresponding text in *De Aequitate* 1 3 has been loosely translated by Heron *Introduction to the history of jurisprudence* (1860) 138: "Equity is properly and simply a virtue of the will, corrective of that wherein the Law is deficient on account of its universality. That is equitable by which the law is corrected". See also Hahlo & Kahn *South African legal system* (1991) 136 referring to Grotius *De Aequitate* 1 3.

⁹⁴ Du Plessis 2002 *THRHR* 406; Neels 1998 *TSAR* 714; Du Toit 1976 *TRW* 43-44. Grotius based his ideas on those of Aristotle (Du Plessis 2002 *THRHR* 406; Hahlo & Kahn *South African legal system* (1991) 136; Du Toit 1976 *TRW* 44). See para 4 4 1 2 *infra* dealing with Aristotle's writings on fairness.

⁹⁵ Voet *De Statutis* 3 4 1-10 as quoted in Neels 1998 *TSAR* 714. See also Du Plessis 2002 *THRHR* 406.

⁹⁶ Huber *Heedensdaegse Rechtsgeleertheyt* 1 1 12-21 (as found in Gane (tr) *Huber's jurisprudence of my time* (1939)). See also Du Plessis 2002 *THRHR* 406; Du Toit 1976 *TRW* 47.

⁹⁷ Voet *Commentarius* 1 1 5-6 & 5 1 51 (as found in Gane (tr) *Selective Voet* (1955)). See also Du Plessis 2002 *THRHR* 406; Neels 1998 *TSAR* 714-715; Du Toit 1976 *TRW* 47.

⁹⁸ Van der Keessel *Praelectiones ad* 1 2 22 (*Th* 24) (as found in Van Warmelo *et al* (eds) *Van der Keessel Voorlesinge* (1961)). See also Du Plessis 2002 *THRHR* 406; Du Toit 1976 *TRW* 47.

⁹⁹ See Van der Linden's supplement to Voet *Commentarius* 1 1 6 (as found in Gane (tr) *Selective Voet* (1955) 10 n (a)). Van der Linden specifically refers to Grotius *De Aequitate* 1 3 (cf n 93 *supra*). See also Du Plessis 2002 *THRHR* 406; Du Toit 1976 *TRW* 47-48.

corrective function of equity was part of the Roman-Dutch law that arrived at the Cape.¹⁰⁰

The concept of good faith (*bona fides*) in the Roman-Dutch law of contract was one of the legal institutions originating from the concept of equity and arrived at the Cape as part of the Roman-Dutch law.¹⁰¹ In Roman-Dutch law, all contracts were considered *bonae fidei*.¹⁰² According to Grotius this meant that the parties “are mutually bound to everything which good faith reasonably and equitably demands”.¹⁰³ Zimmerman argues that the concept of good faith instilled the law of contract with “an equitable spirit”.¹⁰⁴ Furthermore, the principles of freedom and sanctity of contract (also referred to as *pacta sunt servanda*) formed part of the Roman-Dutch law that arrived in South Africa, although it was applied within a mercantilist and monopolistic environment and tempered by the application of good faith.¹⁰⁵ The historical development of good faith and the principles of

¹⁰⁰ Du Plessis 2002 *THRHR* 406; Du Toit 1976 *TRW* 46.

¹⁰¹ Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 519. See also Thomas “The changing fortunes of bona fides in the South African law of contract” in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148; Zimmerman “Good faith and equity” in Zimmerman & Visser (eds) *Southern Cross* (1996) 218.

¹⁰² Decker’s annotation to Van Leeuwen’s *Roomsch Hollandsch Recht* 4 2 1 (as found in Kotzé (tr) *Simon van Leeuwen’s Commentaries* (1923) 12). See also Thomas “The changing fortunes of bona fides in the South African law of contract” in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148; Zimmerman “Good faith and equity” in Zimmerman & Visser (eds) *Southern Cross* (1996) 220.

¹⁰³ Grotius *Inleidinge* 3 15 9 (quoted from Lee (tr) *Grotius’ Jurisprudence of Holland* (1926)). See also Zimmerman “Good faith and equity” in Zimmerman & Visser (eds) *Southern Cross* (1996) 220.

¹⁰⁴ Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 519. See also Thomas “The changing fortunes of bona fides in the South African law of contract” in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148; Zimmerman “Good faith and equity” in Zimmerman & Visser (eds) *Southern Cross* (1996) 218.

¹⁰⁵ Thomas 2008 *Fundamina* 138. For a detailed exposition of the historical development of the principle of *pacta sunt servanda* in Roman and Roman-Dutch law see Visser 1984 *SALJ* 641-655 and the authorities listed there.

freedom and sanctity of contract in the South African common law of contract is analysed in the next chapter.¹⁰⁶

Secondly, the doctrine of *stare decisis* was not part of Roman-Dutch law and although previous decisions were regarded as persuasive they did not have the force of law:

Roman Dutch jurisprudence, while it recognises the value of certainty in judicial sentences, and inculcates the precept that previous decisions should not be lightly departed from, also teaches the principle that a previous decision, which has been shown to be erroneous, ought not be followed.¹⁰⁷

The inherent equity of Roman-Dutch law and the absence of a strict *stare decisis* doctrine meant that the Roman-Dutch writers frequently looked at different sources for guidance and made free use of them.¹⁰⁸ Accordingly, Hahlo and Kahn argue that Roman-Dutch law was flexible and not hampered by unnecessary technicalities and formalities.¹⁰⁹ As time passed, the Roman-Dutch law that arrived at the Cape was amended by the enactment of various legislative instruments but retained its basic Roman-Dutch law character.¹¹⁰

¹⁰⁶ See para 2 2 3 *infra*.

¹⁰⁷ Hahlo & Kahn *Union of South Africa* (1960) 29 quoting Kotzé 1917 SALJ 285-287. Hahlo & Kahn *South African legal system* (1991) 240 state that during the Dutch East India Company's rule in the Cape there was no adherence to the doctrine of *stare decisis*. See also Thomas 2011 *Litnet Akademies* 240; Thomas 2006 *Fundamina* 253; Dolezalek *Stare decisis* (1989); Visagie *Regspleging en reg aan die Kaap* (1969) 70; Wessels 1920 SALJ 269. For more detail on the role of judicial precedent in Roman and Roman-Dutch law see Kotzé 1917 SALJ 280-287.

¹⁰⁸ Hahlo & Kahn *Union of South Africa* (1960) 48. See also De Vos *Regsgeskiedenis* (1992) 236; Visagie *Regspleging en reg aan die Kaap* (1969) 73-76; Wessels 1920 SALJ 267-277.

¹⁰⁹ Hahlo & Kahn *Union of South Africa* (1960) 48.

¹¹⁰ Church *et al Human rights from a comparative perspective* (2007) 55; Bekker *Seymour's customary law* (1993) 1. For more detail see De Vos *Regsgeskiedenis* (1992) 268-271; Hahlo & Kahn *Union of South Africa* (1960) 13-16.

1 4 3 Relationship between Roman-Dutch law and customary law

Initially, the administration of justice at the Cape was managed by a tribunal consisting of Van Riebeeck and employees of the Dutch East India Company.¹¹¹ Later, a *Justitie ende Chrijghsraet* was established to deal with legal questions.¹¹² At first, the jurisdiction of the *Justitie ende Chrijghsraet* (and subsequently the *Raad van Justitie*¹¹³) was limited to employees of the company.¹¹⁴ However, as time passed, it also exercised jurisdiction over *freeburghers*,¹¹⁵ slaves, manumitted slaves¹¹⁶ and Khoikhoi.¹¹⁷ Fagan remarks that the incorporation of the Khoikhoi, an indigenous community, under Dutch jurisdiction illustrates “the changing nature of the Dutch settlement”¹¹⁸ and consequently its departure from

¹¹¹ Fagan “Roman-Dutch law in its South African historical context” in Zimmerman & Visser (eds) *Southern Cross* (1996) 38; De Vos *Regsgeskiedenis* (1992) 233; Visagie 1963 *Acta Juridica* 120; Hahlo & Kahn *Union of South Africa* (1960) 12.

¹¹² Fagan “Roman-Dutch law in its South African historical context” in Zimmerman & Visser (eds) *Southern Cross* (1996) 38; Visagie 1963 *Acta Juridica* 120; Hahlo & Kahn *Union of South Africa* (1960) 12.

¹¹³ For more detail on the development of the *Raad van Justitie* see Visagie 1963 *Acta Juridica* 120-128.

¹¹⁴ Fagan “Roman-Dutch law in its South African historical context” in Zimmerman & Visser (eds) *Southern Cross* (1996) 38.

¹¹⁵ De Vos *Regsgeskiedenis* (1992) 234.

¹¹⁶ They were referred to as “free blacks” and mainly consisted of former slaves with Indian and Indonesian roots, but also from Madagascar and other parts in Africa (Boucher “The Cape under the Dutch East India Company” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 65).

¹¹⁷ Devenish 2005 *TSAR* 550; Du Bois 2004 *International Journal of Legal Information* 217; Fagan “Roman-Dutch law in its South African historical context” in Zimmerman & Visser (eds) *Southern Cross* (1996) 38; Elphick *Kraal and Castle* (1977) 127, 181-188; Sachs *Justice in South Africa* (1973) 18. The earliest recorded case where Roman-Dutch law was applied to the Khoikhoi took place in 1672 (Du Bois 2004 *International Journal of Legal Information* 217; Elphick & Malherbe “The Khoisan to 1828” in Elphick & Giliomee (eds) *Shaping of South African society* (1992) 17). However, between themselves the indigenous people continued to live according to customary law (Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 9).

¹¹⁸ Fagan “Roman-Dutch law in its South African historical context” in Zimmerman & Visser (eds) *Southern Cross* (1996) 38.

the company's initial policy of non-aggression and pro-trade in their dealings with the indigenous people.¹¹⁹

As Roman-Dutch law was now regarded as the common law of the land and applied to disputes involving indigenous people, it marked the start of the unequal relationship between the Roman-Dutch based legal system and customary law.¹²⁰ Bennett argues that the unequal relationship between customary law and the Roman-Dutch based legal system was made even worse by declining resources, disease and forced labour suffered by the KhoiKhoi as well as their continual conflicts with the Dutch.¹²¹ Furthermore, as time passed, the KhoiKhoi would intermingle with the slave population and be absorbed into the coloured population of the Cape.¹²² The San were largely hunted down and those who survived moved into the interior of South Africa.¹²³ All these factors contributed to the non-recognition of customary law because the living culture of the KhoiKhoi and San became weak and consequently it has been proposed that "there was no law to recognize".¹²⁴ As will be seen below, this unequal relationship persisted and was further advanced under British rule.

¹¹⁹ Cf the discussion in the text at n 80 *supra*.

¹²⁰ Bennett *Customary law* (2004) 34-35

¹²¹ Bennett *Customary law* (2004) 35. See also Berat (ed) *Thompson's history of South Africa* (2014) 38-39; Church *et al Human rights from a comparative perspective* (2007) 58; Van Niekerk *Interaction of indigenous law and Western law* (1995) 21-22; Boucher "The Cape under the Dutch East India Company" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 71-72.

¹²² Berat (ed) *Thompson's history of South Africa* (2014) 6; Devenish 2005 *TSAR* 548. However, they also intermingled with Europeans who arrived at the Cape and some of the Bantu tribes in the area (Berat (ed) *Thompson's history of South Africa* (2014) 6).

¹²³ Bennett *Customary law* (2004) 35. See also Church *et al Human rights from a comparative perspective* (2007) 58; Devenish 2005 *TSAR* 548; Van Niekerk *Interaction of indigenous law and Western law* (1995) 22.

¹²⁴ Bennett *Customary law* (2004) 35. See also Church *et al Human rights from a comparative perspective* (2007) 58; Hahlo & Kahn *Union of South Africa* (1960) 4.

1 5 ARRIVAL OF THE BRITISH AND ENGLISH LAW (1795-1909)

1 5 1 Introduction

Generally, the history of the South African law during the British colonisation is discussed in the context of the four colonies and independent states (Cape, Natal, Transvaal and Orange Free State) which were created during this period. Such a division allows for a more or less chronological history of the development of the South African law, and therefore, the same outline is followed in this section.

1 5 2 Cape Colony

1 5 2 1 *British colonisation of the Cape*

The British colonisation of South Africa was initiated by the first occupation of the Cape in 1795.¹²⁵ There was a brief interlude from 1803 to 1806 when the Cape fell under the Batavian Republic.¹²⁶ The second British occupation took place from 1806 to 1814.¹²⁷ Thereafter, the Cape was formally ceded to Great Britain in terms of the Convention of London dated 13 August 1814.¹²⁸

¹²⁵ See Eybers (ed) *Select constitutional documents* (1918) 3 for an extract of the articles of capitulation in this respect. See also Berat (ed) *Thompson's history of South Africa* (2014) 52; Hahlo & Kahn *South African legal system* (1991) 569; De Wet *Ou skrywers in perspektief* (1988) 29; Hahlo & Kahn *Union of South Africa* (1960) 4.

¹²⁶ See Eybers (ed) *Select constitutional documents* (1918) 13-16 for extracts of the proclamation and the two articles of capitulation in this respect. See also Berat (ed) *Thompson's history of South Africa* (2014) 52; A le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 78. The Batavian Republic was the successor to the United Provinces of the Netherlands at that stage (De Vos *Regsgeskiedenis* (1992) 239; Hahlo & Kahn *South African legal system* (1991) 569 n 23; De Wet *Ou skrywers in perspektief* (1988) 30; Hahlo & Kahn *Union of South Africa* (1960) 5).

¹²⁷ Berat (ed) *Thompson's history of South Africa* (2014) 52; A le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 79.

¹²⁸ Convention between Great Britain and the United Netherlands signed at London on 13 August 1814 as found in Eybers (ed) *Select constitutional documents* (1918) 19-23. See also Berat (ed) *Thompson's history of South Africa* (2014) 52; De Vos *Regsgeskiedenis* (1992) 242; Hahlo & Kahn *South African legal system* (1991) 570; De Wet *Ou skrywers in perspektief* (1988) 32; Hahlo & Kahn *Union of South Africa* (1960) 5.

1 5 2 2 Retention of Roman-Dutch law

It was the established practice of that time and incorporated as a rule into English law that the laws of a conquered country, if suitably civilised, remained in force until the conqueror of that country altered them:

[F]or if a King come to a Christian Kingdom by conquest, seeing that he hath *vitae et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature, contained in the decalogue...¹²⁹

In accordance with this rule, the British retained the existing Roman-Dutch based legal system as the common law applicable in the Cape colony¹³⁰ because it was

¹²⁹ *Calvin's Case* (1572-1616) 7 Co rep 1a, 77 ER 377 at 17B, 398. The exception regarding the laws of infidels subsequently overruled by *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 at 209, 1047-1048: "the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in *Calvin's case*, shews the universality and antiquity of the maxim." See further Bennett "Application and ascertainment of customary law" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 37; Thomas 2008 *Fundamina* 134; Bennett *Customary law* (2004) 35 esp n 4; De Vos *Regsgeskiedenis* (1992) 243; Hahlo & Kahn *South African legal system* (1991) 575; De Wet *Ou skrywers in perspektief* (1988) 29-30; Hahlo & Kahn *Union of South Africa* (1960) 17.

¹³⁰ S 31 of the Charter of Justice of 1832, an extract of which can be found in Eybers (ed) *Select constitutional documents* (1918) 114-119. See further Bennett "Application and ascertainment of customary law" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 37; Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148; Thomas 2008 *Fundamina* 135-136; Zimmerman "'Double cross': Comparing Scots and South African law" in Zimmerman & Visser (eds) *Southern Cross* (1996) 16; De Vos *Regsgeskiedenis* (1992) 237-238, 243-244, 247; Hahlo & Kahn *South African legal system* (1991) 575; Erasmus 1991 *SALJ* 268; A le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 76.

regarded as a civilised system of law.¹³¹ Bennett argues that any other legal system was ignored and that the application of the Roman-Dutch based law in matters involving slaves and the KhoiKhoi continued.¹³²

1 5 2 3 *English influences on the administration of justice*

It also became apparent that the British were not going to leave the existing legal system unaltered.¹³³ The English legal system was based on the Anglo-American common law tradition which differed substantially from the civil law tradition on which the Roman-Dutch law was based. As explained by Thomas:

Since English-educated practitioners had to apply a Roman-law based system, the development of the Roman-Dutch law in the Cape Colony was entrusted to lawyers trained in another legal system, in another legal tradition, in another country and in another language.¹³⁴

Although the British retained the existing legal system as the common law of the Cape colony,¹³⁵ many other changes were made to the judicial organisation and the administration of justice with the introduction of the Charters of Justice of 1827 and 1832 as well as other legislative enactments: the Supreme Court of the Cape of Good Hope was introduced and replaced the *Raad van Justitie*;¹³⁶ court judges

¹³¹ Bennett *Customary law* (2004) 35 and SALC *Project for harmonisation of common and indigenous law* (1999) 6 referring to *Wi Parata v Bishop of Wellington* (1887) 3 NZ Jur (NS) 78. See also Church *et al Human rights from a comparative perspective* (2007) 58.

¹³² Bennett *Customary law* (2004) 35, esp n 6. See also Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 107; Bekker *Seymour's customary law* (1993) 1.

¹³³ Hahlo & Kahn *Union of South Africa* (1960) 17.

¹³⁴ Thomas 2008 *Fundamina* 136. See also Thomas 2011 *SUBB Jurisprudentia* 5; Du Bois 2004 *International Journal of Legal Information* 221-222; De Vos *Regsgeskiedenis* (1992) 260.

¹³⁵ Cf the discussion in the text at n 130 *supra*.

¹³⁶ S 2 of the Charter of Justice of 1832. See Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148; Thomas 2008 *Fundamina* 136; Hawthorne 2006 *Fundamina* 72; De Vos *Regsgeskiedenis* (1992) 246; De Vos *Regsgeskiedenis* (1992) 246; Hahlo & Kahn *South*

had to be appointed from the ranks of British barristers or advocates;¹³⁷ pleadings and proceedings in the superior courts had to be drafted and conducted in English;¹³⁸ the Dutch procedural law was replaced by the English civil procedural law;¹³⁹ and the English law of evidence was applied in the courts.¹⁴⁰

Of specific importance is the fact that the English distinction between courts of law and courts of equity was not introduced.¹⁴¹ The English court of equity (the Chancellor's Court) was developed in order to soften the harsh consequences of the inflexible and formal English private common law including the law of contract.¹⁴² Equity in this sense refers not only to the general meaning of justice

African legal system (1991) 577; A le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 87.

¹³⁷ S 3 of the Charter of Justice of 1832. See Thomas 2014 *Fundamina* 909; Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148; Thomas 2008 *Fundamina* 136; Hawthorne 2006 *Fundamina* 72; De Vos *Regsgeskiedenis* (1992) 246; Hahlo & Kahn *Union of South Africa* (1960) 20.

¹³⁸ S 32 of the Charter of Justice of 1832. See Thomas 2008 *Fundamina* 136; De Vos *Regsgeskiedenis* (1992) 247; A le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 87; Hahlo & Kahn *Union of South Africa* (1960).

¹³⁹ S 46 of the Charter of Justice of 1832. See Van Huyssteen *et al Contract law* (2010) 36; Thomas 2008 *Fundamina* 136; Hawthorne 2006 *Fundamina* 72; De Vos *Regsgeskiedenis* (1992) 247-248; A le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 87; Hahlo & Kahn *Union of South Africa* (1960) 18-19.

¹⁴⁰ Ordinance 72 of 1830 (C). See Thomas 2008 *Fundamina* 136-137; Hawthorne 2006 *Fundamina* 72; De Vos *Regsgeskiedenis* (1992) 247; Hahlo & Kahn *South African legal system* (1991) 577; Hahlo & Kahn *Union of South Africa* (1960) 19.

¹⁴¹ Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 146; Van Huyssteen *et al Contract law* (2010) 36; Church *et al Human rights from a comparative perspective* (2007) 55; Thomas 2006 *Fundamina* 257; Zimmerman "Good faith and equity" in Zimmerman & Visser (eds) *Southern Cross* (1996) 217; Erasmus 1991 *SALJ* 269.

¹⁴² For more detail on the development of equity in English law see Thomas 2006 *Fundamina* 253-254; De Vos *Regsgeskiedenis* (1992) 66-67; Erasmus 1991 *SALJ* 267-268. For a

and fairness, but also “a system of rules and doctrines supplementing statutory and common law”.¹⁴³ As Roman-Dutch law with its inherent equity was retained as the applicable law in the Cape, there could be no separate jurisdiction for law and equity.¹⁴⁴

What then was the role of equity in the Supreme Court of the Cape of Good Hope? In an attempt to answer this question Thomas perused the early Cape law reports and found that they referred to equity on a regular basis.¹⁴⁵ Sometimes the references were used to denote equity in the general non-technical sense of the word i.e. fairness.¹⁴⁶ More significantly, he also found cases where equity was referred to as a separate legal system as found in English law.¹⁴⁷ In addition, he found a number of references to authorities on equity in English and American law.¹⁴⁸ He argues that the English barristers and judges interpreted and applied Roman-Dutch law restrictively which resulted in a vacuum that was filled by English law including English equity jurisprudence.¹⁴⁹ This leads him to the

discussion on the role of equity in eighteenth century English contract law see Barnard *Critical legal argument for contractual justice* (2005) 49-53.

¹⁴³ Thomas 2006 *Fundamina* 253. See also Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 145-146.

¹⁴⁴ Erasmus 1991 *SALJ* 269 quoting a letter by Viscount Goderich: “It results from this determination the Office of Chancellor as a distinct Judicial Office will not be established by the Charter of Justice”. See also Van Huyssteen *et al Contract law* (2010) 36.

¹⁴⁵ See Thomas 2006 *Fundamina* 258-259 and the sources referred to by him. See also Thomas “The changing fortunes of bona fides in the South African law of contract” in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148.

¹⁴⁶ Thomas 2006 *Fundamina* 258 and the cases referred to by him in Annexure “A” of his article. These included cases decided prior to the changes made by the British in respect of the legal administration at the Cape.

¹⁴⁷ Thomas 2006 *Fundamina* 259 and the cases referred to by him in Annexure “B” of his article.

¹⁴⁸ Thomas 2006 *Fundamina* 259 stating that references included Fonblanque *on Equity*, Chitty’s *Equity Index* and Story (the cases in which these references appear are listed in Annexure “C” of his article). See also Thomas 2014 *Fundamina* 907-915 on the influence of American law on the nineteenth century Cape common law.

¹⁴⁹ Thomas 2006 *Fundamina* 261. See also Thomas “The changing fortunes of bona fides in the South African law of contract” in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148.

conclusion that the Supreme Court of the Cape of Good Hope did in fact exercise an equitable jurisdiction.¹⁵⁰

However, he shows that the Supreme Court's equitable jurisdiction was limited as time passed.¹⁵¹ He refers to the 1876 case of *Mills and Sons v Trustees of Benjamin Bros* where it is stated as follows:

Now it is quite true that this Court is a Court of Equity as well as of Common Law, but it can administer equity only so far as it is consistent with the principles of Roman-Dutch law.¹⁵²

Almost three decades later, the court expounded upon this position in *Estate Thomas v Kerr*.

The remark is often been made that this Court is a Court of equity as well as of law, and the remark is perfectly just, although not exactly in the same sense in which it would apply to the practice of the Courts in England. In this country there has never been a separation between the two modes of administering remedial justice, but the power of the Court to exercise an equitable jurisdiction is so far as it is not inconsistent with the fixed principles of the Dutch law has been repeatedly recognised. Where the Court has to elect between the rigid application of a rule of the old law to a case not clearly contemplated by that law, and the application of an equitable principle which does not defeat the old law but prevents any injustice from its rigid application, the Court would be quite justified in choosing the latter alternative.¹⁵³

Therefore, Thomas argues that initially the Supreme Court exercised an equitable jurisdiction, but that the court limited its own equity jurisdiction in order to ensure

¹⁵⁰ Thomas 2006 *Fundamina* 260 and the cases referred to him in n 72.

¹⁵¹ Thomas 2006 *Fundamina* 260. See also Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148-149.

¹⁵² *Mills and Sons v Trustees of Benjamin Bros* 1876 6 Buch 121.

¹⁵³ *Estate Thomas v Kerr and another* 1903 20 SC 366. See also Hahlo & Kahn *South African legal system* (1991) 138.

legal certainty.¹⁵⁴ As will become clear, legal certainty was an important goal in English law. Thomas further argues that this limitation was not intended to negate the ideas of equity in Roman-Dutch law as a concept that could be used to address injustices that resulted from the strict adherence to rules of law.¹⁵⁵ However, these developments set the scene to negate the corrective function of equity and have been used to argue “that the South African courts are not courts of conscience”.¹⁵⁶ As will be seen below,¹⁵⁷ this further negation of the role of equity in the South African law is related to the theory of legal positivism.¹⁵⁸

A drastic change from the flexible Roman-Dutch legal system was the introduction of the doctrine of *stare decisis* by the British.¹⁵⁹ This doctrine was not introduced through the enactment of legislation but by the judges of the Supreme Court who were trained in English law.¹⁶⁰ This is most probably because it was such an important part of the English law and promoted legal certainty:

¹⁵⁴ Thomas 2006 *Fundamina* 258ff, esp 260.

¹⁵⁵ Thomas 2006 *Fundamina* 261-262. This can also be deduced from the court’s discussion in *Estate Thomas v Kerr and another* 1903 20 SC 366 (quoted at n 153 *supra*).

¹⁵⁶ Thomas 2006 *Fundamina* 261. This is illustrated in para 2 2 1 2 *infra*.

¹⁵⁷ See the discussion in the text at n 165 *infra*.

¹⁵⁸ Dolezalek *Stare decisis* (1989) 3.

¹⁵⁹ Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 132; Thomas 2011 *Litnet Akademies* 240; Church *et al* *Human rights from a comparative perspective* (2007) 63; Thomas 2006 *Fundamina* 261; Erasmus “The interaction of substantive law and procedure” in Zimmerman & Visser (eds) *Southern Cross* (1996) 150; De Vos *Regsgeskiedenis* (1992) 249, 260; Hahlo & Kahn *South African legal system* (1991) 240; Van Zyl *Geskiedenis van Romeins-Hollandse reg* (1983) 455; Hahlo & Kahn *Union of South Africa* (1960) 29.

¹⁶⁰ Zimmerman & Visser “Introduction: South African law as a mixed legal system” in Zimmerman & Visser (eds) *Southern Cross* (1996) 15 shows that this happened as early as 1830 in the case of *In re Taute* 1830 1 Menz 497 where the court relied on its own previous decision. See also Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 132; Thomas 2011 *Litnet Akademies* 240; Thomas 2006 *Fundamina* 261; Erasmus “The interaction of substantive law and procedure” in Zimmerman & Visser (eds) *Southern Cross* (1996) 150; Hahlo & Kahn *South African legal system* (1991) 240-242; Hahlo & Kahn *Union of South Africa* (1960) 29.

When we come to the common law of England we note that one of its leading characteristics is the weight attached to judicial precedent. In no country is such great authority or respect shown for previous judicial decisions as in England ... This view is apparently based on the balance of convenience, it being considered that the unsettling of what has been once established and acted on outweighs the advantage to be derived from the introduction of the correct rule.¹⁶¹

The strict adherence to the principle of *stare decisis*¹⁶² is also related to legal positivism¹⁶³ and was made possible by the establishment of law reports.¹⁶⁴

Legal positivism¹⁶⁵ as developed by the English philosophers Bentham and Austin was exported during the British colonisation.¹⁶⁶ In this context, legal positivism refers to the idea “that laws are man-made commands issued by a sovereign and that there is no relation between law and morality”.¹⁶⁷ It describes what the law is and not what it should be.¹⁶⁸ This means that the rules of law must be identified, followed and applied without any consideration of the morals underlying the rules.¹⁶⁹ One of the consequences of legal positivism is legal formalism which refers to the ideology that “all law is based on legal doctrine and principles which

¹⁶¹ Kotzé 1917 *SALJ* 290. See also Dolezalek *Stare decisis* (1989) 1.

¹⁶² See the discussion in the text at n 165 *infra*.

¹⁶³ Dolezalek *Stare decisis* (1989) 3.

¹⁶⁴ Thomas 2008 *Fundamina* 138. The oldest law reports in South Africa dates back to 1828 (Menzies *Cases Decided in the Supreme Court of the Cape of Good Hope 1828-1849*).

¹⁶⁵ For a general exposition on the development and meaning of the theory of legal positivism (including its relevance in South African jurisprudence) see Kroeze “Legal positivism” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 62-83.

¹⁶⁶ Thomas “The changing fortunes of bona fides in the South African law of contract” in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 149; Devenish 2005 *TSAR* 555; Thomas 2004 *Fundamina* 193; Bennett & Peart *Sourcebook of African customary law* (1991) 2-3; Brookes *History of native policy* (1924) 172-173.

¹⁶⁷ Thomas 2003 *De Jure* 111. See also Himonga & Nhlapo (eds) *African customary law* (2014) 41; Hawthorne 2006 *Fundamina* 74-75; Kroeze “Legal positivism” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 65-66; Thomas 2004 *Fundamina* 193.

¹⁶⁸ Hawthorne 2006 *Fundamina* 74-75.

¹⁶⁹ Hawthorne 2006 *Fundamina* 75.

can be deduced from precedents".¹⁷⁰ Accordingly, there is only one correct way of deciding a case (according to the existing principles and rules and law) and it is not the court's task to consider the relevant policy considerations or whether justice was achieved between the parties.¹⁷¹ Devenish and Thomas argue that these ideologies substituted the ideas of equity and morality as found in Roman-Dutch law.¹⁷² These ideologies and their influence on the role of fairness in the South African common law of contract are discussed in the next chapter.¹⁷³

Related to the ideas of legal positivism which also arrived at the Cape with the British is the sovereign parliamentary system of government modelled on the Westminster model.¹⁷⁴ Dicey defined English parliamentary sovereignty as follows:

The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament ... has, under the English constitution, the right to make or unmake any law whatever: and, further, than no

¹⁷⁰ Hawthorne 2006 *Fundamina* 76. See also Hoctor "Legal realism" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 158; Botha 2001 *THRHR* (2) 375-376; Atiyah *Rise and fall of freedom of contract* (1979) 389.

¹⁷¹ Hawthorne 2006 *Fundamina* 76; Hoctor "Legal realism" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 158; Botha 2001 *THRHR* (2) 375-376. For an account of these developments in the English law of contract see Barnard *Critical legal argument for contractual justice* (2005) 54-57.

¹⁷² Devenish 2005 *TSAR* 555 stating that: "It took root in the native soil and unfortunately was to completely supplant the Roman-Dutch heritage of natural law of, inter alia, Grotius, Huber and Voet". See also Thomas 2004 *Fundamina* 195 who argues that these ideologies "changed the character of South African private law" which resulted in the disappearance of *bona fides* from the South African law of contract. See, more recently, Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 149.

¹⁷³ See the discussion in para 2.2.3.4 *infra*.

¹⁷⁴ Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(d); Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 24; Devenish 2005 *TSAR* 556; Du Bois 2004 *International Journal of Legal Information* 222.

person or body is recognised by the law of England as having the right to override or set aside the legislation of Parliament.¹⁷⁵

Finally, with the doctrine of parliamentary sovereignty, arrived the principle of the rule of law. The classical conception by Dicey is described with reference to three meanings:

- ... the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government ...;
- ... equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts ...;
- ... the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts ... thus the constitution is the result of the ordinary law of the land.¹⁷⁶

The first two meanings are relevant for this research topic.¹⁷⁷ First, that the law is supreme and that all public power must be exercised in terms of the law and not arbitrarily.¹⁷⁸ Secondly, that everyone is equal before the law and that law should

¹⁷⁵ Dicey *Introduction to study of the law of the constitution* (1965) 39-40. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 42; Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 24; Van der Vyver 1982 *SALJ* 561; Dugard *Human rights* (1978) 37-38; Hahlo & Kahn *Union of South Africa* (1960) 146.

¹⁷⁶ Dicey *Introduction to study of the law of the constitution* (1965) 202-203. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 78; Burns *Administrative law* (2013) 105-106; Freedman "Constitutional law: structures of Government" in Joubert (ed) *LAWSA Vol 5(3)* (2012) para 17; Dugard *Human rights* (1978) 37-38; Hahlo & Kahn *Union of South Africa* (1960) 133.

¹⁷⁷ It must be remembered that there never was and still is no written British constitution (De Vos & Freedman (eds) *South African constitutional law* (2014) 78).

¹⁷⁸ It is interesting to note that Dicey differentiated between arbitrary and discretionary decisions in explaining the role of equity in the English law: "Equity, which originally meant the discretionary, not to say arbitrary interference of the Chancellor, for the ... purpose of securing

be applied equally to all persons irrespective of their status. Botha¹⁷⁹ explains that the rule of law is based upon the generality and autonomy of the law. Generality refers to the fact that any government action (including decisions of the judiciary) should be based on clear and general rules that are known to the public and apply to everyone equally. Vague, open-ended and uncertain legal rules are not permitted because such rules can lead to arbitrary decisions. Therefore, the purpose of this conception of the rule of law is to ensure equality before the law and to protect the freedom of the individual against the abuse of state power.¹⁸⁰ Thus, it is more concerned with formal equality before the law.¹⁸¹ According to Botha,¹⁸² the autonomy of the law refers to the fact that the law is independent and detached from specific interests or any religious, moral, economic or other non-legal norm or belief. Therefore, this conception of the rule of law is based on the belief that law and politics do not mix and hence the judiciary is independent from the other organs of state and must ensure that these organs of state act according to the law. Furthermore, the judiciary must itself act within the confines of the law and merely apply these clear and general rules to a specific case. Accordingly, courts are not allowed to make legal rules or become concerned with policy considerations which results in a formal understanding of the rule of law as grounded in legal positivism and formalism.

The consequence of the importation of parliamentary sovereignty and this conception of the rule of law was that judges at the Cape had no authority to test

substantial justice between the parties in a given case" (Dicey *Introduction to study of the law of the constitution* (1965) 381). As such, equity had a role to play in promoting the rule of law.

¹⁷⁹ Botha 2001 *THRHR* (3) 524. See also Barnard-Naude 2008 *Constitutional Court Review* 166.

¹⁸⁰ Currie & De Waal *Bill of rights handbook* (2014) 10; Freedman "Constitutional law: structures of Government" in Joubert (ed) *LAWSA Vol 5(3)* (2012) para 17; Botha 2001 *THRHR* (3) 524; Dugard *Human rights* (1978) 37.

¹⁸¹ The idea of formal equality is discussed in more detail in para 1 8 2 2 *infra*.

¹⁸² Botha 2001 *THRHR* (3) 524-525. See also Barnard-Naude 2008 *Constitutional Court Review* 166.

the morality or substance of any legislation passed by the Cape colonial parliament.¹⁸³

1 5 2 4 English influences on the existing substantive law

The English law exerted a direct influence on the substantive law of the colony, for example by the introduction of English mercantile law.¹⁸⁴ It also exerted an indirect influence as evidenced by frequent references to English law rules in case law.¹⁸⁵ This is also true in respect of the South African common law of contract¹⁸⁶ and this aspect is investigated in detail in the next chapter.¹⁸⁷

Furthermore, with the British imperial system came the new age of industrialism which involved the ideologies of individualism and capitalism.¹⁸⁸ The idea of capitalism is related to the ideas of legal positivism and was developed by the Scottish philosopher and economist Adam Smith during the eighteenth century.¹⁸⁹ Thomas highlights that the English law of contract arriving in South Africa was

¹⁸³ Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 24; Devenish 2005 *TSAR* 556; Van der Vyver 1982 *SALJ* 562.

¹⁸⁴ Hahlo & Kahn *South African legal system* (1991) 576-577. See also Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 150-154; Thomas 2008 *Fundamina* 137; Du Bois 2004 *International Journal of Legal Information* 222; De Vos *Regsgeskiedenis* (1992) 261; Erasmus 1989 *SALJ* 669; Hahlo & Kahn *Union of South Africa* (1960) 19-20; Lee *Introduction to Roman-Dutch law* (1953) 20.

¹⁸⁵ Hahlo & Kahn *South African legal system* (1991) 578. See also Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 150; Thomas 2008 *Fundamina* 138; De Vos *Regsgeskiedenis* (1992) 260; Lee *Introduction to Roman-Dutch law* (1953) 20.

¹⁸⁶ Bradfield *Christie’s law of contract* (2016) 9ff; Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 106, 108-109; Van Huyssteen *et al Contract law* (2010) 36-37; De Vos *Regsgeskiedenis* (1992) 262; Hahlo & Kahn *South African legal system* (1991) 578; Hahlo & Kahn *Union of South Africa* (1960) 443-444.

¹⁸⁷ See paras 2 2 3 4 (in the context of good faith) & 2 2 4 1 (in the context of public policy) *infra*.

¹⁸⁸ Thomas 2008 *Fundamina* 137; A le Cordeur “The occupation of the Cape, 1795-1854” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 80-82.

¹⁸⁹ Thomas 2008 *Fundamina* 137; Thomas 2004 *Fundamina* 194; Thomas 2003 *De Jure* 110; Atiyah *Rise and fall of freedom of contract* (1979) 324ff.

based on and reflected the ideas of individualism and capitalism.¹⁹⁰ The theories of individualism and capitalism were translated into the law of contract through an emphasis on the principles of freedom and sanctity of contract. Together with the theories of legal positivism and formalism as well as the system of parliamentary sovereignty, this resulted in the idea that the unfairness of a contract was not a matter for the courts but the business of the parties. As long as the parties complied with the formal requirements for an agreement it was binding.¹⁹¹ These changes in the common law of contract are discussed in more detail in the next chapter.¹⁹²

1 5 2 5 English influences in respect of indigenous people and the slave population

In addition, the British moved away from the monopolistic mercantilism which was characteristic of the Dutch East India Company¹⁹³ and implemented changes according to their policy of free trade and labour as developed out of their liberal capitalist ideologies.¹⁹⁴ These changes were noticeable in respect of the position of indigenous people and slaves in the Cape colony. In 1828, the British introduced an ordinance to improve the situation of the colonial subjects of colour and to ensure equal treatment for all free persons within the Cape.¹⁹⁵ It protected

¹⁹⁰ Thomas 2008 *Fundamina* 137; Thomas 2004 *Fundamina* 194. See also Berat (ed) *Thompson's history of South Africa* (2014) 56-57.

¹⁹¹ Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 149.

¹⁹² See paras 2 2 3 4 (in the context of good faith) & 2 2 4 1 (in the context of public policy) *infra*.

¹⁹³ Cf the discussion in the text at n 77 *supra*.

¹⁹⁴ Berat (ed) *Thompson's history of South Africa* (2014) 56-57; Thomas 2008 *Fundamina* 137; Du Bois 2004 *International Journal of Legal Information* 222; Le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 80.

¹⁹⁵ Ordinance 50 of 1828 (C) as found in Eybers (ed) *Select constitutional documents* (1918) 26-28. See Berat (ed) *Thompson's history of South Africa* (2014) 60; Church *et al Human rights from a comparative perspective* (2007) 58; Devenish 2005 *TSAR* 553; Bennett *Customary law* (2004) 35; A le Cordeur "The occupation of the Cape, 1795-1854" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 82-83; Hahlo & Kahn *Union of South Africa* (1960) 5; Linington (ed) *Rogers' native administration in the Union* (1949) 200.

the rights of “Hottentots and other free persons of colour”¹⁹⁶ in that it prohibited “restraints as to their residence, mode of life, and employment” and “compulsory services” to which other colonial subjects were not subject.¹⁹⁷ It confirmed their competency to purchase and own land¹⁹⁸ and contained measures to ensure that they were not forced into labour and that they received payment for wages in money and not liquor or tobacco.¹⁹⁹ However, Bennett argues that this ordinance actually advanced the non-recognition of customary law because it entailed the application of Cape colony law to all disputes as the application of any other legal system would be regarded as discriminatory.²⁰⁰ Nevertheless, this did not prevent the indigenous people from continuing “to act and live in accordance with their traditional laws and customs”.²⁰¹

In line with their policy of free trade and labour, the British were also against slavery.²⁰² The British parliament first passed the Act for the Abolition of the Slave Trade in 1807 which declared slave trading in Africa unlawful.²⁰³ Almost three

¹⁹⁶ The term “hottentots” referred to the Khoikhoi people (cf n 79 *supra*).

¹⁹⁷ S 2 of Ordinance 50 of 1828 (C).

¹⁹⁸ S 3 of Ordinance 50 of 1828 (C).

¹⁹⁹ S 4-6 of Ordinance 50 of 1828 (C).

²⁰⁰ Bennett *Customary law* (2004) 35. See also SALC *Project for harmonisation of common and indigenous law* (1999) 6.

²⁰¹ Bekker *Seymour’s customary law* (1993) 2-3. See also Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 9.

²⁰² This attitude in respect of the Cape can be seen in art 8 of the Convention of London of 13 August 1814 (cf n 128 *supra*) where it is stated that “[t]he Prince Sovereign of the United Netherlands, anxious to co-operate, in the most effectual manner, with His Majesty the King of the United Kingdom of Great Britain and Ireland, so as to bring about the total abolition of the trade in slaves on the coast of Africa, and having spontaneously issued a Decree on the 15th of June, 1814, wherein it is enjoined, that no ships or vessels whatever, destined for the trade in slaves, be cleared out or equipped in any of the harbours or places of His dominions, nor admitted to the forts or possessions on the coast of Guinea, and that no inhabitants of that country shall be sold or exposed as slaves, - does moreover hereby engage to prohibit all His subjects in the most effectual manner and by the most solemn laws, from taking any share whatsoever in such human traffic” (my emphasis).

²⁰³ (47 Geo 3 session 1 c 36). This statute came into effect in 1808 (Thomas 2008 *Fundamina* 137 n 31). See also Berat (ed) *Thompson’s history of South Africa* (2014) 57.

decades thereafter, slavery was abolished in the Cape from 1 December 1834 by the Act for the Abolition of Slavery²⁰⁴ also passed by the British parliament.²⁰⁵

These changes resulted in the dissatisfaction of the Dutch inhabitants in the Cape.²⁰⁶ The Dutch inhabitants were “[d]isturbed by the grant of equal civil rights to the coloured people and slave emancipation, resentful of an alien government and its discipline, [and] fearful of anglicisation”.²⁰⁷ From 1836 onwards, a number of large and organised groups moved out of the colony in what became known as the Great Trek.²⁰⁸ Some of the Trekkers (also called Voortrekkers or Boers) moved into Natal where a small British community was trading at Port Natal but they did not stay long and later moved north.²⁰⁹ The Great Trek also resulted in

²⁰⁴ (3 & 4 Will 4 c 73).

²⁰⁵ Berat (ed) *Thompson’s history of South Africa* (2014) 58; Thomas 2008 *Fundamina* 137; Church *et al Human rights from a comparative perspective* (2007) 58; Devenish 2005 *TSAR* 553; De Vos *Regsgeskiedenis* (1992) 248; Hahlo & Kahn *South African legal system* (1991) 577; A le Cordeur “The occupation of the Cape, 1795-1854” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 83-84; Sachs *Justice in South Africa* (1973) 30; Hahlo & Kahn *Union of South Africa* (1960) 5. Eybers (ed) *Select constitutional documents* (1918) 38 states that there were 39 021 slaves in the Cape colony at this time and that the British parliament offered the owners of these slaves a total of £3 041 290.6s.0d as compensation for setting these slaves free.

²⁰⁶ Berat (ed) *Thompson’s history of South Africa* (2014) 87; Devenish 2005 *TSAR* 557.

²⁰⁷ Hahlo & Kahn *Union of South Africa* (1960) 6. See also Berat (ed) *Thompson’s history of South Africa* (2014) 87; Devenish 2005 *TSAR* 557. See further A le Cordeur “The occupation of the Cape, 1795-1854” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 86 for a discussion on the attempts to Anglicize the Cape although he later concedes that “the impact of the Anglicization policy has been less traumatic than is traditionally thought” (at 89). For more detail on the reasons for the Great Trek, see also De Bruyn “The Great Trek” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 127-131.

²⁰⁸ Berat (ed) *Thompson’s history of South Africa* (2014) 67-69; 88; Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 117; De Bruyn “The Great Trek” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 127; Hahlo & Kahn *Union of South Africa* (1960) 6.

²⁰⁹ Berat (ed) *Thompson’s history of South Africa* (2014) 90; Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 117; De Bruyn “The Great Trek” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 131-135. See further para 1 5 3 *infra*.

the establishment of the two Trekker or Boer republics, the Orange Free State and the Transvaal which laid the foundation of Afrikaner culture.²¹⁰ The two Boer republics are discussed below.²¹¹

During the early period of British colonisation, the British expanded the colony of the Cape into the east where they encountered Xhosa-speaking people.²¹² These people posed a greater threat to the British than the Khoikhoi and the San and after the area (known as British Kaffraria) was occupied during 1846-1847,²¹³ the British realised that non-recognition of the indigenous people's customary law would be impractical.²¹⁴ As a result, the British let the traditional leaders rule the local inhabitants in terms of customary law.²¹⁵ However, in 1854, this policy changed to one where the British attempted to persuade the local inhabitants to give up their customary ways in favour of Christianity and British ideas of what society should look like.²¹⁶ As part of this policy, magistrates were given the sole responsibility to administer justice between the indigenous people on the basis of the law applicable in the Cape colony.²¹⁷ However, the system was so unworkable

²¹⁰ Thomas 2011 *SUBB Jurisprudentia* 6; Thomas 2008 *Fundamina* 139; Devenish 2005 *TSAR* 557; De Bruyn "The Great Trek" in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 127.

²¹¹ See paras 1 5 4 & 1 5 5 *infra*.

²¹² Berat (ed) *Thompson's history of South Africa* (2014) 75; Bennett *Customary law* (2004) 35; Hahlo & Kahn *Union of South Africa* (1960) 5.

²¹³ Berat (ed) *Thompson's history of South Africa* (2014) 76; Thomas 2008 *Fundamina* 138 n 39; Hahlo & Kahn *Union of South Africa* (1960) 319.

²¹⁴ Bennett *Customary law* (2004) 36; Van Niekerk 1990 *Codicillus* 37; Hahlo & Kahn *Union of South Africa* (1960) 319.

²¹⁵ Bennett *Customary law* (2004) 36. See also Van Niekerk 2010 *Fundamina* 472 n 1; Church *et al Human rights from a comparative perspective* (2007) 59; Van Niekerk *Interaction of indigenous law and Western law* (1995) 57-58; Church *Marriage and women in Bophuthatswana* (1989) 113.

²¹⁶ Bennett *Customary law* (2004) 36. See also Church *et al Human rights from a comparative perspective* (2007) 59; Hahlo & Kahn *Union of South Africa* (1960) 319; Church *Marriage and women in Bophuthatswana* (1989) 113.

²¹⁷ This was confirmed by the Cape Supreme Court in *Tabata v Tabata* 1887 5 SC 329. See also Church *et al Human rights from a comparative perspective* (2007) 59; Bennett *Customary*

that the magistrates in the area simply continued to decide cases according to customary law.²¹⁸ This position was relieved in small part by the application of customary law in matters of succession.²¹⁹ Although the general policy of non-recognition was criticised, it remained in force until 1927.²²⁰

With the occupation and annexation of the Transkeian territories between 1877 and 1894,²²¹ the British followed a different approach which was inspired by the Shepstonian system²²² applicable in Natal.²²³ This was due to the remoteness of

law (2004) 36; Du Bois 2004 *International Journal of Legal Information* 227; Hahlo & Kahn *Union of South Africa* (1960) 319.

²¹⁸ Bennett *Customary law* (2004) 36 referring to a report by a magistrate cited in Brookes *History of Native Policy* (1924) 183-184. See also Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 9; Church *et al Human rights from a comparative perspective* (2007) 59; Van Niekerk *Interaction of indigenous law and Western law* (1995) 58; Van Niekerk 1990 *Codicillus* 37; Church *Marriage and women in Bophuthatswana* (1989) 114; Hahlo & Kahn *Union of South Africa* (1960) 319.

²¹⁹ Native Succession Act 18 of 1864 (C) & Native Successions Ordinance 10 of 1864 (British Kaffraria). See Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 8; Van Niekerk 2010 *Fundamina* 472 n 1; Church *et al Human rights from a comparative perspective* (2007) 59; Bennett *Customary law* (2004) 36; Van Niekerk *Interaction of indigenous law and Western law* (1995) 58; Van Niekerk 1990 *Codicillus* 37; Church *Marriage and women in Bophuthatswana* (1989) 114; Hahlo & Kahn *Union of South Africa* (1960) 319 esp n 6. British Kaffraria was incorporated into the British colony in 1866 (Incorporation of British Kaffraria Act 3 of 1865 (C) as found in Eybers (ed) *Select constitutional documents* (1918) 59-61; see also Berat (ed) *Thompson's history of South Africa* (2014) 80).

²²⁰ Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 9; Bennett *Customary law* (2004) 36; Van Niekerk 1990 *Codicillus* 37; Church *Marriage and women in Bophuthatswana* (1989) 114-115. See also para 1 6 3 *infra* in respect of the position after 1927.

²²¹ Church *et al Human rights from a comparative perspective* (2007) 59; Bennett *Customary law* (2004) 36; Hahlo & Kahn *Union of South Africa* (1960) 319. See also Eybers (ed) *Select constitutional documents* (1918) 65 (annexation of Transkeian territories in 1879), 68 (annexation of Tembuland in 1885), 69 (annexation of Xesibe Country in 1886), 70 (annexation of Rode Valley in 1887), 76 (annexation of Pondoland in 1894).

²²² The Shepstonian system is discussed in para 1 5 3 2 *infra*.

the region and the fact that there were few Europeans resident in the area.²²⁴ The colonial courts in these areas were permitted to apply customary law in disputes between the indigenous people²²⁵ but certain indigenous practices such as initiation dances and witchcraft were prohibited.²²⁶ Furthermore, customary law was applicable in so far as it was not repugnant to “the general principles of humanity observed throughout the civilised world”.²²⁷

In the northern parts of the Cape, specifically in Bechuanaland, the British permitted the traditional leaders to apply customary law in disputes between members of their communities.²²⁸ This was later confirmed officially and traditional leaders were granted exclusive civil jurisdiction.²²⁹

²²³ Bennett *Customary law* (2004) 36; SALC *Project for harmonisation of common and indigenous law* (1999) 7; Bekker *Seymour’s customary law* (1993) 4; Linington (ed) *Rogers’ native administration in the Union* (1949) 200-201. For a detailed exposition of the native policy in respect of Transkei see Brookes *History of native policy* (1924) ch 4.

²²⁴ Van Niekerk 1990 *Codicillus* 38.

²²⁵ See Hahlo & Kahn *Union of South Africa* (1960) 320 n 10 for a list of the statutes dealing with the application of customary law in the Transkeian territories. See also Van Niekerk 2010 *Fundamina* 472 n 1; Bennett *Customary law* (2004) 36; Van Niekerk *Interaction of indigenous law and Western law* (1995) 60; Church *Marriage and women in Bophuthatswana* (1989) 116; Linington (ed) *Rogers’ native administration in the Union* (1949) 201; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 403; Brookes *History of native policy* (1924) 187.

²²⁶ Bennett *Customary law* (2004) 36; Van Niekerk *Interaction of indigenous law and Western law* (1995) 60; Van Niekerk 1990 *Codicillus* 38; Brookes *History of native policy* (1924) 187.

²²⁷ Van Niekerk 2010 *Fundamina* 472 n 1; Bennett *Customary law* (2004) 36; Brookes *History of native policy* (1924) 187.

²²⁸ Church *et al Human rights from a comparative perspective* (2007) 59; Bennett *Customary law* (2004) 37; Van Niekerk *Interaction of indigenous law and Western law* (1995) 61; Linington (ed) *Rogers’ native administration in the Union* (1949) 201.

²²⁹ Ss 20, 31-33 of Proc 2 of 1885 (British Bechuanaland). See Church *et al Human rights from a comparative perspective* (2007) 59; Bennett *Customary law* (2004) 37; Church *Marriage and women in Bophuthatswana* (1989) 116; Linington (ed) *Rogers’ native administration in the Union* (1949) 201; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 403.

1 5 3 Natal Colony

1 5 3 1 Retention of Roman-Dutch law

After the arrival of the Trekkers in Natal in early 1838, the British occupied and annexed the district of Natal in 1844-1845.²³⁰ It was decided that the Roman-Dutch law as “accepted, and administered by the legal tribunals of the Colony of the Cape of Good Hope” would be the law of Natal.²³¹ Subsequently, the law of Natal was influenced by the law laid down by the Cape courts and English law played an important role in the development of the law of Natal.²³² English law rules were imported directly and indirectly.²³³ In addition, the judges in Natal were more willing to look at English law for guidance than in other regions of South Africa.²³⁴

1 5 3 2 Approach in respect of indigenous people and their laws

The annexation of Natal caused the Trekkers to leave the area which resulted in a small British population and a large indigenous group.²³⁵ The non-recognition of

²³⁰ The relevant letter patent (dated 31 May 1844) and proclamation (dated 21 August 1845) can be found in Eybers (ed) *Select constitutional documents* (1918) 182-183, 183-184. For more background on the circumstances leading to the annexation of Natal see Berat (ed) *Thompson's history of South Africa* (2014) 92-93; De Vos *Regsgeskiedenis* (1992) 250; De Bruyn “The Great Trek” in Cameron & Spies (eds) *Illustrated history of South Africa* (1988) 135; Welsh *Roots of segregation* (1973) 7ff; Hahlo & Kahn *Union of South Africa* (1960) 6; Lee *Introduction to Roman-Dutch law* (1953) 11.

²³¹ Ordinance 12 of 1845 (C) as found in Eybers (ed) *Select constitutional documents* (1918) 227-229. See De Vos *Regsgeskiedenis* (1992) 250; Hahlo & Kahn *South African legal system* (1991) 576 n 52; Hahlo & Kahn *Union of South Africa* (1960) 24; Lee *Introduction to Roman-Dutch law* (1953) 11.

²³² Hahlo & Kahn *Union of South Africa* (1960) 24-25. See also De Vos *Regsgeskiedenis* (1992) 251; Spiller *History of the District and Supreme Courts of Natal* (1986) 83.

²³³ Spiller *History of the District and Supreme Courts of Natal* (1986) 88-89; Hahlo & Kahn *Union of South Africa* (1960) 24-25.

²³⁴ Spiller *History of the District and Supreme Courts of Natal* (1986) 90-93; Hahlo & Kahn *Union of South Africa* (1960) 24-25.

²³⁵ Berat (ed) *Thompson's history of South Africa* (2014) 97; Church *et al Human rights from a comparative perspective* (2007) 60; Bennett *Customary law* (2004) 37; Church *Marriage and women in Bophuthatswana* (1989) 121; Hahlo & Kahn *Union of South Africa* (1960) 321.

customary law was not a practical option for the small British population who were intimidated by the large number of indigenous people.²³⁶ These circumstances led to the first policy of indirect rule of customary law in South Africa.²³⁷

The new regime was introduced in Natal Ordinance 3 of 1849²³⁸ that repealed the Cape ordinance aimed at improving the situation of the colonial subjects of colour²³⁹ to the extent necessary in order to permit the indigenous people “to administer justice towards each other as they had been used to do in former times”.²⁴⁰ The customary law was not to be abrogated except where “repugnant to the general principles of humanity recognized throughout the whole Civilized World”.²⁴¹ In addition, the ultimate administrative and judicial authority vested in the British Crown²⁴² and the ordinance introduced the office of the Lieutenant-Governor, regarded as the Supreme Chief of all Natives, who were granted “all the power and authority which, according to the laws, customs, and usages of the natives, are held and enjoyed by any supreme or paramount native chief”.²⁴³ As this regime was the initiative of the Diplomatic Agent and Secretary of Native

²³⁶ Bennett *Customary law* (2004) 38; Hahlo & Kahn *Union of South Africa* (1960) 319.

²³⁷ Berat (ed) *Thompson’s history of South Africa* (2014) 98; Thomas 2008 *Fundamina* 141. For a detailed exposition of native policy in Natal see Brookes *History of native policy* (1924) ch 3.

²³⁸ An extract from the ordinance can be found in Eybers (ed) *Select constitutional documents* (1918) 235-238.

²³⁹ Ordinance 50 of 1828 (C). Cf the discussion in the text at n 195 *supra*.

²⁴⁰ The Royal instruction dated 8 March 1848 as quoted in Ordinance 3 of 1849 (N). See also Thomas 2008 *Fundamina* 141; Church *et al Human rights from a comparative perspective* (2007) 60; Bennett *Customary law* (2004) 38; Van Niekerk *Interaction of indigenous law and Western law* (1995) 62; Hahlo & Kahn *Union of South Africa* (1960) 321-322.

²⁴¹ The Royal instruction dated 8 March 1848 as quoted in Ordinance 3 of 1849 (N). See also Van Niekerk 2010 *Fundamina* 472 n 1; Bennett *Customary law* (2004) 38; Hahlo & Kahn *Union of South Africa* (1960) 322.

²⁴² The Royal instruction dated 8 March 1848 as quoted in Ordinance 3 of 1849 (N) state that “[w]e do hereby reserve to Ourselves full power and authority as We from time to time shall see occasion, to amend the Laws of the said Natives, and to provide for the better administration of Justice among them, as may be found practicable”. See also Hahlo & Kahn *Union of South Africa* (1960) 321.

²⁴³ S 4 of Ordinance 3 of 1849 (N). See Church *et al Human rights from a comparative perspective* (2007) 60; Van Niekerk 1990 *Codicillus* 38.

Affairs, Theophilus Shepstone (known as *Somtseu* (Nimrod) to the Zulus), it became known as the Shepstonian system.²⁴⁴

The Native Administration Law²⁴⁵ was introduced in 1875 and repealed Ordinance 3 of 1849. It was enacted to “make better provision for the Administration of Justice among the Native Population of Natal, and for the gradual assimilation of Native Law to the Laws of the Colony”.²⁴⁶ It established “Administrators of Native Law” courts where the administrators were from European descent,²⁴⁷ a Native High Court²⁴⁸ and a Court of Appeal.²⁴⁹ The civil jurisdiction of the African native chiefs was limited to certain instances (for example ownership of or succession to land), while all other civil matters fell under the jurisdiction of the courts of the Administrators of Native Law or the Native High Court.²⁵⁰ Section 5 confirmed that all matters must be adjudicated in accordance with customary law except where it worked “manifest injustice” or was “repugnant to the settled principles and policy of natural equity”.²⁵¹

²⁴⁴ Devenish 2005 *TSAR* 557; Bennett *Customary law* (2004) 38; Van Niekerk 1990 *Codicillus* 38; Hahlo & Kahn *Union of South Africa* (1960) 321; Brookes *History of native policy* (1924) 41. For a detailed account on the introduction of this regime see Welsh *Roots of segregation* (1973) ch 2; Brookes *History of native policy* (1924) ch 3.

²⁴⁵ 26 of 1875 (N) as found in Eybers (ed) *Select constitutional documents* (1918) 247-251.

²⁴⁶ Eybers (ed) *Select constitutional documents* (1918) 247.

²⁴⁷ Ss 2 & 3 of Law 26 of 1875 (N).

²⁴⁸ S 7 of Law 26 of 1875 (N). This court normally consisted of a single judge but could be assisted by Administrators of Native Law, Native Chiefs or Native Officers (Hahlo & Kahn *Union of South Africa* (1960) 322).

²⁴⁹ S 9 of Law 26 of 1875 (N). This court was a branch of the Supreme Court of the Colony and consisted of a judge of the Supreme Court, the Secretary for Native Affairs and the Native High Court judge himself (Hahlo & Kahn *Union of South Africa* (1960) 322).

²⁵⁰ S 5 of Law 26 of 1875 (N) as amended by s 2 of the Native Administration Law 44 of 1887 (N). See further Hahlo & Kahn *Union of South Africa* (1960) 322-323.

²⁵¹ See also Thomas 2008 *Fundamina* 141; Bennett *Customary law* (2004) 38; Hahlo & Kahn *Union of South Africa* (1960) 322-323.

The next step in recognising customary laws was codification.²⁵² There were various attempts to codify the customary law and a draft Code of 1878 became applicable in Zululand in 1887.²⁵³ This Code was not an accurate codification of customary law and drafted without consultation with the Zulu community.²⁵⁴ As a consequence, the Code was ignored to a certain extent in practice and disputes were adjudicated in accordance with the customary law as practised by the people.²⁵⁵ In the rest of Natal, the Code of Native Law was promulgated in terms of Law 19 of 1891.²⁵⁶ The Code did not codify the entire customary law applicable and in many instances did not reflect the actual customary law as practiced by the indigenous people.²⁵⁷ In addition, the Code could only be amended by legislation which made it rigid and out of step with changing circumstances.²⁵⁸

The administration of justice in respect of the indigenous communities was consolidated in the Courts Act 49 of 1898.²⁵⁹ Section 80 confirmed the application of customary law to all civil cases between indigenous people subject to a repugnancy clause:

²⁵² For a more detailed account of the process of codification of customary law in Natal see Bennett *Customary law* (2004) 38-39; Hahlo & Kahn *Union of South Africa* (1960) 323.

²⁵³ Bennett *Customary law* (2004) 39 n 33; Van Niekerk *Interaction of indigenous law and Western law* (1995) 64; Van Niekerk 1990 *Codicillus* 38.

²⁵⁴ Du Plessis "The historical functions of law: developments after 1500" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 113.

²⁵⁵ Church *Marriage and women in Bophuthatswana* (1989) 122-123; Linington (ed) *Rogers' native administration in the Union* (1949) 201.

²⁵⁶ Eybers (ed) *Select constitutional documents* (1918) 259. See also Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 404; Brookes *History of native policy* (1924) 192.

²⁵⁷ Hahlo & Kahn *Union of South Africa* (1960) 323. See also Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 107-108; Church *et al* *Human rights from a comparative perspective* (2007) 60; Church *Marriage and women in Bophuthatswana* (1989) 123.

²⁵⁸ Bennett *Customary law* (2004) 39 n 33; Linington (ed) *Rogers' native administration in the Union* (1949) 201; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 404.

²⁵⁹ See Bekker *Seymour's customary law* (1993) 6.

All civil Native cases shall be tried according to Native laws, customs and usages, save so far as may be otherwise specially provided by law, or as may be of a nature to work some manifest injustice, or be repugnant to the settled principles and policy of natural equity...²⁶⁰

1 5 4 Transvaal

1 5 4 1 Roman-Dutch law as the applicable legal system

With the Trekkers, the Roman-Dutch law arrived in the Transvaal and was adopted as the common law of the land.²⁶¹ In terms of article 31 of the Thirty-three Articles confirmed by the Volksraad in 1849²⁶² the “Hollandsche wet” would be applicable in the absence of any legislation “but only in a moderate way and according to the customs of South Africa and for the prosperity and welfare of the community”.²⁶³ The term “Hollandsche wet” was clarified in the first addendum to the Constitution of the South African Republic of 1859.²⁶⁴ It stated that the work of Van der Linden’s *Koopmans Handboek* was binding, and where not sufficiently

²⁶⁰ The section provided for certain exemptions: “except that all cases arising out of trade transactions of a nature unknown to Native law shall be adjudicated upon according to the principles laid down by the ordinary colonial law in such cases: Provided that nothing in this section shall be deemed to extend the operation of any law of limitation or prescription of action to any case to which but for this Act such law would not have applied.” See Bekker *Seymour’s customary law* (1993) 6; Church *Marriage and women in Bophuthatswana* (1989) 124; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 404.

²⁶¹ Thomas 2008 *Fundamina* 139; Hahlo & Kahn *South African legal system* (1991) 575-576 esp n 52; Hahlo & Kahn *Union of South Africa* (1960) 21.

²⁶² As found in Eybers (ed) *Select constitutional documents* (1918) 349-356. See also Wildenboer 2015 *Fundamina* 457.

²⁶³ Art 31 as translated by Eybers (ed) *Select constitutional documents* (1918) 356. See also Wildenboer 2015 *Fundamina* 465; De Vos *Regsgeskiedenis* (1992) 251; Hahlo & Kahn *South African legal system* (1991) 575-576 esp n 52; Hahlo & Kahn *Union of South Africa* (1960) 21. For a detailed discussion on the application of art 31 by the courts in a number of cases see Wildenboer 2015 *Fundamina* 469-475.

²⁶⁴ As found in Eybers (ed) *Select constitutional documents* (1918) 416-417. See also Wildenboer 2015 *Fundamina* 466.

clear or it did not deal with the relevant issues, Van Leeuwen's *Roomsch Hollandsch Recht* and De Groot's *Inleidinge* would apply.²⁶⁵

Hahlo and Kahn argue that it was not pure Roman-Dutch law as found in these texts that applied, but rather the Roman-Dutch law as administered in the Cape.²⁶⁶ They state that Cape case law was quoted in the early law reports on a frequent basis and included further references to English and Scottish law.²⁶⁷ Furthermore, the courts did not consider themselves confined by the three Roman-Dutch texts referred to above, but also looked at other Roman-Dutch writers and commentators.²⁶⁸ Finally, there was a tendency to borrow from Cape legislation.²⁶⁹

1 5 4 2 Approach in respect of indigenous people and their laws

In respect of the position of customary law, initially the indigenous people were subject to the same laws as the other inhabitants of the Transvaal.²⁷⁰ Later, a firm and consistent policy on customary law emerged with Law 4 of 1885 which aimed to maintain control over the indigenous people.²⁷¹ This Law established a court

²⁶⁵ Arts 1 & 2. See also Wildenboer 2015 *Fundamina* 466-467; Thomas 2008 *Fundamina* 139-140; De Vos *Regsgesiedenis* (1992) 252; Hahlo & Kahn *South African legal system* (1991) 575-576 esp n 52; Hahlo & Kahn *Union of South Africa* (1960) 21.

²⁶⁶ Hahlo & Kahn *Union of South Africa* (1960) 22. See also Wildenboer 2015 *Fundamina* 470.

²⁶⁷ Hahlo & Kahn *Union of South Africa* (1960) 22. See also Wildenboer 2015 *Fundamina* 469.

²⁶⁸ Hahlo & Kahn *Union of South Africa* (1960) 22. See also Wildenboer 2015 *Fundamina* 469.

²⁶⁹ Hahlo & Kahn *Union of South Africa* (1960) 23. See also Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 149.

²⁷⁰ Church *et al Human rights from a comparative perspective* (2007) 60; Bekker *Seymour's customary law* (1993) 5; Van Niekerk 1990 *Codicillus* 39; Church *Marriage and women in Bophuthatswana* (1989) 125; Hahlo & Kahn *Union of South Africa* (1960) 324-325.

²⁷¹ An extract of this statute can be found in Bekker *Seymour's customary law* (1993) 5. See Church *et al Human rights from a comparative perspective* (2007) 60-61; Bennett *Customary law* (2004) 39; Church *Marriage and women in Bophuthatswana* (1989) 125; Hahlo & Kahn *Union of South Africa* (1960) 325; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 404. For a detailed exposition of native policy in Transvaal during this time see Brookes *History of native policy* (1924) ch 5.

system for the administration of justice between indigenous people.²⁷² Native commissioners were appointed in larger native populated areas with jurisdiction over disputes between indigenous people and in smaller areas the local magistrates were appointed as Native commissioners *ex officio*.²⁷³ In respect of the applicable law, section 2 provided the following:

The laws, habits and customs hitherto observed among the Blacks shall continue to remain in force in this Republic as long as they have not appeared to be inconsistent with the general principles of civilization recognized in the civilized world.²⁷⁴

In addition, section 5 prohibited the application of customary law if it resulted in injustice or was in conflict with accepted principles of natural justice.²⁷⁵ Furthermore, the State President was appointed as the paramount chief and granted with “full power, right and authority to review the proceedings in any case, and if necessary to annul or to amend the judgment”.²⁷⁶ Except for a number of minor changes, this system was applicable until 1927.²⁷⁷

²⁷² Bennett *Customary law* (2004) 39; Van Niekerk 1990 *Codicillus* 39; Church *Marriage and women in Bophuthatswana* (1989) 126.

²⁷³ Bennett *Customary law* (2004) 39; Bekker *Seymour’s customary law* (1993) 5; Van Niekerk 1990 *Codicillus* 39.

²⁷⁴ As quoted by Bekker *Seymour’s customary law* (1993) 5. See also Van Niekerk 2010 *Fundamina* 472 n 1; Bennett *Customary law* (2004) 39; Bekker *Seymour’s customary law* (1993) 5; Van Niekerk 1990 *Codicillus* 39; Church *Marriage and women in Bophuthatswana* (1989) 125; Hahlo & Kahn *Union of South Africa* (1960) 325; Linington (ed) *Rogers’ native administration in the Union* (1949) 201; Brookes *History of native policy* (1924) 193.

²⁷⁵ See Bennett *Customary law* (2004) 39; Bekker *Seymour’s customary law* (1993) 5; Van Niekerk 1990 *Codicillus* 39; Church *Marriage and women in Bophuthatswana* (1989) 126.

²⁷⁶ S 6 as quoted by Bekker *Seymour’s customary law* (1993) 5. See also Van Niekerk 1990 *Codicillus* 39; Hahlo & Kahn *Union of South Africa* (1960) 325.

²⁷⁷ Bennett *Customary law* (2004) 40; Bekker *Seymour’s customary law* (1993) 6. See para 1 6 3 *infra* in respect of the position after 1927.

1 5 4 3 *British annexation and consequences*

When the British annexed the Transvaal in 1900²⁷⁸ the existing legal system was retained.²⁷⁹ It was proclaimed that “[t]he Roman-Dutch law except in so far as it is modified by legislative enactments shall be the law of this Colony”.²⁸⁰ Thereafter, an extensive reception of Cape legislation followed.²⁸¹

1 5 5 Orange Free State

1 5 5 1 *Roman-Dutch law as the applicable legal system*

As with the Transvaal, the Roman-Dutch law system was adopted in the Orange Free State. Article 56 of the Constitution of the Orange Free State of 1854²⁸² held that “[t]he Roman-Dutch law shall be the principal law” in the absence of any other legislation.²⁸³ Again, the term “Roman-Dutch” had to be clarified:

That the Roman-Dutch law is accepted as the fundamental law of this State in so far as it was found in force in the Cape Colony at the time of the appointment of the English judges, in the place of the previously existing Council of Justice, and not to include any new laws and institutions, local and general, which may have been introduced into Holland and which are not based on or are in conflict with the old Roman-Dutch law as expounded in the text-books of Voet, Van Leeuwen, Grotius

²⁷⁸ Proc 15 of 1900 (T) as found in Eybers (ed) *Select constitutional documents* (1918) 514-515.

²⁷⁹ Hahlo & Kahn *Union of South Africa* (1960) 24; Lee *Introduction to Roman-Dutch law* (1953) 12.

²⁸⁰ Proc 14 of 1902 (T). See Church *et al Human rights from a comparative perspective* (2007) 56 n 52; De Vos *Regsgeskiedenis* (1992) 253; Hahlo & Kahn *Union of South Africa* (1960) 24; Lee *Introduction to Roman-Dutch law* (1953) 12; Eybers (ed) *Select constitutional documents* (1918) 515.

²⁸¹ Hahlo & Kahn *Union of South Africa* (1960) 24. See also Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 149-150.

²⁸² As found in Eybers (ed) *Select constitutional documents* (1918) 285-296.

²⁸³ Art 56 as translated by Eybers (ed) *Select constitutional documents* (1918) 295. See also Thomas 2008 *Fundamina* 140; De Vos *Regsgeskiedenis* (1992) 254; Hahlo & Kahn *South African legal system* (1991) 576 n 52; Hahlo & Kahn *Union of South Africa* (1960) 22.

De Papegaaï, Merula, Lybrecht, Van der Linden, Van der Keessel and the authorities cited by them.²⁸⁴

Similarly to the law in the Transvaal, the law in the Orange Free State was also influenced directly and indirectly by the law applicable in the Cape.²⁸⁵

1 5 5 2 Approach in respect of indigenous people and their laws

Church *et al* argue that the Orange Free State had a consistent policy on customary law and that it was one of non-recognition.²⁸⁶ Hahlo and Khan maintain that it was not necessary for the Orange Free State to recognise customary law as it only dealt with “the overflow from adjoining native areas”.²⁸⁷ However, two areas populated by indigenous communities necessitated a measure of recognition of customary law. First, the Chief in the Witzieshoek Native Reserve was authorised to apply customary law in civil disputes between community members,²⁸⁸ and secondly, specific recognition was given to customary marriages in the Thaba ‘Nchu reserve.²⁸⁹

²⁸⁴ Art 1 of Ordinance 1 of 1856 (O) as translated by Wessels in *History of Roman-Dutch law* (1908) 369-370. See also De Vos *Regsgeskiedenis* (1992) 254; Eybers (ed) *Select constitutional documents* (1918) 301-311).

²⁸⁵ Cf the discussion in the text at n 266 *supra*. See further Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 149; De Vos *Regsgeskiedenis* (1992) 254-255.

²⁸⁶ Church *et al* *Human rights from a comparative perspective* (2007) 60. See also Church *Marriage and women in Bophuthatswana* (1989) 124; Brookes *History of native policy* (1924) 181, 195. *Contra* Bennett *Customary law* (2004) 40.

²⁸⁷ Hahlo & Kahn *Union of South Africa* (1960) 327. See also Church *et al* *Human rights from a comparative perspective* (2007) 60; Van Niekerk *Interaction of indigenous law and Western law* (1995) 67.

²⁸⁸ Thomas 2008 *Fundamina* 142; Van Niekerk *Interaction of indigenous law and Western law* (1995) 68; Van Niekerk 1990 *Codicillus* 39; Church *Marriage and women in Bophuthatswana* (1989) 124; Hahlo & Kahn *Union of South Africa* (1960) 327; Linington (ed) *Rogers’ native administration in the Union* (1949) 201-202; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 405.

²⁸⁹ Church *et al* *Human rights from a comparative perspective* (2007) 60; Van Niekerk *Interaction of indigenous law and Western law* (1995) 68; Van Niekerk 1990 *Codicillus* 39; Brookes *History of native policy* (1924) 194.

1 5 5 3 *British annexation and its consequences*

When the British annexed the Orange Free State in 1900²⁹⁰ the existing legal system was retained.²⁹¹ Similar to the position in the Transvaal, it was decided that “[t]he Roman-Dutch law shall be the common law of the Colony in so far as it has been introduced into, and is applicable to South Africa”.²⁹² As with the Transvaal, an extensive reception of Cape legislation followed.²⁹³

1 6 UNION OF SOUTH AFRICA AND SEGREGATION (1910-1947)

1 6 1 Establishment of the Union and its legal ideologies

As explained above, prior to the establishment of the Union of South Africa, South Africa consisted of four separate British colonies, namely the Cape, Natal, the Orange River Colony (Orange Free State) and the Transvaal.²⁹⁴ After the South African War, representatives of the four colonies met in a national convention in October 1908 which culminated in the South Africa Act²⁹⁵ which was passed by the British parliament in September 1909.²⁹⁶ The Union of South Africa was proclaimed on 31 May 1910, and by the Statute of Westminster in 1931, it granted sovereign independence.²⁹⁷ Its constitutional model was based on the English

²⁹⁰ The proclamation for the annexation of the Orange Free State can be found in Eybers (ed) *Select constitutional documents* (1918) 344-345.

²⁹¹ Church *et al Human rights from a comparative perspective* (2007) 56; De Vos *Regsgeskiedenis* (1992) 255; Hahlo & Kahn *Union of South Africa* (1960) 24; Lee *Introduction to Roman-Dutch law* (1953) 12.

²⁹² S 1 of Ordinance 3 of 1902 (O) as quoted by Hahlo & Kahn *Union of South Africa* (1960) 24.

²⁹³ Hahlo & Kahn *Union of South Africa* (1960) 24. See also Van der Merwe *et al* “The Republic of South Africa” in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 149-150.

²⁹⁴ Hahlo & Kahn *Union of South Africa* (1960) 7.

²⁹⁵ (9 Edw 7 c 9).

²⁹⁶ Berat (ed) *Thompson’s history of South Africa* (2014) 115, 149-152; Devenish 2005 *TSAR* 559; De Vos *Regsgeskiedenis* (1992) 255; Hahlo & Kahn *South African legal system* (1991) 571; Hahlo & Kahn *Union of South Africa* (1960) 7; Lee *Introduction to Roman-Dutch law* (1953) 13.

²⁹⁷ Berat (ed) *Thompson’s history of South Africa* (2014) 160; Devenish 2005 *TSAR* 562; De Vos *Regsgeskiedenis* (1992) 255; Hahlo & Kahn *South African legal system* (1991) 571; Van der Vyver 1982 *SALJ* 570; Hahlo & Kahn *Union of South Africa* (1960) 7.

doctrine of parliamentary sovereignty and the courts followed a legal positivistic approach:

In adopting a unitary state for South Africa, the architects of the Union adopted the Westminster paradigm, involving a potentially sovereign parliament and the jurisprudence of positivism as exemplified by Bentham, Austen, Dicey and in more recent times Kelsen and Hart. The essence of positivism is that it maintains a separation between law and morality. This jurisprudence was to have an inordinate detrimental influence on legal and jurisprudential development in South Africa.²⁹⁸

It would also seem that this approach included the classical rule of law as contained in Dicey's first two premises.²⁹⁹ Finally, the courts strictly adhered to the doctrine of *stare decisis*³⁰⁰ and the capitalist system introduced by the British was retained.³⁰¹

1 6 2 Unification of the common law

Prior to the unification of South Africa, each colony had its own legal system and section 135 of the South Africa Act provided that the existing law in the four colonies would remain in force until repealed or amended.³⁰² The different systems did not substantially deviate from each other as they were all based on

²⁹⁸ Devenish 2005 *TSAR* 561. See also Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(d); De Vos & Freedman (eds) *South African constitutional law* (2014) 53; Berat (ed) *Thompson's history of South Africa* (2014) 150; Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 25; Hawthorne 2006 *Fundamina* 73-74; Erasmus 1989 *SALJ* 671; Van der Vyver 1982 *SALJ* 570-572.

²⁹⁹ Wessels AJA in *Krohn v The Minister of Defence of the Union of South Africa and the Special Court under Martial Law Regulations Pretoria* 1915 AD 207 referring to the first two premises of Dicey's definition with approval. See also Hahlo & Kahn *Union of South Africa* (1960) 133. Cf the discussion in the text at n 176 *supra*.

³⁰⁰ Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 133; Hahlo & Kahn *South African legal system* (1991) 242.

³⁰¹ Berat (ed) *Thompson's history of South Africa* (2014) 155.

³⁰² See also De Vos *Regsgeskiedenis* (1992) 256.

Roman-Dutch law (as influenced by English law) and had borrowed from each other over the years.³⁰³

The centralisation of the legislative powers, subsequent legislation enacted as well as the establishment of the Appellate Division did much over the years to address the differences in law that existed across the provinces.³⁰⁴ Furthermore, it should be noted that after the unification of South Africa, the strong influence of English law waned and there was a movement to return to the Roman-Dutch law heritage.³⁰⁵ This included the establishment of Roman and Roman-Dutch law subjects at a number of South African universities, the introduction of books and journals dealing with Roman-Dutch law in South Africa, translations of old sources from Latin and Dutch into English, and the willingness of the courts to promote Roman-Dutch law.³⁰⁶

1 6 3 Unification of the recognition of customary law

More needs to be said about the customary law, as its recognition differed substantially from colony to colony.³⁰⁷ The differences in law across the Union

³⁰³ Hahlo & Kahn *Union of South Africa* (1960) 25. Cf the discussions *supra* in paras 1 5 3 1 (Natal), 1 5 4 1 (Transvaal) & 1 5 5 1 (Orange Free State).

³⁰⁴ Hahlo & Kahn *Union of South Africa* (1960) 25. See also De Vos *Regsgeskiedenis* (1992) 256-257.

³⁰⁵ Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 203-204; Church *et al Human rights from a comparative perspective* (2007) 56; Du Bois 2004 *International Journal of Legal Information* 224; De Vos *Regsgeskiedenis* (1992) 263-264; Sanders 1981 *CILSA* 330. The debate surrounding this issue was generally referred to as the "purist-pollutionist debate" (Van Niekerk 2010 *Fundamina* 473).

³⁰⁶ Church *et al Human rights from a comparative perspective* (2007) 56; De Vos *Regsgeskiedenis* (1992) 263-264; Sanders 1981 *CILSA* 330.

³⁰⁷ Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 8; Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 108; Olivier *et al* "Indigenous law" in Joubert (ed) *LAWSA Vol 32* (2009) para 3; Church *et al Human rights from a comparative perspective* (2007) 61; Bennett *Customary law* (2004) 40; SALC *Project for harmonisation of common and indigenous law* (1999) 9; Van Niekerk *Interaction of indigenous law and Western law* (1995) 72; Hahlo &

caused confusion and uncertainty.³⁰⁸ Furthermore, the Union government had other concerns that had to be dealt with:

Social and political changes in the African population were beginning to challenge white rule ... Africans formed a sizeable urban proletariat; many were educated and they were active in forging political associations.³⁰⁹

The government's solution to this problem was to advance and develop the segregation policies that existed before unification.³¹⁰ First, the Natives (later "Black") Land Act³¹¹ was introduced in 1913 which prohibited indigenous people to buy or lease land outside specific "scheduled" areas.³¹² The enactment of this statute established a framework for segregation and later apartheid.³¹³ Thereafter, the Native (later "Black") Administration Act was enacted in 1927 "to re-establish traditional authority".³¹⁴ However, its main aim was to establish a separate system

Kahn *Union of South Africa* (1960) 327. Cf the discussions in paras 1 5 2 5 (Cape), 1 5 3 2 (Natal), 1 5 4 2 (Transvaal) & 1 5 5 2 (Orange Free State) *supra*.

³⁰⁸ Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 108; Church *et al* *Human rights from a comparative perspective* (2007) 61; Bennett *Customary law* (2004) 40; SALC *Project for harmonisation of common and indigenous law* (1999) 9; Van Niekerk *Interaction of indigenous law and Western law* (1995) 72; Church *Marriage and women in Bophuthatswana* (1989) 127; Hahlo & Kahn *Union of South Africa* (1960) 327.

³⁰⁹ Bennett *Customary law* (2004) 41.

³¹⁰ Church *et al* *Human rights from a comparative perspective* (2007) 61; Bennett *Customary law* (2004) 41; SALC *Project for harmonisation of common and indigenous law* (1999) 9.

³¹¹ This Act was repealed in 1991 (cf discussion in the text at n 364 *infra*).

³¹² Berat (ed) *Thompson's history of South Africa* (2014) 163; Himonga & Nhlapo (eds) *African customary law* (2014) 10; Bennett *Customary law* (2004) 41; Thomas 2008 *Fundamina* 146; SALC *Project for harmonisation of common and indigenous law* (1999) 10. For more detail see Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 468-472.

³¹³ SALC *Project for harmonisation of common and indigenous law* (1999) 10. For more detail on this statute and its effect on the indigenous population see Berat (ed) *Thompson's history of South Africa* (2014) 163-166.

³¹⁴ Bennett *Customary law* (2004) 41; SALC *Project for harmonisation of common and indigenous law* (1999) 10; Van Niekerk *Interaction of indigenous law and Western law* (1995) 72-73; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 405-406.

for the administration of justice to mirror the policy of segregation in land ownership.³¹⁵ This Act replaced the different statutes governing customary law in South Africa.³¹⁶ It provided customary law with a separate but unequal status to that of common law.³¹⁷ Similar to the Shepstonian system, the Governor-General was appointed as “the supreme chief of all Natives” with the necessary powers to exercise this authority over the indigenous people and their laws.³¹⁸ A separate court system was established, consisting of traditional leaders and native commissioners.³¹⁹ The courts of the traditional leaders could apply customary law only,³²⁰ while the courts of the native commissioners were granted with discretionary powers to apply the customary or common law in civil disputes between indigenous people in respect of “questions of customs followed by Natives”.³²¹ Furthermore, customary law was applied provided it did not conflict with the principles of public policy or natural justice.³²²

³¹⁵ SALC *Project for harmonisation of common and indigenous law* (1999) 10. See also Himonga & Nhlapo (eds) *African customary law* (2014) 11; Van Niekerk *Interaction of indigenous law and Western law* (1995) 72; Church *Marriage and women in Bophuthatswana* (1989) 134.

³¹⁶ Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 8; Olivier *et al* “Indigenous law” in Joubert (ed) *LAWSA Vol 32* (2009) para 3; Bennett *Customary law* (2004) 41; Bekker *Seymour’s customary law* (1993) 7; Van Niekerk 1990 *Codicillus* 39.

³¹⁷ Olivier *et al* “Indigenous law” in Joubert (ed) *LAWSA Vol 32* (2009) para 3; Thomas 2008 *Fundamina* 142; Bennett *Customary law* (2004) 41; Thomas & Tladi 1999 *CILSA* 356.

³¹⁸ S 1.

³¹⁹ Ch 2. See also Himonga & Nhlapo (eds) *African customary law* (2014) 11-12; Thomas 2008 *Fundamina* 142; Bennett *Customary law* (2004) 41; Van Niekerk 1990 *Codicillus* 39.

³²⁰ S 12 (1).

³²¹ S 11(1). See also Bennett *Customary law* (2004) 41-42.

³²² S 11(1). See also Himonga & Nhlapo (eds) *African customary law* (2014) 12; Olivier *et al* “Indigenous law” in Joubert (ed) *LAWSA Vol 32* (2009) para 3; Thomas 2008 *Fundamina* 142; Thomas & Tladi 1999 *CILSA* 356; Van Niekerk *Interaction of indigenous law and Western law* (1995) 73; Van Niekerk 1990 *Codicillus* 39; Kennedy & Schlosberg *Law and custom of the South African constitution* (1935) 406.

1 7 NATIONAL PARTY RULE AND APARTHEID (1948-1993)³²³

1 7 1 Introduction of apartheid and its ideologies

The National Party based their election campaign on the ideology of apartheid and won the election in 1948.³²⁴ The four main ideas of apartheid have been described as follows:

First, the population of South Africa comprised of four “racial groups” – White, Coloured, Indian, and African – each with its own inherent culture. Second, Whites, as the civilized race, were entitled to have absolute control over the state. Third, white interests should prevail over black interests; the state was not obliged to provide equal facilities for the subordinate races. Fourth, the white racial group formed a single nation, with Afrikaans- and English-speaking components, while Africans belonged to several (eventually ten) distinct nations or potential nations – a formula that made the white nation the largest in the country.³²⁵

The new government started building on earlier segregation legislation and introduced more apartheid orientated laws.³²⁶ Specifically, the elimination of voting rights of the indigenous people and coloureds can be mentioned.³²⁷ This was in stark contrast with international human rights developments, specifically the

³²³ For a detailed historical exposition of the apartheid era in South Africa see Berat (ed) *Thompson’s history of South Africa* (2014) ch 6.

³²⁴ Berat (ed) *Thompson’s history of South Africa* (2014) 187; Woolman & Swanepoel “Constitutional history” in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(h); Thomas 2008 *Fundamina* 145; Lodge “Die Afrikanernasionaliste aan die bewind” in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 310.

³²⁵ Berat (ed) *Thompson’s history of South Africa* (2014) 190. See also Lodge “Die Afrikanernasionaliste aan die bewind” in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 314ff.

³²⁶ Berat (ed) *Thompson’s history of South Africa* (2014) 190 and the legislation referred to there; Thomas 2008 *Fundamina* 145 esp n 102 listing various pieces of apartheid legislation. See further Lodge “Die Afrikanernasionaliste aan die bewind” in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 314ff.

³²⁷ For more detail see Berat (ed) *Thompson’s history of South Africa* (2014) 190-193; Woolman & Swanepoel “Constitutional history” in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(h); Lodge “Die Afrikanernasionaliste aan die bewind” in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 311-316.

adoption of the Universal Declaration of Human Rights that same year³²⁸ which is based on the principle of human dignity³²⁹ and enshrines a number of universally recognised human rights including the right to equality³³⁰ and a number of freedom protecting human rights.

1 7 2 Legal culture under apartheid

These changes were enabled by the system of parliamentary sovereignty and legal positivism inherited from the British colonial rule.³³¹ This included a formal understanding of the rule of law which differed from Dicey's classical definition.³³² Under apartheid the rule of law required only that decisions were made by the application of existing legislative provisions and rules of law irrespective of their procedural or substantive equality.³³³ Also absent was the idea that everyone is equal before the law and subject to the same laws. This conception of the rule of law permitted the white minority to enact, execute and enforce racist and violent

³²⁸ 1948 (GA Res 217A (III)).

³²⁹ Preamble.

³³⁰ Art 7 which states as follows: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

³³¹ Berat (ed) *Thompson's history of South Africa* (2014) 190-191; Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 25-26; Devenish 2005 *TSAR* 559; Van der Vyver 1982 *SALJ* 572. Cf the discussion in para 1 5 2 3 *supra*.

³³² See Hahlo & Kahn *Union of South Africa* (1960) 133-136 for a detailed discussion of how the rule of law under the apartheid government differed from the Diceyan conception of the rule of law (cf the discussion in the text at n 176 *supra*).

³³³ Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman & Bishop (eds) *Constitutional law* (2014) para 11.1(a); Krüger 2010 *PELJ* 479; Currie & De Waal (eds) *New constitutional and administrative law* (2001) 76.

laws.³³⁴ Formally, the idea of rule of law included the idea that a public power may not be exercised *ultra vires* or arbitrary³³⁵ but in practice this was another matter:

It is notorious both that the meaning of 'arbitrary' underwent contraction and that the stringency of the demand for clear parliamentary authorization underwent dilution under the stress of apartheid-era realpolitik.³³⁶

Eventually, a slightly more moderate view was proposed, namely that as long as a law is properly enacted it is lawful and binding but this still excluded any adjudication on the law's substance.³³⁷ Therefore, it has been argued that the rule of law under apartheid is better described as "rule by law".³³⁸

Subsequently, the legal culture of the apartheid era has been described as follows:

[C]onservative and positivist, with judicial deference to the executive and to parliamentary sovereignty; formalistic, technical and authoritarian; and 'of reasoned argument' and justification.³³⁹

This approach also included strict adherence to the doctrine of *stare decisis*.³⁴⁰

³³⁴ De Vos & Freedman (eds) *South African constitutional law* (2014) 79. For some examples of such laws see the discussion by Hahlo & Kahn *Union of South Africa* (1960) 133-136.

³³⁵ Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman & Bishop (eds) *Constitutional law* (2014) para 11.1(a); Krüger 2010 *PELJ* 479.

³³⁶ Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman & Bishop (eds) *Constitutional law* (2014) para 11.1(a) n 5.

³³⁷ Grenfell *Promoting the rule of law* (2013) 106; Schmid "Thickening the rule of law in transition: the constitutional entrenchment of economic and social rights in South Africa" in Kristjánsdóttir *et al* (eds) *International law in domestic courts* (2012) 62; Dugard *Human rights* (1978) 43-44.

³³⁸ De Vos & Freedman (eds) *South African constitutional law* (2014) 78-79; Grenfell *Promoting the rule of law* (2013) 106; Krüger 2010 *PELJ* 479; Dyzenhaus 2007 *SALJ* 738; Dugard *Human rights* (1978) 43.

³³⁹ Keep & Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 29. See also Davis & Klare 2010 *SAJHR* 407; Langa 2006 *Stell LR* 353, 356-357; Du Bois 2004 *International Journal of Legal Information* 225-226; Moseneke 2002 *SAJHR* 316; Klare 1998 *SAJHR* 157-158, 168.

1 7 3 Establishment of and developments during the South African Republic

When South Africa became a republic in 1961, the system of parliamentary sovereignty was retained and the government persisted in enacting laws and implementing actions in line with their apartheid ideology.³⁴¹ These included rigid pass laws, forced removals, racially zoned group areas as well as segregation in respect of education, participation in sports, modes of transportation, public amenities and so forth.³⁴² As the apartheid ideology advocated segregation of the races but not equal rights and services for all, the socio-economic conditions experienced by the indigenous people were appalling. For example, they earned lower wages than their white counterparts and did not enjoy the same job opportunities as whites.³⁴³ This meant that they did not have adequate access to the necessary nutrition and housing. Also, the health system was largely used for the benefit of whites,³⁴⁴ other public services for the indigenous people were far inferior to those of whites,³⁴⁵ and their education system was also of a lower quality.³⁴⁶ These conditions were further compounded by the far reaching powers of the government to arrest and detain without trial as well as their power to ban

³⁴⁰ Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 133; Hahlo & Kahn *South African legal system* (1991) 242.

³⁴¹ De Vos & Freedman (eds) *South African constitutional law* (2014) 53; Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 25; Church *et al* *Human rights from a comparative perspective* (2007) 56; Hahlo & Kahn *South African legal system* (1991) 571.

³⁴² Berat (ed) *Thompson's history of South Africa* (2014) 193-197. See also Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.2(i); Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 23; Liebenberg *Socio-economic rights* (2010) 2-6.

³⁴³ Defined as "the lowest sum on which a household could possibly live in South African social circumstances" (Berat (ed) *Thompson's history of South Africa* (2014) 202).

³⁴⁴ Berat (ed) *Thompson's history of South Africa* (2014) 202-203.

³⁴⁵ Berat (ed) *Thompson's history of South Africa* (2014) 201.

³⁴⁶ Berat (ed) *Thompson's history of South Africa* (2014) 196-197.

any organisation or prevent the holding of meetings of any sort.³⁴⁷ In addition, the exercise of these powers were usually characterised by physical violence and torture.³⁴⁸ As a result, an extremely unequal society was created.

During this time, the nationalist regime promoted a specific type of Afrikaner culture:

Their [the Afrikaners'] language was unique and most Afrikaners experienced little but the Nationalist world perspective from cradle to grave: at home, in Afrikaans-language schools and universities, in Dutch Reformed churches, in social groups, on radio and television, and in books and newspapers. In particular, their schools imbued them with a political mythology derived from a historiography that distorted the past for nationalist purposes. For example, it made heroes out of the border ruffians who were responsible for the Slagtersnek rebellion in 1815, and it associated God with the victory of the Afrikaner commando over the Zulu at the battle of Blood River on December 16, 1838.³⁴⁹

In line with this type of ideology, the movement to purify the South African law of English law influences and to return to the Roman-Dutch law heritage was strong at this time.³⁵⁰ This debate would continue into the 1980s,³⁵¹ but eventually it was accepted that purifying the South African common law from all English law

³⁴⁷ Berat (ed) *Thompson's history of South Africa* (2014) 199. See also Van der Vyver 1982 *SALJ* 576-577.

³⁴⁸ Berat (ed) *Thompson's history of South Africa* (2014) 198-200. See also Van der Vyver 1982 *SALJ* 577.

³⁴⁹ Berat (ed) *Thompson's history of South Africa* (2014) 198.

³⁵⁰ Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 210; Thomas 2011 *SUBB Jurisprudentia* 6; Church *et al Human rights from a comparative perspective* (2007) 56; Du Bois 2004 *International Journal of Legal Information* 224-225; Church 1996 *Fundamina* 309; De Vos *Regsgeskiedenis* (1992) 265.

³⁵¹ Van Niekerk 2010 *Fundamina* 473 n 5 and the literature cited there.

influences was impractical.³⁵² As a consequence, the English law influence on the South African common law of contract can still be observed today.³⁵³

1 7 4 Deterioration and fall of apartheid

The actions of the apartheid government were not implemented without resistance. Local resistance came in different forms and included criticism of the apartheid system (by the church, certain universities, organisations, writers and artists), political resistance by political parties and black trade union movements.³⁵⁴ Internationally, apartheid was also condemned³⁵⁵ which included the institution of economic sanctions against the South African government.³⁵⁶ By the 1980s the apartheid regime was deteriorating.³⁵⁷

This forced the government to make judicial reforms in respect of the recognition of customary law.³⁵⁸ As part of these reforms, section 11(1) of the Black Administration Act was repealed but re-enacted as section 45A(1) of the Magistrate's Courts Act.³⁵⁹ Thereafter, a more detailed reform of customary law

³⁵² Van der Merwe *et al* "The Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 204; Church *et al Human rights from a comparative perspective* (2007) 56; Church 1996 *Fundamina* 309; De Vos *Regsgeskiedenis* (1992) 267-268.

³⁵³ This idea is explored throughout the next chapter.

³⁵⁴ For a discussion of the most important resistance movements see Berat (ed) *Thompson's history of South Africa* (2014) 204-213; Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.3.

³⁵⁵ For a more detailed discussion see Berat (ed) *Thompson's history of South Africa* (2014) 213-220.

³⁵⁶ See Berat (ed) *Thompson's history of South Africa* (2014) 233-234.

³⁵⁷ Bennett *Customary law* (2004) 42. For a detailed discussion of this period (1978-1989) see Berat (ed) *Thompson's history of South Africa* (2014) ch 7.

³⁵⁸ SALC *Project for harmonisation of common and indigenous law* (1999) 12.

³⁵⁹ See also Himonga & Nhlapo (eds) *African customary law* (2014) 16; Olivier *et al* "Indigenous law" in Joubert (ed) *LAWSA Vol 32* (2009) para 3; SALC *Project for harmonisation of common and indigenous law* (1999) 12.

was undertaken which culminated in the enactment of the Law of Evidence Amendment Act 45 of 1988.³⁶⁰ Of specific relevance is section 1(1):

Any court may take judicial notice of the law of a foreign state or indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice...

Although customary law was still subject to a repugnancy clause,³⁶¹ it is important to note that customary law could now be applied by any court.³⁶² In addition, the court could take judicial notice of customary law.³⁶³ Further legislative reforms included the repeal of the Black Land Act in 1991.³⁶⁴

The resistance to apartheid increased and when it became clear that South Africa was on the brink of a civil war, negotiations began to end apartheid.³⁶⁵ The negotiations culminated in the enactment of the interim Constitution³⁶⁶ and a

³⁶⁰ Himonga & Nhlapo (eds) *African customary law* (2014) 16; SALC *Project for harmonisation of common and indigenous law* (1999) 13.

³⁶¹ Himonga & Nhlapo (eds) *African customary law* (2014) 16; Church *et al Human rights from a comparative perspective* (2007) 52; SALC *Project for harmonisation of common and indigenous law* (1999) 13; Thomas & Tladi 1999 *CILSA* 356.

³⁶² Himonga & Nhlapo (eds) *African customary law* (2014) 16; Church *et al Human rights from a comparative perspective* (2007) 61; Du Bois 2004 *International Journal of Legal Information* 230.

³⁶³ Himonga & Nhlapo (eds) *African customary law* (2014) 16; Barnard-Naudé "Sources of law and legal authority" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 145; Olivier *et al* "Indigenous law" in Joubert (ed) *LAWSA Vol 32* (2009) para 3; Church *et al Human rights from a comparative perspective* (2007) 61-62; Du Bois 2004 *International Journal of Legal Information* 230.

³⁶⁴ Repealed in terms of s 1(a) of the Abolition of Racially Based Land Measures Act 108 of 1991. Cf the discussion in the text at n 311 *supra*.

³⁶⁵ For a detailed discussion see Berat (ed) *Thompson's history of South Africa* (2014) ch 8. See also Currie & De Waal *Bill of rights handbook* (2014) 4; Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.4; Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 14-20; Liebenberg *Socio-economic rights* (2010) 7.

³⁶⁶ Constitution of the Republic of South Africa 200 of 1993.

national election in April 1994 which was open to all races.³⁶⁷ The African National Congress Party won the majority vote and Nelson Mandela became the first African president of South Africa.³⁶⁸

1 8 NEW CONSTITUTIONAL ORDER (1994 TO DATE)

1 8 1 Constitutional supremacy

The final Constitution³⁶⁹ came into force on 4 February 1997,³⁷⁰ recognises that South Africa is a sovereign democratic state and acknowledges the supremacy of the Constitution.³⁷¹ Therefore, the system of parliamentary sovereignty ended and was substituted with constitutional sovereignty.³⁷² This means that the Constitution is the supreme law of the country and any law or conduct inconsistent with the

³⁶⁷ Berat (ed) *Thompson's history of South Africa* (2014) 263. See also Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.4(d); Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 20; Liebenberg *Socio-economic rights* (2010) 7; Lodge "Die Afrikanernasionaliste aan die bewind" in Giliomee & Mbenga (eds) *Nuwe geskiedenis van Suid-Afrika* (2007) 407-408.

³⁶⁸ Berat (ed) *Thompson's history of South Africa* (2014) 264. See also Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.4(d); Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 14.

³⁶⁹ Constitution of the Republic of South Africa, 1996. All references to "the Constitution" in this thesis refer to this statute unless indicated otherwise.

³⁷⁰ For more detail on the enactment and certification process of the final Constitution see Currie & De Waal *Bill of rights handbook* (2014) 6-7; Woolman & Swanepoel "Constitutional history" in Woolman & Bishop (eds) *Constitutional law* (2014) para 2.5.

³⁷¹ S 1.

³⁷² Currie & De Waal *Bill of rights handbook* (2014) 2; De Vos & Freedman (eds) *South African constitutional law* (2014) 26; Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman & Bishop (eds) *Constitutional law* (2014) para 11.1(c) & 11.3(c)(ii); Burns *Administrative law* (2013) 95; Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 26; Liebenberg *Socio-economic rights* (2010) 1.

Constitution is invalid.³⁷³ The Constitutional Court has explained the supremacy of the Constitution as follows:

There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.³⁷⁴

1 8 2 Objective normative value system: Founding constitutional values

Section 1 of the Constitution states that the Republic of South Africa is founded upon the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.³⁷⁵

The inclusion of these values means that the Constitution establishes “an objective normative value system” which guides the introduction of new laws and the application and development of existing laws.³⁷⁶ The values of human

³⁷³ S 2 of the Constitution. See also Currie & De Waal *Bill of rights handbook* (2014) 2, 9; De Vos & Freedman (eds) *South African constitutional law* (2014) 26, 54-55; Burns *Administrative law* (2013) 96; Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 26.

³⁷⁴ *Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and others* 2000 2 SA 674 (CC) para 44.

³⁷⁵ S 1 of the Constitution. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 26.

³⁷⁶ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 4 SA 938 (CC) para 54. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 324. See further the discussion in para 1 8 3 2 *infra*.

dignity³⁷⁷, equality and freedom are of particular importance in the Constitution³⁷⁸ and the Constitutional Court has described these three values as “conjoined, reciprocal and covalent” and “foundational to the Republic”.³⁷⁹

These three constitutional values as well as the constitutional value encapsulating the principle of the rule of law are particularly relevant for the purposes of this research topic. For ease of reference, these four constitutional values are referred to as the founding constitutional values in this thesis.³⁸⁰ Specifically, chapter three constitutes a critical discussion of these values as they are expressed in the

³⁷⁷ Throughout this thesis the term “human dignity” is used rather than referring to “dignity”. First, this is the term used in the Constitution (see ss 1, 7(1), 36(1) & 39(1)). Although, s 10 of the Constitution speaks of “dignity” in the provision itself, it is entitled “human dignity”. Secondly, generally, there is a difference in meaning of the two terms:

Dignity in general ... is a term of many meanings. It applies to all sorts of carriers, human and non-human, and indicates primarily certain distinctive qualities which given them a rank above others that do not have these qualities. In fact, dignity in the general sense is a matter of degree. It reflects an aristocratic picture of reality in the tradition of the “Great Chain of Being” with higher and lower dignities. Such dignity is subject to change, to increase and decrease: it can be gained and lost. It finds its expression in such dignities as are conferred on “dignitaries” through honors or titles, and can be expressed in dignified or undignified comportment.

Human dignity is a very different matter. It implies the very denial of an aristocratic order of dignities. For it refers to the minimum dignity which belongs to every human being qua human. It does not admit of any degrees. It is equal for all humans. It cannot be gained or lost. In this respect human dignity as a species of dignity differs fundamentally from the genus (Spiegelberg as quoted in Beylerveld & Brownsword *Human dignity in bioethics* (2004) 50).

Thirdly, the above description of “human dignity” is similar in meaning to that provided in s 10 of the Constitution which provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

³⁷⁸ Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 324.

³⁷⁹ *S v Mamabolo (E TV and others intervening)* 2001 3 SA 409 (CC) para 41. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 324-325.

³⁸⁰ This is in order to differentiate between these values and ubuntu which is referred to as an underlying constitutional value (see the discussion in para 1 8 4 3(a) *infra*).

common law of contract. However, at this stage, it is necessary to mention a number of ideas in respect of the values of human dignity, equality and the rule of law.

1 8 2 1 Human dignity³⁸¹

Human dignity is the first constitutional value mentioned in section 1, and it has been argued, that it is the most important of all the constitutional values.³⁸² Human dignity is regarded as the core value of the Constitution and the most important human right³⁸³ from which all the other human rights derive.³⁸⁴ In *S v Makwanyane* it was held that human dignity (together with the right to life) is “the most important of all human rights”.³⁸⁵ In *Dawood v Minister of Home Affairs* the court explained the importance and role of human dignity as follows:

The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights.³⁸⁶

³⁸¹ The constitutional value of human dignity is investigated in more detail in para 3 2 *infra*.

³⁸² Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 326.

³⁸³ Human dignity is also an enforceable right in terms of s 10 of the Constitution (quoted in n 377 *supra*). This thesis focusses on the role of human dignity as a foundational constitutional value. The reasons for this approach is set out in para 3 2 1 *infra*.

³⁸⁴ De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 418; Hawthorne 2011 *SAPL* 432; Botha 2009 *Stell LR* 196-197; Barnard *Critical legal argument for contractual justice* (2005) 230.

³⁸⁵ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 144 (see also paras 328-329 forming part of the separate judgment of Justice O’Regan).

³⁸⁶ *Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* 2000 3 SA 936 (CC) para 35.

1 8 2 2 Equality

The “achievement of equality” is enshrined as a foundational constitutional value in section 1 of the Constitution. Although equality is also an enforceable right in terms of section 9, this thesis focusses on the role of equality as a foundational constitutional value.³⁸⁷ However, as the Constitutional Court has provided content to equality with reference to the wording in section 9, reference will be made to this provision where necessary to illuminate the court’s approach to the constitutional value of equality.³⁸⁸ At this stage, it is important to note that the constitutional value of equality refers to both formal and substantive equality.

(a) Formal equality

The Constitution contains liberal elements as various human rights are enshrined therein.³⁸⁹ Therefore, the Constitution establishes a liberal democracy.³⁹⁰ Specifically, section 9(1) provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. This is usually referred to as formal equality before the law.³⁹¹ Formal equality assumes that everyone is equal to each other and therefore any differentiation in treatment (for example based on race or gender)³⁹² is irrational and arbitrary.³⁹³ Therefore, inequality can be

³⁸⁷ The reason for this approach is set out in para 3 2 1 *infra*.

³⁸⁸ Cf the discussion dealing with the Constitutional Court’s approach to the constitutional value of equality in para 3 3 3 *infra*.

³⁸⁹ See also De Vos & Freedman (eds) *South African constitutional law* (2014) 28; Liebenberg *Socio-economic rights* (2010) 35; Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 48.

³⁹⁰ Du Plessis “Interpretation” in Woolman & Bishop (eds) *Constitutional law* (2014) para 32.3(c)(iv); Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 29-30.

³⁹¹ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c) n 26; Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 28; Hawthorne 1995 *THRHR* 159.

³⁹² S 9 of the Constitution prohibits discrimination on the following grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

eradicated by granting the same rights and entitlements to everyone, in accordance with the same “neutral” standard of measurement.³⁹⁴ Accordingly, it does not take account of the actual lived social and economic circumstances of the person or group and advances a formal approach to law (i.e. legal formalism).³⁹⁵ Consequently, it denotes a formal prohibition against discrimination.³⁹⁶

(b) Substantive equality

Although the Constitution contains liberal elements and provides for formal equality before the law, it is not purely liberal.³⁹⁷ It also aims to achieve substantive equality in law.³⁹⁸ Substantive equality recognises that inequality is rooted in the existing social and economic differences within the society.³⁹⁹ It

³⁹³ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 421.

³⁹⁴ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); Currie & De Waal *Bill of rights handbook* (2014) 213; De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 421.

³⁹⁵ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); Currie & De Waal *Bill of rights handbook* (2014) 213-214; De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 421; Hawthorne 1995 *THRHR* 166. Cf the discussion in the text at n 170 *supra*.

³⁹⁶ De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 421.

³⁹⁷ De Vos & Freedman (eds) *South African constitutional law* (2014) 28; Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 32, 39. See also Klare 1998 *SAJHR* 152.

³⁹⁸ De Vos & Freedman (eds) *South African constitutional law* (2014) 28; Du Plessis “Interpretation” in Woolman & Bishop (eds) *Constitutional law* (2014) para 32.3(c)(iv); Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 28; Langa 2006 *Stell LR* 352; Bhana & Pieterse 2005 *SALJ* 880; Moseneke 2002 *SAJHR* 314; Klare 1998 *SAJHR* 154.

³⁹⁹ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); Currie & De Waal *Bill of rights handbook* (2014) 213; Liebenberg *Socio-economic rights* (2010) 98; Hawthorne 1995 *THRHR* 159-160.

requires an understanding of the social and economic conditions that create and reinforce inequality within the society in great part exacerbated by the centuries of the legally sanctioned perpetuation of inequality.⁴⁰⁰ Subsequently, it involves an investigation into the surrounding context, specifically the actual lived, social and economic conditions of the relevant persons or groups.⁴⁰¹ This entails a move away from legal formalism based on formal equality towards a consideration of the equality of the outcome i.e. the impact of the act and the harm it creates.⁴⁰² This allows the law to treat people differently when such differentiation ensures equality of outcome.⁴⁰³ Whether differentiation would lead to equality of outcome must be determined with reference to the aim of the specific right and its underlying values.⁴⁰⁴

The idea of substantive equality can be identified in a number of constitutional provisions. The Preamble of the Constitution recognises “the injustices of our past” and adopts the Constitution as the supreme law of the country in order to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” and to “[i]mprove the quality of life of all citizens and free the potential of each person”.⁴⁰⁵ Also, as was seen above,

⁴⁰⁰ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); Liebenberg *Socio-economic rights* (2010) 98.

⁴⁰¹ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); Currie & De Waal *Bill of rights handbook* (2014) 213; Liebenberg *Socio-economic rights* (2010) 98; Bhana & Pieterse 2005 *SALJ* 880; Botha 2001 *THRHR* (3) 528-529.

⁴⁰² Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); Currie & De Waal *Bill of rights handbook* (2014) 213; Botha 2001 *THRHR* (3) 528-529.

⁴⁰³ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c); Currie & De Waal *Bill of rights handbook* (2014) 213; De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 421; Hawthorne 1995 *THRHR* 160.

⁴⁰⁴ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(c).

⁴⁰⁵ See also De Vos & Freedman (eds) *South African constitutional law* (2014) 33; Liebenberg *Socio-economic rights* (2010) 25; Moseneke 2002 *SAJHR* 313; Klare 1998 *SAJHR* 150;

section 1(a) of the Constitution lists “the *achievement* of equality” as one of its founding values.⁴⁰⁶ Most importantly, section 9(2) provides that:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.⁴⁰⁷

Finally, the Constitution entrenches a number of socio-economic rights that promote substantive equality⁴⁰⁸ and includes rights that deal with freedom of trade, occupation and profession;⁴⁰⁹ labour relations;⁴¹⁰ housing;⁴¹¹ health care, food, water and social security;⁴¹² children’s socio-economic rights;⁴¹³ education;⁴¹⁴ language and culture;⁴¹⁵ and detained persons’ socio-economic rights.⁴¹⁶

Hawthorne 1995 *THRHR* 160. Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 32 & Langa 2006 *Stell LR* 352 refer to the Postamble of the interim Constitution which states that the interim Constitution provides “a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development for all South Africans, irrespective of colour, race, class, belief or sex”.

⁴⁰⁶ My emphasis. See also Klare 1998 *SAJHR* 153-154.

⁴⁰⁷ See also Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.4(a); Currie & De Waal *Bill of rights handbook* (2014) 214 n 19; Bhana & Pieterse 2005 *SALJ* 880.

⁴⁰⁸ Liebenberg *Socio-economic rights* (2010) 35.

⁴⁰⁹ S 22 of the Constitution.

⁴¹⁰ S 23 of the Constitution.

⁴¹¹ S 26 of the Constitution.

⁴¹² S 27 of the Constitution.

⁴¹³ S 28(1)(c) of the Constitution.

⁴¹⁴ S 29 of the Constitution.

⁴¹⁵ Ss 30-31 of the Constitution.

⁴¹⁶ S 35(2)(e) of the Constitution.

Therefore, the Constitution aims to achieve substantive equality and establish an egalitarian society by addressing the social and economic injustices of the past.⁴¹⁷

1 8 2 3 Rule of law

In respect of the constitutional value of the rule of law, two aspects can be mentioned at this stage. In the first place the Constitutional Court has confirmed that the rule of law in terms of the Constitution embodies the principle of legality.⁴¹⁸ This includes that any exercise of public power must comply with the Constitution and arbitrary decisions and abuses of discretionary powers are not permitted.⁴¹⁹ Specifically, the judiciary is bound to the rule of law and section 165 of the Constitution provides as follows:

The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.⁴²⁰

Secondly, however, the meaning of the rule of law under the Constitution goes further than the classical conception by Dicey based on formal equality before the

⁴¹⁷ See also Bhana & Pieterse 2005 SALJ 880.

⁴¹⁸ *Democratic Alliance v President of South Africa and others* 2013 1 SA 248 (CC) para 12; *Albutt v Centre for the Study of Violence and Reconciliation and others* 2010 3 SA 293 (CC) para 49; *Affordable Medicines Trust and others v Minister of Health and another* 2006 3 SA 247 (CC) para 49; *Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and others* 2000 2 SA 674 (CC) para 20; *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 1 SA 1 (CC) para 38; *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 1 SA 374 (CC) para 56. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 82; Burns *Administrative law* (2013) 108; Botha 2001 *THRHR* (3) 535.

⁴¹⁹ De Vos & Freedman (eds) *South African constitutional law* (2014) 83; Freedman "Constitutional law: structures of Government" in Joubert (ed) *LAWSA Vol 5(3)* (2012) para 21; Botha 2001 *THRHR* (3) 535-536.

⁴²⁰ See also *Van Rooyen and others v The State and others (General Council of the Bar of South Africa intervening)* 2002 5 SA 246 (CC) para 18. See further De Vos & Freedman (eds) *South African constitutional law* (2014) 84.

law.⁴²¹ It is also concerned with the impact of the law on the affected persons and the substantive content thereof,⁴²² specifically in view of the Constitution's aim to achieve substantive equality as discussed above. This has resulted in the Constitution being described as transformative⁴²³ and the process through which these ideals are achieved is called "transformative constitutionalism". Klare defines transformative constitutionalism as follows:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase "reform", but something short of or different from "revolution" in any traditional sense of the word. In the background is an idea of highly egalitarian, caring, multicultural community, governed through participatory, democratic processes in both the polity and large portions of what we now call the "private sphere".⁴²⁴

⁴²¹ De Vos & Freedman (eds) *South African constitutional law* (2014) 84. See also Burns *Administrative law* (2013) 106.

⁴²² De Vos & Freedman (eds) *South African constitutional law* (2014) 84. See also Burns *Administrative law* (2013) 106-107; Krüger 2010 *PELJ* 483-484; Botha 2001 *THRHR* (3) 534-535.

⁴²³ See e.g. *Road Accident Fund and another v Mdeyide* 2011 2 SA 26 (CC) para 125; *Minister of Finance and another v Van Heerden* 2004 6 SA 121 (CC) para 142; *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8; *Du Plessis and others v De Klerk and another* 1996 3 SA 850 (CC) para 157; *S v Makwanyane and another* 1995 3 SA 391 (CC) para 262. See also Currie & De Waal *Bill of rights handbook* (2014) 214; De Vos & Freedman (eds) *South African constitutional law* (2014) 27; Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman & Bishop (eds) *Constitutional law* (2014) para 11.3(c)(i); Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 32; Liebenberg *Socio-economic rights* (2010) 24; Davis & Klare 2010 *SAJHR* 404; Langa 2006 *Stell LR* 351; Moseneke 2002 *SAJHR* 316.

⁴²⁴ Klare 1998 *SAJHR* 150. See also Du Plessis "Interpretation" in Woolman & Bishop (eds) *Constitutional law* (2014) para 32.3(c)(iv); Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 39; Van der Merwe *et al* "The

Specifically, he argues that this process requires a different judicial mind-set when interpreting the Constitution and developing the law in line with constitutional values:

Judicial mindset and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance. Accordingly, the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods. They cannot have assumed that the document's [Constitution's] loft ambitions would be interpreted according to, and therefore constrained by, the intellectual instinct and habits of mind of the traditional common or Roman-Dutch lawyer trained and professionally socialized during the apartheid era.⁴²⁵

Although Klare accepts that the Constitution aims to protect individual rights and freedoms, he contends that it is also committed to egalitarian social transformation in the private sphere.⁴²⁶ Consequently, the Constitution should be interpreted in order to achieve egalitarian social transformation in the private field.⁴²⁷ Accordingly, any interpretation and application of the law should promote the realisation of socio-economic rights, and hence substantive equality, within the relevant historical and political context.⁴²⁸ Therefore, it has been argued that

Republic of South Africa" in Palmer (ed) *Mixed jurisdictions worldwide* (2012) 148; Liebenberg *Socio-economic rights* (2010) 24.

⁴²⁵ Klare 1998 *SAJHR* 156. See also Du Plessis "Interpretation" in Woolman & Bishop (eds) *Constitutional law* (2014) para 32.3(c)(iv); Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 39; Davis & Klare 2010 *SAJHR* 405-406, 411.

⁴²⁶ Klare 1998 *SAJHR* 150-152, 155-156. See also Himonga *et al* 2013 *PELJ* 371; Davis & Klare 2010 *SAJHR* 404; Moseneke 2009 *Stell LR* 4; Moseneke 2002 *SAJHR* 314; Botha 2001 *THRHR* (3) 535; Albertyn & Goldblatt 1998 *SAJHR* 249.

⁴²⁷ Klare 1998 *SAJHR* 151.

⁴²⁸ Klare 1998 *SAJHR* 150, 156. See also Barnard-Naudé "The post-apartheid legal order" in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 39; Moseneke 2002 *SAJHR* 314; Albertyn & Goldblatt 1998 *SAJHR* 251ff.

transformative constitutionalism involves “the levelling of the economic playing fields that were so drastically skewed by the apartheid system”.⁴²⁹

More importantly, this means that this form of interpretative approach involves the consideration of values external to the legal texts under consideration. As stated by Justice Mokgoro in *S v Makwanyane*:

The interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself ... To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.⁴³⁰

This is a stark departure from the conservative legal culture of the apartheid era which was formalistic, legal positivistic, entailed strict adherence to the doctrine of *stare decisis*, supposedly “value neutral” and based on parliamentary sovereignty.⁴³¹ Rather, transformative constitutionalism requires that judges should acknowledge that their judgments are value-based, political and moral in nature:

While the policy under apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court

⁴²⁹ Langa 2006 *Stell LR* 352 as referred to with approval by Himonga “Exploring the concept of ubuntu in the South African legal system” in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 15.

⁴³⁰ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 302-304 as quoted by Klare 1998 *SAJHR* 157-157. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 30; Langa 2006 *Stell LR* 353; Moseneke 2002 *SAJHR* 315; Botha 2001 *THRHR* (3) 535; Alibertyn & Goldblatt 1998 *SAJHR* 249.

⁴³¹ Cf discussion in the text at n 339 *supra*. See also Du Plessis “Interpretation” in Woolman & Bishop (eds) *Constitutional law* (2014) para 32.3(c)(iv); Burns *Administrative law* (2013) 99; Liebenberg *Socio-economic rights* (2010) 43ff; Botha 2001 *THRHR* (3) 529-530.

decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.⁴³²

Klare further argues that such an interpretation would not undermine the principles of legal constraint and the rule of law as this approach to interpretation “does not imply that the Constitution means *whatever* a decisionmaker ‘might wish it to mean’”.⁴³³ Rather, transformative constitutionalism requires that judges should substantiate their judgments in accordance with the political and moral values of the Constitution.⁴³⁴ In other words, judgments should be substantiated with reference to the “objective normative value system” established under the Constitution.⁴³⁵ This includes a legal interpretation committed to egalitarian social transformation which is sensitive to the social and historical context.⁴³⁶ Thus, the formal conception of the rule of law has been transformed into a more substantive model in terms of which “the rule of law is seen as an important mechanism for achieving a just society”.⁴³⁷

Liebenberg argues that such a society cannot be achieved by addressing the inequalities created by apartheid only, but that these provisions indicate that the Constitution also aims to address new forms of disadvantage and marginalisation,

⁴³² Langa 2006 *Stell LR* 353. See also Davis & Klare 2010 *SAJHR* 408; Liebenberg *Socio-economic rights* (2010) 46-48; Moseneke 2002 *SAJHR* 317; Botha 2001 *THRHR* (3) 535; Klare 1998 *SAJHR* 158.

⁴³³ Klare 1998 *SAJHR* 151. See also Barnard-Naudé 2013 *SAJHR* 470-471; Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 40; Langa 2006 *Stell LR* 357.

⁴³⁴ Klare 1998 *SAJHR* 150-151, 171. See also Currie & De Waal *Bill of rights handbook* (2014) 63; Liebenberg *Socio-economic rights* (2010) 34, 47-48. Mention can also be made of s 39(1) which provides that courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom when interpreting the Bill of Rights.

⁴³⁵ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 4 SA 938 (CC) para 54.

⁴³⁶ Klare 1998 *SAJHR* 150-151. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 33; Botha 2001 *THRHR* (3) 539.

⁴³⁷ Freedman “Constitutional law: structures of government” in Joubert (ed) *LAWSA Vol 5(3)* (2012) para 18.

for example xenophobia emerging in post-apartheid South Africa.⁴³⁸ This view is supported by Justice Langa:

Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant. This is perhaps the ultimate vision of a transformative, rather than a transitional Constitution. This is a perspective that sees the Constitution as not transformative because of its peculiar historical position or its particular socio-economic goals but because it envisions a society that will always be open to change and contestation, a society that will always be defined by transformation.⁴³⁹

The courts' approach to the rule of law in the common law of contract is discussed in the next chapter⁴⁴⁰ and critically analysed in chapter three.⁴⁴¹

1 8 3 Status and development of common and customary law under the Constitution

1 8 3 1 Constitutional recognition of common and customary law

The final Constitution formally recognises the common law⁴⁴² and the customary law as sources of South African law:

The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.⁴⁴³

⁴³⁸ Liebenberg *Socio-economic rights* (2010) 27-28.

⁴³⁹ Langa 2006 *Stell LR* 354. See also Liebenberg *Socio-economic rights* (2010) 29; Cornell 2008 *Acta Juridica* 18.

⁴⁴⁰ See the discussion in para 2 3 2 *infra*.

⁴⁴¹ See the discussion in para 3 5 *infra*.

⁴⁴² The common law in this sense refers to the non-statutory law which consists of the rules of the Roman-Dutch based legal system as influenced by English law and developed by the South African courts over time (Church *et al Human rights from a comparative perspective* (2007) 54; Thomas & Tladi 1999 *CILSA* 355).

⁴⁴³ S 39(3).

The constitutional recognition of customary law as a source of law is an important step in acknowledging and advancing the multicultural society of South Africa and promoting the project of transformative constitutionalism.⁴⁴⁴

1 8 3 2 *Constitutional development of common and customary law*

As the Constitution is regarded as the supreme law of the country⁴⁴⁵ it is only to be expected that the common and customary law are subject to the Constitution.⁴⁴⁶ Section 39(2) of the Constitution states that when developing the common or customary law, the court must promote the spirit, purport and objects of the Bill of Rights.⁴⁴⁷ This is referred to as indirect horizontal application of the Bill of Rights⁴⁴⁸ and means that the common and customary law and their development are subject to the Constitution and its underlying values.⁴⁴⁹

⁴⁴⁴ Klare 1998 *SAJHR* 155. See also Himonga *et al* 2013 *PELJ* 372; Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 30; Mokgoro 1998 *PELJ* 8.

⁴⁴⁵ S 2 of the Constitution (cf the discussion in para 1 8 1 *supra*).

⁴⁴⁶ The common and customary law is recognised “to the extent that they are consistent with the Bill” (cf s 39(3) quoted at n 443 *supra*).

⁴⁴⁷ See also Davis & Klare 2010 *SAJHR* 409-410; Church & Church 2008 *Fundamina* 6; Ackermann 2000 *HJIL* 544.

⁴⁴⁸ De Vos & Freedman (eds) *South African constitutional law* (2014) 342; Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 36. Although s 8(2) of the Constitution provides for direct horizontal application of the Bill of Rights to natural or juristic persons, the courts have held that indirect application of the Bill of Rights to the common law is the most appropriate method when dealing with fairness in the law of contract (see para 2 3 2 3 *infra*). Accordingly, the direct horizontal application of the Bill of Rights to issues dealing with the law of contract falls outside the scope of this thesis. However, the interpretation and interrelationship between these two sections remain controversial (see e.g. Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) ch 31; Liebenberg 2008 *TSAR* 465-466). For discussions on this controversy with reference to the law of contract see e.g. Du Bois 2015 *Acta Juridica* 284-299; Davis 2011 *Stell LR* 855; Rautenbach 2009 *TSAR* 613-637; Bhana 2008 *SAJHR* 308-311.

⁴⁴⁹ Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e); Barnard-Naudé “The post-apartheid legal order” in Humby *et al* (eds) *Law and legal skills in South Africa* (2012) 26-27.

In respect of the development of the common law, the Constitutional Court in *S v Thebus* noted that there are at least two instances where the need to develop the common law in terms of section 39(2) arises:

The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the “objective normative value system” found in the Constitution.⁴⁵⁰

Furthermore, when developing the common law, section 173 grants the Constitutional Court, the Supreme Court of Appeal and the high courts the inherent power to develop the common law, taking into account the interests of justice.

In *Carmichele v Minister of Safety and Security* the Constitutional Court stated that the court’s obligation to develop the common law is not discretionary but rather a “general obligation”⁴⁵¹ and is applicable whether the parties requested the court to develop the common law or not.⁴⁵² Therefore, judges are obliged to change and develop existing laws to bring them in line with the rights and values of the

⁴⁵⁰ *S v Thebus and another* 2003 6 SA 505 (CC) para 28. Cf the discussion on the objective normative value system of the Constitution in para 1 8 11 8 2 *supra*.

⁴⁵¹ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 4 SA 938 (CC) para 39 referring to ss 39(2) & 173 of the Constitution. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 342; Currie & De Waal *Bill of rights handbook* (2014) 61; Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e).

⁴⁵² *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 4 SA 938 (CC) para 36. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 342; Currie & De Waal *Bill of rights handbook* (2014) 61; Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e).

Constitution.⁴⁵³ Davis and Klare argue that judges are required to promote constitutional values and that this involves more than ensuring that judge-made law conforms to the Constitution.⁴⁵⁴ Along the same lines, Cornell and Friedman describe section 39(2) as “one of the primary tools through which the Constitution is intended to do its revolutionary work”.⁴⁵⁵ This is because the development of the common law should take place within the project of transformative constitutionalism.⁴⁵⁶ In other words, the common law should be developed to promote the values and aims of the Constitution, specifically to establish a more egalitarian society. More specifically, transformation should take place in respect of legal rules governing the relationships between private persons.⁴⁵⁷ As explained by Liebenberg:

Any attempt to shield common-law rules from judicial review in terms of constitutional rights and values will operate to entrench and perpetuate the power and privileged position of those who already enjoy access to socio-economic resources. And it will operate to reinforce the exclusion and marginalisation of those who currently lack the means to participate meaningfully in the social and economic institutions of society. This will entrench rather than transform South African’s legacy of colonialism and apartheid which systemically deprived black people of access not only to political power, but also of access to a range of socio-economic resources and services.⁴⁵⁸

Recently, the Constitutional Court stated that the following factors must be considered when developing the common law in this respect:

[A court] must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the

⁴⁵³ Langa 2006 *Stell LR* 357.

⁴⁵⁴ Davis & Klare 2010 *SAJHR* 410-411. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 343-344; Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e)(ii)(bb).

⁴⁵⁵ Cornell & Friedman 2011 *MLJ* 2.

⁴⁵⁶ Cf discussion in para 1 8 2 2(b) *supra*. See also Davis & Klare 2010 *SAJHR* 404-405.

⁴⁵⁷ Cornell & Friedman 2011 *MLJ* 2.

⁴⁵⁸ Liebenberg 2008 *TSAR* 465.

rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.⁴⁵⁹

In addition, the courts have laid down the following limitations to this power. First, the common law must be developed incrementally and on a case by case basis:

In exercising their powers to develop the common law, Judges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary.⁴⁶⁰

Secondly, the courts' power to develop the common law is also constrained by the application of the principle of *stare decisis*. In *Ex parte Minister of Safety and Security: In re S v Walters* the Constitutional Court dealt with this issue in respect of court decisions "delivered after the advent of the constitutional regime":⁴⁶¹

High courts are obliged to follow legal interpretations of the SCA [Supreme Court of Appeal], whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself

⁴⁵⁹ *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and another* 2016 1 SA 621 (CC) para 39.

⁴⁶⁰ *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 4 SA 938 (CC) para 36. See also *Masiya v Director of Public Prosecutions, Pretoria and another (Centre for Applied Legal Studies and another, amici curiae)* 2007 5 SA 30 (CC) para 31: "Courts must be astute to avoid the appropriation of the Legislature's role in law reform when developing the common law. The greater power given to the Courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, fact-driven development". See further Currie & De Waal *Bill of rights handbook* (2014) 63; Woolman "Application" in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e)(iv).

⁴⁶¹ Presumably, the court was referring to post-1994 decisions (see Currie & De Waal *Bill of rights handbook* (2014) 64). See also Woolman "Application" in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e)(x).

decides otherwise or this Court [the Constitutional Court] does so in respect of a constitutional issue.⁴⁶²

In *Afrox Health Care v Strydom* the Supreme Court of Appeal further limited this power in respect of pre-constitutional court decisions.⁴⁶³ It held that such decisions dealing with the common law by the higher courts are binding except where in direct conflict with a constitutional provision or in cases dealing with normative standards like *boni mores* or public policy.⁴⁶⁴

The rules and the relevant principles dealing with the application of the Bill of Rights to cases dealing with fairness in contracts are discussed in more detail in the next chapter.⁴⁶⁵

1 8 3 3 *Unequal relationship between common and customary law*

Although the Constitution recognises the customary law as a separate legal system with the same status of that of common law,⁴⁶⁶ this does not mean that

⁴⁶² *Ex parte Minister of Safety and Security and others: In re S v Walters* 2002 2 SACR 105 (CC) para 61. See also Currie & De Waal *Bill of rights handbook* (2014) 64; Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e)(x).

⁴⁶³ Again, the term “pre-constitutional decisions” (“pre-konstitusionele beslissings”) is not defined by the court (at paras 26-30) but it would seem it refers to pre-1994 decisions (Currie & De Waal *Bill of rights handbook* (2014) 65).

⁴⁶⁴ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) paras 27-29. See also Currie & De Waal *Bill of rights handbook* (2014) 64-65; Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e)(x). The principles formulated in these two cases have been the subject of criticism (see e.g. Woolman & Brand 2003 *SA Public Law* 37-82 as supported by Hawthorne 2006 *Fundamina* 85-86).

⁴⁶⁵ See the discussion in para 2 3 2 *infra*.

⁴⁶⁶ See also *Gumede v The President of the Republic of South Africa and others* 2009 3 SA 152 (CC) para 22 in which the court confirmed that the customary law “lives side by side with the common law and legislation”; *Mthembu v Letsela and another* 1997 2 SA 936 (T) where the court stated that “customary law has been accepted by the framers of the Constitution as a separate legal and cultural system which may be freely chosen by persons desiring to do so”. See further Bekker “Nature and sphere of African customary law” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 18; Bennett “Application and ascertainment of

customary law is treated the same as common law. Section 211(3) of the Constitution states:

The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

This means that customary law must not only be in line with the Constitution⁴⁶⁷ but it should also meet the requirements of section 1(1) of the Law of Evidence Amendment Act, namely that it must be readily ascertainable with sufficient certainty and not be opposed to the principles of public policy or natural justice.⁴⁶⁸

Olivier *et al* criticise the retention of the repugnancy clause as an irregularity that should be repealed as public policy should in any event be determined with reference to the Constitution and its underlying values.⁴⁶⁹ In *Mabuza v Mbatha*, the court held a similar opinion:

Unfortunately one still finds dicta referring to the notorious repugnancy clauses as though one were still dealing with a pre-1994 situation. Such dicta, in my view, are unfortunate. The proper approach is to accept that the Constitution is the supreme law of the Republic. Thus any custom which is inconsistent with the Constitution cannot withstand constitutional scrutiny. In line with this approach, my view is that it is not necessary at all to say African Customary Law should not be opposed to the principles of public policy or natural justice. To say that is fundamentally flawed as it reduces African Law (which is practised by the vast majority in this country) to foreign law – in Africa!⁴⁷⁰

customary law” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 38; Bennett 2011 *PELJ* 30; Bennett 2011 *Loyola Law Review* 709.

⁴⁶⁷ Cf ss 39(2) & 39(3) as discussed *supra*.

⁴⁶⁸ This section is quoted at n 360 *supra*. See also Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 12; Olivier *et al* “Indigenous law” in Joubert (ed) *LAWSA Vol 32* (2009) para 5.

⁴⁶⁹ Olivier *et al* “Indigenous law” in Joubert (ed) *LAWSA Vol 32* (2009) para 4 n 3.

⁴⁷⁰ *Mabuza v Mbatha* 2003 4 SA 218 (C) para 30. A similar approach can be identified in *Bhe and others v Magistrate, Khayelitsha, and others (Commission for Gender Equality as amicus*

However, it would seem that customary law is still not equal in status to the common law as the development of customary law is still largely dominated and directed by common law or Western values.⁴⁷¹ It is still seen through the lens of common law rules and values. Furthermore, the common law is rarely assessed from the viewpoint of customary rules and values.⁴⁷² This is especially true for the South African common law of contract where customary law values have exerted no direct or indirect influence on the common law of contract until recently.⁴⁷³

curiae); *Shibi v Sithole and others*; *South African Human Rights Commission and another v President of the Republic of South Africa and another* 2005 1 SA 580 (CC) paras 42-46. See also Woolman "Application" in Woolman & Bishop (eds) *Constitutional law* (2014) para 31.4(e)(x); Cornell *Law and revolution in South Africa* (2014) 76.

⁴⁷¹ Rautenbach "The phenomenon of legal pluralism" in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 6-7; Bennett 2011 *PELJ* 30; Bennett 2011 *Loyola Law Review* 709-710; Thomas 2011 *SUBB Jurisprudentia* 6-7. See also *Alexkor Ltd and another v The Richtersveld Community and others* 2004 5 SA 460 (CC) para 51; *Mthembu v Letsela and another* 1998 2 SA 675 (T) 688.

⁴⁷² Bennett 2011 *PELJ* 30. See also Van Niekerk 2010 *Fundamina* 474-476; Church & Church 2008 *Fundamina* 4; Van Niekerk 1998 *CILSA* 160.

⁴⁷³ Van Huyssteen *et al Contract law* (2010) 37. This is evidenced by the fact that most standard South African law of contract textbooks do not discuss the customary law of contract at all (see e.g. Van Huyssteen *et al Contract* (2016); Bradfield *Christie's law of contract* (2016); Hutchison & Pretorius (eds) *Contract* (2012)). The influence of ubuntu in the common law of contract is a recent development and discussed in para 2 3 3 *infra*.

Keep and Midgley refer to this dichotomy as a failure to develop a legal culture that reflects customary values.⁴⁷⁴ They further argue that a plural legal culture is necessary in order to legitimise the new legal system in South Africa.⁴⁷⁵ In the words of the Justice Sachs in *S v Makwanyane*:

To begin with, I wish firmly to express my agreement with the need to take account of the tradition, beliefs and values of all sectors of South African society when developing our jurisprudence.

...

Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice. We cannot, unfortunately, extend the equality principles backwards in time to remove the humiliations and indignities suffered by past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalised.⁴⁷⁶

This idea of a pluralistic culture is also reflected in the Preamble of the Constitution as it states that “South Africa belongs to all who live in it, united in our *diversity*”.⁴⁷⁷

One of the ways to establish a plural legal culture is by incorporating indigenous values into the common law through the use of ubuntu as an underlying constitutional value which must be used when interpreting and developing the

⁴⁷⁴ Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 48 as supported by Himonga *et al* 2013 *PELJ* 370.

⁴⁷⁵ Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 48 as supported by Himonga *et al* 2013 *PELJ* 370. See also Mokgoro & Woolman 2010 *SAPL* 403; Mokgoro 1998 *PELJ* 4-5; Van Niekerk *Interaction of indigenous law and Western law* (1995) 326.

⁴⁷⁶ *S v Makwanyane and another* 1995 3 SA 391 (CC) paras 361 & 365. See also Himonga *et al* 2013 *PELJ* 393.

⁴⁷⁷ My emphasis. See also Church & Church 2008 *Fundamina* 4.

existing South African common law.⁴⁷⁸ This is the approach that is followed in this thesis.

1 8 4 Ubuntu as a legal concept

1 8 4 1 *Difficulty in defining ubuntu*

From the different meanings ascribed to ubuntu in the various written sources as set out by Gade earlier in this chapter, it emerges that ubuntu has been used in various contexts.⁴⁷⁹ Specifically, it was shown that ubuntu has been linked to the moral theory of humanism and the political and economic theory of socialism.⁴⁸⁰

In the field of law, it is generally accepted that ubuntu is not easily definable.⁴⁸¹ It has been argued that defining an African concept from an abstract point of view is contrary to “the very essence of the African world-view” which follows a more concrete approach.⁴⁸² Nevertheless, the open-endedness of ubuntu is often cited as a major criticism against the use thereof as a legal concept.⁴⁸³ For others, the fact that ubuntu resists a precise definition is precisely what makes it valuable as a

⁴⁷⁸ Himonga *et al* 2013 *PELJ* 370; Bennett 2011 *PELJ* 30; Bennett 2011 *Loyola Law Review* 710, 712; Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 30; Pieterse “‘Traditional’ African jurisprudence” in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 441; Mokgoro 1998 *PELJ* 1, 10.

⁴⁷⁹ Cf the discussion in the text at n 54 *supra*.

⁴⁸⁰ Cf the discussion dealing with the underlying values of the customary law in para 1 3 2 2 *supra*.

⁴⁸¹ Bekker “Nature and sphere of African customary law in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 27; Himonga *et al* 2013 *PELJ* 374; Himonga “Exploring the concept of ubuntu in the South African legal system” in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 2; Mokgoro “Ubuntu as a legal principle in an ever-changing world” in Diedrich (ed) *Ubuntu, good faith & equity* (2011) 1; Bennett 2011 *Loyola Law Review* 710; Bohler-Muller 2007 *Obiter* 591; Bekker 2006 *SAPL* 334; Bohler-Muller 2005 *SAPL* 266; Kroeze 2002 *Stell LR* 273; Mokgoro 1998 *PELJ* 2; English 1996 *SAJHR* 641ff.

⁴⁸² Mokgoro 1998 *PELJ* 2. This is in view of the flexible and dynamic nature of customary law (cf the discussion on the nature and characteristics of customary law in para 1 3 2 1 *supra*).

⁴⁸³ Bekker 2006 *SAPL* 335; Kroeze 2002 *Stell LR* 260-261; English 1996 *SAJHR* 641ff.

principle that can be used in legal interpretation.⁴⁸⁴ I would like to add that criticisms levied at the open-endedness of ubuntu, to some extent, also ignore the fact that open norms⁴⁸⁵ have always played, and will always play, a role in the development of the law because “lawmakers cannot foresee every possibility and provide decisions on every eventuality”.⁴⁸⁶ Open norms play an important role in the interpretation and development of the law because they enable value judgments and reflect the fact that the classical conception of the rule of law is just “not flexible enough to cope with the complexities of modern society”.⁴⁸⁷ Thus, the introduction of ubuntu as an open norm that can be used in legal interpretation and development reflects the change in the South African legal culture from a conservative legal positivistic one under apartheid⁴⁸⁸ into a culture that promotes a value-based approach to law as envisaged by the Constitution.⁴⁸⁹

That being said, it is still necessary to establish what values are embraced by ubuntu if it is going to be of any use in making value judgments. The specific values encapsulated by ubuntu are also the subject of some controversy which has resulted in additional criticism against its use as a legal concept.⁴⁹⁰ Therefore,

⁴⁸⁴ Mokgoro “Ubuntu as a legal principle in an ever-changing world” in Diedrich (ed) *Ubuntu, good faith & equity* (2011) 1. See also Himonga “Exploring the concept of ubuntu in the South African legal system” in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012); Bohler-Muller 2007 *Obiter* 595.

⁴⁸⁵ An open norm refers to a rule or standard that has no fixed or restricted meaning, can apply to various situations and enables value judgments (Hawthorne 2013 *THRHR* 300-301; Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 177 n 9; Bhana & Pieterse 2005 *SALJ* 868).

⁴⁸⁶ Hawthorne 2013 *Fundamina* 300.

⁴⁸⁷ Hawthorne 2008 *SAPL* 85; Mokgoro “Ubuntu as a legal principle in an ever-changing world” in Diedrich (ed) *Ubuntu, good faith & equity* (2011) 1-2. See also Bennett 2011 *PELJ* 48 who draws parallels between ubuntu and the concept of equity in English law (see again, para 1 5 2 3 *supra* on the development of equity in English law).

⁴⁸⁸ See the discussion dealing with the legal culture under apartheid in para 1 7 2 *supra*.

⁴⁸⁹ Cf the discussion dealing with the constitutional value of the rule of law in para 1 8 2 3 *supra*.

⁴⁹⁰ For example Keevy 2009 *JJS* 61-88 on ubuntu as a religious worldview that violates s 15(1) of the Constitution & Keevy 2009 *JJS* 19-58 on ubuntu as a part of African law and African thinking that is patriarchal in nature and against the foundational constitutional values.

the best approach to establish the values of ubuntu in the legal sphere is to focus on how ubuntu has been described and applied in court decisions. There are three reasons for this approach. First, the research topic focuses on the emerging and future role of ubuntu. Therefore, the emphasis is on ubuntu in its modern appearance. As stated by Pieterse:

[A] return to its [ubuntu's] pre-colonial state is neither practically nor ideologically feasible. Yet, certain of the values underlying pre-colonial thinking still reverberate through contemporary African society. Through engaging with these values, in their contemporary manifestations, a view emerges of law and society that might prove useful...⁴⁹¹

Secondly, the research topic addresses the emerging and future role of ubuntu in the common law of contract which means that the focus should be on how ubuntu has been described and applied in the legal sphere:

Although *ubuntu* has not been defined with precision, the courts in South Africa have indicated their understanding of this concept. For this country's legal system, the courts' views are the most important as they invariably form the basis of decision-making and, ultimately, court precedents.⁴⁹²

Thirdly, rather than trying to describe ubuntu in abstract terms, Bennett argues that the better approach is "to consider the ways and contexts in which the word is being used".⁴⁹³ Therefore, a better understanding of ubuntu as a legal concept can be obtained by analysing the ways in which it has been constructed and applied in law.⁴⁹⁴

⁴⁹¹ Pieterse "'Traditional' African jurisprudence" in Roederer & Moellendorf (eds) *Jurisprudence* (2006) 439. See also Biko *I write what I like* (2004) 45; Mokgoro 1998 *PELJ* 3.

⁴⁹² Himonga "Exploring the concept of ubuntu in the South African legal system" in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 2.

⁴⁹³ Bennett 2011 *PELJ* 31. See also Bennett 2011 *Loyola Law Review* 710.

⁴⁹⁴ Bennett 2011 *PELJ* 31.

In this chapter, the focus is on the introduction and development of ubuntu in the South African law generally. It starts with a discussion of how ubuntu was introduced into law and developed into a value underlying the interim Constitution followed by its development under the final Constitution. How ubuntu has been applied in the common law of contract is investigated in the next chapter.⁴⁹⁵ In chapter three, these judicial descriptions of ubuntu will be further illuminated with reference to academic writings in African philosophy.⁴⁹⁶

1 8 4 2 Ubuntu under the interim Constitution

(a) Introduction of ubuntu in the interim Constitution

The first reference to ubuntu in South African law can be found in one of the concluding provisions of the interim Constitution under the heading “National unity and reconciliation”:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.⁴⁹⁷

From this provision, it transpires that ubuntu was introduced into the official law as a restorative tool that can be used to correct the injustices of the past. Accordingly, the idea of ubuntu resonates with the project of transformative constitutionalism as discussed above.⁴⁹⁸ Its inclusion in the interim Constitution resulted in the

⁴⁹⁵ Cf the discussion on the influence of ubuntu in the common law of contract in para 2 3 3 *infra*.

⁴⁹⁶ Cf the discussion dealing with the philosophical writings on ubuntu in para 3 2 5 *infra*.

⁴⁹⁷ My emphasis.

⁴⁹⁸ Himonga *et al* 2013 *PELJ* 371. Cf the discussion in para 1 8 2 2(b) *supra* and see further para 3 5 *infra*.

adoption of African values and ideas into South African law which is also in line with the aim to establish a plural legal culture.⁴⁹⁹

(b) Development of ubuntu under the interim Constitution

Ubuntu was referred to in South African jurisprudence in the constitutional court judgment of *S v Makwanyane* dealing with the constitutionality of the death penalty which was decided under the interim Constitution. At this stage, this case is discussed only to the extent necessary to show how ubuntu was introduced into law as a legal concept and to identify a number of aspects that are further investigated in chapter three of this thesis.⁵⁰⁰

The court referred to the post-amble of the interim Constitution and the idea that this document should be interpreted according to the specific historical background of South Africa and in line with the ideals of ubuntu.⁵⁰¹ As the interim Constitution did not provide a definition of ubuntu, Justice Langa provided the following explanation:

It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.⁵⁰²

⁴⁹⁹ Cf the discussion in para 1 8 3 3 *supra*.

⁵⁰⁰ A detailed discussion of these aspects can be found in para 3 2 5 *infra*.

⁵⁰¹ *S v Makwanyane and another* 1995 3 SA 391 (CC) esp para 263-264 (Justice Mahomed), but also paras 130-131 (Justice Chaskalson); 223-227 (Justice Langa); 237 (Justice Madala); 307-308 (Justice Mokgoro); 374 n 231 (Justice Sachs).

⁵⁰² *S v Makwanyane and another* 1995 3 SA 391 (CC) para 224. Justice Mahomed's ideas of ubuntu conformed in general to those of Justice Langa as he maintained that it involves the recognition of another's "innate humanity" and "the reciprocity this generates in interaction within the collective community" (*S v Makwanyane and another* 1995 3 SA 391 (CC) para 263).

He further emphasised the link between ubuntu and human dignity:

An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity ... Respect for the dignity of every person is integral to this concept.⁵⁰³

In her judgment Justice Mokgoro translated ubuntu as “humaneness” which she interpreted as “personhood and ‘morality’” and later “humanity and morality”.⁵⁰⁴ She linked ubuntu to the proverb “umuntu ngumuntu ngabantu”⁵⁰⁵ (which translates as “a person is a person through other persons”)⁵⁰⁶ and stated that it describes “the significance of group solidarity on survival issues so central to the survival of communities”.⁵⁰⁷ She further maintained that ubuntu encapsulates the values of “group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”.⁵⁰⁸ Finally, she held that the spirit of ubuntu stresses respect for human dignity and marked a change from confrontation to conciliation.⁵⁰⁹ Later she referred to the International Covenant on Civil and Political Rights⁵¹⁰ which states that “human rights derive from the inherent dignity of the human person” and stated that this “is not different from what the spirit of *ubuntu* embraces”.⁵¹¹

In his judgment in the same case, Justice Madala emphasised that ubuntu encapsulates ideas of humaneness and stated that it also referred to social justice and fairness.⁵¹²

⁵⁰³ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 225.

⁵⁰⁴ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308. See also Mokgoro 1998 *PELJ* 2.

⁵⁰⁵ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308.

⁵⁰⁶ Cf discussion in the text at n 57 *supra*.

⁵⁰⁷ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308.

⁵⁰⁸ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308.

⁵⁰⁹ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308.

⁵¹⁰ 1966 (GA res 2200A (XXI)).

⁵¹¹ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 309.

⁵¹² *S v Makwanyane and another* 1995 3 SA 391 (CC) para 237.

More importantly, further remarks by Justices Madala and Mokgoro indicate that ubuntu should be regarded as a value underlying the interim Constitution and should be used when interpreting the Bill of Rights.⁵¹³ Justice Madala stated that ubuntu “permeates the [interim] Constitution generally and more particularly chap 3, which embodies the entrenched fundamental human rights”.⁵¹⁴ Justice Mokgoro held that legislative interpretation in the new constitutional order would be “radically” different from that under apartheid.⁵¹⁵ She argued that post-apartheid legislative interpretation must be value based⁵¹⁶ and she envisaged that ubuntu could play an important role in this task:

In interpreting the Bill of Fundamental Rights and Freedoms, ... an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of ubuntu – a notion now coming to be generally articulated in this country.⁵¹⁷

Justice Mokgoro therefore, regards ubuntu as a shared value that should be used to develop a new legal culture that incorporates a normative approach to constitutional interpretation.⁵¹⁸ In other words, ubuntu is an underlying value of the Constitution and should be used in the project of transformative

⁵¹³ Himonga *et al* 2013 *PELJ* 377-378. See also Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 8-11.

⁵¹⁴ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 237.

⁵¹⁵ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 301. Her description of legislative interpretation under apartheid coincides with that discussed earlier in para 1 7 2 *supra*: “In that legal order, due to the sovereignty of Parliament, the supremacy of legislation and the absence of judicial review of parliamentary statutes, courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text, no matter how unjust the legislative provision”.

⁵¹⁶ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 302 (cf the quote at n 430 *supra*).

⁵¹⁷ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 302. See also Mokgoro 1998 *PELJ* 6.

⁵¹⁸ Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 34.

constitutionalism.⁵¹⁹ Ubuntu is treated as a value that embodies the spirit, purport and object of the Constitution.⁵²⁰ In this sense, ubuntu is viewed as an underlying value of the Constitution that exerts an indirect influence on the law.⁵²¹

Furthermore, the judgments of Justices Langa and Mokgoro indicate that ubuntu can aid in the proper understanding of human dignity as a core value of the Constitution.⁵²² In this context, Keep and Midgley argue that human dignity as a core value of the Constitution must be interpreted as embracing the concept of ubuntu.⁵²³ The relationship between ubuntu and the constitutional value of human dignity is critically investigated in chapter three of this thesis.⁵²⁴

1 8 4 3 Ubuntu under the final Constitution

Although ubuntu is not mentioned in the final Constitution, it has remained a part of South Africa's constitutional jurisprudence as evidenced by a number of constitutional court judgments.⁵²⁵ In this section, the judgments relevant to the research topic are discussed in a more or less chronological order to show how ubuntu has developed as a legal concept and a number of aspects are identified which are further investigated in chapter three.⁵²⁶ However, court judgments dealing with the role of ubuntu in the common law of contract are discussed in the

⁵¹⁹ Cf the discussion in para 1 8 2 3 *supra*.

⁵²⁰ Keep & Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 35.

⁵²¹ Keep & Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 35.

⁵²² The discussions in the text at n 503 (Justice Langa) and n 509 (Justice Mokgoro) *supra*. The idea of human dignity as a core value of the Constitution is mentioned in para 1 8 2 1 *supra* and further elaborated upon in para 3 2 1 *infra*.

⁵²³ Keep & Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 35.

⁵²⁴ Cf the discussion of the constitutional value of human dignity in para 3 2 *infra*.

⁵²⁵ For example, see the collection of case extracts in Cornell & Muvangua (eds) *uBuntu and the law* (2012).

⁵²⁶ A detailed discussion of these aspects is contained in para 3 2 5 *infra*.

next chapter as they are better understood within the context of the historical development of fairness in the common law of contract.⁵²⁷

(a) Ubuntu as an underlying value of the final Constitution

For the purpose of this thesis, *Port Elizabeth Municipality v Various Occupiers* needs to be discussed. In this case, the Port Elizabeth Municipality, after receiving a petition signed by 1 600 people, applied for the eviction of a group of people who, for a number of years, occupied privately owned land within the area of the municipality.⁵²⁸ In his judgment, Justice Sachs started off by sketching the constitutional and statutory context of the case. He referred to previous legislation dealing with unlawful occupiers prior to the introduction of the Constitution and the Roman-Dutch law principles of ownership.⁵²⁹ He explained how these rules were used to ensure residential segregation during the apartheid era and resulted in “large, well-established and affluent white urban areas co-existing, side by side, with crammed pockets of impoverished and insecure black ones”.⁵³⁰ He argued that this background is relevant when interpreting section 26(3) of the Constitution which prohibits the eviction from or demolition of anyone’s home without a court order made after consideration of all the relevant circumstances.⁵³¹

Justice Sachs proceeded to argue that the interpretation of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”) should be interpreted against this background as it was specifically enacted to overcome these previous abuses in respect of eviction proceedings.⁵³² He stated that this meant a change from the “depersonalised processes” of past evictions to “humanised procedures that focused on fairness to all” and entails that the interests of both the owner and the unlawful occupier have to be taken into

⁵²⁷ Cf the discussion on the influence of ubuntu in the common law of contract in para 2 3 3 *infra*.

⁵²⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 1-2.

⁵²⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 8-10.

⁵³⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 10.

⁵³¹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 10.

⁵³² *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 11.

account.⁵³³ This balancing act between the interests of the owner and the unlawful occupier has to take place within the context of the values and aims of the Constitution.⁵³⁴ In this respect, he specifically referred to the transformative aims of the Constitution to achieve social justice and equality.⁵³⁵

Section 6 of PIE permits an eviction order if it is just and equitable to make the order after consideration of all the relevant circumstances. Justice Sachs emphasised the importance of taking account of the actual circumstances of each case:

The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. ... Each case accordingly has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as reasonably possible.⁵³⁶

Furthermore, the reference to “just and equitable” indicated a balancing of the interests of the owner and the unlawful occupier.⁵³⁷ Therefore, the court would have to consider extraneous factors (including morality, fairness, social values and circumstances which would bring about a fair and equitable judgment) and the specific facts of the case.⁵³⁸ The honourable judge also argued that the reference to justice and equity emphasises the philosophical and strategic aims of the Act.⁵³⁹ Accordingly, Justice Sachs held that such an interpretation permitted the foundational values of the rule of law and the achievement of equality to be

⁵³³ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 13.

⁵³⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 14-15.

⁵³⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 16-17, 35.

⁵³⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 31.

⁵³⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 33.

⁵³⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 33-34.

⁵³⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 35.

interactive, complementary and mutually reinforcing rather than in tension with each other.⁵⁴⁰

This type of interpretation permitted the court to consider other values underlying the Constitution,⁵⁴¹ and in doing so, Justice Sachs referred to the value of ubuntu:

PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.⁵⁴²

Therefore, Justice Sachs confirmed the status of ubuntu as an underlying value of the final Constitution which should inform legal interpretation in accordance with the ideas of transformative constitutionalism.⁵⁴³ This is because Justice Sachs viewed ubuntu as part of the culture of the majority of the population that should now inform the legal convictions of the South African community. Accordingly, ubuntu is part of the legal convictions of the new constitutional community that should be considered when interpreting and developing the law in line with the constitutional values to establish a plural legal culture and in order to legitimise the

⁵⁴⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 35.

⁵⁴¹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 36.

⁵⁴² *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.

⁵⁴³ See also Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 18; Davis & Klare 2010 *SAJHR* 411; Keep & Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 34.

new legal system in South Africa.⁵⁴⁴ In addition, Justice Sachs used ubuntu to inform the constitutional value of human dignity when he stated that ubuntu “combines individual rights with a communitarian philosophy” and that it refers to the development of a new society based on “human interdependence, respect and concern”.⁵⁴⁵ Specifically, Justice Sachs viewed human dignity as a collective concern:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.⁵⁴⁶

In this way Justice Sachs was able to use ubuntu to endorse and promote the idea of substantive equality, especially in the context of socio-economic rights (*in casu* the right to housing).⁵⁴⁷

In *City of Johannesburg v Rand Properties* the High Court elaborated on the role of ubuntu in eviction proceedings, especially its role in informing or giving content to the value of human dignity.⁵⁴⁸ Judge Jajbhay referred to the decision in *Port Elizabeth Municipality v Various Occupiers* and also linked the transformative aims of the Constitution to ubuntu.⁵⁴⁹ Like Justice Sachs, he emphasised the interconnectedness between community members and the responsibilities that

⁵⁴⁴ See again the discussion on the unequal relationship between the customary and common law in para 1 8 3 3 *supra*.

⁵⁴⁵ See also Himonga “Exploring the concept of ubuntu in the South African legal system” in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 2.

⁵⁴⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 18. See also Mokgoro & Woolman 2010 *SAPL* 403 n 10.

⁵⁴⁷ Himonga “Exploring the concept of ubuntu in the South African legal system” in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 15 esp n 61.

⁵⁴⁸ The high court’s judgment was overturned by the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 3 SA 208 (CC) in respect of the municipality’s obligation to create and implement a comprehensive housing plan.

⁵⁴⁹ *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) para 62.

flow from this interconnectedness to build a democratic, caring and egalitarian society.⁵⁵⁰ Specifically, he emphasised the responsibility of the community to respect the human dignity of each community member:

[*Ubuntu*] recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community, that such a person may be a part of.⁵⁵¹

He argued that this responsibility includes “the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community”.⁵⁵² In other words, the respect for the human dignity of each community member is integral in establishing and maintaining a harmonious community. Finally, he stated that “in the establishment of our constitutional values, we must not allow urbanisation and the accumulation of wealth and material possessions to rob us of our warmth, hospitality and genuine interests in each other as human beings”.⁵⁵³ Therefore, the idea that human dignity entails the responsibility of each community member to be concerned with the material well-being of other community members can be identified. In other words, ubuntu promotes the realisation of socio-economic rights as a collective concern and can be used as a critique against individualist and capitalist ideas in law.⁵⁵⁴

The importance of the individual in the community in the context of ubuntu was further expanded upon by the Constitutional Court in *MEC for Education, KwaZulu-Natal v Pillay*.⁵⁵⁵ In this case, a school learner was prohibited by the school's code of conduct from wearing a gold nose-stud in accordance with her

⁵⁵⁰ *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) paras 62-63.

⁵⁵¹ *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) para 63.

⁵⁵² *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) para 63.

⁵⁵³ *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) para 63.

⁵⁵⁴ Himonga “Exploring the concept of ubuntu in the South African legal system” in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 15 esp n 61; Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 19.

⁵⁵⁵ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC).

South Indian family traditions and culture. Justice Langa referred to the *Port Elizabeth Municipality v Various Occupiers* case where Justice Sachs stated that “we are not islands unto ourselves” and stated that this idea is central to understanding the place of the individual in African culture.⁵⁵⁶ He cited the African philosopher Gyekye who wrote that “an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons”.⁵⁵⁷ According to Justice Langa:

This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one’s sense of self-worth is defined by one’s identity. Cultural identity is one of the most important parts of a person’s identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community’s practices and traditions.⁵⁵⁸

This case emphasises the interdependence between the individual and her human dignity and the community. It illustrates the importance of the individual in African culture and how the community must respect and support individual self-realisation and how a person can only develop into a unique being through engagement with the community. Social harmony is not obtained by sacrificing the needs of the individual for the greater good of the community, but rather the greater good of the community is measured against the extent to which members of the community are respected and supported in their efforts to achieve self-realisation.⁵⁵⁹

(b) Role of ubuntu in developing the private law

As ubuntu is an underlying value of the final Constitution, Davis and Klare reason that section 39(2) of the Constitution obliges the courts to “re-imagine all law in the

⁵⁵⁶ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 53.

⁵⁵⁷ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 53.

⁵⁵⁸ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 53.

⁵⁵⁹ See also Mokgoro “Ubuntu as a legal principle in an ever-changing world” in Diedrich (ed) *Ubuntu, good faith & equity* (2011) 1-2.

spirit of ubuntu”.⁵⁶⁰ This means that ubuntu is relevant when developing the principles and rules in the private sphere.⁵⁶¹ Again, this is line with the goal to establish a plural legal culture and to legitimise the new legal system in South Africa.⁵⁶² However, it would seem that the private law sphere has been far less enthusiastic in its embrace and use of ubuntu.⁵⁶³ One of the few cases (outside the sphere of the law of contract)⁵⁶⁴ in which the meaning of ubuntu in the private sphere was applied and expanded upon is *Dikoko v Mokhatla* dealing with the appropriate remedy for a defamation action.⁵⁶⁵

In her dissenting judgment, Justice Mokgoro emphasised the link between human dignity and ubuntu.⁵⁶⁶ She referred to the aim of customary law to restore “harmonious human and social relationships where they have been ruptured by an infraction of community norms”.⁵⁶⁷ Thus, she emphasised restorative justice rather than retributive justice.⁵⁶⁸ She argued that the monetary award should aim to restore the human dignity of the plaintiff rather than merely punishing the offender.⁵⁶⁹ She further held that courts should be proactive and encourage apology and mutual understanding where feasible:

Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner

⁵⁶⁰ Davis & Klare 2010 *SAJHR* 411.

⁵⁶¹ Cornell & Friedman 2011 *MLJ* 4-5 prefer the term “common law” over the use of the term “private law”. I am agreement with their criticisms but use the term “private law” in this context as the term “common law” has been used earlier in this thesis in another context (cf the definition of “common law” in n 442).

⁵⁶² See again the discussion on the unequal relationship between customary and common law in para 1 8 3 3 *supra*.

⁵⁶³ Himonga *et al* 2013 *PELJ* 400; Bennett 2011 *PELJ* 40; Bennett 2011 *Loyola Law Review* 717.

⁵⁶⁴ The influence of ubuntu in the common law of contract is investigated in para 2 3 3 *infra*.

⁵⁶⁵ *Dikoko v Mokhatla* 2006 6 SA 235 (CC). See also the discussion of this case by Himonga *et al* 2013 *PELJ* 400.

⁵⁶⁶ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 68.

⁵⁶⁷ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 68.

⁵⁶⁸ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 69.

⁵⁶⁹ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 68.

humanity, the resultant harmony would serve the good of both the plaintiff and the defendant.⁵⁷⁰

In his dissenting judgment, Justice Sachs also emphasised that ubuntu aims for restorative justice rather than relying on purely retributive principles.⁵⁷¹ However, he maintained that neither the principles of restorative justice or ubuntu have to be restricted to its traditional sphere, namely criminal law.⁵⁷² He asserted that ubuntu could and should be used in a creative way across various fields of law, including the private sphere.⁵⁷³ Specifically, he stated as follows:

Ubuntu-botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically, it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past. In present-day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.⁵⁷⁴

Therefore, both Justices Mokgoro and Sachs affirmed the link between ubuntu and restorative justice. Also, both are of the view that ubuntu does not operate only within the public sphere but can be used to promote constitutional values in laws governing relationships between private persons.⁵⁷⁵ Specifically, Justice Sachs is of the view that ubuntu could inform the constitutional value of human dignity in a manner that could bring together the constitutional values of freedom and equality in a more harmonious manner. This means that ubuntu can and

⁵⁷⁰ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 69.

⁵⁷¹ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 114.

⁵⁷² *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 115. See also Himonga *et al* 2013 *PELJ* 397.

⁵⁷³ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 115-116. See also Bennett 2011 *Loyola Law Review* 710 who argues that ubuntu is a malleable, dynamic and changing concept.

⁵⁷⁴ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 113.

⁵⁷⁵ See also Keep & Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 46.

should inform the constitutional value of human dignity in the law of contract in a way that would promote more harmony between the constitutional values of freedom and equality. Following Justice Sachs remarks, this thesis examines how ubuntu could inform the expression of the founding constitutional values in the common law of contract.⁵⁷⁶

(c) Role of ubuntu in the harmonisation of Western and African values

In *Dikoko v Mokhatla*, Justice Sachs compared the concept of ubuntu with that of the Roman-Dutch law remedy of *amende honorable*:

Although *ubuntu-botho* and the *amende honorable* are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal. Both are directed towards promoting face-to-face encounter between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures the centrepiece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted.⁵⁷⁷

According to Keep & Midgley, Justice Sach's comparison between the remedies of and values underlying customary law and that of common law indicate that it may be possible to harmonise African and Western values.⁵⁷⁸ Referring to the remarks by Justice Sachs and the earlier case of *Bophuthatswana Broadcasting Corporation v Ramosa*,⁵⁷⁹ they argue that the harmonisation of African and

⁵⁷⁶ This is the subject matter of ch 3 *infra*.

⁵⁷⁷ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 116.

⁵⁷⁸ Keep & Midgley "The emerging role of *ubuntu-botho* in developing a consensual South African legal culture" in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 47.

⁵⁷⁹ In this case, the judge identified common values in passages from Confucius, the Bible and Roman law (*Bophuthatswana Broadcasting Corporation v Ramosa* 1997 JOL 283 (B) 4-5; see also Himonga *et al* 2013 *PELJ* 390). Himonga *et al* 2013 *PELJ* 403 also refer to the minority judgment of Mogoeng in *The Citizen 1978 (Pty) Ltd and others v McBride (Johnstone and others, amici curiae)* 2011 4 SA 191 (CC) para 216 where it was stated that "[u]buntu gives expression to, among others, a biblical injunction that one should do unto others as he or she would have them do unto him or her".

Western values is possible because they include universal or shared values.⁵⁸⁰ They further argue that harmonisation is feasible when the focus shifts from the cultural and historical roots of the specific value to what the value seeks to accomplish.⁵⁸¹ Specifically, they maintain that “[a] break from past domination of one school of thought over another must be emphasised and the notion of inclusivity that is inherent in *ubuntu-botho* makes it an ideal overarching vehicle for expressing shared values”.⁵⁸²

Although establishing how the values embraced by ubuntu are similar to Western values is a good starting point, Bohler-Muller argues that how the values in ubuntu differ from Western values, is where ubuntu’s real transformative power lies:

[U]buntu could be utilised to promote a different set of ideals for interpreting the Bill of Rights – ideals not rooted in Eurocentric thinking around atomistic individualism.⁵⁸³

She concludes that ubuntu as a communitarian ethic can provide alternative values to liberal legalism.⁵⁸⁴ Therefore, in chapter three, similarities and differences are identified between the values of ubuntu and those underlying the common law of contract in order to propose how ubuntu could be used to develop the role of good faith in the common law of contract.

⁵⁸⁰ Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 47. See also Himonga *et al* 2013 *PELJ* 372; Van Niekerk *Interaction of indigenous law and Western law* (1995) 329.

⁵⁸¹ Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 48. See also Himonga *et al* 2013 *PELJ* 372-373.

⁵⁸² Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 48. See also Himonga *et al* 2013 *PELJ* 370.

⁵⁸³ Bohler-Muller 2005 *SAPL* 268. See also Kroeze 2002 *Stell LR* 260-261.

⁵⁸⁴ Bohler-Muller 2005 *SAPL* 267.

19 CONCLUSION

The South African common law has been described as Western law because it shares “a basic intellectual and jurisprudential tradition with other legal systems belonging to the Romano-Germanic and common-law families”.⁵⁸⁵ As a result, the South African common law is still largely dominated by and developed in accordance with Western laws and ideals.⁵⁸⁶ As explained by Rautenbach:

In South Africa, the dominance of Western Law dates back to the time when the colonisers superimposed European law upon the indigenous legal systems. There was neither a desire by the local people, nor any degree of consciousness and voluntariness on their part to receive foreign law...⁵⁸⁷

The recognition of customary law was closely related to the political developments in South Africa.⁵⁸⁸ Thomas emphasises that customary law was used “as a tool of colonialism and apartheid”.⁵⁸⁹ Customary law was always treated separately from common law⁵⁹⁰ and its application made subject to a repugnancy clause which meant that it had to conform to common law (Western) values.⁵⁹¹ Therefore, customary law has been shaped, developed and influenced by common law ideas and rules but the values underlying customary law have exerted no influence on

⁵⁸⁵ Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 5 n 2. See also Thomas 2004 *Fundamina* 188.

⁵⁸⁶ Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 6-7; Church *et al Human rights from a comparative perspective* (2007) 52-53; Van Niekerk 1990 *Codicillus* 34.

⁵⁸⁷ Rautenbach “The phenomenon of legal pluralism” in Rautenbach & Bekker (eds) *Introduction to legal pluralism* (2014) 6. See also Van Niekerk 1990 *Codicillus* 35.

⁵⁸⁸ SALC *Project for harmonisation of common and indigenous law* (1999) 20.

⁵⁸⁹ Thomas 2008 *Fundamina* 142. See also Du Bois 2004 *International Journal of Legal Information* 228.

⁵⁹⁰ Church *et al Human rights from a comparative perspective* (2007) 52; Zimmerman & Visser “Introduction: South African law as a mixed legal system” in Zimmerman & Visser (eds) *Southern Cross* (1996) 12-13.

⁵⁹¹ Church *et al Human rights from a comparative perspective* (2007) 52; Thomas & Tladi 1999 *CILSA* 356; Van Niekerk 1998 *CILSA* 160.

the common law.⁵⁹² More importantly, the pre-constitutional history of the relationship between the common and customary law shows a prolonged and persistent marginalisation of the customary law and its underlying values which resulted in the belief that common law rules, principles and values are superior and more civilised than those found in customary law. Over the last four centuries, the South African law has reiterated this myth time and time again. Although much has been achieved under the new constitutional order to give customary law and its underlying values a rightful place in South African law, there is still much work ahead, especially in the more traditional and conservative contract law sphere.

The historical development of the South African common law of contract follows the same pattern as the development of the South African common law⁵⁹³ and is grounded in what Justice Yacoob calls the “colonial legal tradition”.⁵⁹⁴ It is still firmly rooted in the civil law tradition (Roman-Dutch law) as influenced by the common law tradition, through English law and is based solely on Western values and ideologies.⁵⁹⁵ The customary law and its underlying values have had no direct or indirect influence on the South African common law of contract in the pre-constitutional era. Customary law never influenced the South African common law of contract after the arrival of the Dutch nor during the British colonisation. It also did not exert any influence on the common law of contract during the period of the unification of South Africa or during apartheid thereafter.⁵⁹⁶

After the introduction of the Constitution, ubuntu, as an underlying value of customary law, has played an increasingly important role in the development of the South African law and has itself developed into an underlying value of the Constitution which should be used when developing the common law of contract in line with the Constitution. Unfortunately, as will be illustrated in the next chapter,

⁵⁹² Du Bois 2004 *International Journal of Legal Information* 229.

⁵⁹³ Van Huyssteen *et al Contract law* (2010) 34.

⁵⁹⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 23 (quoted at n 2 *supra*).

⁵⁹⁵ Van Huyssteen *et al Contract law* (2010) 34-37.

⁵⁹⁶ This is illustrated in more detail throughout in the next chapter.

ubuntu has played a limited role and received a less than enthusiastic welcome in the common law of contract.⁵⁹⁷ Be that as it may, Justice Yacoob's remarks⁵⁹⁸ indicate that the time is ripe to consider how ubuntu should inform the role of good faith in the South African common law of contract. Why and how this proposal has come about, can only be fully understood against the historical development of fairness in the South African common law of contract which is the subject matter of the next chapter.

⁵⁹⁷ The influence of ubuntu on the common law of contract is discussed in para 2 3 3 *infra*.

⁵⁹⁸ Cf the discussion in para 1 1 *supra*.

CHAPTER 2 LEGAL HISTORICAL DEVELOPMENT OF FAIRNESS IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT

The rules of the law of contract reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness, as well as economic, commercial and social expediency. For this reason, the law of contract has a dynamic and changing nature.⁵⁹⁹

2 1 INTRODUCTION

Before harmonisation of the concepts of good faith and ubuntu in the common law of contract can be attempted, it is necessary to understand what the current underlying values of the common law of contract are and how they are expressed through the concept of good faith. This is necessary in order to identify the problems and issues concerning the current role of good faith in the common law of contract and to investigate how ubuntu could address these deficiencies. This in turn requires an understanding of the legal historical development of the role of fairness⁶⁰⁰ in the South African common law of contract against the relevant political, economic and social background which was discussed in the previous chapter.

Why this chapter investigates the legal historical development of fairness in the South African common law of contract and not only that of good faith and ubuntu also requires clarification. This is due to the way in which the courts have dealt with unfair contract terms and the unfair enforcement of contract terms. Throughout the years, the courts have utilised a number of open norms⁶⁰¹ to address contractual unfairness. As already mentioned, open norms are necessary to address situations not foreseen by law.⁶⁰² As further explained by Hawthorne:

⁵⁹⁹ Van Huyssteen *et al Contract* (2016) para 1.42.

⁶⁰⁰ For an explanation on the use of the word "fairness" in this thesis see n 6 *supra*.

⁶⁰¹ An open norm refers to a rule or standard that has no fixed or restricted meaning, can apply to various situations and enables value judgments (cf the discussion in n 485 *supra*).

⁶⁰² Cf the discussion dealing with the difficulty in defining ubuntu in para 1 8 4 1 *supra*.

[T]he aim of the law is to provide protection for the interests of citizens who are entitled to the rule of law and not to be ruled by discretion. However, it is trite that lawmakers cannot foresee every possibility and provide decisions on every eventuality, and it is within this sphere between law and discretion that general clauses [i.e. rules that incorporate open norms] play a role.⁶⁰³

Specifically, open norms are necessary in the common law of contract to address unfair contract terms and the unfair enforcement of contract terms not covered by the existing rules.⁶⁰⁴ The open norms used in the law of contract and relevant to this thesis include the *exceptio doli generalis*, good faith (*bona fides*), public policy informing the rules governing the legality of contracts, the objective normative value system established under the Constitution and more recently, ubuntu and fairness as contemplated in section 48 of the Consumer Protection Act 68 of 2008 (hereafter “the CPA”). In order to understand the role of good faith and ubuntu in preventing unfair contracts and the unfair enforcement of contracts, it is necessary to comprehend how they relate to and have been used in conjunction with these other open norms in the common law of contract.

This chapter consists of two parts, namely (1) development of fairness in the common law of contract prior to the Constitution and (2) development of fairness in the common law of contract after the Constitution. As with the previous chapter,

⁶⁰³ Hawthorne 2013 *Fundamina* 300. General clauses can be defined as follows: “This refers to the rules which are not formulated by the legislature in a way which lends itself readily and directly to application, rules which need not even be written, i.e. rules which encapsulate the situation in vague terms and which may cover a large range of cases: abuse of rights or also unfairness” (Grundmann “General standards and principles, *clauses generales* and *Generalklauseln* in European Contract Law: a survey” in Grundmann & Mazeaud (eds) *General clauses in European contract law* (2006) 2-3 as quoted in Hawthorne 2014 *PELJ* 2822). As was shown earlier, equity had a similar regulatory and corrective role in the Roman-Dutch law which arrived at the Cape (cf the discussion in para 1 4 2 2 *supra*).

⁶⁰⁴ Bhana & Pieterse 2005 *SALJ* 871 where they state that “it has always been the role of South African courts to develop the common law in cases where they are presented with a novel legal problem for which there is no legal precedent or authority, or where the common law appears to be out of step with the social and economic reality”.

this chapter does not constitute an exhaustive critical discussion of the issues raised, but rather aims to give an account of these developments to the extent necessary to address the research problem.

2 2 FAIRNESS IN THE COMMON LAW OF CONTRACT PRIOR TO THE CONSTITUTION

2 2 1 Introduction

As explained previously, the South African common law of contract is firmly rooted in Roman-Dutch law.⁶⁰⁵ The Roman-Dutch law was inherently equitable and the concept of *bona fides* infused Roman-Dutch law of contract with an equitable spirit. This equitable law of contract incorporating the concept of *bona fides* then arrived in South Africa with the Dutch. Therefore, fairness in South African contracts was assessed by the application of remedies that originated in Roman law and formed part of the Roman-Dutch law which arrived in South Africa during the seventeenth century. For the purposes of this thesis, the *exceptio doli generalis* and good faith (*bona fides*) must be discussed. Unfortunately, as will be seen below, these remedies were abolished or severely limited by the courts over time which resulted in a need for another open norm to address contractual unfairness. This was addressed by utilising the rules governing legality of contracts as informed by the open norm of public policy which was transplanted from English law.⁶⁰⁶ Therefore, the role of public policy in preventing contractual unfairness is also discussed.

2 2 2 Exceptio doli generalis

2 2 2 1 Introduction

Before dealing with the development of the *exceptio doli generalis* in South African law, the introduction and application of this remedy and the development of the *bona fidei* contracts in Roman and Roman-Dutch law must be discussed. These discussions highlight only the most relevant issues for the purposes of this

⁶⁰⁵ Cf again para 1 4 *supra*.

⁶⁰⁶ See Hawthorne 2013 *Fundamina* 300-320 in which she shows how the concept of public policy in the South African common law of contract was imported from English law.

chapter, but a more detailed discussion on the development of fairness in Roman law contracts is contained in chapter four of this thesis.

2 2 2 2 Roman law

In Roman law, contracts were either classified as *stricti iuris* or *bonae fidei*.⁶⁰⁷ The earlier so-called *stricti iuris* contracts were binding as long as the correct form was observed.⁶⁰⁸ This meant that even where a contract was induced by fraud the aggrieved party was bound to the contract as long as the formal requirements were met.⁶⁰⁹ In contrast, the later *bonae fidei* contracts required no formalities and their validity was based on the agreement (*consensus*) between the parties.⁶¹⁰ Furthermore, the *formulae* of the *bona fide* actions included a clause at the end instructing the judge to decide the case according to what the defendant ought to do or give “*ex fide bona*” (in good faith).⁶¹¹ Thus, the judge had to decide the case on the basis of the principle of good faith.⁶¹² Gaius explains that “the *iudex*

⁶⁰⁷ Stein *Buckland’s text-book of Roman law* (1996) 413; Van Warmelo *Principles of Roman civil law* (1980) paras 393-394.

⁶⁰⁸ Van Warmelo *Principles of Roman civil law* (1980) para 424.

⁶⁰⁹ Du Plessis *Borkowski’s Roman law* (2015) 263; Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 520-521; Zimmerman *Law of obligations* (1990) 663; Van Warmelo *Principles of Roman civil law* (1980) para 424; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 97; Nicholas *Introduction to Roman law* (1962) 164.

⁶¹⁰ Gaius *Inst* 3 136: “The reason why we say that in these cases the obligations are contracted by consent is that no formality whether of words or writing is required, but it is enough that the persons dealing have consented” (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Van Warmelo *Principles of Roman civil law* (1980) para 441; Buckland *Manual of Roman private law* (1947) 277.

⁶¹¹ Du Plessis *Borkowski’s Roman law* (2015) 263; Mousourakis *Historical context of Roman law* (2003) 200-201; Zimmerman *Law of obligations* (1990) 140, 761-762; Dannenbring *Kaser’s Roman private law* (1984) 174; Van Warmelo *Principles of Roman civil law* (1980) para 441; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 95; Stein “Equitable principles in Roman law” in Newman (ed) *Equity in the world’s legal systems* (1973) 81; Schulz *Roman legal science* (1953) 51.

⁶¹² Mousourakis *Historical context of Roman law* (2003) 21; Du Plessis 2002 *THRHR* 398; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith*

appears to be allowed complete discretion in assessing, on the bases of justice and equity, how much ought to be made good to the plaintiff”.⁶¹³ In this context, good faith referred to honesty and fairness,⁶¹⁴ which in turn denoted an objective and ethical standard of behaviour that was expected from the parties.⁶¹⁵ As a result, fraud was actionable in *bonae fidei* contracts.⁶¹⁶

This resulted in a discrepancy between *bonae fidei* and *stricti iuris* contracts which was addressed by the introduction of the defence of fraud (*exceptio doli*) for the *stricti iuris* contracts.⁶¹⁷ The *exceptio doli* provided for the insertion of the clause “if in this matter nothing has been or is being done *dolo malo* by Aulus Agerius” into the formula on the request of the defendant.⁶¹⁸ Zimmerman distinguishes between

(2000) 77; Van Warmelo *Principles of Roman civil law* (1980) para 441; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 95.

⁶¹³ Gaius *Inst* 4 61 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)).

⁶¹⁴ Berger *Encyclopedic dictionary of Roman law* (1953) 374 sv “Bona fides”.

⁶¹⁵ Gaius *Inst* 3 137: “Further, in these contracts [consensual contracts] the parties are reciprocally liable for what each is bound in fairness and equity to perform for the other...” (quoted from De Zulueta *Institutes of Gaius part 1* (1958)); D 16 3 31*pr* where it is stated that “[t]he good faith that is required in contracts calls for level dealing in the highest degree” (quoted from Watson *Digest of Justinian* (2009-2011)). See further Földi 2014 *Fundamina* 318 n 37; Földi 2007 *Annales Univ Budapest* 58; Du Plessis 2002 *THRHR* 399, Van Warmelo *Principles of Roman civil law* (1980) para 394.

⁶¹⁶ Watson *Law of the ancient Romans* (1970) 60; Buckland *Manual of Roman private law* (1947) 252.

⁶¹⁷ Thomas 2003 *De Jure* 107; Zimmerman *Law of obligations* (1990) 663-664; Watson *Law of the ancient Romans* (1970) 60. For a detailed discussion of the introduction and development of the *exceptio doli* see Zimmerman *Law of obligations* (1990) 663ff; Van Warmelo *Principles of Roman civil law* (1980) para 698-704; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 97.

⁶¹⁸ Gaius *Inst* 4 119 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 520; Aronstam *Consumer protection* (1979) 168-169; De Wet *Estoppel by representation* (1939) 83.

two instances that are contained in the formula.⁶¹⁹ The first instance is fraudulent behaviour prior to the institution of the action (referring to the words “nothing has been ... done”).⁶²⁰ Secondly, instances where the action itself constitutes fraud (referring to the words “is being done”).⁶²¹ The first instance is commonly referred to as the *exceptio doli specialis*, while the latter is called the *exceptio doli generalis*.⁶²² Initially, the *exceptio doli* was limited to fraudulent behaviour⁶²³ but as time passed the insertion of this defence (especially the *exceptio doli generalis*) “provided the judge with the same far-ranging discretion that he already had in *bonae fidei iudicia*”.⁶²⁴ In other words, the judge was required to resolve the contractual dispute in a fair and reasonable manner.⁶²⁵ Many years later, this is reflected in the following passage of the Digest:

⁶¹⁹ Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 520. See also Aronstam 1979 *THRHR* 28; De Wet *Estoppel by representation* (1939) 83.

⁶²⁰ Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 520. See also Aronstam 1979 *THRHR* 28; De Wet *Estoppel by representation* (1939) 83.

⁶²¹ Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 520. See also Aronstam 1979 *THRHR* 28; De Wet *Estoppel by representation* (1939) 83.

⁶²² Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 27; Aronstam *Consumer protection* (1979) 169; De Wet *Estoppel by representation* (1939) 83. This distinction is a modern one and did not exist in Roman law (Aronstam 1979 *THRHR* 28).

⁶²³ Zimmerman *Law of obligations* (1990) 665; Buckland *Manual of Roman private law* (1947) 252.

⁶²⁴ Zimmerman *Law of obligations* (1990) 667. See also Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 520; Dannenbring *Kaser’s Roman private law* (1984) 176. For a detailed discussion of the introduction and development of the *exceptio doli* see Zimmerman *Law of obligations* (1990) 663ff; Van Warmelo *Principles of Roman civil law* (1980) para 698-704; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 97.

⁶²⁵ Du Plessis *Borkowski’s Roman law* (2015) 263; Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 520; Zimmerman *Law of obligations* (1990) 668.

The praetor established this defence (*sic*) to the end that a person's fraud should not benefit him through the medium of the civil law but contrary to natural equity.⁶²⁶

2 2 2 3 *Roman-Dutch law*

As time passed, the distinction between *bonae fidei* and *stricti iuris* contracts became less important.⁶²⁷ Finally, in Roman-Dutch law it was stated that all contracts were *bonae fidei* in character and based on consent:

Further, we may also conveniently dispense with the division of contracts into *stricti iuris* and *bonae fidei*, for according to our customs all contracts are considered to be *bonae fidei*, which necessarily follows, if we hold that with us all contracts are constituted by consent...⁶²⁸

It seemed that the substantive content of the *exceptio doli generalis* “was absorbed into the requirement of good faith” which meant that the *exceptio doli generalis* was no longer needed.⁶²⁹ However, strangely enough the expression “*exceptio doli*” was still used in Roman-Dutch law.⁶³⁰

⁶²⁶ D 44 4 1, Paul, *Edict, book 71* (quoted from Watson *Digest of Justinian* (2009-2011)). The original text speaks of “contra naturalem aequitatem”. See also Erasmus 1989 SALJ 674.

⁶²⁷ Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 27; Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 521; Zimmerman *Law of obligations* (1990) 671.

⁶²⁸ Decker’s annotation to Van Leeuwen’s *Roomsche Hollandsche Recht* 4 2 1 (as found in Kotzé (tr) *Simon van Leeuwen’s Commentaries* (1923) 12). See also Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 27; Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 522; Zimmerman “Good faith and equity” in Zimmerman & Visser (eds) *Southern Cross* (1996) 220; Zimmerman *Law of obligations* (1990) 671; Aronstam *Consumer protection* (1979) 172; Aronstam 1979 *THRHR* 31.

⁶²⁹ Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 522. See also Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 27; Zimmerman *Law of obligations* (1990) 102 & 509 where he states that the *exceptio doli* was inherent in all *bonae fidei* contracts.

⁶³⁰ Zimmerman “Good faith and equity” in Zimmerman & Visser (eds) *Southern Cross* (1996) 220.

2 2 2 4 South African law

(a) Introduction and development

It seemed that the *exceptio doli* also arrived in South Africa as part of the Roman-Dutch law.⁶³¹ Van Huyssteen refers to a case from 1827 where this exception was utilised as a defence to a claim.⁶³² It is not clear from the case report why the defence was not successful, but Van Huyssteen argues that the use of this exception by the defence supports the proposition that the *exceptio doli generalis* was part of the law at the Cape.⁶³³ Furthermore, the *exceptio doli generalis* was also used to introduce various English law doctrines into the South African common law of contract during the early twentieth century when English law exerted an extensive influence on the substantive law at the Cape.⁶³⁴

For a long time the status of the *exceptio doli generalis* was uncertain in South African law. There were some court decisions⁶³⁵ and academic writings⁶³⁶ that supported its application and other court decisions⁶³⁷ and academic writings⁶³⁸

⁶³¹ Zimmerman "Good faith and equity" in Zimmerman & Visser (eds) *Southern Cross* (1996) 220.

⁶³² Van Huyssteen "Evaluering van die Kaapse regspraak met betrekking tot sekere beginsels en reëls van die materiële kontratereg" in Visagie *et al Siviele Appèlhof en Raad van Justisie 1806-1827* (1992) C 12 referring to *JD Karnspek v H Hegers* (1827) CJ 2149 420 (26/7/1827).

⁶³³ Van Huyssteen "Evaluering van die Kaapse regspraak met betrekking tot sekere beginsels en reëls van die materiële kontratereg" in Visagie *et al Siviele Appèlhof en Raad van Justisie 1806-1827* (1992) C 12.

⁶³⁴ For a detailed discussion on this issue see Zimmerman "Good faith and equity" in Zimmerman & Visser (eds) *Southern Cross* (1996) 221-231; Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 523-539. Cf para 1 5 2 4 *supra*.

⁶³⁵ See e.g. *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd* 1983 1 SA 254 (A) 436-439; *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W) 212-213; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 27; *Zuurbekom Ltd v Union Corporation Ltd* 1947 1 SA 514 (A) 535-537; *Weinerlein v Goch Buildings Ltd* 1925 AD 292-293.

⁶³⁶ See e.g. Van der Walt 1986 SALJ 651; Van Warmelo 1981 *De Jure* 203-220; Kerr 1982 *THRHR* 85-87; Kerr 1981 *THRHR* 91-94; Kerr 1981 *THRHR* 88-91; Kerr 1981 SALJ 158-162; Aronstam *Consumer protection* (1979) 181ff; Aronstam 1979 *THRHR* 28ff; Kerr 1971 SALJ 408-411.

⁶³⁷ See e.g. *Novic and another v Comair Holdings Ltd and others* 1979 2 SA 116 (W) 155-157; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 2 SA 436 (T) 437-439; *North Vaal Mineral Co Ltd v Lovasz* 1961 3 SA 604 (T) 607-608.

that questioned its existence and application. Some legal scholars also argued that the *exceptio doli generalis* was used to address unfairness in contracts in South African law because the courts had limited the role of good faith to do so.⁶³⁹

(b) Burial by the Appellate Division

Finally, in 1988, this issue was settled by the Appellate Division in *Bank of Lisbon and South Africa v De Ornelas*. The respondents (two brothers) were joint managing directors of a company that obtained overdraft facilities from the appellant (“the Bank”).⁶⁴⁰ These overdraft facilities were secured with a number of security instruments against the individual respondents.⁶⁴¹ After the respondents discharged the overdraft debt, they requested the cancellation and return of the securities given.⁶⁴² The Bank refused because it claimed that the security instruments also served as security for a claim for contractual damages against the company of the respondents.⁶⁴³ The Bank alleged that it was entitled to hold onto the security instruments until the company had discharged its entire indebtedness (including the contractual damages) to the Bank.⁶⁴⁴ The respondents alleged that the Bank’s conduct amounted to *dolus generalis* because the Bank was relying on the wide wording used in the security documents to include a claim that was not in the contemplation of the parties at the time the security documents were executed.⁶⁴⁵

⁶³⁸ See e.g. Olivier 1964 *THRHR* 26-28; De Wet *Estoppel by representation* (1939) 83-89.

⁶³⁹ Hawthorne 2013 *Fundamina* 302; Du Plessis 2002 *THRHR* 407. The limitation of the role of good faith in the South African law of contract is investigated in more detail in paras 2 2 3 4-2 2 3 6 *infra*.

⁶⁴⁰ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 607.

⁶⁴¹ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 607.

⁶⁴² *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 607-608.

⁶⁴³ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 608.

⁶⁴⁴ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 608.

⁶⁴⁵ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 608. Extracts of the specific clauses in the various security documents are quoted in the judgment itself (at 608-609).

The court had to decide on the applicability of the *exceptio doli generalis* to written contracts.⁶⁴⁶ After a lengthy and academic investigation into the development of the *exceptio doli* from Roman to Roman-Dutch law, the court came to the conclusion that the *exceptio doli generalis* never formed part of the Roman-Dutch law and therefore never became part of South African law.⁶⁴⁷ Subsequently, the parties were bound to the contractual provisions in the security instruments and the wording in them was wide enough to include the Bank's right to retain the security documents in respect of the claim for contractual damages against the respondents' company.⁶⁴⁸

This decision was met with mixed reactions which included a considerable amount of criticism.⁶⁴⁹ Some academic writers argued that the *exceptio doli* was in fact part of the Roman-Dutch law and therefore did form part of the South African law.⁶⁵⁰ It was also argued, that even if this was not the case, the *exceptio doli* was incorporated into South African law by the acceptance of its existence by the courts and various academic writers.⁶⁵¹ In other words, the courts were not limited by developments in Roman and Roman-Dutch law and had the power to decide that the *exceptio doli generalis* should be available in South African law.⁶⁵² Therefore, the court's approach was criticised because it relied on historical developments rather than being sensitive to modern problems and the underlying

⁶⁴⁶ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 592.

⁶⁴⁷ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 605-607.

⁶⁴⁸ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 608-609.

⁶⁴⁹ See e.g. Lewis 2003 *SALJ* 332; Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 573-582; Zimmerman 1992 *Stell LR* 6-9; Kerr 1991 *SALJ* 583-586; Lewis 1991 *SALJ* 262-264; Zimmerman *Law of obligations* (1990) 676-677; Lewis 1990 *SALJ* 26-44; Erasmus 1989 *SALJ* 675-677; Van der Merwe *et al* 1989 *SALJ* 235-242; Hawthorne & Thomas 1989 *De Jure* 143-154; Lambiris 1988 *SALJ* 644-651.

⁶⁵⁰ Kerr 1991 *SALJ* 585; Van der Merwe *et al* 1989 *SALJ* 238; Hawthorne & Thomas 1989 *De Jure* 144-150. See also Jansen JA's minority judgment in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 616-617. *Contra* Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 550.

⁶⁵¹ Hawthorne & Thomas 1989 *De Jure* 150-152. See also Jansen JA's minority judgment in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 616.

⁶⁵² Lambiris 1988 *SALJ* 647.

fundamental notion that open norms are necessary to cater for situations not foreseen by the existing legal rules.⁶⁵³ As explained by Van der Merwe *et al*:

[H]owever necessary and acceptable a general legal rule may be, the need to qualify it for the sake of meeting the requirements of justice in a particular instance will always exist.⁶⁵⁴

Along the same lines, some criticised the court's decision as an attempt to keep the principle of equity out of the common law of contract.⁶⁵⁵ These last two criticisms are discussed in more detail in the next section dealing with the legal historical development of good faith in the South African common law of contract.⁶⁵⁶

The controversy surrounding the existence of the *exceptio doli generalis* was further aggravated by the Appellate Division in the case of *Van der Merwe v Meades*⁶⁵⁷ which led Kerr to argue that the court's endorsement of the *replicatio doli generalis* resulted in the revival of the *exceptio doli generalis*.⁶⁵⁸

(c) Post-constitutional reburial by the Supreme Court of Appeal

Two decades after the decision in *Bank of Lisbon and South Africa v De Ornelas*, the reintroduction of the *exceptio doli generalis* was raised in an appeal to the Constitutional Court on the basis that the remedy would be in line with the values of the Constitution.⁶⁵⁹ The appeal was dismissed because the argument was

⁶⁵³ Van der Merwe *et al* 1989 SALJ 239. See also Hutchison "Good faith in the South African law of contract" in Brownsword *et al* (eds) *Good faith in contract* (1999) 221; Zimmerman 1992 *Stell LR* 9; Hawthorne & Thomas 1989 *De Jure* 154.

⁶⁵⁴ Van der Merwe *et al* 1989 SALJ 239.

⁶⁵⁵ Hawthorne & Thomas 1989 *De Jure* 150. See also Barnard 2006 *Stell LR* 393-394; Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 573; Lewis 1990 SALJ 29.

⁶⁵⁶ See para 2 2 3 *infra*.

⁶⁵⁷ *Van der Merwe v Meades* 1991 2 SA 1 (A).

⁶⁵⁸ Kerr 1991 SALJ 584-585.

⁶⁵⁹ *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 4 SA 16 (CC) para 3.

raised in the Constitutional Court as a court of first instance.⁶⁶⁰ Again, this decision resulted in some academic debate and criticism.⁶⁶¹ Recently, the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa Ltd* reburied the *exceptio doli generalis* by confirming the decision in *Bank of Lisbon and South Africa v De Ornelas*.⁶⁶²

As this research topic is limited to the harmonisation of good faith and ubuntu, a detailed and critical analysis of the role of the *exceptio doli* in the South African law and its possible reintroduction falls outside the scope of this thesis.

2 2 3 Good faith (*bona fides*)

2 2 3 1 Roman law

At this stage it will suffice⁶⁶³ to reiterate⁶⁶⁴ that the *formulae* of the later *bona fide* actions included a clause at the end of the formula instructing the judge to decide the case according to what the defendant ought to do or give “*ex fide bona*” (in good faith).⁶⁶⁵ This meant that the judge had to decide the case on the basis of the principle of good faith⁶⁶⁶ and it appears that the judge was “allowed complete

⁶⁶⁰ *Crown Restaurant CC v Gold Reef City Theme Park (Pty) Ltd* 2008 4 SA 16 (CC) paras 6-7.

⁶⁶¹ See e.g. Bradfield *Christie's law of contract* (2016) 13; Davis & Klare 2010 *SAJHR* 481; Barnard-Naude 2008 *Constitutional Court Review* 188-193; Kerr 2008 *SALJ* 241-248; Glover 2007 *SALJ* 449-459.

⁶⁶² *Bredenkamp v Standard Bank South Africa* 2010 (SCA) paras 32-35. See also Van Huyssteen *et al Contract* (2016) para 9.259; Barnard-Naudé 2011 *Stell LR* 166-167.

⁶⁶³ A detailed discussion of the introduction and development of the *bonae fidei* contracts in Roman law can be found in ch 4 of this thesis.

⁶⁶⁴ Cf the discussion in para 2 2 2 2 *supra*.

⁶⁶⁵ Du Plessis *Borkowski's Roman law* (2015) 263; Mousourakis *Historical context of Roman law* (2003) 200-201; Zimmerman *Law of obligations* (1990) 140, 761-762; Dannenbring *Kaser's Roman private law* (1984) 174; Van Warmelo *Principles of Roman civil law* (1980) para 441; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 95; Stein “Equitable principles in Roman law” in Newman (ed) *Equity in the world's legal systems* (1973) 81; Schulz *Roman legal science* (1953) 51.

⁶⁶⁶ Mousourakis *Historical context of Roman law* (2003) 21; Du Plessis 2002 *THRHR* 398; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith*

discretion in assessing, on the bases of justice and equity, how much ought to be made good to the plaintiff".⁶⁶⁷ In this context, good faith referred to honesty and fairness,⁶⁶⁸ which in turn denoted an objective and ethical standard of behaviour that was expected from the parties.⁶⁶⁹

Bona fides also functioned as a tool to supplement *lacunae* in and correct deficiencies in the *ius civile* where the application of the existing rules would result in unfairness. The introduction of the *exceptio doli* for the *stricti iuris* contracts is an example of this role of *bona fides* in Roman law.⁶⁷⁰

2 2 3 2 Roman-Dutch law

The position in Roman-Dutch law was similar. Earlier in this thesis, it was stated that all contracts in Roman-Dutch law were *bonae fidei* which meant that the parties were bound to everything which good faith reasonably and equitably demanded.⁶⁷¹ It was further mentioned that this included a subsidiary and corrective function where the existing rules did not cater for the specific situation or where the application of the existing rules would result in unfairness and injustice.⁶⁷²

(2000) 77; Van Warmelo *Principles of Roman civil law* (1980) para 441; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 95.

⁶⁶⁷ Gaius *Inst* 4 61 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)).

⁶⁶⁸ Berger *Encyclopedic dictionary of Roman law* (1953) 374 sv "Bona fides".

⁶⁶⁹ Gaius *Inst* 3 137: "Further, in these contracts [consensual contracts] the parties are reciprocally liable for what each is bound in fairness and equity to perform for the other..." (quoted from De Zulueta *Institutes of Gaius part 1* (1958)); D 16 3 31*pr* where it is stated that "[t]he good faith that is required in contracts calls for level dealing in the highest degree" (quoted from Watson *Digest of Justinian* (2009-2011)). See further Földi 2014 *Fundamina* 318 n 37; Földi 2007 *Annales Univ Budapest* 58; Du Plessis 2002 *THRHR* 399, Van Warmelo *Principles of Roman civil law* (1980) para 394.

⁶⁷⁰ Cf the discussion on the introduction and development of the *exceptio doli* in Roman law in para 2 2 2 2 *supra*.

⁶⁷¹ Cf the discussion in paras 1 4 2 2 & 2 2 2 3 *supra*.

⁶⁷² Cf the discussion in para 1 4 2 2 *supra*. In *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 651 the following description of the role of *bona fides* in Roman-Dutch law is found: "This meant that ... the court had wide powers of complementing or

2 2 3 3 *Early South African law prior to British influences (1806-1827)*

Van Huyssteen indicates that good faith was referred to in court decisions dealing with the common law of contract at the Cape in the period from 1806 to 1827 (i.e. prior to the British changes to the administration of justice).⁶⁷³ He indicates that it was referred to as an auxiliary argument and factor that had to be considered when determining whether a contract should be enforced or not.⁶⁷⁴ He also states that there are cases where good faith clearly played a central role.⁶⁷⁵

2 2 3 4 *Gradual negation of good faith and the importation of the classical model of contract law (1827-1909)*

The British changes to the administration of justice at the Cape were initiated in 1827⁶⁷⁶ but it took some time before these influences were transposed into the common law of contract. Therefore, as late as 1852, the idea that a contract is void if it is contrary to good faith is reflected in the law reports. In *Trustees, South African Bank v Prince*,⁶⁷⁷ the bank had a mortgage over a property and the mortgagor was in arrears and in financial difficulty. Prince approached the bank and agreed to guarantee the bank against any deficiency that might arise on the

restricting the duties of parties, of implying terms, in accordance with the requirements of justice, reasonableness and fairness”.

⁶⁷³ Van Huyssteen “Evaluering van die Kaapse regspraak met betrekking tot sekere beginsels en reëls van die materiële kontraterereg” in Visagie *et al Siviele Appèlhof en Raad van Justisie 1806-1827* (1992) C 9. Cf para 1 5 2 3 *supra* dealing with the English influences on the administration of justice at the Cape.

⁶⁷⁴ Van Huyssteen “Evaluering van die Kaapse regspraak met betrekking tot sekere beginsels en reëls van die materiële kontraterereg” in Visagie *et al Siviele Appèlhof en Raad van Justisie 1806-1827* (1992) C 9 referring to *Van Niekerken v Horak* (1823) CJ 1856 56 (21/8/1823) & *Hoffman v Tesselaar* (1808) CJ 1467 33 (11/08/1808) as examples.

⁶⁷⁵ Van Huyssteen “Evaluering van die Kaapse regspraak met betrekking tot sekere beginsels en reëls van die materiële kontraterereg” in Visagie *et al Siviele Appèlhof en Raad van Justisie 1806-1827* (1992) C 9-11 referring and discussing the case of *JJ Smuts NO v F Mabile* (1825) CJ 1999 37 (26/05/1825).

⁶⁷⁶ Cf para 1 5 2 3 *supra* dealing with the English influences on the administration of justice at the Cape.

⁶⁷⁷ 1852 1 Searle 198.

sale of the property if the bank proceeded against the mortgagor. The bank proceeded, the mortgagor surrendered the estate and the property was sold by public auction to Prince. However, prior to the auction, Prince (with the assistance of the bank) induced the trustee of the insolvent estate to alter the conditions of the sale (which was fixed by a resolution of the creditors) to his benefit which resulted in him purchasing the property at a lesser price than it would have fetched if the conditions of the sale had not been altered. As this was to the detriment of the other creditors and the insolvent, the question arose whether the sale of the property was void because it was unjust towards the other creditors and the insolvent. In framing the question before the court, the court stated that the sale of the property would be void “if repugnant to justice, good faith, or good morals”.⁶⁷⁸ After considering the above facts, the court held that the contract was “unjust and unconscionable” towards the other creditors and the insolvent, and consequently void.⁶⁷⁹ The court also held that the contract of sale was void because it was contrary to the policy of the applicable insolvent laws which aimed to protect the common interest of all the creditors.⁶⁸⁰ Accordingly, the idea of public policy as found in English law also played a role in the decision.⁶⁸¹

Then, in 1860, a more conservative approach can be identified in *Dyason v Ruthven*⁶⁸² where the court had to consider whether a contract providing for an interest rate of twelve percent per year was usurious. There was no rule that set a maximum legal interest rate but the court held that the agreed interest rate could be reduced on proof of extortion or of actual or constructive fraud with reference to the particular circumstances of the case.⁶⁸³ In handing down his judgment, Judge Watermeyer made the following statement:

⁶⁷⁸ *Trustees, South African Bank v Prince* 1852 1 Searle 205.

⁶⁷⁹ *Trustees, South African Bank v Prince* 1852 1 Searle 205-206.

⁶⁸⁰ *Trustees, South African Bank v Prince* 1852 1 Searle 206.

⁶⁸¹ See, in general, Hawthorne 2013 *Fundamina* 300-320 on the origin of the concept of public policy in the South African law of contract.

⁶⁸² 1860 3 Searle 282.

⁶⁸³ *Dyason v Ruthven* 1860 3 Searle 310-312. See also Hawthorne 2013 *Fundamina* 313; Wessels *Law of contract vol 1* (1937) para 579.

When men contract it must be assumed that they know what they contract, and it would probably be difficult to obtain a rescission and restitution, unless proceedings nearly akin to fraud were established.⁶⁸⁴

Hawthorne maintains that the decision was motivated by public policy⁶⁸⁵ and so a gradual shift can be identified from good faith to public policy as the standard against which the enforcement of a contract should be measured. Furthermore, the non-enforcement of a contract was now limited to cases of actual or constructive fraud or extortion which was a more stringent test than that required by *bona fides*.

Finally, fifteen years later, in *Reynolds v Donald Currie & Co*⁶⁸⁶ the court referred to English law when it made the following statement:

And to these stipulations the Courts of Law felt themselves compelled to give effect on the undeniable principle, that, in the absence of fraud or illegality, Courts of Justice are bound to give effect to conditions, however stringent and oppressive, to which the parties to a contract have *deliberately agreed*.⁶⁸⁷

Questions regarding the fairness of a contract had to be decided with reference to the rules of illegality and public policy which did not prohibit the enforcement of unfair terms. In consequence, the role of good faith in addressing unfair contracts was severely limited.

This is not surprising as this was also the year in which the English case of *Printing and Numerical Registering Company v Sampson* was handed down. The

⁶⁸⁴ *Dyason v Ruthven* 1860 3 Searle 310.

⁶⁸⁵ Hawthorne 2013 *Fundamina* 313.

⁶⁸⁶ 1875 NLR 1. This case dealt with the enforcement of a clause included on a passenger ticket which excluded the carrier's liability in respect of damages to the passenger's baggage while stowed on a passenger ship on route from London to Natal. As previously indicated, the courts in Natal was much more willing to look to English law for legal guidance (cf the discussion in para 1 5 3 1 *supra*).

⁶⁸⁷ *Reynolds v Donald Currie & Co* 1875 NLR.

following passage from this case is regarded as the *locus classicus* of the classical description of the principle of freedom of contract:

It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider – that you are not lightly to interfere with this freedom to contract.⁶⁸⁸

This model is referred to as the classical model of contract law⁶⁸⁹ which is based on the principles of freedom and sanctity of contract.⁶⁹⁰ Freedom of contract entails that the parties can decide whether, with whom and on what terms to contract which finds expression through consensus.⁶⁹¹ This leads to the principle of sanctity of contract which refers to the idea that where a contract was entered into freely and where the terms thereof are not contrary to public policy it should be enforced.⁶⁹² Sanctity of contract is sometimes still expressed by the Latin

⁶⁸⁸ *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 465.

⁶⁸⁹ For detailed expositions on the classical law of contract see Collins *Law of contract* (2003) 3-10; Atiyah *Rise and fall of freedom of contract* (1979) 226ff.

⁶⁹⁰ Van Huyssteen *et al Contract* (2016) para 1.41; Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 23; Hawthorne 2012 *THRHR* 348; Barnard-Naude 2008 *Constitutional Court Review* 168; Bhana & Pieterse 2005 *SALJ* 867; Pretorius 2003 *THRHR* 640; Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 184; Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 551; Hawthorne 1995 *THRHR* 164; Zimmerman *Law of obligations* (1990) 576-577.

⁶⁹¹ Van Huyssteen *et al Contract* (2016) para 1.41; Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 23; Hawthorne 2012 *THRHR* 348; Bhana & Pieterse 2005 *SALJ* 867; Pretorius 2003 *THRHR* 640; Tladi 2002 *De Jure* 308; Hawthorne 1995 *THRHR* 163.

⁶⁹² Van Huyssteen *et al Contract* (2016) para 1.41; Bradfield *Christie’s law of contract* (2016) 12-13; Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 23; Bhana & Pieterse 2005 *SALJ* 867; Pretorius 2003 *THRHR* 640; Zimmerman *Law of*

phrase *pacta sunt servanda*.⁶⁹³ This conception of freedom of contract is succinctly described by Hawthorne:

First of all, it is used to mean that persons should be free to negotiate the terms of their contracts without legislative interference. Secondly, the meaning attached is that where parties have concluded a contract, the terms of the contract should not be interfered with and should be given full effect. Thirdly, it has been interpreted to mean that a person should be free to select the parties he contracts with; and fourthly, that a person should be free to decide not to contract.⁶⁹⁴

Accordingly, it promotes an individualistic approach to contracts that is based on the political philosophies of individualism and economic liberalism.⁶⁹⁵

The classical approach to contract law further assumes that the contracting parties are in an equal bargaining position and therefore promotes formal equality.⁶⁹⁶ As Hawthorne explains:

obligations (1990) 576-577. As explained by Adams & Brownsword *Key issues in contract* (1995) 217 (as quoted by Hawthorne 2012 *THRHR* 348 n 11): "According to the classical view, the social function of contract is not simply to facilitate exchange: contract is a vehicle for maximising economic self-interest. Contractors may legitimately pursue their own interests, prioritising their own interests against those of the other side, subject only to such minimal constraints as those pertaining to fraud and coercion".

⁶⁹³ Bradfield *Christie's law of contract* (2016) 12; Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 23; Bhana & Pieterse 2005 *SALJ* 867; Zimmerman *Law of obligations* (1990) 576.

⁶⁹⁴ Hawthorne 1995 *THRHR* 163.

⁶⁹⁵ Bhana & Pieterse 2005 *SALJ* 867; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 185. See further the discussion in the text at n 710 *infra* dealing with the changing political, economic and social environment of that time.

⁶⁹⁶ Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 23-24; Hawthorne 2011 *SUBB Jurisprudentia* para 1; Bhana & Pieterse 2005 *SALJ* 867; Hawthorne 2004 *THRHR* 301; Hawthorne 2003 *THRHR* 117; Pretorius 2003 *THRHR* 640; Hawthorne 1995 *THRHR* 163, 165. Cf the discussion dealing with formal equality before the law in para 1 8 2 2 *supra*.

Both classical contract law and the classical conception of the rule of law have as their point of departure that inequality between individuals is the result of natural differences and capabilities and that no legal system could be held accountable for recognising the formal equality of individuals.⁶⁹⁷

Consequently, the classical model of contract law is not concerned with the respective bargaining position of the parties or the resulting unfairness of the bargain.⁶⁹⁸ As explained by Hawthorne, it “does not take into account the discrepancies in resources such as ownership, wealth and knowledge, which sustain inequality between the parties to a contract”.⁶⁹⁹

In terms of the classical approach, good faith requires that the court should give effect to that which is agreed between the parties.⁷⁰⁰ In this way, the requirement of good faith is married to the ideas of freedom and sanctity of contract.⁷⁰¹ In turn, this forms the basis of a formalistic approach to contracts as the courts need only concern themselves with the formal validity and enforceability of the contract as the substance of the contract has been agreed between the parties and must be honoured.⁷⁰² Accordingly, the substantive unfairness of a contract is not a matter for the courts but the business of the parties.⁷⁰³ In other words, this approach to

⁶⁹⁷ Hawthorne 2008 *SAPL* 79. See also Hawthorne 2012 *THRHR* 348. Cf the discussion on the classical conception of the rule of law in para 1 5 2 3 *supra*.

⁶⁹⁸ Hawthorne 1995 *THRHR* 165-166.

⁶⁹⁹ Hawthorne 1995 *THRHR* 166. See also Barnard-Naudé 2013 *SAJHR* 472-473.

⁷⁰⁰ Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 23; Pretorius 2003 *THRHR* 640; Bhana & Pieterse 2005 *SALJ* 867.

⁷⁰¹ Bhana & Pieterse 2005 *SALJ* 867.

⁷⁰² Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 23; Hawthorne 2012 *THRHR* 348; Hawthorne 2006 *Fundamina* 76; Bhana & Pieterse 2005 *SALJ* 867; Pretorius 2003 *THRHR* 640; Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 185; Zimmerman *Law of obligations* (1990) 577.

⁷⁰³ Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 23; Hawthorne 2011 *SUBB jurisprudentia* para 2; Moseneke 2009 *Stell LR* 9; Hawthorne 2006 *Fundamina* 76; Bhana & Pieterse 2005 *SALJ* 867; Pretorius 2003 *THRHR* 640; Zimmerman *Law of obligations* (1990) 577.

contracts promotes a self-regulating and self-correcting market where there is no or little state interference.⁷⁰⁴

Consequently, the classical model of contract law prefers to deal with clear, unambiguous and certain rules instead of normative values like equity.⁷⁰⁵ By necessity, such an approach relies on the idea that the rules of law are absolute, neutral and can be deduced from legal precedent.⁷⁰⁶ Freedom and sanctity of contract are presented as neutral principles or absolute truths.⁷⁰⁷ It follows that the court then merely applies the neutral rules of law to ascertain whether a contract has been established, and once this has been done, the contract must be enforced.⁷⁰⁸ In this way, commercial and legal certainty is achieved.⁷⁰⁹

Finally, these changes can be ascribed to the changing political and economic climate during and after the English colonisation.⁷¹⁰ These have already been discussed in the previous chapter and can be summarised as follows: The negation of the court's equity jurisdiction and the import of a strict *stare decisis* doctrine which were due to the increasing emphasis on legal certainty which in turn can be traced back to legal positivism and formalism.⁷¹¹ In turn, legal

⁷⁰⁴ Hawthorne 2012 *THRHR* 348; Hawthorne 2011 *SUBB Jurisprudentia* para 2; Moseneke 2009 *Stell LR* 9; Hawthorne 2006 *Fundamina* 77; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 185.

⁷⁰⁵ Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 23; Bhana & Pieterse 2005 *SALJ* 867.

⁷⁰⁶ Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 24; Bhana & Pieterse 2005 *SALJ* 867-868.

⁷⁰⁷ Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 24; Bhana & Pieterse 2005 *SALJ* 867.

⁷⁰⁸ Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 23; Bhana & Pieterse 2005 *SALJ* 867.

⁷⁰⁹ Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 23; Bhana & Pieterse 2005 *SALJ* 867.

⁷¹⁰ Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 149.

⁷¹¹ Cf the discussion in para 1 5 2 3 *supra* dealing with the English influences on the administration of justice in the Cape colony during the nineteenth century.

positivism is closely related to the system of parliamentary sovereignty and the classical rule of law that arrived in South Africa with the British, and was adopted by the ideologies of individualism and capitalism.⁷¹²

Gradually, these principles were incorporated into the common law of contract by the courts as illustrated by the following remarks in *A Trimble v Jameson & Co*:

[I]t was observed that the determination of what is contrary to the so-called “policy of the law” necessarily varies from time to time. Many transactions are now upheld by Courts which a former generation would have avoided as being contrary to the supposed policy of the law.

... judges are much less disposed nowadays than their predecessors were to undertake what practically amounts to legislation, for public policy equally requires that the utmost liberty of contracting be conceded, and judges may not lightly interfere with the freedom of contract.⁷¹³

This is also reflected in the reasoning of the court soon thereafter in *Burger v Central South African Railways*:

[O]ur law does not recognise the right of a court to release a contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable”.⁷¹⁴

Eventually, by 1907, good faith was reduced to an underlying principle of the law of contract:

As regards the good faith which is required in the fulfilment of contracts it may be laid down broadly, with respect to all contracts, that any loss

⁷¹² Cf the discussion dealing with the English influences on the existing substantive law in the Cape colony during the nineteenth century (para 1 5 2 4 *supra*).

⁷¹³ *A Trimble v Jameson & Co* 1903 24 NLR 56 referring to *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 462. The earliest case that I could find that refers to *Printing and Numerical Registering Company v Sampson* is *St Marc v Harvey* 1893 10 SC 267.

⁷¹⁴ *Burger v Central South African Railways* 1903 TS 576 quoting English law. See also Bradfield *Christie’s law of contract* (2016) 15; Barnard-Naude 2008 *Constitutional Court Review* 168.

suffered by either party by actual fraud on the part of the other will have to be made good by the latter, and from this liability the parties will not even be able to release themselves in advance by contract. For such fraud the Court may cancel the contract altogether.

When it comes to a question of breach of faith falling short of actual fraud, no general rule can be laid down, inasmuch as different kinds of contract vary as to the degree of good faith which is required in their fulfilment.⁷¹⁵

It is also interesting to note that a number of contract law textbooks of that time do not mention good faith at all.⁷¹⁶

2 2 3 5 *Good faith's limited role during the Union (1910-1947)*

The role of good faith as an underlying principle of the common law of contract continued during the Union of South Africa. There were also cases in which the Appellate Division recognised and realised the principle of good faith.⁷¹⁷ However, in 1925, the court in *Weinerlein v Goch Buildings* reiterated the limited role of equity in the South African law along the lines of that found in *Mills and Sons v Trustees of Benjamin Bros* (1876) and *Estate Thomas v Kerr* (1903):⁷¹⁸

Our common law, based to a great extent on the civil law, contains many an equitable principle; but equity, as distinct from and opposed to the law, does not prevail with us. Equitable principles are only of force in so

⁷¹⁵ Maasdorp *Law of obligations* (1907) 80.

⁷¹⁶ Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 149 referring to Lee *Introduction to Roman-Dutch law* (1915). See also Roos & Reitz *Principles of Roman-Dutch law* (1909) as another example.

⁷¹⁷ *MacDuff & Co Ltd (in Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573; *Neugebauer & Co Ltd v Hermann* 1923 AD 573-574. See also the discussion of these cases by Hawthorne 2001 *THRHR* 512; Olivier AJ in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (SCA) 319.

⁷¹⁸ In para 1 5 2 3 *supra* it was shown how these judgments resulted in the limitation of the Supreme Court of the Cape of Good Hope's equity jurisdiction during the late nineteenth century.

far as they have become authoritatively incorporated and recognised as rules of positive law.⁷¹⁹

Furthermore, the classical model of contract law continued to play an important role in case law.⁷²⁰ How this model of contract law was married to the concept of good faith can be seen in the following extract from Wessels' first edition of his *The Law of Contract in South Africa* in 1937:

As the distinction between contracts *bonae fidei* and *stricti juris* is obsolete, and as all contracts are now *bonae fidei*, our law requires that they must be executed in good faith... The meaning of this is not only that there is no fraud and deceit, but that the execution of the contract must be in accordance with the real intention of the parties as revealed by the terms of the contract...⁷²¹

2 2 3 6 *Good faith's limited role under apartheid and the start of modern law of contract (1948-1993)*

Throughout the years the courts periodically reiterated that all contracts are *bonae fidei* in nature,⁷²² used the principle of good faith to create new equitable rules and gave expression to it through various indirect methods (for example the

⁷¹⁹ *Weinerlein v Goch Buildings Ltd* 1925 AD 295. See also the discussion of this case by Hawthorne 2001 *THRHR* 512; Olivier AJ in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 (SCA) 319.

⁷²⁰ See e.g. *Wells v South African Alumenite Company* 1927 AD 73 referring to *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 465.

⁷²¹ Wessels *Law of contract vol 1* (1937) para 1997 as referred to by Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 149.

⁷²² *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A) 433; *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 651; *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A) 28; *Meskin NO v Anglo-American Corporation of SA Ltd and another* 1968 4 SA 793 (W) 804. See also Du Plessis 2002 *THRHR* 407; Hawthorne 2001 *THRHR* 512; Hutchison "Good faith in the South African law of contract" in Brownsword *et al* (eds) *Good faith in contract* (1999) 213.

interpretation of contract and *ex lege* and tacit terms).⁷²³ Again, these indirect methods were used because the classical model of contract law continued to play an important role under apartheid.⁷²⁴ It was only after the demise of the *exceptio doli generalis* in *Bank of Lisbon and South Africa v De Ornelas* that the idea that good faith could be used to address unfair contracts received detailed attention.⁷²⁵ To understand why this was the case, it is necessary to discuss the courts' comments on the role of good faith in in the common law of contract.

The court accepted that all contracts are *bona fide*⁷²⁶ which meant that "the contracting parties were bound to everything which good faith reasonably and equitably demanded".⁷²⁷ However, it denied the existence of a general substantive rule based on equity. According to the court, there was no such remedy in Roman-Dutch law because:

... the Dutch Courts, unlike the English Courts ... did not administer a system of equity as distinct from a system of law. Roman-Dutch law is itself inherently an equitable legal system. In administering the law the Dutch Courts paid due regard to considerations of equity but only where

⁷²³ Hawthorne 2001 *THRHR* 512; Hawthorne 1995 *THRHR* 172. For an overview on the influence of good faith in shaping the existing rules and doctrines of the South African law of contract see Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 552-572; Zimmerman "Good faith and equity" in Zimmerman & Visser (eds) *Southern Cross* (1996) 241-254.

⁷²⁴ See e.g. *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1997 4 All SA 482 (N) 492 referring to *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 465. See again para 1 7 1 *supra* for a general discussion on the nature and development of the South African law under apartheid.

⁷²⁵ Thomas "The changing fortunes of bona fides in the South African law of contract" in Van den Berge *et al* (eds) *Historische wortels van het recht* (2014) 148; Hutchison "Good faith in the South African law of contract" in Brownsword *et al* (eds) *Good faith in contract* (1999) 214; Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 550. Cf the discussion in para 2 2 2 *supra*.

⁷²⁶ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 599, 601.

⁷²⁷ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 601.

equity was not inconsistent with the principles of law. Equity could not override a clear rule of law.⁷²⁸

The court stated that the position is the same under South African law.⁷²⁹ Furthermore, the court denied that there was any evidence that the concept of *bona fides* developed to fulfil the function of the *exceptio doli*:

I cannot find any support in Roman-Dutch law for the proposition that in the law of contract an equitable exception or defence, similar in effect to the *exceptio doli generalis*, was utilised under the aegis of *bona fides*.⁷³⁰

The court based its argument on an historical analysis of the *exceptio doli generalis* in Roman and Roman-Dutch law. In doing this, the court ignored certain aspects of the role of equity in Roman-Dutch law. In the previous chapter, it was shown that the Roman-Dutch law that arrived in South Africa was inherently equitable and flexible, and that although previous decisions had persuasive value they did not have the force of law. This equity was not only of a subsidiary nature but also included a corrective function where adherence to the strict rules of law would result in injustice.⁷³¹

The court also ignored British influences on the role of equity in South African law. These were also discussed in the previous chapter and refer to the Supreme Court's assumed equity jurisdiction which was limited in *Mills and Sons v Trustees of Benjamin Bros* and as further elaborated on in *Estate Thomas v Kerr*.⁷³² Not surprisingly, the court referred to *Estate Thomas v Kerr* in support of its view that equity cannot override a clear rule of law but did not make any reference to the

⁷²⁸ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 606.

⁷²⁹ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 606.

⁷³⁰ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 606. Jansen JA also conceded this in his minority judgment: "In our law the requisite of good faith has not as yet absorbed the principles of the *exceptio doli*" (at 616).

⁷³¹ See para 1 4 2 1 *supra*.

⁷³² See para 1 5 2 3 *supra*.

corrective function of equity.⁷³³ This in effect, negated the role of equity in the South African common law of contract to correct injustices that results from the strict adherence to rules of law. In other words, the court did not consider the role of equity on the existing rules in a comprehensive manner⁷³⁴ and attempted “to keep equity as a principle out of the law of contract”.⁷³⁵

The court’s decision further does not actually deal with the underlying policy considerations.⁷³⁶ The issue of an equitable discretion must be assessed with reference the principles of freedom and sanctity of contract as well as legal certainty.⁷³⁷ As was seen in the previous chapter, the weight given to the public policy considerations of freedom and sanctity of contract and legal certainty resulted in negation of the role of equity during the British colonisation.⁷³⁸ It was also shown that these ideologies found their way into the South African common law of contract and continued to play an important role during the Union of South African and under apartheid.⁷³⁹ Therefore, it is not surprising that this type of approach can be identified in the court’s judgment.⁷⁴⁰ As remarked by Hawthorne:

It is obvious in our case law that freedom of contract has dominated at the expense of social and economic realities. Most judges ignore the discrepancy between the formal requirements of freedom and equality

⁷³³ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 606. See also Zimmerman 1992 *Stell LR* 7; Van der Merwe *et al* 1989 *SALJ* 241.

⁷³⁴ Van der Merwe *et al* 1989 *SALJ* 241. See also Lewis 1991 *SALJ* 263.

⁷³⁵ Hawthorne & Thomas 1989 *De Jure* 150. See also Lewis 2003 *SALJ* 333; Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 573; Lewis 1990 *SALJ* 29.

⁷³⁶ Lewis 2003 *SALJ* 333; Zimmerman 1992 *Stell LR* 9; Lewis 1991 *SALJ* 263; Erasmus 1989 *SALJ* 676, esp n 59; Van der Merwe *et al* 1989 *SALJ* 240.

⁷³⁷ Van der Merwe *et al* 1989 *SALJ* 240. See also Lewis 1990 *SALJ* 29 (esp n 12); Erasmus 1989 *SALJ* 676-677.

⁷³⁸ See paras 1 5 2 3 & 1 5 2 4 *supra*.

⁷³⁹ See the discussions in paras 2 2 3 5 & 2 2 3 6 *supra*.

⁷⁴⁰ Barnard-Naude 2008 *Constitutional Court Review* 178; Lewis 2003 *SALJ* 331-332; Cockrell 1992 *SALJ* 44.

and socio-economic reality, and continue to uphold the assumptions of the nineteenth century.⁷⁴¹

In contrast to this, judge of appeal Jansen in his minority judgment in *Bank of Lisbon and South Africa v De Ornelas* argued that the policy considerations of freedom and sanctity of contract and legal certainty are not absolute values and cited various examples in the common law of contract where these principles give way to other policy considerations based on equity.⁷⁴² He further contended that the weight attached to them would depend on the specific socio-economic context and mentioned that in recent years the principle of freedom and sanctity of contract have become the subject of increasing attack as a result of “rampant inflation, monopolistic practices giving rise to unequal bargaining power and the large-scale use of standard form contracts”.⁷⁴³

Hawthorne and Judge Jansen’s remarks refer to what is described as a modern concept of contract law which involves a paternalistic approach through the interference in private contracts in order to correct injustices resulting from unequal bargaining relationships and the use of standard term contracts.⁷⁴⁴ This more modern approach to the law of contract reflects greater changes in the political, economic and social environment. The industrial age created great discrepancies in economic power that resulted in the exploitation of vulnerable individuals and groups.⁷⁴⁵ In South Africa this was further compounded by

⁷⁴¹ Hawthorne 2001 *THRHR* 513.

⁷⁴² *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 613-615 mentioning the court’s discretion to refuse a right to specific performance and the enforcement of restraints of trade and to reduce contractually agreed penalties as examples.

⁷⁴³ *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) 613. See also Van der Merwe *et al* 1989 *SALJ* 240.

⁷⁴⁴ Hawthorne 2008 *SAPR* 84; Hawthorne 2006 *Fundamina* 81; Bhana & Pieterse 2005 *SALJ* 868; Pretorius 2003 *THRHR* 641-642; Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 575; Hawthorne 1995 *THRHR* 167; Hahlo 1981 *SALJ* 70.

⁷⁴⁵ Hawthorne 2008 *SAPR* 80; Botha 2001 *THRHR* (3) 526-527.

apartheid which created further political, economic and social inequality.⁷⁴⁶ This resulted in the inability of the formal conceptions of equality and the rule of law to prevent the exploitation of a contracting party in a weaker bargaining position.⁷⁴⁷ In other words, reliance on the common law ideals of freedom and sanctity of contract in conjunction with a formalistic and positivistic approach by the courts has the effect of sustaining and promoting these inequalities.⁷⁴⁸ To correct these inequalities, state intervention is required which results in what is generally referred to as a social welfare state⁷⁴⁹ and aims to protect more vulnerable individuals and groups against economic and social exploitation.⁷⁵⁰ Botha describes these changes as follows:

The pressures of democratisation and industrialisation gave rise to more overt state intervention in economic and social life. The shift from a liberal, supposedly non-interventionist state to a welfare state was necessitated both by the economic imperatives of the capitalist system, and by the need to preserve the legitimacy and stability of the liberal democratic state. On the one hand, the state had to intervene in the economy to correct market failures, and thus to ensure the success of the economic system. On the other hand, it became increasingly difficult to reconcile vast economic and social inequality with the liberal idea that society consists of free and equal individuals. The state therefore came under pressure to improve the social position of women, children and the poor through protective measures (eg labour legislation) and welfare entitlements.⁷⁵¹

⁷⁴⁶ Hawthorne 2008 *SAPR* 80. See also the discussion dealing with the apartheid era in para 1 7 *supra*.

⁷⁴⁷ Hawthorne 2012 *THRHR* 348; Botha 2001 *THRHR* (3) 526.

⁷⁴⁸ Hawthorne 2006 *Fundamina* 75-79 as supported by Louw 2013 *PELJ* 58. See also Davis & Klare 2010 *SAJHR* 411.

⁷⁴⁹ Hawthorne 2008 *SAPR* 80 provides the following definition of a welfare state: "any state which is characterised by a high degree of government intervention in social and economic life and the existence of extensive regulatory frameworks and administrative apparatuses designed to further social, economic and political goals" (cf Botha 2001 *THRHR* (3) 526 n 13).

⁷⁵⁰ Hawthorne 2008 *SAPR* 80. See further Hawthorne 2006 *Fundamina* 81; Hahlo 1981 *SALJ* 70.

⁷⁵¹ Botha 2001 *THRHR* (3) 526-527. See also Hawthorne 2008 *SAPL* 83.

This would include not only legislative intervention⁷⁵² but also a more normative approach to judicial adjudication.⁷⁵³ As explained by Bhana and Pieterse:

[A]lthough parties still enjoy freedom of contract, normative considerations play a fairly important part in allowing the state an active role in preventing or curing any harm to the contracting parties themselves or to society in general... Such normative considerations are communitarian in nature. They acknowledge that contract does not operate in isolation, but that it forms part of the greater fabric of society. Society should therefore exercise some control over contract, so as to ensure social justice and equality.⁷⁵⁴

Finally, these normative values should be flexible and open-ended in order to promote social justice and equality:

The generality of legal norms is further eroded by the prevalence of discretionary regulation. Formal rules are often not flexible enough to cope with the complexity of modern societies, and are replaced by open-ended standards, such as “good faith”, “good morals”, “reasonableness” and “public interest”. As a result, judges and officials enjoy a wide discretion in the application and interpretation of legal norms. This results in an increase in the range of facts considered relevant to a decision, and greater scope for individualised and context-specific decision-making”.⁷⁵⁵

Returning to the decision in *Bank of Lisbon and South African v De Ornelas*, it can be argued that the court attempted to limit the use of open norms in the law contract. However, its remarks regarding the concept of *bona fides* left some uncertainty. As stated earlier, the court eliminated the *exceptio doli* and did not transfer its role to *bona fides* but held that all contracts are *bonae fidei*. Thus, it did not give any specific content to the principle of good faith in the common law of contract.⁷⁵⁶ This resulted in uncertainty in respect of the exact role of good faith in

⁷⁵² See the discussion in para 2 3 4 *infra* dealing with the enactment and application of the CPA.

⁷⁵³ Hawthorne 2006 *Fundamina* 80; Hahlo 1981 *SALJ* 70.

⁷⁵⁴ Bhana & Pieterse 2005 *SALJ* 868.

⁷⁵⁵ Botha 2001 *THRHR* (3) 528. See also Bhana & Pieterse 2005 *SALJ* 868.

⁷⁵⁶ Lubbe 1990 *Stell LR* 19; Van der Merwe *et al* 1989 *SALJ* 241.

preventing and correcting contractual unfairness.⁷⁵⁷ Consequently, the following question arose in academic literature:

[W]as good faith a free-floating principle that permitted a court to intervene directly in contractual relations, or did it operate only indirectly, through established common-law rules and doctrines, such as those relating to public policy and the legality of contracts?⁷⁵⁸

As will be seen below, the courts preferred the latter approach which brings the discussion to the rules dealing with the legality of contracts as informed by public policy.

2 2 4 Legality of contracts and public policy

2 2 4 1 Importation of public policy during the British colonisation (1827-1909)

It was shown above how the role of good faith in addressing unfair contract terms was gradually negated until it was reduced to an underlying principle of the common law of contract. At the same time, the English concept of public policy was imported into the common law of contract in terms of which contracts contrary to public policy were illegal, and consequently void. However, unfair contract terms were not considered against public policy because public policy was defined conservatively and with reference to freedom and sanctity of contract as expressed in classical contract law.⁷⁵⁹

⁷⁵⁷ Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 27; Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 545; Cockrell 1992 *SALJ* 55-56; Van der Merwe *et al* 1989 *SALJ* 241-242.

⁷⁵⁸ Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 28. See further Brand & Brodie “Good faith in contract law” Zimmerman *et al* (eds) *Mixed legal systems* (2004) 94; Van der Merwe *et al* 1989 *SALJ* 242.

⁷⁵⁹ Cf the discussion in para 2 2 3 4 *supra*.

2 2 4 2 *Public policy during the Union years (1910-1944)*

This state of affairs continued under the Union years.⁷⁶⁰ Although it was accepted that public policy varied from time to time, a guarded approach was taken. Wessels explains that the tendency of that time was “to restrict rather than to extend the principles by which contracts are avoided on the ground of public policy”.⁷⁶¹ Again, the classical model of contract law can be identified in the standard contract law textbook published during this period:

Freedom to enter into any contract is the policy of our law, and when once a valid contract has been entered into, the parties are bound thereby as by a law. Courts of law must therefore not lightly interfere with freedom to contract and seek to set aside contracts on the ground that they are against public policy.⁷⁶²

2 2 4 3 *Public policy during apartheid (1948-1993)*

This position continued during the apartheid years⁷⁶³ as illustrated by Hahlo’s following statement:

⁷⁶⁰ See e.g. *Van Rensburg v Staughton* 1914 AD 328: “The position for him is no doubt hard; but those who enter into onerous or one-sided agreements have only themselves to thank. A court of law cannot assist them merely because the results are harsh”. See also Hawthorne 2006 *THRHR* 50.

⁷⁶¹ Wessels *Law of contract vol 1* (1937) para 497. See also Wessels *Law of contract vol 1* (1937) para 2002 n 1 (as supplemented by Supplement 1 in Wessels *Law of contract vol 2* (1937) 1563): “The duty of the courts is to expound and not to expand public policy, and the doctrine should be invoked only in clear cases, in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds.”

⁷⁶² Wessels *Law of contract vol 1* (1937) para 1997. In support of this proposition, he quotes *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 465 which is quoted in the text at n 688 *supra*. See further Wessels *Law of contract vol 1* (1937) para 496; *Wells v South African Alumenite Company* 1927 AD 73 (also referring to *Printing and Numerical Registering Company v Sampson*).

⁷⁶³ See e.g. *Wynns Car Care Products v First National Industrial Bank Ltd* 1991 2 SA 754 (A) 760; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 1 SA 298 (A) 436; *Grinaker Construction v Transvaal Provincial Administration* 1982 1 SA 78 (A) 96; *Haviland Estates (Pty) Ltd and another v McMaster* 1969 2 SA 312 (A) 336; *Sleightholme Farms (Pvt) Ltd v National Farmers*

[P]rovided a man is not a minor or a lunatic and his consent is not vitiated by fraud, mistake or duress, his contractual undertakings will be enforced to the letter. If through inexperience, carelessness or weakness of character, he has allowed himself to be overreached, it is just too bad for him, and it can only be hoped that he will learn from his experience. The courts will not release him from the contract or make a better bargain for him. Darwinian survival of the fittest, the law of nature is also the law of the market place.⁷⁶⁴

However, in 1984, the appeal court in *Magna Alloys and Research (SA) v Ellis* reconsidered the role of public policy. It confirmed that agreements that are in conflict with public policy are unenforceable and held that the content of public policy changes over time, that there is no closed list of agreements that are contrary to public policy and that the courts must determine whether an agreement is contrary to public policy or not.⁷⁶⁵ Therefore, it could be argued that the court viewed public policy as an open norm.⁷⁶⁶

After the demise of the *exceptio doli generalis* in *Bank of Lisbon and South Africa v De Ornelas* in 1988, the courts quickly turned to the concept of public policy to address the need for an open norm to address contractual unfairness.⁷⁶⁷ In 1989, the court in *Sasfin v Beukes* held that unfair contracts should be dealt with in accordance with the rules and principles of legality and public policy. In this case, an anaesthetist (Beukes) granted a deed of cession in favour of a finance company (Sasfin) which placed Sasfin in complete control of his earnings. On notice of session to Beukes' debtors Sasfin would be able to recover all of Beukes'

Union Mutual Insurance Society Ltd 1967 1 SA 13 (R) 18. See also the discussion of these cases by Hawthorne in 2006 *THRHR* 50-51.

⁷⁶⁴ Hahlo 1981 *SALJ* 70 as quoted by Barnard-Naude 2008 *Constitutional Court Review* 163 & Hawthorne 2006 *THRHR* 49.

⁷⁶⁵ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891-893. See also Lubbe 2004 *SALJ* 400

⁷⁶⁶ Lubbe 2004 *SALJ* 400. See also Thomas "Legality" in Hutchison & Pretorius (eds) *Contract* (2012) 177.

⁷⁶⁷ Hawthorne 2014 *PELJ* 2822; Hawthorne 2013 *Fundamina* 303; Brand 2009 *SALJ* 75.

book debts and retain all amounts recovered, whether or not he owed any money to Sasfin. Beukes was incapable of ending this situation.⁷⁶⁸

The court held that where a contract is contrary to public policy it should not be enforced.⁷⁶⁹ The court also accepted that public policy is a vague and contentious concept and difficult to determine (in other words an open norm), but argued that the interest of the community is of utmost importance to determine public policy:

Agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.⁷⁷⁰

Therefore, a court must not hesitate to declare a contract contrary to public policy when necessary.⁷⁷¹ However, such power should be exercised with restraint:

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.⁷⁷²

The court stressed that public policy generally favours freedom and sanctity of contract.⁷⁷³ However, the court should also take account of "the doing of simple

⁷⁶⁸ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7, 13-14.

⁷⁶⁹ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7 referring to *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891.

⁷⁷⁰ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 7-8.

⁷⁷¹ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9.

⁷⁷² *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9.

⁷⁷³ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9. In this respect, the court referred to *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 462 (as quoted at n 688 *supra*).

justice between man and man”.⁷⁷⁴ In balancing these policy considerations, the court concluded that the provisions of the contract were so unfair and unreasonable towards Beukes that the deed of cession was contrary to public policy and therefore unenforceable.⁷⁷⁵ The court was of the view that the contract relegated Beukes to the position of a slave:

As a result Beukes could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of Sasfin (or, for that matter, any of the other creditors). What is more, this situation could ... have continued indefinitely at the pleasure of Sasfin (or the other creditors). Beukes was powerless to bring it to an end...⁷⁷⁶

Therefore, the court preferred that unfair contracts should be dealt with in accordance with the rules and principles of public policy and legality.⁷⁷⁷ Although the judgment reiterated the importance of freedom and sanctity of contract, it accepted that these principles were not absolute and could be tempered by other policy considerations. Thus, Lubbe argued that finding a fair solution involves a balancing act between competing values.⁷⁷⁸ For Lubbe, such a balancing act needs to take place not only with reference to the interests of society (i.e. the importance of freedom and sanctity of contract and legal certainty in general) but also with reference to the specific interests of the contracting parties (i.e. “simple justice between man and man”).⁷⁷⁹ In this respect, the court confined itself to the specific interests of the parties as reflected in the contract terms themselves.

⁷⁷⁴ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9 referring to *Jajbhay v Cassim* 1939 AD 544 where it is stated “public policy should properly take into account the doing of simple justice between man and man”.

⁷⁷⁵ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 18-19.

⁷⁷⁶ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 13.

⁷⁷⁷ Hawthorne 2013 *Fundamina* 303; Brand & Brodie “Good faith in contract law” Zimmerman *et al* (eds) *Mixed legal systems* (2004) 96; Hutchison “Good faith in the South African law of contract” in Brownsword *et al* (eds) *Good faith in contract* (1999) 225.

⁷⁷⁸ Lubbe 1990 *Stell LR* 13. See also Lewis 2003 *SALJ* 334.

⁷⁷⁹ Lubbe 1990 *Stell LR* 17. See also Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 184; Lewis 2003 *SALJ* 334.

Furthermore, it is submitted that the balancing act will always be between policy considerations that support the enforcement of the contract on the one hand and policy considerations that support the non-enforcement of the contract on the other.

Although the court did not refer to the principle of good faith, Lubbe argued for the use of good faith when dealing with public policy rather than the concept of “simple justice between man and man”.⁷⁸⁰ He criticised the concept of “simple justice between man and man” as being vague and open to abuse because it could hide the fact that a judge exercised an equitable discretion (presumably in accordance with her own individual sense of fairness).⁷⁸¹ He argued that the principle of good faith would be a better counterweight against the principles of freedom and sanctity of contract.⁷⁸² He argued that where a contractual term constitutes an unreasonable and one-sided promotion of one party’s own interests at the expense of the other party it may be contrary to the principles of good faith and consequently also against public policy.⁷⁸³ In other words, Lubbe was arguing that the principle of good faith should find expression in the concept of public policy. However, Lubbe’s argument is somewhat circular as all open norms (including good faith) must be given content by the courts, but it illustrates that these open norms, namely “simple justice between man and man”, “public policy”, “good faith” and as will be seen later “ubuntu”⁷⁸⁴ require some standard of fairness between contracting parties.

Lubbe’s approach was followed by appeal judge Olivier in his minority judgment in *Eerste Nasionale Bank van Suidelike Afrika v Saayman*.⁷⁸⁵ This case concerned

⁷⁸⁰ Lubbe 1990 *Stell LR* 17ff.

⁷⁸¹ Lubbe 1990 *Stell LR* 17-18.

⁷⁸² Lubbe 1990 *Stell LR* 20.

⁷⁸³ Lubbe 1990 *Stell LR* 20-21. Referred to with approval by Hutchison “Good faith in the South African law of contract” in Brownsword *et al* (eds) *Good faith in contract* (1999) 225; Zimmerman “Good faith and equity” in Zimmerman & Visser (eds) *Southern Cross* (1996) 259-260.

⁷⁸⁴ See the discussion in para 2 3 3 *infra*.

⁷⁸⁵ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA).

an old, frail and ill woman who signed a suretyship in favour of the bank to secure her son's obligations to the bank. The majority held that the suretyship was unenforceable because the woman lacked contractual capacity.⁷⁸⁶ Appeal judge Olivier came to the same conclusion but based his decision on the principle of good faith.⁷⁸⁷ He reiterated that all contracts in South African law are *bonae fidei* and therefore governed by good faith.⁷⁸⁸ He held that there is an undeniable link between good faith, public interest and public policy and that good faith is based on the convictions of the community about what is fair and must be applied because public interest so requires.⁷⁸⁹ He further argued that the decision in *Bank of Lisbon and South Africa v De Ornelas* did not limit the role of good faith in the common law of contract.⁷⁹⁰ Therefore, the court may apply the principles of public interest which includes the principle of good faith but conceded that this must be done wisely and carefully to prevent legal uncertainty and the arbitrary use of power based on the judge's individual sense of fairness.⁷⁹¹ He further held that public interest does not demand that a party should be held bound to an otherwise enforceable contract where such a contract does not meet the requirements of good faith.⁷⁹²

Soon after this judgment, Olivier's approach was followed by the Cape division in *Miller v Dannecker*.⁷⁹³ Later that same year, the Supreme Court of Appeal also referred to the minority judgment of Olivier with apparent approval.⁷⁹⁴

⁷⁸⁶ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 318.

⁷⁸⁷ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 318.

⁷⁸⁸ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 321.

⁷⁸⁹ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 321-322, 326.

⁷⁹⁰ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 323.

⁷⁹¹ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 324 referring to *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9 (quoted at n 772 *supra*).

⁷⁹² *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 331. See also the discussion by Hutchison "Good faith in the South African law of contract" in Brownsword *et al* (eds) *Good faith in contract* (1999) 225-226.

⁷⁹³ *Miller and another NNO v Dannecker* 2001 1 SA 928 (C) para 19. See also the discussions by Louw 2013 *PELJ* 54; Brand 2009 *SALJ* 80-81; Brand & Brodie "Good faith in contract law"

2 2 5 Concluding remarks

From the above discussions it emerges that the *exceptio doli generalis*, good faith and public policy are all open norms which have been used to incorporate fairness into the South African common law of contract in order to address unfair contract terms not covered by the existing rules. Whenever the courts tried to close the existing open norms by striking down or limiting a rule that incorporated such norms, another rule was identified and used to ameliorate unfairness.

As was seen in the previous chapter, the Constitution requires a more open-ended and normative approach to the interpretation and development of the existing law.⁷⁹⁵ Consequently, it was only a matter of time before the Constitution would positively influence the use of open norms in the common law of contract which is investigated in following next section.

2 3 FAIRNESS IN THE COMMON LAW OF CONTRACT AFTER THE CONSTITUTION

2 3 1 Introduction

This section is dedicated to establish the influence of the Constitution on the role of fairness in the common law of contract to the extent necessary to address the research problem. It comprises three sections, namely (1) the influence of the Constitution on the common law of contract, (2) the influence of ubuntu, as an underlying constitutional value, on the common law of contract, and (3) the introduction of the CPA as a statute that aims to promote constitutional values in the common law of contract.

Zimmerman *et al* (eds) *Mixed legal systems* (2004) 104-105; Lewis 2003 *SALJ* 336; Hawthorne 2003 *SA Merc LJ* 273.

⁷⁹⁴ *NBS Boland Bank Ltd 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) para 28 (*obiter*).

⁷⁹⁵ See the discussion in para 1 8 2 3 *supra*.

2 3 2 Influence of the Constitution on the common law of contract

2 3 2 1 Cape Provincial Division decisions

The first case in the common law of contract that referred to the Constitution was *Janse van Rensburg v Grieve Trust* in which the court had to decide whether the *actio quanti minoris* was available in a trade-in agreement where the trade-in vehicle had a latent defect or where an innocently but incorrect *dictum et promissum* was made in respect of the trade-in vehicle.⁷⁹⁶

In this case, the appellant (Janse van Rensburg) purchased a used motor vehicle from the respondent (Grieve Trust) and part of the payment was to be made by the trade-in of the appellant's interest in another vehicle (valued as the difference between the trade-in value and the amount still owed on the vehicle). The appellant was under the *bona fide* mistaken belief that the trade-in vehicle was a 1993 model, but actually it was a 1989 model. If the respondent had known that the vehicle was a 1989 model the trade-in value of the vehicle would have been less than that agreed and the respondent claimed a reduction of the purchase price for the trade-in vehicle being the difference between the two trade-in values.⁷⁹⁷

Judge van Zyl extended the application of the *actio quanti minoris* to trade-in agreements because such an extension is "required by the principles of justice, equity, reasonableness and good faith inherent in our common law" and because public policy "demands that the relevant law be extended and adapted to meet the needs of modern commercial practice".⁷⁹⁸ He argued that it would be inequitable that the seller would be liable for latent defects and misrepresentations relating to the vehicle while the purchaser would have no such liability in respect of the trade-in vehicle.⁷⁹⁹ In this respect, the judge followed Olivier's approach in his minority

⁷⁹⁶ *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C) 316-317.

⁷⁹⁷ *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C) 316-317.

⁷⁹⁸ *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C) 325.

⁷⁹⁹ *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C) 325.

judgment in *Eerste Nasionale Bank van Suidelike Afrika v Saayman*⁸⁰⁰ and maintained that this approach was in line with the values in the Constitution, with specific reference to the right of equality.⁸⁰¹ In justifying the development of the common law in line with the values of the Constitution, he referred to sections 8(3)(a),⁸⁰² 39(2)⁸⁰³ and 173⁸⁰⁴ of the Constitution.⁸⁰⁵

This was the first case in which the court acknowledged the constitutional mandate to develop the common law in line with the values of the Constitution.⁸⁰⁶ It would seem that the court envisaged both direct and indirect horizontal application of the Bill of Rights to matters of fairness in the common law of contract because it referred to section 8 (covering direct horizontal application) and sections 39(2) and 173 (dealing with indirect horizontal application). However, as will be seen below, the Constitutional Court later held that indirect application of the Bill of Rights to the common law is the most appropriate method when dealing with fairness in the common law of contract.⁸⁰⁷ Nonetheless, direct horizontal application of the Bill of Rights to common law of contract matters remains a

⁸⁰⁰ *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C) 325. Cf the discussion in the text at n 787 *supra*.

⁸⁰¹ S 9(1) of the Constitution: "Everyone is equal before the law and has the right to equal protection and benefit of the law".

⁸⁰² S 8(3)(a) states that when a provision of the Bill of Rights is applied to a private person, a court, in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop the common law to the extent that legislation does not give effect to that right. S 8(2) provides that the Bill of Rights binds a natural or juristic person 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). See further Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 35-36.

⁸⁰³ S 39(2) states that when "developing the common law" the court "must promote the spirit, purport and objects of the Bill of Rights". See again the discussion in para 1 8 3 2 *supra*.

⁸⁰⁴ S 173 provides the higher courts with the inherent power "to develop the common law, taking into account the interests of justice". See again the discussion in para 1 8 3 2 *supra*.

⁸⁰⁵ *Janse van Rensburg v Grieve Trust* CC 2000 1 SA 315 (C) 326.

⁸⁰⁶ Hawthorne 2001 *THRHR* 516.

⁸⁰⁷ See the discussion of *Barkhuizen v Napier* 2007 5 SA 323 (CC) in para 2 3 2 3 *infra*.

contentious issue.⁸⁰⁸ However, the court did recognise the creative role of good faith to adapt and extend existing rules and principles if so required by public policy, which concept the court linked the right of equality. Hawthorne argued that this meant that the court “actively recognised equity as a principle of the South African law of contract” in contrast to the view that equity is only considered in so far it does not conflict with the existing rules of law.⁸⁰⁹

Thereafter followed *Mort v Henry Shields-Chiat* dealing with a mandate agreement.⁸¹⁰ The question regarding the validity of the mandate on the basis of good faith was not raised properly by the parties and there was not sufficient evidence to invoke the principle of good faith, but the court dealt with this issue in an *obiter* comment.⁸¹¹ Judge Davis stated that the concept of good faith is shaped by the legal convictions of the community with reference to the constitutional values of dignity, equality and freedom.⁸¹² The principle of freedom supports the idea of freedom and sanctity of contract but the principles of equality and dignity support the idea that contracting parties “must adhere to a minimum threshold of mutual respect in which ‘the unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a

⁸⁰⁸ See e.g. Du Bois 2015 *Acta Juridica* 284-299; Davis 2011 *Stell LR* 855; Rautenbach 2009 *TSAR* 613-637; Bhana 2008 *SAJHR* 308-311. Discussions of the issues surrounding direct horizontal application of the Bill of Rights to private persons can also be found in Woolman “Application” in Woolman & Bishop (eds) *Constitutional law* (2014) ch 31; Liebenberg 2008 *TSAR* 465-466.

⁸⁰⁹ Hawthorne 2001 *THRHR* 513. See also Hawthorne 2003 *SA Merc LJ* 273.

⁸¹⁰ The facts of the case were as follows: A minor was physically and mentally impaired due to a motor vehicle accident. His father entered into a mandate agreement with the respondent (a law firm) to claim damages on behalf of the minor against the Road Accident Fund (RAF). After the claim was settled, the RAF paid the settled amount into the respondents’ trust account and the respondent deducted a large amount as fees and costs (*Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 465-466). The court accepted that the mandate made provision for the deduction of the fees by the attorneys (*Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 473).

⁸¹¹ *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 474-476.

⁸¹² *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 474-475.

degree as to outweigh the public interest in the sanctity of contracts”⁸¹³. Therefore, the court must develop the common law of contract in line with the Constitution:

In short, the constitutional State which was introduced in 1994 mandates that all law should be congruent with the fundamental values of the Constitution. Oppressive, unreasonable or unconscionable contracts can fall foul of the values of the Constitution.⁸¹⁴

The final Cape Provincial Division case which requires attention is *Coetzee v Comitis*.⁸¹⁵ In this case, the court considered the constitutionality of the National Soccer League’s (NSL’s) rules which provided that a player wishing to play professional football (1) had to register with the NSL; (2) had to obtain a clearance certificate from his current club before he could be registered by the NSL as a player at a new club; (3) remained a registered player of his last club for 30 months after the expiry of his contract during which period his former club is entitled to compensation if the player concludes a contract with a new club; (4) in the event that the two clubs cannot agree on the amount of compensation, the amount is to be calculated by an arbitrator in terms of a pre-set formula; and (5) until the amount was set and paid, the player was unable to register with his new club.⁸¹⁶

Judge Traverso held that as a player is prevented from joining a new club until any compensation dispute between the two clubs is resolved, the situation is similar to that of a restraint of trade under a normal commercial employment contract.⁸¹⁷ He stated that if the court determined that the NSL rules are contrary to public policy,

⁸¹³ *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 475. Cf the views of Lubbe discussed in the text at n 783 *supra*.

⁸¹⁴ *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 475 referring to *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C) 325-326. See further the discussions by Hawthorne 2006 *Fundamina* 78-79; Hawthorne 2003 *SA Merc LJ* 274; Du Plessis 2002 *THRHR* 411; Du Plessis 2002 *De Jure* 385-390.

⁸¹⁵ *Coetzee v Comitis and others* 2001 1 SA 1254 (C).

⁸¹⁶ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 15.

⁸¹⁷ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 29.

then the contract between the player and his former club which incorporate these rules is contrary to public policy and the “restraint of trade” should not be enforced.⁸¹⁸

Dealing with public policy, the court confirmed that considerations of public policy change with time and that in the new democracy where the Constitution is the supreme law “public policy should be considered against the background of the Constitution and the Bill of Rights”.⁸¹⁹ Considering the effect of the NSL rules on the player’s dignity enshrined in section 10, the court held as follows:

[A] player, in terms of the NSL rules, is helpless. He can give no input in respect of the transfer fee, and, if all else fails, he is at the mercy of an arbitrator who determines the compensation payable according to a formula for which there is no rational basis. The player would then be treated just like an object. His figures will be fed into the formula and an amount will pop up! Not very different from the manner in which the book value of a motor vehicle is determined! It is abundantly clear that the transfer fee thus determined bears no relation to any amount expended by the club in training the player. In my view, this procedure strips the player of his human dignity as enshrined in the Constitution.⁸²⁰

Consequently, the court determined that the compensation regime in terms of the NSL rules constituted an unreasonable restraint of trade, was inconsistent with the provisions of the Constitution, and therefore, invalid.⁸²¹ The court’s decision meant that contract terms that infringed a person’s human dignity would be considered contrary to public policy, and hence, invalid and unenforceable.⁸²²

⁸¹⁸ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 32.

⁸¹⁹ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 31.

⁸²⁰ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 34.

⁸²¹ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 41.

⁸²² See also the discussion of this case by Woolman “Dignity” in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.4(f); Botha 2009 *Stell LR* 202; Lubbe 2004 *SALJ* 422.

2 3 2 2 Supreme Court of Appeal decisions

The issue dealing with the Constitution's effect on the common law rules governing unfair contracts finally arrived in the Supreme Court of Appeal in the case of *Brisley v Drotzky* dealing with the enforceability of a non-variation clause.⁸²³ The court struck a damaging blow to the principle of good faith when it held that good faith was an abstract value underlying the substantive common law of contract and not an independent substantive rule that can be used to strike down a contract that would otherwise be enforceable.⁸²⁴ If this would be allowed, the court argued, it would mean that whether a contract would be enforceable or not would depend on what a particular judge viewed as fair and just.⁸²⁵ Therefore, the case would not be decided by the law, but by the judge.⁸²⁶ The court held that granting a judge such a discretion would ignore the principle of *pacta sunt*

⁸²³ A lease agreement was concluded between the appellant (the lessee) and the respondent (the lessor). In terms of the agreement, the rent was payable in advance on the first of each month failing which the lessor was entitled to cancel the lease immediately. The agreement also contained a non-variation clause (i.e. a term stating the no alteration, variation or cancellation of any terms of the lease would be of any force unless in writing and signed by the parties). When the lessee failed to pay the rent timeously the first month, the lessor cancelled the lease and gave the lessee two weeks to vacate the leased property. An eviction order was granted which the lessee appealed. According to the lessee, there was a later oral agreement between herself and the lessor that entitled her to pay the rent as it would suit her for the first six months of the lease. Consequently, she argued that enforcing the non-variation clause would be unreasonable, unfair and contrary to the principle of good faith (*Brisley v Drotzky* 2002 4 SA 1 (SCA) paras 1-5, 11).

⁸²⁴ *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 22 referring to Hutchison 2001 SALJ 743-744. The court (at paras 11-27) expressly rejected Olivier's approach in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) (cf the discussion in the text at n 786 *supra*), as well of the views of the courts in *Miller and another NNO v Dannecker* 2001 1 SA 928 (C) (cf the discussion in the text at n 793 *supra*), *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C) (cf the discussion in the text at n 814 *supra*) and *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) (cf the discussion in the text at n 810 *supra*).

⁸²⁵ *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 24.

⁸²⁶ *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 24.

servanda and lead to commercial uncertainty.⁸²⁷ The court stressed the fact that “public policy generally favours the utmost freedom of contract”.⁸²⁸

Although the court accepted that the Constitution requires that the law should be developed in line with constitutional values, it held that the court cannot shelter in the shadow of the Constitution to attack the underlying principles of the common law of contract.⁸²⁹ It also argued that a “free judicial discretion” is not one of the values of the Constitution.⁸³⁰ Finally, it held that the principles set out in *Sasfin v Beukes* cannot be used to prevent the enforcement of contractual terms that are not in themselves contrary to public policy.⁸³¹ It stated that even if the principles in *Sasfin v Beukes* could be extended to the enforcement of terms based on unfairness, it should only be applied in exceptional cases.⁸³²

The court’s decision meant that good faith was not recognised as an open norm because, the court argued, it would result in too much legal uncertainty.⁸³³ However, as pointed out by Barnard-Naudé and Hawthorne, the court had no reservation to rely on public policy to deal with contractual unfairness which is also an open-ended concept.⁸³⁴ Furthermore, the court’s decision was met with criticism because it favoured freedom and sanctity of contract and legal certainty over principles of equity⁸³⁵ and followed a positivistic and formalistic approach to

⁸²⁷ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 24.

⁸²⁸ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 31 quoting *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9 (cf the discussion in the text at n 768 *supra*).

⁸²⁹ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 24.

⁸³⁰ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 24.

⁸³¹ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 31.

⁸³² *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 31.

⁸³³ Lubbe 2004 *SALJ* 397. See also Bhana & Pieterse 2005 *SALJ* 873.

⁸³⁴ Barnard-Naude 2008 *Constitutional Court Review* 195; Barnard 2006 *Law and Critique* 155; Hawthorne 2003 *SA Merc LJ* 277.

⁸³⁵ Barnard 2006 *Law and Critique* 155; Hawthorne 2003 *SA Merc LJ* 276; Pretorius 2003 *THRHR* 644.

law.⁸³⁶ Hawthorne also argued that the court's approach ignored the new constitutional model informed by the ideas of transformative constitutionalism.⁸³⁷

Soon thereafter, the enforceability of an exemption clause that excluded a private hospital's liability for the negligent conduct of its nursing staff was considered in *Afrox Healthcare v Strydom*. With reference to *Sasfin v Beukes* the court accepted that a contract term which is so unfair as to be against public policy would be unenforceable but cautioned that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases to prevent the decision being based on the judge's own subjective perception of fairness.⁸³⁸

The court confirmed that public policy is now rooted in the Constitution and its founding values, namely dignity, equality and freedom.⁸³⁹ According to the court, these values require the courts to show restraint when striking down contracts because contractual autonomy is part of the constitutional value of freedom and also informs the constitutional value of dignity.⁸⁴⁰ The court also made the following interesting statement:

The *constitutional value* of contractual freedom includes, in turn, again the principle which finds expression in the maxim *pacta sunt servanda*.⁸⁴¹

⁸³⁶ Hawthorne 2006 *Fundamina* 77-78; Lubbe 2004 *SALJ* 397-398, 407-409; Pretorius 2003 *THRHR* 644-645; Hawthorne 2003 *Merc LJ* 276. However, Lewis 2003 *SALJ* 337 argues that the court's reference to constitutional values indicate a departure from the blind positivism characteristic of previous decisions.

⁸³⁷ Hawthorne 2003 *SA Merc LJ* 276-277. See also Barnard 2006 *Law and Critique* 155-156. Cf para 1 8 2 3 *supra* dealing with transformative constitutionalism.

⁸³⁸ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 8.

⁸³⁹ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 18.

⁸⁴⁰ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 22 quoting the minority judgment of appeal judge Cameron in *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 94.

⁸⁴¹ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 23 (my emphasis). Translated from the Afrikaans which reads as follows: Die grondwetlike waarde van kontrakteersvryheid omvat, op sy beurt, weer die beginsel wat in die stelreël *pacta sunt servanda* uitdrukking vind".

It is submitted that the Supreme Court of Appeal elevated contractual freedom as well as sanctity of contract to constitutional values without motivation and justification.

Furthermore, although the court recognised that the unequal bargaining position of the parties is a relevant factor in deciding whether a contract term is contrary to public policy, it argued that its presence alone will not result in the contract term being contrary to public policy.⁸⁴² Hence, the court held that the exemption clause was not against public policy.⁸⁴³ In respect of the respondent's alternative argument based on good faith, the court confirmed the position set out in *Brisley v Drotsky* that good faith is an abstract value underlying the substantive common law of contract and not an independent substantive rule that can be used to strike down a contract that would otherwise be enforceable.⁸⁴⁴

The approach of the Supreme Court of Appeal in *Afrox Healthcare v Strydom* is similar to its approach in *Brisley v Drotsky*.⁸⁴⁵ The court emphasised the importance of freedom and sanctity of contract and legal certainty as informed by the ideas of individualism, capitalism, legal positivism and legal formalism.⁸⁴⁶ Although the court accepted that public policy is now rooted in the Constitution, it did not use the Constitution to inform the concept of public policy but rather used the existing ideas of public policy to inform constitutional values. This can be deduced from the court's remarks that contractual autonomy is part of the constitutional value of freedom and also informs the constitutional value of human dignity. More strikingly, the court expressly elevated freedom of contract into a

⁸⁴² *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12.

⁸⁴³ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 24.

⁸⁴⁴ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 32. See also *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) paras 26-31.

⁸⁴⁵ Pretorius 2003 *THRHR* 644.

⁸⁴⁶ Lewis 2013 *THRHR* 82; Botha 2009 *Stell LR* 212; Barnard-Naude 2008 *Constitutional Court Review* 185; Hawthorne 2006 *Fundamina* 79-80; Bhana & Pieterse 2005 *SALJ* 865; Pretorius 2003 *THRHR* 644.

constitutional value.⁸⁴⁷ This approach enabled the court to grant constitutional endorsement to the classical liberal conception of contractual autonomy.⁸⁴⁸ Accordingly, the court's approach is more in line with the conservative legal culture that existed prior to the enactment of the Constitution and does not follow an approach in line with the ideas of transformative constitutionalism. As lamented by Hawthorne:

Despite rhetorical support for good faith, fairness and reasonableness, however, the post-constitutional pattern in our case law remains a succession of victories for the free marketeers. It would appear that the heritage of positivism and formalism has effectively jeopardised development of the law of contract by means of constitutional interpretation.⁸⁴⁹

The court's expression of the value of human dignity as being informed by contractual autonomy (and as an expression of the constitutional value of freedom) is a conception of human dignity that is informed by the classical law of contract as based on freedom and sanctity of contract.⁸⁵⁰ Furthermore, it is a departure from the conception of human dignity expressed in *Mort v Henry Shields-Chiat*. In that case, the court held that the principles of equality and dignity support the idea that contracting parties "must adhere to a minimum threshold of mutual respect in which 'the unreasonable and one-sided promotion of one's own

⁸⁴⁷ Van Huyssteen *et al Contract* (2016) para 9.275; Bhana & Pieterse 2005 *SALJ* 877-878; Lubbe 2004 *SALJ* 415. See also Liebenberg 2008 *TSAR* 476.

⁸⁴⁸ Davis & Klare 2010 *SAJHR* 473-474; Botha 2009 *Stell LR* 212; Davis 2008 *SAJHR* 325; Bhana & Pieterse 2005 *SALJ* 882. See again the description of the classical model of contract law in para 2 2 3 4 *supra*.

⁸⁴⁹ Remarks by Hawthorne 2006 *Fundamina* 84 in response to the decisions of *Brisley v Drotsky* 2002 4 SA 1 (SCA) and *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA). See also Bhana & Pieterse 2005 *SALJ* 865 where they remarked that these two decisions "indicated a reversion of contract law to its classical libertarian roots and a concomitant hostility, not only to constitutional values, but also to broader concerns of equity and fairness that had previously been allowed to infiltrate the application of its rules". See further Liebenberg 2008 *TSAR* 475 who argues that the court's approach is excessively formalistic and based on a literal interpretation of the rights contained in the Constitution.

⁸⁵⁰ Lubbe 2004 *SALJ* 421.

interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts”⁸⁵¹.

Accordingly, the court’s approach is a giant step backwards from the principles laid down in *Sasfin v Beukes*.⁸⁵² In *Sasfin v Beukes* the court accepted that the principles of freedom and sanctity of contract were not absolute and that public policy required that a balance should be found between freedom and sanctity of contract on the one hand and fairness or equity on the other.⁸⁵³ The court’s approach in *Afrox Healthcare v Strydom* leaves little possibility for such a balancing act because contractual autonomy is now enshrined as a constitutional value itself and informs the constitutional value of human dignity.⁸⁵⁴ Furthermore, the constitutional value of equality cannot on its own justify a conclusion that a contract term is unfair. Finally, any consideration of fairness is not allowed as it would defeat the rule of law because it would result in arbitrary decisions that would lead to legal and commercial uncertainty. Therefore, the classical model of contract law pervades and tempers all these constitutional values and consequently the transformative aims of the Constitution are subverted. As remarked by Klare and Davis:

These judgments share a reluctance to interrogate common law verities in light of Bill of Rights values, a minimalist attitude toward social transformation, a surprising readiness to place a neo-liberal gloss on the Constitution, and an uncritical acceptance of traditional legal methodology.⁸⁵⁵

As it became clear that the Supreme Court of Appeal was taking a conservative stance in respect of fairness in contracts and the constitutional development of the

⁸⁵¹ *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 475 (also quoted in the text at n 813 *supra*).

⁸⁵² Davis & Klare 2010 *SAJHR* 481.

⁸⁵³ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9 as discussed in para 2 2 4 3 *supra*.

⁸⁵⁴ Botha 2009 *Stell LR* 212.

⁸⁵⁵ Davis & Klare 2010 *SAJHR* 468. See also Botha 2009 *Stell LR* 212.

common law of contract, the question arose as to whether the Constitutional Court would follow a similar approach.⁸⁵⁶

2 3 2 3 *The Constitutional Court enters the battlefield*

This issue arrived in the Constitutional Court in the case of *Barkhuizen v Napier*.⁸⁵⁷ The case involved the enforcement of a time-limitation clause in a short-term insurance contract which stated that the insurer would be released from liability unless the insured instituted legal proceedings within 90 days after the insurer rejected a claim.⁸⁵⁸ The insured attacked the clause on two grounds. First, that the clause was unconstitutional because it constituted an unreasonable and unjustified limitation of the insured's right to judicial redress in terms of section 34 of the Constitution. Secondly, that the clause was contrary to public policy.⁸⁵⁹

The court was not convinced that the constitutionality of a contractual term should be tested directly against a provision in the Bill of Rights and argued that indirect horizontal application of the Constitution would be better suited to the task.⁸⁶⁰ It held that constitutional challenges to contractual terms must be determined by testing the terms against public policy which it defined as "the legal convictions of the community" and "those values that are held most dear by the society".⁸⁶¹ The court stated that public policy must now be determined with reference to the Constitution and its founding values (namely freedom, dignity, equality and the

⁸⁵⁶ Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 30.

⁸⁵⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC).

⁸⁵⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 3-5.

⁸⁵⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 19-20.

⁸⁶⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 23-30. See also Bradfield *Christie's law of contract* (2016) 406; Currie & De Waal *Bill of rights handbook* (2014) 61-62; Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 37; Floyd "Legality" in Hutchison & Pretorius (eds) *Contract* (2012) 178.

⁸⁶¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28. See also Currie & De Waal *Bill of rights handbook* (2014) 61-62; Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 30.

rule of law) and that a contract term that is contrary to such values is contrary to public policy and therefore unenforceable.⁸⁶²

The court maintained that such an approach would allow “the doctrine of *pacta sunt servanda* to operate” but also give a court the necessary power to refuse the enforcement of a contract term which conflicts with constitutional values despite the fact that the parties agreed to the inclusion of the term.⁸⁶³ Consequently, the court held that public policy recognises the need to do simple justice between man and man⁸⁶⁴ and implicates notions of fairness, justice, equity and reasonableness.⁸⁶⁵ Specifically, the court referred to the appeal court’s test laid down in *Sasfin v Beukes*⁸⁶⁶ which entails a balancing act between the policy considerations of freedom and sanctity of contract on the one hand and simple justice between individuals on the other.⁸⁶⁷ As submitted previously, the balancing act will always be between policy considerations that support the enforcement of the contract on the one hand and policy considerations that support the non-enforcement of the contract on the other.⁸⁶⁸ Accordingly, the Constitutional Court accepted that freedom and sanctity of contract are important policy considerations and should not be interfered with lightly, but also recognised the need to do simple justice between the contracting parties.⁸⁶⁹ In this respect, the Constitutional Court referred with approval to the Supreme Court of Appeal’s statement that “the Constitution requires us to employ its values to achieve a balance that strikes

⁸⁶² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 29. See also Van Huyssteen *et al Contract* (2016) para 1.55; Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 178.

⁸⁶³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 30.

⁸⁶⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 51 & 70.

⁸⁶⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 51 & 73. See also Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 30; Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 185.

⁸⁶⁶ Cf the discussion of *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) in the text at n 769 *supra*.

⁸⁶⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 50 n 33 referring to *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9.

⁸⁶⁸ Cf the discussion in the text at n 779 *supra*. See also Naudé “Section 48” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 34.

⁸⁶⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 70.

down the unacceptable excesses of ‘freedom of contract’, while seeking to permit individuals the dignity and autonomy of regulating their own lives”.⁸⁷⁰ However, the Constitutional Court expressly rejected the Supreme Court of Appeal’s contention that the fact that a contract term is unfair or might operate harshly cannot lead to the conclusion that the term is contrary to constitutional values and principles.⁸⁷¹

The court stated that when determining fairness, two questions should be asked:

The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevented compliance with the time-limitation clause.⁸⁷²

As seen above, the first part of the test for fairness asks whether the clause itself is reasonable or not.⁸⁷³ This step requires a balancing act between the policy considerations of freedom and sanctity of contract which gives effect to the constitutional values of freedom and human dignity on the one hand, and another policy consideration as reflected in a constitutional right or value (*in casu* the right to access to justice)⁸⁷⁴ in support of the non-enforcement of the contract on the other.⁸⁷⁵ This balancing act between the different policy considerations as

⁸⁷⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 70 referring to *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 13.

⁸⁷¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 72. See also Van Huyssteen *et al Contract* (2016) para 7.24; Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 30-31.

⁸⁷² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 56. See also Bradfield *Christie’s law of contract* (2016) 19; Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 31.

⁸⁷³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57.

⁸⁷⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 33 where the court stated that the right to judicial redress protected in s 34 of the Constitution “not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy”. See also Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 186.

⁸⁷⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57. See also Bhana & Meerkotter 2015 *SALJ* 507; Hawthorne 2014 *THRHR* 351 n 34; Hutchison “The nature and basis of contract” in

expressions of constitutional rights and values is objective in nature as it deals with these values on an abstract level as reflected in the terms of the contract itself.⁸⁷⁶ In considering sanctity of contract the court reiterated that contracts freely and voluntarily entered into must generally be enforced. This is, the court reasoned, because the ability to regulate your own affairs – even to your own detriment – comprises the constitutional values of freedom and dignity.⁸⁷⁷ The court then stated that if the objective terms do not violate public policy,⁸⁷⁸ the further question that arises is “whether the terms are contrary to public policy in the light of the relative situation of the contracting parties”.⁸⁷⁹ The latter determination is subjective in nature.⁸⁸⁰ Specifically, the court held that an unequal bargaining relationship is a relevant factor in determining whether a contractual term is contrary to public policy because South Africa comprises such an unequal society.⁸⁸¹

Hutchison & Pretorius (eds) *Contract* (2012) 31; Hawthorne 2010 *De Jure* 398; Brand 2009 *SALJ* 84-85; Barnard-Naude 2008 *Constitutional Court Review* 198; Bhana 2008 *SAJHR* 314.

⁸⁷⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59 where the court refers to the “objective terms” of the contract. See also Hawthorne 2010 *De Jure* 398; Botha 2009 *Stell LR* 212.

⁸⁷⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57. See also Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 178-179.

⁸⁷⁸ As pointed out by Hawthorne 2010 *De Jure* 398-399 most clauses dealing with exclusion of liability, time limitations and enforcement of unilateral rights will probably be considered objectively fair.

⁸⁷⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59. There is some uncertainty whether this specific question forms part of the first or the second part of the test for fairness. Sutherland 2009 *Stell LR* 55 argues that it forms part of the first part of the test for fairness. This view seems to be supported by Wallis 2016 *SALJ* 552-553; Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 31; Bhana 2008 *SAJHR* 315. Hawthorne 2010 *De Jure* 398 is of the view that it forms part of the second part of the test. It is submitted that the interpretation depends on whether the test for fairness is seen as being divided according to the fairness of the terms itself vs the enforcement of the terms or whether the different parts of the test is interpreted as differentiating between an objective vs subject approach to fairness. It is submitted that the court’s decision is open to both interpretations (see also Sutherland 2009 *Stell LR* 56).

⁸⁸⁰ Hawthorne 2010 *De Jure* 398. See also Wallis 2016 *SALJ* 552-553.

⁸⁸¹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59. See also Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 179.

The second part of the test states that if the clause itself is reasonable and does not violate public policy, it should be determined whether the clause should be enforced in light of the circumstances which prevented compliance with the clause.⁸⁸² In other words, it should be determined whether the enforcement of the clause is unfair or unreasonable.⁸⁸³ This part of the test is subjective in nature and requires an investigation into the circumstances of the case.⁸⁸⁴

The court found that the time-limitation clause was objectively reasonable.⁸⁸⁵ In the absence of any evidence regarding the inequality of the bargaining positions of the contracting parties and Barkhuizen's failure to provide reasons why he failed to comply with the time-bar clause, the court could not apply the subjective parts of the test for fairness.⁸⁸⁶ Therefore, the court held that the time-limitation clause was valid and enforceable.⁸⁸⁷

The court also dealt with the principle of good faith. It reiterated that the principle of good faith refers to "justice, reasonableness and fairness".⁸⁸⁸ It noted that good faith is not an independent rule that can be used to strike down a contract due to unfairness but operates as an underlying principle that finds expression through existing doctrines and rules in the common law of contract.⁸⁸⁹ *Obiter* the court questioned whether this restricted role of good faith is appropriate under the Constitution, but it did not take this line of argument any further.⁸⁹⁰

⁸⁸² *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56 & 58.

⁸⁸³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 58 & 70.

⁸⁸⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59. See also Wallis 2016 *SALJ* 552-553; Bhana & Meerkotter 2015 *SALJ* 504; Hawthorne 2014 *THRHR* 351 n 35; Bhana 2014 *SAPL* 509.

⁸⁸⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 63.

⁸⁸⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 66 & 84.

⁸⁸⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 67 & 86.

⁸⁸⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80.

⁸⁸⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

⁸⁹⁰ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

The decision in *Barkhuizen v Napier* established public policy as the “doctrinal gateway” through which constitutional values could inform the common law of contract.⁸⁹¹ It also confirmed that public policy is an open norm in the common law of contract and could function as a general clause.⁸⁹² Furthermore, the test for fairness formulated by the court made provision for setting aside unfair contract terms and the unfair enforcement of contract terms.⁸⁹³ It is also important to note that the subjective test is relevant in determining the fairness of the clause itself and the enforcement of the clause.⁸⁹⁴ As illustrated by Hawthorne, the subjective test leads to the conclusion that the court recognised substantive equality in the common law of contract because the surrounding circumstances of the transaction must be taken into account in determining whether the contract term or its enforcement is fair.⁸⁹⁵ As will be seen below, it has been argued that the subjective part of the test for fairness is based upon ubuntu.⁸⁹⁶

Nevertheless, the court’s view that the ability to regulate your own affairs (even to your own detriment) gives effect to the constitutional values of freedom and dignity was criticised as another attempt to give constitutional entrenchment to the classical liberal conception of freedom and sanctity of contract rather than determining how the Constitution and its values should inform these principles as part of the greater transformative constitutional project.⁸⁹⁷

⁸⁹¹ Brand 2009 *SALJ* 84. See also Hawthorne 2014 *PELJ* 2827-2828.

⁸⁹² Hawthorne 2010 *De Jure* 395. See also Du Bois 2015 *Acta Juridica* 282.

⁸⁹³ Hawthorne 2010 *De Jure* 400.

⁸⁹⁴ Hawthorne 2010 *De Jure* 400. See also Wallis 2016 *SALJ* 552-553.

⁸⁹⁵ Hawthorne 2014 *PELJ* 2829; Hawthorne 2010 *De Jure* 399; Bhana 2008 *SAJHR* 316. See also Wallis 2016 *SALJ* 553 who argues that the second part of the test for fairness may result in legal uncertainty and arbitrary decisions.

⁸⁹⁶ Cf the discussion in para 2 3 3 2 *infra*.

⁸⁹⁷ Hawthorne 2014 *PELJ* 2822; Hawthorne 2012 *THRHR* 347; Davis 2011 *Stell LR* 854; Davis & Klare 2010 *SAJHR* 478; Davis 2010 *SAJHR* 93; Brand 2009 *SALJ* 85-86; Bhana 2008 *SAJHR* 315; Lubbe 2004 *SALJ* 420-421.

2 3 2 4 *The Supreme Court of Appeal strikes back*

The Supreme Court of Appeal struck back in *Bredenkamp v Standard Bank of South Africa* which dealt with the exercise of a contractual right that entitled the bank to close a client's bank accounts on reasonable notice and for any reason.⁸⁹⁸ Relying on the principles of fairness laid down in *Barkhuizen v Napier*, the client argued that the bank was required to exercise this right fairly and for good cause.⁸⁹⁹ In other words, the client relied on the second part of the test for fairness as laid down in *Barkhuizen v Napier*.⁹⁰⁰

The Supreme Court of Appeal referred to the test laid down in *Sasfin v Beukes* which requires a balancing act between competing values.⁹⁰¹ As submitted previously, the balancing act will always be between policy considerations that support the enforcement of the contract on the one hand and policy considerations that support the non-enforcement of the contract on the other.⁹⁰² The court held that public policy considerations are not static and their weight may change as circumstances change.⁹⁰³ It reiterated that sanctity of contract is an important but not the only policy consideration when determining whether a contract is contrary to public policy.⁹⁰⁴ The court accepted that public policy is now rooted in the Constitution and its underlying values but stated that this does not mean that public policy values cannot be found elsewhere.⁹⁰⁵

Importantly, the court stated that the judgment in *Barkhuizen v Napier* did not hold that the enforcement of a valid contractual clause must be fair and reasonable

⁸⁹⁸ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 6.

⁸⁹⁹ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 1, 25-26.

⁹⁰⁰ Cf the discussion in the text at n 882 *supra*.

⁹⁰¹ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 38. Cf the discussion of *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) in the text at n 769 *supra*.

⁹⁰² Cf the discussion in the text at n 779 *supra*.

⁹⁰³ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 38.

⁹⁰⁴ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 36-38.

⁹⁰⁵ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 39.

where no public policy consideration in the Constitution or elsewhere is implicated.⁹⁰⁶ Therefore, fairness and reasonableness becomes relevant only when a specific constitutional value or right is implicated and it must be determined whether the clause or its enforcement is contrary to public policy.⁹⁰⁷ As indicated by the court in *Barkhuizen v Napier*,⁹⁰⁸ this balancing act will be between freedom and sanctity of contract which gives effect to the constitutional values of freedom and human dignity on the one hand, and another policy consideration as reflected in a constitutional right or value in support of the non-enforcement of the contract on the other. As mentioned before, this balancing act is objective in nature.⁹⁰⁹ This means that a court must identify the relevant policy considerations that are limited in terms of the contract or its enforcement as reflected in specific constitutional values and/or rights before it may apply the second part of the test for fairness which deals with the enforcement of a clause and is subjective in nature.⁹¹⁰ Thus, the court explained the judgment in *Barkhuizen v Napier* as follows:

This all means that, as I understand the judgment, if a contract is prima facie contrary to constitutional values, questions of enforcement would not arise. However, enforcement of a prima facie innocent contract may implicate an identified constitutional value. If the value is unjustifiably affected, the term will not be enforced. An example would be where a lease provides for the right to sublease with the consent of the landlord. Such a term is prima facie innocent. Should the landlord attempt to use it

⁹⁰⁶ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 50. See also Van Huyssteen *et al Contract* (2016) para 9.269; Bradfield *Christie's law of contract* (2016) 20.

⁹⁰⁷ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 43-44. See also Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 32.

⁹⁰⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57 as discussed in the text at n 875 *supra*.

⁹⁰⁹ Cf the discussion in the text at n 876 *supra*.

⁹¹⁰ The second part of the test states that if the clause itself is reasonable and does not violate public policy, it should be determined whether the clause should be enforced in light of the circumstances which prevented compliance with the clause (cf the discussion in the text at n 882 *supra*).

to prevent the property being sublet in circumstances amounting to discrimination under the equality clause, the term will not be enforced.⁹¹¹

Therefore, the court rejected the idea that fairness is an overarching requirement in the common law of contract.⁹¹² Specifically, the court expressly rejected the idea of an equitable discretion because it would defeat the principle of the rule of law entrenched as a founding value of the Constitution.⁹¹³

A constitutional principle that tends to be overlooked, when generalised resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.⁹¹⁴

The court's reasoning is open to criticism. Again, the court merely granted constitutional endorsement to the classical liberal conception of contractual autonomy and formal equality, and did not follow a transformative constitutional approach.⁹¹⁵ In addition, the court's conception of the constitutional value of the rule of law is based on a classical conception of the rule of law based on formal equality.⁹¹⁶ Finally, it is difficult to reconcile the views of the Supreme Court of Appeal on the role of fairness in the common law of contract with that of the Constitutional Court.⁹¹⁷ As mentioned before,⁹¹⁸ the Constitutional Court in

⁹¹¹ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 47. See also Bhana 2014 *SAPL* 521; Hutchison "The nature and basis of contract" in Hutchison & Pretorius (eds) *Contract* (2012) 31.

⁹¹² *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 50-53.

⁹¹³ S 1(c) of the Constitution (quoted in para 1 8 1 *supra*).

⁹¹⁴ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 39. Cf s 1(c) of the Constitution (quoted in para 1 8 1 *supra*).

⁹¹⁵ Bhana 2014 *SAPL* 515.

⁹¹⁶ See the description of the classical rule of law which arrived in South African with the British during the nineteenth century (para 1 5 2 3 *supra*). As shown previously, the classical conception of the rule of law was retained during the Union years (see para 1 6 1 *supra*) and an even more conservative conception was used during apartheid (see para 1 7 2 *supra*). See further Bhana 2014 *SAPL* 519.

⁹¹⁷ Hawthorne 2010 *De Jure* 407.

Barkhuizen v Napier expressly rejected the view that a contract term that is unfair or might operate harshly cannot lead to the conclusion that the term is contrary to constitutional values and principles. The apparent tension between these two decisions can be seen in *Absa Bank v Coe Family Trust* where Judge Davis for the Western Cape High Court attempted to reconcile the two judgments:

To the extent that the dictum of ... [the Supreme Court of Appeal] suggests that fairness is not to be considered in an enquiry into the enforceability of a contract, that reading would be in direct conflict with *Barkhuizen* ... By contrast, if the ... [Supreme Court of Appeal] is suggesting that any enquiry into fairness can only take place through the prism of public policy as mediated by the values of the Constitution, then nothing is added to the existing state of law ...⁹¹⁹

However, the Supreme Court of Appeal soon had the opportunity to reiterate its position in *Bredenkamp v Standard Bank of South Africa*. In *African Dawn Property Finance 2 v Dreams Travel and Tours* it stated as follows:

It bears restating that our Constitution and its value system do not confer on judges a general jurisdiction to declare contracts invalid on the basis of their subjective perceptions of fairness or on grounds of imprecise notion of good faith. Nor does the fact that a term is unfair, or that it may operate harshly, of itself lead to the conclusion that it offends against constitutional principles.⁹²⁰

In *Maphango v Aengus Lifestyle Properties* and *Potgieter v Potgieter* the Supreme Court of Appeal also restated that good faith and fairness are not freestanding requirements for the exercise of a contractual right and that good faith is an underlying value that is given expression through existing rules of law.⁹²¹ In both

⁹¹⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 72 as discussed in the text at n 871 *supra*.

⁹¹⁹ *ABSA Bank v Coe Family Trust and others* 2012 3 SA 184 (WCC) 190. See also the criticism of this case by Wallis 2016 SALJ 554 n 40.

⁹²⁰ *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and others* 2011 3 SA 511 (SCA) para 28.

⁹²¹ *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) paras 23-24; *Potgieter and another v Potgieter NO and others* 2012 1 SA 637 (SCA) paras 32-33.

cases the Supreme Court of Appeal reiterated that this is the position in law “[u]nless and until the Constitutional Court holds otherwise”.⁹²²

2 3 2 5 *The Constitutional Court refers to and relies on good faith*

Although one of these cases did find its way to the Constitutional Court, it was decided with reference to the provisions in the Rental Housing Act.⁹²³ However, Justice Froneman’s statement in his concurring but separate judgment that “[d]etermining the true ambit of *Barkhuizen* must wait for another day” indicated that the Constitutional Court would not merely accept the Supreme Court of Appeal’s restrictive interpretation of *Barkhuizen v Napier*.⁹²⁴

This need to determine the exact role of the principle of good faith in the law of contract was also stressed by the Constitutional Court in *Everfresh v Market Virginia v Shoprite Checkers* as reflected in the following statement:

Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.⁹²⁵

Recently, in *Botha v Rich*, the Constitutional Court had to determine whether the enforcement of a cancellation clause was contrary to public policy. Botha (the buyer) had concluded an instalment sale of immovable property with a trust (the

⁹²² *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) para 25; *Potgieter and another v Potgieter NO and others* 2012 1 SA 637 (SCA) para 34.

⁹²³ *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC).

⁹²⁴ *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) para 158.

⁹²⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22.

seller).⁹²⁶ The cancellation clause provided for the cancellation of the agreement and the forfeiture of all sums already paid by Botha in the event of a breach by her.⁹²⁷ The contract also provided that Botha may demand transfer of the property in terms of section 27 of the Alienation of Land Act 68 of 1981 after she had paid at least half the purchase price.⁹²⁸ After Botha had paid three quarters of the purchase price she began to default on the payments and the trust sued for cancellation and eviction.⁹²⁹ In turn, Botha demanded transfer of the property in terms of section 27 of the Alienation of Land Act as provided for in the contract.⁹³⁰

The trust was successful in the high court and the full bench of that division on appeal.⁹³¹ In the Constitutional Court, one of Botha's main contentions was "that the enforcement of the cancellation clause, where more than 50% of the purchase price has been paid, and in the face of a demand for a transfer pursuant to s 27, is contrary to public policy".⁹³² In this respect, Botha contended that the cancellation of the contract, in other words, the enforcement of the cancellation clause by the trustees was contrary to public policy because it violated her constitutional rights.⁹³³ In determining this question, the court held that public policy generally requires enforcement of contractual obligations freely and voluntarily undertaken which gives effect to the constitutional values of freedom and human dignity.⁹³⁴

Thereafter the court stated as follows:

All law, including the common law of contract, derives its force from the Constitution and is thus subject to constitutional control. It is of public importance to determine whether cancellation of a contract, governed by the Act, and the resultant forfeiture of the payments – of more than half of

⁹²⁶ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 4.

⁹²⁷ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 4.

⁹²⁸ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 4.

⁹²⁹ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) paras 5-6.

⁹³⁰ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 8.

⁹³¹ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) paras 13-17.

⁹³² *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 19.

⁹³³ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 19.

⁹³⁴ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 23.

the purchase price of the property – are fair and thus constitutionally compliant.⁹³⁵

After considering the meaning of section 27(1) in much detail, the court held that Botha was entitled to demand transfer of the immovable property in terms of this provision.⁹³⁶ Subsequently, the trustees raised the *exceptio non adimpleti contractus* on account of Botha's failure to pay the instalments and other monies due in terms of the agreement.⁹³⁷ The court accepted that Botha's right to demand transfer of the property is reciprocal to her obligation to pay the instalments timeously.⁹³⁸ However, the court held that where the rigid application of the principle of reciprocity may lead to injustice, the principle of good faith as an underlying value of the common law of contract encompasses the necessary flexibility to ensure fairness.⁹³⁹ Specifically, it stated as follows:

The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interest. Good faith is the lens through which we come to understand

⁹³⁵ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 24.

⁹³⁶ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) paras 28-41. See also the discussions by Bhana & Meerkotter 2015 SALJ 499-502 & Hawthorne 2014 THRHR 294-295.

⁹³⁷ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) paras 42-43.

⁹³⁸ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) paras 43-44.

⁹³⁹ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 45 referring to *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A) 651-652. Bhana & Meerkotter 2015 SALJ 502-503 criticise the court's decision because they argue that the *exceptio non adimpleti contractus* as a contractual defence would not be applicable in relation to Botha's statutory right in terms of s 27(1) of the Alienation of Land Act. However, their reasoning ignores the fact that this statutory right was incorporated into the contract itself and therefore also constituted a contractual right (*Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 4 esp n 4).

contracts in that way. In this case good faith is given expression through the principle of reciprocity and the *exceptio non adimpleti contractus*.⁹⁴⁰

Therefore, the court held that Botha's right to demand transfer of the property was conditional on her payment of the arrear amounts to avoid undue hardship to the trustees.⁹⁴¹ For the same reasons, the court held that the application for cancellation of the contract by the trustees should also fail because enforcing the cancellation clause and granting forfeiture of the monies already paid "would be a disproportionate penalty for the breach".⁹⁴²

Sharrock, Bhana and Meerkotter argue that the reasoning of the court leads to the impression that the court impliedly held that the enforcement of the cancellation clause would be unfair and therefore unconstitutional.⁹⁴³ Sharrock argues that if this is the case, it would seem that the court's decision is in conflict with the appeal court decisions which held that fairness is not an overarching requirement for the enforcement of a contract.⁹⁴⁴ In addition, Bhana and Meerkotter maintain that as the court did not explicitly implicate an enumerated right it would seem that it is not necessary to implicate a specific right or value in the Bill of Rights as envisaged by the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa*.⁹⁴⁵ Nevertheless, they argue that the facts of the case could possibly have implicated the rights to freedom of trade, occupation and profession (section 22) property (section 25).⁹⁴⁶ As will be seen later, it is submitted that the court

⁹⁴⁰ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 46.

⁹⁴¹ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 49. However, see the criticisms by Wallis 2016 SALJ 554-557.

⁹⁴² *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 51. See also Bradfield *Christie's law of contract* (2016) 22.

⁹⁴³ Sharrock 2015 SA Merc LJ 179-180; Bhana & Meerkotter 2015 SALJ 505.

⁹⁴⁴ Sharrock 2015 SA Merc LJ 179-183.

⁹⁴⁵ Bhana & Meerkotter 2015 SALJ 505. See also *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 43-44 as discussed in the text at n 907.

⁹⁴⁶ Bhana & Meerkotter 2015 SALJ 505.

implicated the constitutional value of human dignity which it linked to the principle of good faith.⁹⁴⁷

As the Constitutional Court did not expressly deal with the question whether good faith can be used as a substantive rule to set aside an unfair contract term or the unfair enforcement thereof the legal position in this respect remains uncertain.⁹⁴⁸ Especially, in consideration of the conflicting views between the Constitutional Court in *Barkhuizen v Napier* and the Supreme Court of Appeal decisions starting with *Bredenkamp v Standard Bank of South Africa*.⁹⁴⁹ It would seem that the Constitutional Court has reinforced the view that good faith is an abstract value underlying the substantive law of contract which finds expression through existing rules and doctrines. This is because the court speaks of good faith as “the lens through which we come to understand” that bilateral contracts cannot be regarded as “a matter of each side pursuing his or her own self-interest without regard to the other party’s interests” which in this case is expressed through the principle of reciprocity and the *exceptio non adimpleti contractus*.⁹⁵⁰ This view would accord with that of the Supreme Court of Appeal in the above mentioned cases. However, it could be argued that the Constitutional Court also held that the Constitution requires that the enforcement of a contractual provision requires good faith (i.e. fairness) from the parties. This is reflected in the Gauteng Local Division’s interpretation of this decision in the case of *ABSA Bank v Lekuku*:

The CC highlighted the fact that enforcement of stipulations in bilateral contracts requires good faith from both parties. Though this was part of our common law, it has now received constitutional approval.⁹⁵¹

⁹⁴⁷ Cf the discussion dealing the approach to human dignity in the common law of contract in para 3 2 7 3 *infra*.

⁹⁴⁸ Hawthorne 2016 *THRHR* 296-297. See also Van Huyssteen *et al Contract* (2016) para 7.82; Bradfield *Christie’s law of contract* (2016) 22-23.

⁹⁴⁹ Sharrock 2015 *SA Merc LJ* 181-184; Bhana & Meerkotter 2015 *SALJ* 502-503.

⁹⁵⁰ Cf the quote in the text at n 940 *supra*.

⁹⁵¹ *ABSA Bank Limited v Lekuku* 2015 JOL 32434 (GJ) para 72.

Bhana, Meerkotter and Sharrock further argue that the court failed to provide sufficient guidance on how to determine when a clause would be unenforceable due to unfairness and that this opens up the door for judges to impose their own ideas of contractual fairness rather than following an objective standard.⁹⁵² Accordingly, Bhana and Meerkotter argue that the Constitutional Court's decision rather vindicates the Supreme Court of Appeal's "primary concern with the 'free floating' notion of fairness".⁹⁵³

Despite or perhaps because of these uncertainties, there are indications that the Constitutional Court is of the view that ubuntu as an underlying constitutional value could be used to develop the role of good faith to ensure better contractual fairness.

2 3 3 Influence of ubuntu on the common law of contract

2 3 3 1 Introduction

The introduction and development of the concept of ubuntu as an underlying constitutional value was addressed in some detail in the previous chapter. It was shown how ubuntu was included in and applied by the Constitutional Court under the interim Constitution⁹⁵⁴ and developed into an underlying value of the final Constitution.⁹⁵⁵ It was also illustrated how ubuntu, as an underlying value of the final Constitution, informs the constitutional value of human dignity, promotes the realisation of socio-economic rights and forms part of the legal convictions of the majority of the population that must now be taken into account when interpreting and developing existing legal rules.⁹⁵⁶ Accordingly, ubuntu has a creative role to play in the development of the common law in terms of section 39(2) of the Constitution.

⁹⁵² Sharrock 2015 *SA Merc LJ* 180; Bhana & Meerkotter 2015 *SALJ* 506. See also Wallis 2016 *SALJ* 557.

⁹⁵³ Bhana & Meerkotter 2015 *SALJ* 495. See also Bradfield *Christie's law of contract* (2016) 22-23.

⁹⁵⁴ See the discussion in para 1 8 4 2 *supra*.

⁹⁵⁵ See the discussion in para 1 8 4 3 *supra*.

⁹⁵⁶ See the discussion in para 1 8 4 3(a) *supra*

However, the common law has not proved enthusiastic about embracing the concept of ubuntu.⁹⁵⁷ This is not surprising considering the fact that the Supreme Court of Appeal has followed a conservative approach when developing the common law in line with constitutional values.⁹⁵⁸ Bennett further argues that the reason why ubuntu has not been used in the common law of contract could be because the common law of contract already contains principles and rules to deal with the type of problems ubuntu has been used for.⁹⁵⁹ He specifically refers to good faith and public policy read with the Bill of Rights.⁹⁶⁰ However, as the Supreme Court of Appeal has persistently limited the role of good faith to prevent unfairness in contracts,⁹⁶¹ it would seem that ubuntu may still have a role to play when dealing with the question of legality. Especially, as ubuntu has an integral role to play in establishing a plural legal culture under the new Constitution.⁹⁶²

2 3 3 2 *Constitutional Court decisions*

The Constitutional Court discussed the role of ubuntu in the common law of contract in two decisions, namely *Barkhuizen v Napier*⁹⁶³ and *Everfresh Market Virginia v Shoprite Checkers*.⁹⁶⁴

As discussed above,⁹⁶⁵ the court in *Barkhuizen v Napier* defined public policy as “the legal convictions of the community”.⁹⁶⁶ It held that these convictions can now be found in the Constitution and its founding values (freedom, dignity and equality

⁹⁵⁷ See the discussion in para 1 8 4 3(b) *supra*.

⁹⁵⁸ See the discussions in paras 2 3 2 2 & 2 3 2 4 *supra* dealing with the Supreme Court of Appeal’s approach to contractual fairness under the Constitution.

⁹⁵⁹ Bennett 2011 *PELJ* 44.

⁹⁶⁰ Bennett 2011 *PELJ* 45.

⁹⁶¹ See the discussion in para 2 3 2 4 *supra*.

⁹⁶² Cf the discussion in para 1 8 4 3(c) *supra* on ubuntu’s role in harmonising Western and African values.

⁹⁶³ *Barkhuizen v Napier* 2007 5 SA 323 (CC).

⁹⁶⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC).

⁹⁶⁵ Cf the discussion in para 2 3 2 3 *supra*.

⁹⁶⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28.

as well as the rule of law) and that a term in a contract that is contrary to such values is contrary to public policy and unenforceable.⁹⁶⁷ The court then stated that public policy implicates notions of fairness, justice, equity and reasonableness. In this respect, public policy takes account of the necessity to do simple justice between man and man and “is informed by the concept of *ubuntu*”.⁹⁶⁸ It has been argued⁹⁶⁹ that by referring to ubuntu as an underlying value of the Constitution, the court was able to formulate the subjective test for fairness which requires an investigation into the relative situation of the contracting parties including an assessment of their bargaining power⁹⁷⁰ and the surrounding circumstances of the case.⁹⁷¹ This is further dealt with in the next chapter.⁹⁷²

In addition, the court later stated that good faith also refers to justice, reasonableness, fairness and equity⁹⁷³ and, as was seen above, it questioned whether good faith’s limited role would be appropriate under the Constitution.⁹⁷⁴ Therefore, it would appear that the court identified the underlying constitutional value of ubuntu as the vehicle to inform the open norm of public policy in order to import constitutional values into the common law of contract (especially in view of the limited role that good faith plays in this respect).⁹⁷⁵ It could also be argued that the court is of the view that ubuntu as an underlying constitutional value should be used to develop the open norm of public policy to reflect the legal convictions of the indigenous people that make up the majority of the population in South Africa.

⁹⁶⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 29.

⁹⁶⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51.

⁹⁶⁹ Cornell and Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 24; Hawthorne 2010 *De Jure* 400.

⁹⁷⁰ Cf the discussion of *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56-59 in the text at n 881 *supra* dealing with the test for fairness of a clause itself.

⁹⁷¹ Cf the discussion of *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56-59 in the text at n 885 *supra* dealing with the test for fairness for the enforcement of a clause.

⁹⁷² Cf the discussion in the text at n 1547 *infra*.

⁹⁷³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 80.

⁹⁷⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

⁹⁷⁵ Hawthorne 2014 *PELJ* 2828.

A more explicit explanation of the role of ubuntu in the common law of contract can be found in the subsequent constitutional court decision of *Everfresh Market Virginia v Shoprite Checkers*. This case concerned the validity of a “right of renewal” clause in a lease agreement. The relevant clause stated that the lessee had the right to renew the lease for a further fixed period on the same terms and conditions as the existing lease save that there would be no further right of renewal and that the rentals for the renewal period shall be agreed between the parties. It further provided that the lessee should give notice of its intention to renew, and if it did give due notice and the parties failed to reach agreement then the right of renewal would be void.⁹⁷⁶ The lessee gave due notice to renew the lease and proposed a new rental to initiate negotiations but the lessor replied that the clause was not legally binding and enforceable and sought an order to evict the lessee.⁹⁷⁷ The lessee argued that the clause obliged the lessor to make a *bona fide* attempt to agree on the rental for the new period.⁹⁷⁸ The High Court stated that an option to renew a lease on terms to be agreed is unenforceable.⁹⁷⁹ Eventually, the case ended up in the Constitutional Court on appeal.⁹⁸⁰

In the Constitutional Court, the lessee raised its constitutional argument for the first time. It argued that the common law had to be developed in terms of section 39(2) of the Constitution, because it was contrary to the values of the Constitution for a court to sanction a party’s non-compliance with a clause that it agreed to. In other words, the lessor was obliged to negotiate in good faith with the view to agree on a new rental.⁹⁸¹ The majority of the court dismissed the appeal because the constitutional argument was raised in the Constitutional Court as a

⁹⁷⁶ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 3.

⁹⁷⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 5 & 7.

⁹⁷⁸ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 9.

⁹⁷⁹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 10.

⁹⁸⁰ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 12.

⁹⁸¹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 13.

court of first instance.⁹⁸² However, the court did stress that the common law of contract, and especially the concept of good faith, must be infused with constitutional values including the underlying value of ubuntu.⁹⁸³ The court stated that ubuntu highlights the communal nature of society, the ideas of humaneness, social justice and fairness and incorporates the values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.⁹⁸⁴ The court also seemed to lean towards the argument proffered by the lessee:

Were a court to entertain Everfresh's [the lessee's] argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.⁹⁸⁵

The minority judgment also stressed the importance of good faith in the common law of contract and the urgency and importance of determining the role of good faith within a constitutional framework:

Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual

⁹⁸² *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) paras 73-74. See Bhana & Broeders 2014 *THRHR* 168-173 for a critique of the majority's refusal to make a decision on the constitutional arguments.

⁹⁸³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71. As pointed out by Bhana & Broeders 2014 *THRHR* 164, these remarks were *obiter* but remain important because they were made unanimously.

⁹⁸⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71.

⁹⁸⁵ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 72.

dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.⁹⁸⁶

Thereafter Justice Yacoob made the following remark which led to the research topic of this thesis:

The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce takes place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.⁹⁸⁷

Consequently, the minority held that the case had to be remitted back to the High Court for reconsideration in view of the above considerations.⁹⁸⁸

In view of the previous discussions in chapter one and this chapter, I read these remarks to mean the following: The limited role of good faith as determined by the Supreme Court of Appeal is an expression of the underlying values of the common law of contract which are informed by legal convictions rooted in the colonial tradition. When determining whether the current role of good faith should be developed in line with the values of the Constitution, the underlying constitutional

⁹⁸⁶ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 22.

⁹⁸⁷ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 23 (also quoted in para 1 1 *supra*).

⁹⁸⁸ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 42.

value of ubuntu should be considered.⁹⁸⁹ This is important in order to establish a plural legal culture because it takes account of the legal convictions of the indigenous communities that were ignored prior to the constitutional era.⁹⁹⁰ This would require a proper appreciation of ubuntu which should go further than merely assuming that fairness in terms of good faith (as a product of the colonial common law tradition) can be equated to fairness in terms of ubuntu. Therefore, it seems to me that the court is questioning whether the current role of good faith is in line with the values of the Constitution, especially the underlying value of ubuntu. Therefore, ubuntu as an underlying value of the Constitution should be used to critique and expand the current role of good faith because its current role is an expression of values rooted predominantly in the colonial common law tradition and do not reflect the underlying values of the Constitution. Therefore, it is submitted that the court is of the view that the current underlying value system of the common law of contract should be adapted in accordance with the underlying constitutional value of ubuntu.⁹⁹¹ This is addressed in the next chapter.

As this thesis does not deal with the development of the rules governing agreements to agree specifically, this discussion does not include a critical assessment of the court's remarks in this regard.⁹⁹²

⁹⁸⁹ Harms 2014 *SALJ* 6 criticises the court for not identifying the relevant founding constitutional value and merely referring to ubuntu. This criticism has some merit because ubuntu, as an underlying constitutional value, should inform how the founding constitutional values are expressed in the law of contract. How ubuntu should inform the founding constitutional values' expression in the law of contract is addressed in the next chapter.

⁹⁹⁰ *Contra* Harms 2014 *SALJ* 6 who states that "the snide reference by Yacoob J to 'colonial' laws, as if there are some pre- or non-colonial laws that can change the meaning of words, was accordingly uncalled for".

⁹⁹¹ *Contra* Wallis 2016 *SALJ* 559 who is of the opinion that Justice Yacoob's remarks do not implicate great changes in respect of the existing principles of the law of contract.

⁹⁹² For more detailed analyses of the decision in this respect see Harms 2014 *SALJ* 4-7; Bhana & Broeders 2014 *THRHR* 173-176; Lewis 2013 *THRHR* 85-87, 89, 92.

2 3 3 3 *Western Cape Division decisions*

The first case applying the remarks in *Everfresh Market Virginia v Shoprite Checkers* is *Combined Developers v Arun Holdings*.⁹⁹³ This case dealt with the legality of an acceleration clause in a loan agreement which provided that the lender would be entitled to claim payment of the whole debt if the borrower defaulted and failed to correct the default within four days of receiving written notice from the lender.⁹⁹⁴ After failing to pay a due instalment of R 42 133.15 the lender notified the borrower of the default by email.⁹⁹⁵ The borrower made the payment in the time period allowed but did not pay the default interest which totalled R 87.57.⁹⁹⁶ Due to a dispute unrelated to the payment default, the lender decided to treat the non-payment of the default interest as an event of default in terms of the acceleration clause and claimed payment of the whole debt (R7 665 040.14 together with interest).⁹⁹⁷

Judge Davis held that there was nothing unconstitutional about the inclusion of the acceleration clause in the contract.⁹⁹⁸ Rather, the question is whether the lender's interpretation of the clause is against public policy.⁹⁹⁹ He also argued that although a clause in a contract may not be contrary to public policy in itself, its enforcement may be so oppressive, unconscionable or immoral as to be contrary to public policy.¹⁰⁰⁰ He confirmed that it has been a long established rule that the power to declare a clause unenforceable because it is contrary to public policy should be exercised sparingly and not with reference to the judge's "individual sense of propriety and fairness".¹⁰⁰¹ He further stated that an objective standard

⁹⁹³ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC).

⁹⁹⁴ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) para 2.

⁹⁹⁵ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) para 3.

⁹⁹⁶ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) para 4.

⁹⁹⁷ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) paras 5 & 25.

⁹⁹⁸ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) para 29.

⁹⁹⁹ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) para 30.

¹⁰⁰⁰ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) paras 36 referring to *Juglal NO and another v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 5 SA 248 (SCA) paras 12-13.

¹⁰⁰¹ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) paras 33 & 37.

should be used and such a standard can now be found in the normative framework of the Constitution.¹⁰⁰² This is because public policy must accord with the normative framework of the Constitution.¹⁰⁰³

Specifically, Judge Davis held that guidance on the normative framework of the Constitution can be found in *Everfresh Market Virginia v Shoprite Checkers*.¹⁰⁰⁴ Referring to both the majority and minority judgments' remarks on the role of ubuntu in the law of contract, he held that public policy embraces the concept of good faith and reasonableness.¹⁰⁰⁵ Applying these principles to the facts, he stated as follows:

The implementation of clause 7.2 [the acceleration clause] as sought by the applicant [the lender] is so draconian and startlingly unfair that this particular construction of the clause must be in breach of public policy. Some form of communication to pay a measly sum of R86.57 immediately following payment of the large principal sum should surely have been required. In other words, it cannot be congruent with public policy that a demand, in an ambiguous form ... can first be met with silence because R86.57 has not been paid, and then a week later the full weight of clause 7.2 be applied by the applicant to gain massive commercial advantage, to the significant disadvantage of the respondents [the borrower].¹⁰⁰⁶

Although it is difficult to determine the actual basis for the rejection of the claim, Sharrock argues that it appears that the court held that the enforcement of the clause (rather than the clause itself as interpreted by the lender) was so unfair as to be contrary to public policy.¹⁰⁰⁷ Bearing in mind that this judgment was handed down prior to that of the Constitutional Court in *Botha v Rich* the further question which arises is how the court's judgment can be reconciled with the appeal court

¹⁰⁰² *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) para 37.

¹⁰⁰³ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) paras 31 & 37.

¹⁰⁰⁴ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) paras 38-39.

¹⁰⁰⁵ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) paras 38-40.

¹⁰⁰⁶ *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) para 42.

¹⁰⁰⁷ Sharrock 2015 SA Merc LJ 189-190.

decisions that reject the idea that an unfair contract term or the unfair enforcement of a contract term on its own could lead to the conclusion that it offends constitutional values?

First, it must be noted that Judge Davis fails to make any mention of these decisions in his judgment. However, it could possibly be argued that he is following his own interpretation of these cases as set out in *Absa Bank v Coe Family Trust*. There he suggested that the remarks in *Bredenkamp v Standard Bank of South Africa* should be interpreted to mean that “any enquiry into fairness can only take place through the prism of public policy as mediated by the values of the Constitution” and does not mean “that fairness is not to be considered in an enquiry into the enforceability of a contract”.¹⁰⁰⁸ Secondly, and more likely, it would seem that Judge Davis, relying on the Constitutional Court’s remarks on the role of ubuntu in the law of contract in *Everfresh Market Virginia v Shoprite Checkers*, held that a proper appreciation of the values embraced by ubuntu requires that greater weight should be given to the principle of good faith and reasonableness in determining whether the enforcement of a contractual term is contrary to public policy or not. If this is the case, the problem is that the court did not explain how a proper appreciation of ubuntu would lead to such a conclusion. It is not clear from his judgment how the notions of “humaneness, social justice and fairness” and “group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity” translate into a more prominent role for the principle of good faith when determining whether a clause or its enforcement is contrary to public policy.¹⁰⁰⁹ Especially in view of the Supreme Court of Appeal’s persistent view that the limited role of good faith is in line with the constitutional values of human dignity, equality, freedom and the rule of law.

It is submitted that a proper appreciation of ubuntu requires an investigation into how ubuntu as an underlying constitutional value informs the foundational

¹⁰⁰⁸ *ABSA Bank v Coe Family Trust and others* 2012 3 SA 184 (WCC) 190 (also quoted at n 919 *supra*).

¹⁰⁰⁹ See also Wallis 2016 *SALJ* 560-561 for a similar criticism when dealing with the decision in *Everfresh Market Virginia v Shoprite Checkers* 2011 (CC).

constitutional values as expressed in the law of contract. Only then can it be determined how ubuntu can be used to develop the current expression of these values in the law of contract and how this can lead to a more prominent role for good faith when determining whether a contract or its enforcement is contrary to public policy. Such an investigation is undertaken in the next chapter.

Recently, in *Savage v Order of the Sisters of the Holy Cross, Cape Province*, the court provided more guidance on how the principle of ubuntu could be applied in the common law of contract. In this case, the principle of ubuntu was invoked explicitly by the tenants of a church property in seeking to interdict the transfer thereof. The tenants feared that if the property is transferred to the new owner, he would evict them from the property.¹⁰¹⁰ The tenants raised various grounds in favour of granting the interdict. In the first place the tenants alleged that their tenancy was based on cessions of lifelong leases entered into between the Catholic Church and their forebears. They argued that the lifelong leases were ceded to them with the verbal consent of the first respondent who is the successor in title of the church property.¹⁰¹¹ Secondly, the tenants claimed that the property was under the umbrella of the Catholic Church and that canon law and common-law principles precluded the alienation of the property in the manner executed by the first respondent.¹⁰¹² Thirdly, the tenants argued that the principle of ubuntu applied to the mutually beneficial relationship between themselves and the first respondent.¹⁰¹³ In this respect, the tenants argued that they had made rigorous efforts to engage with the first respondent regarding the transfer of the church property and the first respondent's obligation to provide the tenants with security of

¹⁰¹⁰ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) para 14.

¹⁰¹¹ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) para 15.

¹⁰¹² *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) paras 17-21.

¹⁰¹³ The relationship was mutually beneficial as the first respondent assisted the tenants as parishioners while in turn the first respondent derived the benefit of having devout Catholic families occupying the church property (*Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) para 16).

tenure in the form of written leases.¹⁰¹⁴ In response, the first respondent argued that it was obliged to sell the property for economic reasons as the property was a drain on its already deteriorating financial resources.¹⁰¹⁵

In dealing with the application of ubuntu to the relationship between the tenants and the first respondent, the court referred to the remarks in *Everfresh Market Virginia v Shoprite Checkers* where it was stated that the common law rules governing the law of contract should be developed with reference to the principle of ubuntu and the spirit, purport and objects of the Constitution.¹⁰¹⁶ The court held that the principle of ubuntu must be taken into account when interpreting property rights and the relationship between owners and tenants and occupiers of property.¹⁰¹⁷ In applying the principle of ubuntu to the facts the court held as follows:

In my view, the first respondent's efforts to alienate the property and thereby address their financial woes cannot reasonably be regarded as inhumane, unreasonable and contrary to the principles of *ubuntu*. However, courts have an obligation to infuse elements of grace and compassion into the formal structures of the law applicable. It is important to encourage the evolution of property rights and thereby balance the interests of the first respondent with the interests of the applicants in a principled way, so that the quality of their lives can be meaningfully improved and not worsened.¹⁰¹⁸

¹⁰¹⁴ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) para 16.

¹⁰¹⁵ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) para 24.

¹⁰¹⁶ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) para 36.

¹⁰¹⁷ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) paras 36-37 referring to *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37 (quoted at n 542 *supra*).

¹⁰¹⁸ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) para 40.

Therefore, the court applied the principle of ubuntu to the contractual relationship between a landlord and a tenant. In this respect, the court held that the application of ubuntu would require a balancing act between the interests of the landlord and the interests of the tenants. Although alienating the property due to financial pressures is not inhumane or unreasonable, the interests of the tenants should also not be worsened by such alienation. Accordingly, the court held that not granting the interdict would place the tenants in a worse position because allowing the transfer of the property would defeat the tenants' claims in the main action.¹⁰¹⁹

Although this judgment dealt more with eviction proceedings it is important for the law of contract because the court expressly stated that the common law of contract should be infused with the principle of ubuntu and did so in respect of the legal relationship between landlord and tenant. In doing so, the court held that the concept of ubuntu would require a balancing act between the interests of the landlord and those of the tenant with reference to the specific circumstances of the case. It follows that the test formulated by the court accords with the subjective test for fairness laid down in *Barkhuizen v Napier* which requires an investigation into the relative situation of the contracting parties¹⁰²⁰ which was also based on the concept of ubuntu.¹⁰²¹

2 3 3 4 *Concluding remarks*

The references to ubuntu by the courts in the context of the common law of contract are commendable in establishing a plural legal culture in terms of the new Constitution. Unfortunately, there is still much uncertainty regarding how the concept of ubuntu should inform the role of good faith in ensuring better contractual fairness and these uncertainties are addressed in the next chapter.

¹⁰¹⁹ *Savage and others v Order of the Sisters of the Holy Cross, Cape Province and others* 2015 6 SA 1 (WCC) paras 48 & 52.

¹⁰²⁰ Cf the discussions of *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56-59 in the text at n 881 (dealing with the test for fairness of a clause itself) and at n 885 (dealing with the test for fairness for the enforcement of a clause).

¹⁰²¹ The link between the subjective test for fairness and ubuntu is discussed in the text at n 971 *supra*.

First, however, it is necessary to discuss the open norm of fairness incorporated into section 48 of the CPA.

2 3 4 The Consumer Protection Act (“the CPA”)

2 3 4 1 Introduction

Although the research problem focusses on contractual fairness in the common law of contract,¹⁰²² it is necessary to refer to certain provisions in the CPA dealing with contractual fairness in the consumer market since the interpretation and application of these provisions will be affected by how ubuntu as an underlying constitutional value informs the expression of the founding constitutional values in the law of contract. Accordingly, this section discusses these provisions only to the extent necessary to illustrate how the interpretation of these provisions would need to take account of the harmonisation of good faith and ubuntu in the common law of contract.

As was seen previously, the Supreme Court of Appeal has taken a conservative approach to the use of open norms in the common law of contract and endorsed the classical model of contract law as based on freedom and sanctity of contract, which entails a formalistic approach to contracts.¹⁰²³ It has been pointed out how this body of jurisprudence has been motivated by traditional interpretation of the rule of law and follows a liberal interpretation of the constitutional values human dignity, equality, freedom and the rule of law, thus ignoring the movement towards a modern theory of contract law.¹⁰²⁴ However, the Constitution requires a normative approach aiming for social transformation and substantive equality.¹⁰²⁵

¹⁰²² The common law refers to the non-statutory law which consists of the rules of the Roman-Dutch based legal system as influenced by English law and developed by the South African courts over time (cf the discussion in n 442 *supra*).

¹⁰²³ See the discussions in paras 2 3 2 2 & 2 3 2 4 *supra*.

¹⁰²⁴ See the discussion on the modern law of contract in para 2 2 3 6 *supra*.

¹⁰²⁵ See in general the discussion on the constitutional value of the rule of law in para 1 8 2 3 *supra*.

This gap resulted in the enactment of the CPA in order to ensure better contractual fairness within the consumer market.¹⁰²⁶

The CPA became fully operational on 31 March 2011¹⁰²⁷ but only applies to certain consumer contracts as set out in the Act.¹⁰²⁸ Generally, the CPA aims to address unequal bargaining relationships in these consumer contracts¹⁰²⁹ by protecting a number of fundamental consumer rights. For the purpose of this thesis, the consumer's right to fair, just and reasonable terms and conditions¹⁰³⁰ is relevant and discussed below.

2 3 4 2 Prohibition on unfair contract terms and the unfair enforcement of contract terms

Section 48(1)(a)(ii) provides that a supplier must not offer to sell, sell or enter into an agreement to sell, any goods or services on terms that are unfair, unreasonable or unjust. Section 48(1)(a)(i) provides that a supplier must not offer to sell, sell or enter into an agreement to sell, any goods or services at a price that is unfair, unreasonable or unjust. Furthermore, section 48(1)(c)(i) states that a supplier may not require a consumer to waive any rights on terms that are unfair, unreasonable or unjust, or impose any such terms as a condition for entering into the transaction. These provisions deal with the content of the contract terms,¹⁰³¹ and therefore, prohibit unfair contract terms. It has further been argued that as the

¹⁰²⁶ Hawthorne 2012 *THRHR* 353; Hawthorne 2010 *De Jure* 396.

¹⁰²⁷ The CPA was supposed to come into full operation on 24 October 2010 (s 122 read with item 2(2) of Sched 2) but the Minister deferred the date to 31 March 2011 in terms of item 2(3)(a) of Sched 2 (see GN 917 in GG 33581 of 23 September 2010).

¹⁰²⁸ For more on the scope and application of the CPA see ss 5-6 of the Act. See also Sharrock *Business transactions law* (2016) 593-595; De Stadler "Section 5" & "Section 6" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (OS, 2014); Du Plessis 2013 *THRHR* 228-231; Van Eeden *Consumer Protection law* (2013) ch 3; Naudé & De Stadler "The Consumer Protection Act 68 of 2008" in Hutchison & Pretorius (eds) *Contract* (2012) 435-438; Jacobs *et al* 2010 *PER* 309-318; Sharrock 2010 *SA Merc LJ* 299-305.

¹⁰²⁹ Mupangavanhu 2015 *De Jure* 129; Hawthorne 2011 *SAPL* 435; Woker 2010 *Obiter* 230.

¹⁰³⁰ Contained in Part G (ss 48-52) of the CPA.

¹⁰³¹ Hawthorne 2012 *THRHR* 361, 363.

meanings of “unfair”, “unreasonable” and “unjust” overlap,¹⁰³² and as all three terms qualify as open norms in themselves, it would have been more apt to use only one term, for example “unfair”. Nevertheless, there are further provisions in the CPA that aim to provide content or concretisation to the general requirement for fair, reasonable and just contract terms.

Section 48(2) does not limit the generality of section 48(1)¹⁰³³ and lists a number of examples of terms, which would be regarded as unfair, unreasonable or unjust. The first two subsections provide guidance on how to determine whether a contract term itself would be considered unfair. Section 48(2)(a) provides that a term is unfair, unreasonable or unjust if it is excessively one-sided in favour of any person other than a consumer or other person to whom goods or services are to be supplied. Naudé interprets this provision to mean that the parties’ interests must be balanced against each other¹⁰³⁴ and it is submitted that such a balancing act denotes an equitable discretion by the courts.¹⁰³⁵ This is a departure from the Supreme Court of Appeal’s consistent rejection of an equitable discretion in the common law of contract,¹⁰³⁶ albeit that the equitable discretion created in section 48 is only applicable to contracts governed by the Act.¹⁰³⁷ In addition, section 48(2)(b) states that if a term of an agreement is so adverse to the consumer as to be inequitable, the term will be unfair. However, Naudé argues that “inequitable”

¹⁰³² Naudé “Section 48” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 1; Sharrock *Business transactions law* (2016) 606.

¹⁰³³ Therefore, a term may be unfair even if it does not meet the criteria set out in s 48(2) (Sharrock *Business transactions law* (2016) 606; Sharrock 2010 *SA Merc LJ* 308).

¹⁰³⁴ Naudé “Section 48” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 12.

¹⁰³⁵ Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 187; Hawthorne 2012 *THRHR* 346, 361-362. Naudé “Section 48” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 12 accepts that s 48(2)(a) “leaves much to the discretion of the court” when applying this provision.

¹⁰³⁶ Cf the discussion on the Supreme Court of Appeals approach to fairness in the common law of contract in paras 2 3 2 2 & 2 3 2 4 *supra*.

¹⁰³⁷ Cf the discussion in the text at n 1028 *supra*.

and “unfair” are synonyms and as such section 48(2)(b) does not provide further illumination on how to determine whether a term is unfair.¹⁰³⁸

Further guidelines provided by the legislature in assessing the fairness of a term are found in section 52(2) of the Act.¹⁰³⁹ This provision contains a list of factors that the court must consider when determining whether a term is unfair, unreasonable or unjust. The listed factors are the following:

- (a) the fair value of the goods or services in question;
- (b) the nature of the parties, their relationship to each other and their relative capacity, education, experience, sophistication and bargaining position;
- (c) the circumstances of the agreement that existed or were reasonably foreseeable at the time the contract was concluded;
- (d) the conduct of the parties;
- (e) whether there was any negotiation between the parties, and if so, the extent of that negotiation;
- (f) whether, as a result of conduct engaged in by the supplier, the consumer was required to do anything that was not reasonably necessary for the legitimate interests of the supplier;
- (g) the extent to which any documents relating to the agreement satisfied the plain language requirements in section 22 of the CPA;
- (h) whether the consumer knew or ought reasonably to have known of the existence and extent of any particular provision of the agreement that is alleged to have been unfair, unreasonable or unjust, having regard to any custom of trade and any previous dealings between the parties;
- (i) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a different supplier; and

¹⁰³⁸ Naudé 2009 *SALJ* 516. See further Sharrock *Business transactions law* (2016) 606-607; Bradfield *Christie’s law of contract* (2016) 25; Hawthorne 2012 *THRHR* 363; Naudé & De Stadler “The Consumer Protection Act 68 of 2008” in Hutchison & Pretorius (eds) *Contract* (2012) 450; Sharrock 2010 *SA Merc LJ* 308.

¹⁰³⁹ Hawthorne 2014 *THRHR* 417-418.

- (j) in the case of supply of goods, whether the goods were manufactured, processed or adapted to the special order of the consumer.¹⁰⁴⁰

As can be seen from the above, almost all of the factors listed concern the surrounding circumstances of the contract and the parties rather than the actual contract terms themselves.¹⁰⁴¹ Therefore, the inclusion and consideration of these factors promote substantive equality.¹⁰⁴² This it to be expected bearing in mind that one of the main aims of the CPA is to address unfair bargaining relationships and it is an important step in “legitimising contextualisation of the particular circumstances in relation to the adjudication process.”¹⁰⁴³ Consequently, it is submitted that the provisions of the CPA incorporate a subjective test for fairness similar to that in *Barkhuizen v Napier*, the latter being inspired by ubuntu.¹⁰⁴⁴

There are also other provisions in the CPA that provide more guidance on the general requirement for fair, reasonable or just terms. Section 51 contains a list of prohibited (so-called “blacklist” terms).¹⁰⁴⁵ There are also terms that are presumed

¹⁰⁴⁰ For a more detailed discussion of these factors see e.g. Naudé “Section 52” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016); Sharrock *Business transactions law* (2016) 607-608; Sharrock 2010 *SA Merc LJ* 309-313; Naudé 2009 *SALJ* 524.

¹⁰⁴¹ Naudé 2009 *SALJ* 515, 529.

¹⁰⁴² Hawthorne 2012 *THRHR* 368.

¹⁰⁴³ Hawthorne 2012 *THRHR* 369. See also Davis 2011 *Stell LR* 861.

¹⁰⁴⁴ Cf the discussion of the test for fairness set out in *Barkhuizen v Napier* 2007 5 SA 323 (CC) in the text at n 872 *supra*.

¹⁰⁴⁵ These terms include the limitation or exemption of a supplier from liability for gross negligence (s 51(1)(c)(i)); assumption of risk or liability by the consumer (s 51(1)(c)(ii); imposition of an obligation on the consumer to pay for damage to or assumption of risk of handling goods displayed by the supplier (s 51(1)(c)(iii); agreements resulting from negative option marketing (s 51(1)(d) read with s 31); agreements requiring supplementary agreements (s 51(1)(e) & s 51(2)(a)); agreements relative to a consumer’s claim against the Guardian’s fund (s 51(1)(f)); false acknowledgement by a consumer (s 51(1)(g)(i) & (ii)); terms entailing forfeiture of money as a result of exercising a right in terms of the Act (s 51(1)(h)(i) & (ii)); terms authorising entrance to premises to repossess goods (s 51(1)(j)(i)); undertakings to sign documentation in advance (s 51(1)(j)(ii)); agreements to a predetermined enforcement costs ((s 51(1)(j)(iii)); terms requiring deposit of an identity document, credit or debit card, bank account or automatic teller machine access card or any similar identity document or device (s 51(1)(j)(i) &

unfair (so-called “greylist” terms).¹⁰⁴⁶ This does not mean that any other terms in a contract cannot be considered unfair in terms of section 48 of the CPA.¹⁰⁴⁷ Furthermore, the greylist terms are only presumed unfair and hence still subject to the test for fairness set out in section 48.¹⁰⁴⁸

Moving on to the unfair enforcement of contract terms, section 48(1)(b) provides that a supplier must not administer a transaction or an agreement for the supply of any goods or services, in a manner that is unfair, unreasonable or unjust. It can be argued that the word “administer” refers to enforcement of a contract term.¹⁰⁴⁹ The word “administer” can be defined as “attend to the organisation or implementation of”.¹⁰⁵⁰ Thus, the administration of the agreement refers to the implementation of the agreement which denotes the actual enforcement of the contract terms.

s 52(1)(b)(i)); or provision of a personal identification code or number to be used to access an account (s 51(1)(j)(ii) & s 52(1)(b)(ii)). For a discussion of these prohibited terms see e.g. Naudé “Section 51” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016); Sharrock *Business transactions law* (2016) 603-605; Hawthorne 2014 *THRHR* 420; Hawthorne 2013 *SUBB Jurisprudentia* 68; Hawthorne 2012 *THRHR* 363-366; Sharrock 2010 *SA Merc LJ* 316-321; Naudé 2009 *SALJ* 519.

¹⁰⁴⁶ These terms are contained in reg 44(3) of the regulations made by the Minister in terms of section 120(1)(d) of the CPA and published in GN R293 in GG 34180 of 1 April 2011 (“the CPA regulations”). It should be noted that this list applies only to a term in a contract “between a supplier operating on a for-profit basis and acting wholly or mainly for purposes related to his or her business or profession and an individual consumer or individual consumers who entered into it for purposes wholly or mainly unrelated to his or her business or profession” (reg 44(1) of the CPA regulations). For more detail relating to these presumed unfair terms see e.g. Naudé “Regulation 44” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016); Sharrock *Business transactions law* (2016) 608-613; Hawthorne 2014 *THRHR* 421; Hawthorne 2013 *SUBB Jurisprudentia* 68; Hawthorne 2012 *THRHR* 366-368; Naudé 2009 *SALJ* 519-524.

¹⁰⁴⁷ Reg 44(2)(b) of the CPA regulations states that the list in reg 44(3) is non-exhaustive and that other terms may also be unfair for purposes of s 48 of the Act.

¹⁰⁴⁸ Reg 44(2)(a) of the CPA regulations states that the list in reg 44(3) is indicative only, and such terms could be fair depending on the facts of the case.

¹⁰⁴⁹ See also Bradfield *Christie’s law of contract* (2016) 24.

¹⁰⁵⁰ The Dictionary Unit for South African English (eds) *South African Concise Oxford Dictionary* (2007) *sv* administer.

Accordingly, it is submitted that this provision prohibits the unfair enforcement of contract terms and has created an equitable discretion in this respect. Although it would seem that section 48(2) is not applicable when dealing with the unfair enforcement of a contract term,¹⁰⁵¹ the court is still obliged to consider the list of factors in section 52(2) to determine whether the enforcement was unfair or not.¹⁰⁵² As stated above,¹⁰⁵³ the list of factors predominantly deals with the circumstances surrounding the contract, and hence it promotes substantive equality. Therefore, the CPA's approach to the unfair enforcement of contract terms accords with the approach of the Constitutional Court in *Barkhuizen v Napier* in which the court laid down a subjective test for fairness when determining whether enforcement of a contract term is unfair or not, which test was also inspired by ubuntu.¹⁰⁵⁴ Although the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa* held that the subjective part of the test dealing with the unfair enforcement of a contract term becomes relevant only when a specific constitutional value or right is implicated as envisaged by the objective part of the test for fairness,¹⁰⁵⁵ it has been suggested that the Constitutional Court in *Botha v Rich* applied the subjective part of the test without reference to a specific constitutional value or right.¹⁰⁵⁶ Accordingly, some legal scholars interpreted the court's decision as impliedly holding that the unfair enforcement of a contract term would be unconstitutional, and hence against public policy.¹⁰⁵⁷

¹⁰⁵¹ S 48(2) concerns "a transaction or agreement, a term or condition of a transaction or agreement, or a notice to which a term or condition is purportedly subject".

¹⁰⁵² S 52(1) provides that in any proceedings before a court concerning the contravention of s 48, the court must consider the list of factors in s 52(2).

¹⁰⁵³ Cf the discussion in the text at n 1039 *supra*.

¹⁰⁵⁴ Cf the discussion of the test for fairness set out in *Barkhuizen v Napier* 2007 5 SA 323 (CC) in the text at n 872 *supra*.

¹⁰⁵⁵ Cf the discussion of this case in para 2 3 2 4 *supra*.

¹⁰⁵⁶ Cf the discussion of the case in the text at n 943 *supra*.

¹⁰⁵⁷ Cf the discussion of this case in para 2 3 2 5 *supra*.

In the next chapter,¹⁰⁵⁸ I propose an interpretation of the court's decision in *Botha v Rich* that supports the conclusion that the court did in fact develop the common law of contract to reflect an equitable discretion as informed by the proper appreciation of the constitutional value of human dignity. If this proposal is correct, the position dealing with the unfair enforcement of contract terms under the CPA is similar to that under common law.

It has been argued that as section 40 which deals with "unconscionable conduct" provides for "any form of unfair conduct", section 48(1)(b) is "unnecessary and confusing".¹⁰⁵⁹ In this respect, section 40(1)(c) provides that a supplier may not use "unfair tactics" in connection with the "enforcement of an agreement to supply any goods or services to a consumer". However, it would seem that the test laid down in section 40 is more stringent than that under section 48. In the first place, section 1 of the Act defines "unconscionable" conduct as conduct that is "unethical or improper to a degree that would shock the conscience of a reasonable person." Consequently, Du Plessis argues that this definition suggests "a high degree of impropriety, and not merely conduct which is generally felt to be unfair".¹⁰⁶⁰ Furthermore, although the term "unfair tactics" is not defined in the Act itself, Du Plessis proposes that "tactics" could denote that "available means are artfully or skilfully used to achieve a particular ends" and that the term "unfair" suggests "that there is something unacceptable about the use of this means".¹⁰⁶¹ Therefore, although there is an overlap between the provisions in sections 40(1)(c) and

¹⁰⁵⁸ See the discussion dealing with the Constitutional Court's development of the common law of contract to incorporate an equitable discretion when dealing with the enforcement of a contract term in para 3 2 7 3 *infra*.

¹⁰⁵⁹ Naudé "Section 48" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 10.

¹⁰⁶⁰ Du Plessis "Section 40" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (OS, 2014) para 2.

¹⁰⁶¹ Du Plessis "Section 40" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (OS, 2014) para 18. See also Sharrock *Business transactions law* (2016) 597 who argue that the meaning of the term "unfair tactics" is uncertain.

48(1)(b),¹⁰⁶² it is submitted that the latter provides a consumer with more extensive protection against the unfair enforcement of contract terms.

From the discussion above, the conclusion can be reached that the provisions in section 48(1) grant the courts “an equitable jurisdiction”¹⁰⁶³ when dealing with unfair contract terms and the unfair enforcement of contract terms. As pointed out by Hawthorne, section 48(1) qualifies as a so-called “general clause”.¹⁰⁶⁴ Although the CPA contains a number of guidelines,¹⁰⁶⁵ the development of the test for fairness and the concomitant process of concretising the provisions in section 48 have been left to the courts and they will have to construct relevant rules on an ongoing basis.¹⁰⁶⁶

It is possible that the Supreme Court of Appeal's resistance to fairness as a standard for the enforcement of a contract¹⁰⁶⁷ may well translate into a more restrictive interpretation of these provisions than that submitted by an interpretation of the founding constitutional values, as inspired by ubuntu. Therefore, it is necessary to investigate the CPA's constitutional imperatives and how its provisions must be interpreted.

¹⁰⁶² Du Plessis “Section 40” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (OS, 2014) para 6.

¹⁰⁶³ Floyd “Legality” in Hutchison & Pretorius (eds) *Contract* (2012) 187. See also Hawthorne 2012 *THRHR* 346, 361-362.

¹⁰⁶⁴ Hawthorne 2012 *THRHR* 361-362. See also Naudé “Section 48” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 1. As previously stated, a general clause is a legal rule that incorporates an open norm and which must be given content by the legislature and/or the courts (cf the definition of an open norm as set out in n 601 *supra*).

¹⁰⁶⁵ Hawthorne 2012 *THRHR* 369; Naudé 2009 *SALJ* 529.

¹⁰⁶⁶ Hawthorne 2012 *THRHR* 362.

¹⁰⁶⁷ Cf the discussion on the Supreme Court of Appeals approach to fairness in common law contracts in paras 2 3 2 2 & 2 3 2 4 *supra*.

2 3 4 3 *The CPA as a statute that promotes constitutional values*

Section 7(2) of the Constitution provides that the state must promote and fulfil the rights in the Bill of Rights. As was seen in the previous chapter,¹⁰⁶⁸ section 9(2) of the Constitution provides that legislative and other measures may be taken to protect persons against unfair discrimination and advance persons disadvantaged by unfair discrimination. Accordingly, it was argued that the Constitution is committed to the achievement of substantive equality, and specifically, egalitarian social transformation in the private sphere.¹⁰⁶⁹

The CPA is a good example of legislation aimed at promoting substantive equality in the private sphere.¹⁰⁷⁰ The Preamble of the CPA recognises “[t]hat apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy and other forms of social and economic inequality”. It further recognises the necessity to “fulfil the rights of historically disadvantaged persons and to promote their full participation as consumers” and “to protect the interests of all consumers” and “ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace”. As such, the CPA recognises the need to address economic inequality caused by apartheid and aims to promote better market participation by historically disadvantaged persons.¹⁰⁷¹ Therefore, the CPA incorporates a social welfarist approach to contracts because it promotes and advances social justice and the economic welfare of consumers.¹⁰⁷² Specifically, the link between equality and the consumer’s right to fair contract terms in section 48 of the Act has been emphasised.¹⁰⁷³

¹⁰⁶⁸ See para 1 8 2 3 *supra* which deals with the transformative aims of the Constitution.

¹⁰⁶⁹ See also Hawthorne 2014 *THRHR* 408 dealing with this in the context of the common law of contract.

¹⁰⁷⁰ Van Huyssteen *et al Contract* (2016) para 1.60; Mupangavanhu 2015 *De Jure* 129; Hawthorne 2014 *THRHR* 417; Hawthorne 2011 *SAPL* 431.

¹⁰⁷¹ Hawthorne 2013 *SUBB Iurisprudentia* 60; Hawthorne 2012 *THRHR* 361; Hawthorne 2011 *SAPL* 431.

¹⁰⁷² Hawthorne 2012 *THRHR* 361.

¹⁰⁷³ Naudé “Introduction to ss 48-52 and reg 44” in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 8.

It has also been stated that the consumer rights in the CPA promote the human dignity of consumers,¹⁰⁷⁴ which is also the case for the consumer's right to fair contract terms as set out in section 48.¹⁰⁷⁵ Subsequently, the CPA promotes a more "person-orientated" approach to contracts because it "is concerned with how the physical, property, social and economic interests of consumers will be affected by the terms of their agreements and takes cognisance of a consumer's ability to protect her interests, which demands contextualisation".¹⁰⁷⁶ Therefore, the constitutional aim towards substantive equality is also linked to the promotion of human dignity.¹⁰⁷⁷

2 3 4 4 *Constitutional interpretation of the CPA*

As mentioned in the previous chapter, all law (including any legislation) is subject to the Constitution.¹⁰⁷⁸ Section 39(2) of the Constitution provides that when any legislation is interpreted by a court, forum of tribunal, its interpretation "must promote the spirit, purport and objects of the Bill of Rights".¹⁰⁷⁹ This would include an interpretation consistent with a transformative constitutional approach that aims to achieve substantive equality.¹⁰⁸⁰ As stated by the court in *Standard Bank of South Africa v Dlamini*:

Our Constitutional Court ("the CC") has repeatedly endorsed the substantive approach to equality. Likewise, national legislation contemplated in the equality clause aimed at preventing or prohibiting

¹⁰⁷⁴ Eiselen & Naudé "Introduction and overview of the Consumer Protection Act" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (OS, 2014) para 29; Hawthorne 2011 *SAPL* 431-433.

¹⁰⁷⁵ Naudé "Introduction to ss 48-52 and reg 44" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 8.

¹⁰⁷⁶ Hawthorne 2013 *SUBB Jurisprudentia* 66; Hawthorne 2012 *THRHR* 361.

¹⁰⁷⁷ The connection between human dignity and substantive equality is discussed in more detail in paras 3 2 & 3 3 *infra* that deals with the constitutional values of human dignity and equality.

¹⁰⁷⁸ Cf the discussion in para 1 8 1 *supra*.

¹⁰⁷⁹ Cf the discussion in para 1 8 3 2 *supra* dealing with the development of the common and customary law in terms of s 39(2).

¹⁰⁸⁰ Cf the discussion in para 1 8 2 3 *supra* on the rule of law under the Constitution.

unfair discrimination must also be interpreted in ways that achieve substantive effect.¹⁰⁸¹

More importantly, such an interpretation involves the incorporation of values or norms, and as was seen previously, these values are found in the “objective normative value system” established under the Constitution.¹⁰⁸² As explained by Liebenberg, this means that such legislation must be interpreted “to facilitate the development of people to their full potential and their participation as equals in all spheres of our society” and should not be interpreted to preserve the existing common law norms as far as possible.¹⁰⁸³

The CPA is a good example of this type of legislation and therefore it should be interpreted to achieve substantive equality which involves a normative approach as informed by the objective normative value system established under the Constitution.¹⁰⁸⁴ As elucidated by Hawthorne:

Promulgation of the Consumer Protection Act has been a decisive move, since mandatory consumer protection legislation represents a shift from rules based on formal reasoning to rules based on a more discretionary form of reasoning, characteristic of a fairness-based approach to contract law.¹⁰⁸⁵

Furthermore, in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* the Constitutional Court held that section 39(2) obliges a judge “to examine the objects and purport of an Act and to read the provisions of

¹⁰⁸¹ *Standard Bank of South Africa Ltd v Dlamini* 2013 JOL 30897 (KZD) para 30.

¹⁰⁸² See the discussion in para 1 8 2 *supra*.

¹⁰⁸³ Liebenberg 2008 *TSAR* 473 on the interpretation of legislation dealing with socio-economic rights.

¹⁰⁸⁴ *Standard Bank of South Africa Ltd v Dlamini* 2013 JOL 30897 (KZD) para 30 read with para 32. The objective normative value system of the Constitution is dealt with in para 1 8 2 *supra*.

¹⁰⁸⁵ Hawthorne 2012 *THRHR* 353. See also Hawthorne 2008 *SAPL* 62 where she argues that this development is proof “that the legitimacy of the formalistic rule of law approach has become questionable”.

legislation, so far as possible, 'in conformity' with the Bill of Rights".¹⁰⁸⁶ Therefore, the purpose of the CPA should be investigated when interpreting any of its provisions. Section 3 of the CPA states that the main purpose of the CPA is to promote and advance the social and economic welfare of consumers in South Africa.¹⁰⁸⁷ This must be accomplished by the establishment and maintenance of a fair, accessible, efficient and sustainable consumer market;¹⁰⁸⁸ also, by promoting fair business practices¹⁰⁸⁹ and protecting consumers from unfair trade practices and conduct.¹⁰⁹⁰ Specifically, the CPA aims to protect the rights of vulnerable persons.¹⁰⁹¹ These would include persons from low-income and remote communities, minors, seniors, illiterate persons or persons with a low literacy level, the visually impaired and persons who have limited language skills in the language in which the advertisement, agreement or other visual representation is presented.¹⁰⁹² Therefore, "[t]he more vulnerable the consumer is, the more protection is required".¹⁰⁹³

As a final note it can also be mentioned that the CPA contains provisions dealing with its interpretation and the development of the common law of contract. Section 2(1) provides that the CPA should be interpreted to give effect to the purposes detailed in section 3. In addition, the CPA should not be interpreted in such a way as to preclude a consumer from exercising any of her common-law rights.¹⁰⁹⁴ Furthermore, when a matter is brought before a court in terms of the Act, the court has the following obligations: first, the court must develop the

¹⁰⁸⁶ *Investigating 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) para 22. See also De Vos & Freedman (eds) *South African constitutional law* (2014) 339; Liebenberg 2008 TSAR 472.

¹⁰⁸⁷ S 3(1).

¹⁰⁸⁸ S 3(1)(a).

¹⁰⁸⁹ S 3(1)(c).

¹⁰⁹⁰ S 3(1)(d).

¹⁰⁹¹ S 3(1)(b).

¹⁰⁹² S 3(1)(b)

¹⁰⁹³ Du Preez 2009 TSAR 63.

¹⁰⁹⁴ S 2(10).

common law to improve the realisation and enjoyment of consumer rights generally and, in particular, to improve the position of the vulnerable persons referred to above.¹⁰⁹⁵ Secondly, the court must promote the spirit and purposes of the CPA.¹⁰⁹⁶ Finally, section 4(3) provides that if any provision in the CPA can have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the CPA and will best improve the realisation and enjoyment of consumer rights and, in particular, the position of the vulnerable persons mentioned above.

2 3 4 5 *Role of ubuntu when interpreting the CPA*

As section 39(2) of the Constitution means that the CPA should be interpreted to promote constitutional values, the underlying value of ubuntu will be one of the factors to guide this interpretation.¹⁰⁹⁷ In fact, it would seem that ubuntu is especially relevant in the interpretation of the CPA, as, the Preamble of the CPA specifically recognises the social and economic inequality caused by apartheid and the need to address this inequality. The CPA is seen as a tool to ensure that previously excluded members can now become part of the community that has access to the market place.¹⁰⁹⁸ It follows that the CPA aims to promote the realisation of socio-economic rights which accords with the ideas in ubuntu.¹⁰⁹⁹ It was also illustrated how the CPA aims to promote the constitutional value of human dignity,¹¹⁰⁰ and as already shown, ubuntu is closely related to and informs the meaning of human dignity in terms of the Constitution.¹¹⁰¹ Therefore, ubuntu

¹⁰⁹⁵ S 4(2)(a).

¹⁰⁹⁶ S 4(2)(b)(i).

¹⁰⁹⁷ Cf the discussion on the role of ubuntu in private law in para 1 8 4 3(b) *supra*.

¹⁰⁹⁸ Cf the discussion on the CPA as a statute that promotes constitutional values in para 2 3 4 3 *supra*.

¹⁰⁹⁹ For the link between ubuntu and promotion of socio-economic rights see e.g. *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) & *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) discussed in para 1 8 4 3(a) *supra*.

¹¹⁰⁰ See the discussion on how the CPA promotes human dignity in para 2 3 4 3 *supra*.

¹¹⁰¹ See the discussion of *S v Makwanyane and another* 1995 3 SA 391 (CC) in para 1 8 4 2(b) *supra*. See also the discussions of *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA

will be relevant to inform the meaning of the constitutional values of human dignity and equality when interpreting and giving content to the provisions of the CPA.¹¹⁰²

Finally, in *Everfresh Market Virginia v Shoprite Checkers* Justice Yacoob emphasised the role of ubuntu in protecting vulnerable consumers:

It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on [*sic*] one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu.¹¹⁰³

Thus ubuntu has an important role to play in the interpretation and application of the CPA, especially when applying the court's equitable discretion in section 48 of the Act. The open norm of fairness incorporated into section 48 should be interpreted within the context of the values and aims of the Constitution as informed by ubuntu.

Recently, Eiselen and Naudé argued that the principle of good faith as linked to human dignity should inform the interpretation of these provisions:

Although the CPA does not refer to the concept of good faith, this concept is at the heart of Chapter 2, Parts F and G, which deal with unconscionable conduct and the right to fair, just and reasonable terms and conditions. These terms are closely associated with the concept of good faith. In addition, good faith can arguably be linked to the

78 (W); *Dikoko v Mokhatla* 2006 6 SA 235 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) as discussed in para 1 8 4 3 *supra*.

¹¹⁰² How ubuntu informs the constitutional value of human dignity is critically analysed in paras 3 2 5 to 3 2 7 *infra*.

¹¹⁰³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 24 (Yacoob minority judgment).

fundamental right to dignity. It could be argued that dignity and good faith in the context of consumer contracts means that the supplier must show a reasonable measure of concern for the interests of the consumer and not merely further its own interests in a one-sided manner.¹¹⁰⁴

It is proposed that this argument compliments the submissions regarding ubuntu because the Constitutional Court envisages that the principle of good faith must be infused with the underlying constitutional value of ubuntu.¹¹⁰⁵ Furthermore, it was submitted that the harmonisation of good faith and ubuntu involves a critical investigation into how ubuntu should inform the expression of the founding constitutional values, namely human dignity, equality, freedom and the rule of law, in the common law of contract.¹¹⁰⁶ Therefore, it is submitted that how ubuntu informs the founding constitutional values in the common law of contract and how this interpretation could lead to a more prominent role for good faith in ensuring contractual fairness is relevant when interpreting the open norm of fairness created in section 48 of the CPA.

How ubuntu informs these constitutional values and what this means for the role of good faith in the common law of contract is critically analysed in the next chapter.

2 4 CONCLUSION

It was shown throughout this chapter how the role of fairness in the South African law has developed over the years as informed by the political, economic and social climate prevalent at the time. Although the Roman-Dutch law of contract

¹¹⁰⁴ Eiselen & Naudé "Introduction and overview of the Consumer Protection Act" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (OS, 2014) para 4. See also Naudé 2009 SALJ 517-518 who argues that the court should consider the principle of good faith when assessing whether a term is unfair in terms of s 48 of the CPA (supported by Davis 2011 *Stell LR* 861).

¹¹⁰⁵ Cf the discussions of *Barkhuizen v Napier* 2007 5 SA 323 (CC) in the text at n 973 *supra* & *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) in the text at n 983 *supra*.

¹¹⁰⁶ Cf the discussion of *Combined Developers v Arun Holdings and others* 2015 3 SA 215 (WCC) in the text at n 1009 *supra*.

that arrived in South Africa was flexible and fair, new political and economic ideas that arrived with the British resulted in various changes to the existing legal system at the Cape, including the arrival of the classical model of contract law. This model of contract law is based on freedom and sanctity of contract and has proved resistant to the idea of substantive fairness in contracts.

During the apartheid era, the classical model of contract law was entrenched into the legal system as an absolute truth rather than the product of specific political and economic ideals. Although the movement towards the modern theory of contract and the introduction of the Constitution has brought with it changing political and economic ideals, the common law of contract has been particularly slow in embracing the new transformative constitutional approach. As was shown throughout this chapter, the Supreme Court of Appeal's limitation of the role of good faith is an expression of the underlying values of the common law of contract rooted in the colonial tradition. As expounded upon by Barnard:

The South African law of contract has been telling for centuries a grand story or narrative 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 – even in circumstances when those contracts are deeply unfair and does not contribute to human well-being.¹¹⁰⁷

As part of the new transformative constitutional approach, the Constitutional Court envisages that ubuntu could promote the development of good faith in the common law of contract to reflect the values enshrined in the Constitution rather than those rooted in the colonial legal tradition. The need for such change is pressing, but it was shown that there remains much uncertainty as to how the values of ubuntu should be translated into the common law of contract. A first tentative step was proposed in this chapter, namely that ubuntu as an underlying value of the Constitution should be used to critique and expand the current role of good faith as an expression of values rooted predominantly in the colonial common law tradition. The next chapter will investigate how ubuntu, as an

¹¹⁰⁷ Barnard *Critical legal argument for contractual justice* (2005) 6.

underlying constitutional value, can be used to critique and transform the current role of good faith in the South African common law of contract.

CHAPTER 3 CRITICAL ANALYSIS OF THE INTERPRETATION OF THE FOUNDING CONSTITUTIONAL VALUES IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT

Values ... serve as *reasons for* rules; conversely, rules (if they are any good) serve to implement values...¹¹⁰⁸

3 1 INTRODUCTION

The founding constitutional values¹¹⁰⁹ should be viewed as principles underlying the Constitution.¹¹¹⁰ In other words, they serve as the foundation of the constitutional provisions especially those found in the Bill of Rights. They do not have a stand-alone legal effect but are given expression to by the other provisions in the Bill of Rights. In *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* the Constitutional Court stated as follows:

The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of ch 2 which contains the Bill of Rights.¹¹¹¹

¹¹⁰⁸ Michelman “The rule of law, legality and the supremacy of the Constitution” in Woolman & Bishop (eds) *Constitutional law* (2014) para 11.4(a).

¹¹⁰⁹ In the context of this thesis the term “founding constitutional values” refer to the values of human dignity, equality, freedom and the rule of law as found in s 1 of the Constitution. This is in order to differentiate between these values and ubuntu which is referred to as an underlying constitutional value (cf the discussion in para 1 8 4 *supra* which deals with the development of ubuntu into an underlying value of the Constitution).

¹¹¹⁰ Fowkes “Founding provisions” in Woolman & Bishop (eds) *Constitutional law* (2014) para 13.3(b).

¹¹¹¹ *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others* 2005 3 SA 280 (CC) para 2. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 324; Fowkes “Founding provisions” in Woolman & Bishop (eds) *Constitutional law* (2014)

Section 39(2) of the Constitution is the provision most commonly used to give expression to the founding constitutional values:¹¹¹²

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

This is also the case in the common law of contract. In *Barkhuizen v Napier*¹¹¹³ the Constitutional Court stated as follows:

[C]ourts have a constitutional obligation to develop common law, including the principles of the law of contract, so as to bring it in line with values that underlie our Constitution. When developing the common law of contract, courts are required to do so in a manner that “promotes the spirit, purport and objects of the bill of Rights”. Section 39(2) of the Constitution says so.¹¹¹⁴

As was shown in the previous chapter, the court further held that constitutional challenges to contractual terms must be determined by testing the contract terms against public policy which the court held “represents the legal convictions of the community” and “those values that are held most dear by the society”.¹¹¹⁵ The court then stated that public policy must now be determined with reference to the Constitution and its founding values:

para 13.3(b); Woolman “Dignity” in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.3(d).

¹¹¹² Fowkes “Founding provisions” in Woolman & Bishop (eds) *Constitutional law* (2014) para 13.4(c)(i); Woolman “Dignity” in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.3(d). For a detailed discussion on the role of s 39(2) in developing the common law see para 1 8 3 2 *supra*.

¹¹¹³ The facts of the case, the judgment of court and the academic commentary on this decision is discussed in detail in para 2 3 2 3 *supra*.

¹¹¹⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 35.

¹¹¹⁵ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28.

Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values which underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law.¹¹¹⁶

The court then stated that a contract term that is contrary to such values is contrary to public policy and therefore unenforceable:

What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.¹¹¹⁷

Therefore, section 39(2) is the appropriate mechanism through which to give effect to the founding constitutional values in the common law of contract through the open norm¹¹¹⁸ of public policy.¹¹¹⁹ Along the same lines, section 39(2) also requires that any interpretation of the consumer's right to fair, reasonable and just terms in section 48¹¹²⁰ of the CPA should promote the founding constitutional values.¹¹²¹

¹¹¹⁶ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28.

¹¹¹⁷ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 29.

¹¹¹⁸ An open norm refers to a rule or standard that has no fixed or restricted meaning, can apply to various situations and enables value judgments (cf the discussions in paras 1 8 4 1 & 2 1 *supra*).

¹¹¹⁹ This role of s 39(2) in the law of contract has been promoted by various academic scholars (see e.g. Barnard *Critical legal argument for contractual justice* (2005) 140; Bhana & Pieterse 2005 *SALJ* 870; Lubbe 2004 *SALJ* 402-403; Hawthorne 2003 *THRHR* 117).

¹¹²⁰ S 48 of the CPA is discussed in detail in para 2 3 4 2 *supra*.

¹¹²¹ The constitutional interpretation of the provisions in the CPA is discussed in more detail in para 2 3 4 4 *supra*.

At first glance, this type of approach does not appear to be controversial. Nonetheless, the founding constitutional values are open-ended concepts themselves that are concretised by the specific political philosophy used to inform their content.¹¹²² As was seen previously, with the introduction of the Constitution, the political and economic ideals that should inform the common law of contract have changed. Previously, the philosophical basis of the common law of contract was grounded firmly in individualism and economic liberalism.¹¹²³ Now the Constitution requires a normative approach based on human dignity and the promotion of substantive equality by addressing the social and economic injustices of the past.¹¹²⁴ Therefore, a move from a non-interventionist state to a social welfare state can be identified. In the common law of contract this translates into a paternalistic approach through state intervention in private contracts in order to correct injustices resulting from unequal bargaining relationships.¹¹²⁵ Furthermore, the Constitution promotes a plural legal culture that should take account of the legal convictions of the indigenous people in South Africa.¹¹²⁶ Finally, it was shown how ubuntu as an underlying value of the customary law has evolved into an underlying value of the Constitution that informs the founding constitutional values, especially that of human dignity.¹¹²⁷

As was seen earlier, these constitutional aims have not been transposed into the common law of contract. The introduction and chronological development of the

¹¹²² Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 323; Bhana & Pieterse 2005 *SALJ* 876 referring to Woolman & Davis 1996 *SAJHR* 361. See also Lubbe 2004 *SALJ* 420 where he states that the “fundamental rights set out in the Constitution are also formulated in general and indeterminate terms, it clearly being the intention to leave their detailed implications to be constructed and developed by courts”.

¹¹²³ This was illustrated throughout the previous chapter (see generally para 2 2 *supra*).

¹¹²⁴ See the discussion in para 1 8 2 3 *supra*.

¹¹²⁵ See the discussion dealing with the modern law of contract in para 2 2 3 6 *supra*.

¹¹²⁶ See the discussion dealing with the unequal relationship between the common and customary law in para 1 8 3 3 *supra*.

¹¹²⁷ For a detailed discussion on the development of ubuntu into an underlying constitutional value see paras 1 8 4 2(b) & 1 8 4 3(a) *supra*.

classical model of contract law in South African law was investigated in the previous chapter.¹¹²⁸ It was shown how this classical model was imported into the common law of contract under British rule,¹¹²⁹ retained during the union years¹¹³⁰ and continued to play an important role during apartheid.¹¹³¹ With the movement towards modern contract theory¹¹³² and in the wake of the Constitution¹¹³³ there were promising indications that the courts would be willing to promote a greater emphasis on fairness in contracts. However, in *Brisley v Drotsky*¹¹³⁴ and *Afrox Healthcare v Strydom*,¹¹³⁵ the Supreme Court of Appeal halted developments in this direction by constitutionally endorsing the classical model of contract law.¹¹³⁶ Despite later contrary indications by the Constitutional Court that fairness should play a substantive role in contracts,¹¹³⁷ the Supreme Court of Appeal has

¹¹²⁸ See the discussions throughout the previous chapter starting at para 2 2 3 3 *supra*.

¹¹²⁹ See the discussion of the introduction of the classical model of the law of contract during the nineteenth century in para 2 2 3 3 *supra*.

¹¹³⁰ See the discussion in paras 2 2 3 5 (in the context of good faith) & 2 2 4 2 (in the context of public policy) *supra* dealing with the role of the classical model of contract law during the union years.

¹¹³¹ See the discussion in paras 2 2 3 6 (in the context of good faith) & 2 2 4 3 (in the context of public policy) *supra* dealing with the role of the classical model of contract law under apartheid.

¹¹³² See the discussion of judge of appeal Jansen's minority judgment in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA 580 (A) in para 2 2 3 6 *supra*. See also the discussion of appeal judge Olivier's minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) as well as the discussions of *Miller and another NNO v Dannecker* 2001 1 SA 928 (C) & *NBS Boland Bank Ltd 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) in para 2 2 4 3 *supra*. The development and principles of the modern law of contract is also set out in para 2 2 3 6 *supra*.

¹¹³³ See the discussion in para 2 3 2 1 *supra* dealing with the court decisions in *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C) & *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) decided after the enactment of the Constitution.

¹¹³⁴ 2002 4 SA 1 (SCA).

¹¹³⁵ 2002 6 SA 21 (SCA).

¹¹³⁶ Both these court decisions and the criticisms in response thereto are discussed in detail in para 2 3 2 2 *supra*. The classical model of contract law is discussed in para 2 2 3 4 *supra*.

¹¹³⁷ See the detailed discussions of *Barkhuizen v Napier* 2007 5 SA 323 (CC) in para 2 3 2 3 *supra*; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) in para 2 3 3 2 & *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) in para 2 3 2 5.

consistently limited the role of fairness in the common law of contract in line with the classical approach.¹¹³⁸ In fact, it was shown how the appeal court granted constitutional endorsement to the classical model of contract law and the classical conception of the rule of law by equating their values to those found in the Constitution. In other words, the appeal court has interpreted the founding constitutional values of human dignity, equality, freedom and the rule of law with reference to political and economic philosophies grounded in individualism and economic liberalism.¹¹³⁹ It was also shown that there is concern that the court may follow a similarly conservative approach when interpreting and applying the consumer's right to fair, reasonable and just terms in section 48 of the CPA.¹¹⁴⁰

Although ubuntu, as an underlying constitutional value, has featured in a number of contract law judgments, it was shown how these references consist mainly of general remarks which merely indicate that ubuntu would require a more direct role for fairness in the common law of contract to prevent unfair contract terms and the unfair enforcement of contract terms. Where ubuntu was applied with the result that more emphasis was placed on fairness between contracting parties, this has also been done in vague and general terms, without a detailed explanation of how the values encompassed in ubuntu would result in the requirement for more contractual fairness. Consequently, these approaches to ubuntu were criticised.¹¹⁴¹ Therefore, there is a need to investigate and explore what values are embraced by ubuntu, as an underlying constitutional value. This is the aim of this chapter and this investigation is undertaken in the following manner. The current expression of the founding constitutional values (human dignity, equality, freedom and the rule of law) in the common law of contract is

¹¹³⁸ See the discussions of *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA), *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and others* 2011 3 SA 511 (SCA), *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) & *Potgieter and another v Potgieter NO and others* 2012 1 SA 637 (SCA) in para 2 3 2 4 *supra*.

¹¹³⁹ This was illustrated in the previous chapter (see esp the discussions in paras 2 3 2 2 & 2 3 2 4 *supra*).

¹¹⁴⁰ This concern was covered in more detail in para 2 3 4 2 *supra*.

¹¹⁴¹ These cases were critically discussed in para 2 3 3 *supra*.

discussed in a critical manner by comparing the expression of these values with those encapsulated by ubuntu. This includes the identification and discussion of the existing problems surrounding the current expression of these values in the common law of contract, especially the limited role of good faith, and how ubuntu, as an underlying constitutional value, should be used to develop the role of good faith in the common law of contract to promote greater contractual fairness.

3 2 HUMAN DIGNITY

3 2 1 Importance of human dignity

As previously mentioned, human dignity is regarded as the core value of the Constitution and the most important human right from which all the other human rights derive.¹¹⁴² Therefore, as pointed out by Barnard,¹¹⁴³ the content given to the constitutional value of human dignity in the common law of contract is of particular importance. Especially, as the content given to this value effects how the other founding constitutional values of equality, freedom and the rule of law are concretised.¹¹⁴⁴

Although human dignity is also an enforceable right,¹¹⁴⁵ the focus in this thesis is on the role of human dignity as a foundational constitutional value. In the first place, the Constitutional Court held that this is the approach that must be followed when dealing with constitutional challenges to contractual terms,¹¹⁴⁶ and secondly,

¹¹⁴² Cf the discussion dealing with human dignity as a constitutional value in para 1 8 2 1 *supra*.

¹¹⁴³ Barnard *Critical legal argument for contractual justice* (2005) 230.

¹¹⁴⁴ Ackermann 2004 *New Zealand Law Review* 648. See also Barnard *Critical legal argument for contractual justice* (2005) 229 who argues that the values of human dignity, equality and freedom should be investigated together in the law of contract when dealing with issues of fairness. See also Bhana & Pieterse 2005 *SALJ* 876ff for a detailed investigation on the interaction between the constitutional values of freedom, equality and human dignity in the South African law of contract.

¹¹⁴⁵ S 10 of the Constitution provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

¹¹⁴⁶ Cf the discussion of *Barkhuizen v Napier* 2007 5 SA 323 (CC) in the text at n 1114 *supra*.

human dignity is rarely invoked as a right itself.¹¹⁴⁷ However, as the Constitutional Court has provided content to the founding constitutional value of human dignity with reference to the wording in section 10, reference will be made to this provision where necessary to illuminate the court's approach to the constitutional value of human dignity.¹¹⁴⁸

3 2 2 Difficulty in defining human dignity

The fact that human dignity is an open ended concept means that determining its meaning is not an easy matter.¹¹⁴⁹ As explained by Feldman, its meaning is dependent on the specific political and/or moral philosophy used to inform its content:

[I]deas about descriptions of dignity are linked to beliefs about what is involved in living a good life, and to ideas of the Good more generally... [and] such ideas are culturally specific, and consensus in relation to them is difficult to maintain in a pluralist society.¹¹⁵⁰

¹¹⁴⁷ De Vos "Equality, human dignity and privacy rights" in De Vos & Freedman (eds) *South African constitutional law* (2014) 458-461; Woolman "Dignity" in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.3.

¹¹⁴⁸ See the discussions dealing with the approach to human dignity in the Constitution (para 3 2 7 1) and by the Constitutional Court (para 3 2 7 2) *infra*.

¹¹⁴⁹ *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2014 2 SA 168 (CC) para 52; *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 1 SA 6 (CC) para 28. See also De Vos "Equality, human dignity and privacy rights" in De Vos & Freedman (eds) *South African constitutional law* (2014) 418; Cameron "Dignity and disgrace: moral citizenship and constitutional protection" in McCrudden (ed) *Understanding human dignity* (2013) 480; Hawthorne 2011 *SUBB Jurisprudentia* para 4 1; Brand 2009 *SALJ* 86; Lubbe 2004 *SALJ* 421; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191.

¹¹⁵⁰ Feldman 1999 *Public Law* 686. See also Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 323; Hawthorne 2011 *SUBB Jurisprudentia* para 4 1; Foster *Human dignity in bioethics and law* (2011) 44-45; Brownsword "Genetic engineering, free trade and human rights: global standards and local ethics" in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 292; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds)

Specifically, Feldman observes that the difficulty in defining human dignity is that it is generally viewed as either serving individual or collective interests:

[W]e must not assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect. If the state takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the state's view, interfere with the dignity of the individual, a social group or the human race as a whole... The quest for human dignity may subvert rather than enhance choice, and in some circumstances may limit rather than extend the scope of traditional "first generation" human rights and fundamental freedoms. Once it becomes a tool in the hands of lawmakers and judges, the concept of human dignity is a two-edged sword.¹¹⁵¹

As pointed out by a number of contract law scholars, the same problem is faced when attempting to define the constitutional value of human dignity in the common law of contract.¹¹⁵² However, before investigating the meaning of human dignity in the South African common law of contract, it is necessary to discuss how the dualistic approach to human dignity is understood in the law of contract.¹¹⁵³ This is

Human rights in private law (2001) 191. In the context of the law of contract, see Barnard *Critical legal argument for contractual justice* (2005) 231 where he talks about the clash between freedom of contract (derived from the constitutional value of freedom) and good faith (which he argues is derived from the constitutional value of human dignity) and states that "people do not share the same ideas about the extent of freedom of contract and the extend of good faith, primarily because most of the time they do not share the same morality".

¹¹⁵¹ Feldman 1999 *Public law* 685. See also Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 326; Brownsword "Human dignity from a legal perspective" in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 1; Hawthorne 2011 *SUBB Jurisprudentia* para 4 1; Foster *Human dignity in bioethics and law* (2011) 14; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191.

¹¹⁵² Hawthorne 2011 *SUBB Jurisprudentia* para 4 1; Brand 2009 *SALJ* 86; Bhana 2007 *SALJ* 274; Barnard *Critical legal argument for contractual justice* (2005) 231-232; Lubbe 2004 *SALJ* 420-421; Bhana & Pieterse 2005 *SALJ* 880.

¹¹⁵³ See the discussion in para 3 2 3 *infra*.

followed by a critical discussion of the philosophical origins of this approach.¹¹⁵⁴ Thereafter, in view of these discussions, the approach to human dignity in the Constitution, by the Constitutional Court generally, and as applied in the South African common law of contract is analysed in a critical manner.¹¹⁵⁵

3 2 3 Dualistic approach to human dignity in the law of contract

3 2 3 1 Introduction

It is not my intention nor is it possible to make an original contribution to the interpretation and understanding of human dignity. Thus, for the application of human dignity to the law of contract the seminal work of Brownsword including the work he produced in collaboration with Beyleveld will be relied upon.¹¹⁵⁶

Beyleveld and Brownsword (relying on Feldman)¹¹⁵⁷ distinguish between two concepts of human dignity, namely human dignity as empowerment and human dignity as constraint.¹¹⁵⁸ Human dignity as empowerment refers to the case where human dignity promotes individual interests in the law of contract, while human dignity as constraint refers to instances where communitarian interests are

¹¹⁵⁴ See the discussion in para 3 2 4 *infra*.

¹¹⁵⁵ See the discussion in para 3 2 7 *infra*.

¹¹⁵⁶ Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 181-199. See also Brownsword "Genetic engineering, free trade and human rights: global standards and local ethics" in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008); Beyleveld & Brownsword *Human dignity in bioethics* (2004); Beyleveld & Brownsword 1998 *Modern Law Review* 661-680.

¹¹⁵⁷ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 26; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191.

¹¹⁵⁸ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 11. See also Brownsword "Genetic engineering, free trade and human rights: global standards and local ethics" in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 292; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191.

promoted.¹¹⁵⁹ As the idea of human dignity as empowerment can be linked to the earlier classical law of contract it will be discussed first,¹¹⁶⁰ followed by the concept of human dignity as constraint which aligns more closely with the theories underpinning modern law of contract.¹¹⁶¹

3 2 3 2 *Human dignity as empowerment*

These eminent authors explain that the idea of human dignity as empowerment is embedded in the development of the modern culture of human rights after the Second World War.¹¹⁶² Referring to a number of post-Second World War international human rights instruments,¹¹⁶³ they explain that the role of human dignity in human rights is based on the following premises:

[T]hat each and every human being has inherent *dignity*; that it is this *inherent* dignity that grounds (or accounts for) the possession of human rights (it is from such inherent dignity that such rights are *derived*); that these are *inalienable* rights, and that, because all humans have dignity, they hold these rights *equally*.¹¹⁶⁴

Accordingly, they argue that human dignity acts as background justification for human rights and “the practical business of pressing one’s interest against others

¹¹⁵⁹ Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191. See also Beylvelde & Brownsword *Human dignity in bioethics* (2004) 11.

¹¹⁶⁰ Cf the discussion dealing the classical law of contract in para 2 2 3 4 *supra*.

¹¹⁶¹ Cf the discussion dealing with the development of the modern law of contract in para 2 2 3 6 *supra*.

¹¹⁶² Beylvelde & Brownsword *Human dignity in bioethics* (2004) 11ff. See also Brownsword “Genetic engineering, free trade and human rights: global standards and local ethics” in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 293-294.

¹¹⁶³ Specifically, they refer to the Universal Declaration of Human Rights 1948 (GA Res 217A (III)), the International Covenant on Economic, Social and Cultural Rights 1966 (GA Res 2200A (XXI)) & the International Covenant on Civil and Political Rights 1966 (GA res 2200A (XXI)). Cf the discussion dealing with the introduction of apartheid in South Africa in para 1 7 1 *supra* as contrasted with the international human rights movement.

¹¹⁶⁴ Beylvelde & Brownsword *Human dignity in bioethics* (2004) 13. See also Botha 2009 *Stell LR* 174.

(particularly against powerful States) will be conducted in terms of claimed human rights".¹¹⁶⁵

The authors argue that if these are the accepted premises about the role of human dignity in the field of human rights, the question then arises why humans have inherent dignity? In other words, what distinctive characteristic of being human gives a person inherent dignity?¹¹⁶⁶ According to these authors, the predominant view states that humans have inherent dignity because they have the capacity to act autonomously (i.e. "the capacity to control one's actions by reference to the choices one has made").¹¹⁶⁷ They further rely on the following explanation by Raz:

Respecting human dignity entails treating humans as persons capable of planning and plotting their future. Thus, respecting people's dignity includes respecting their autonomy, their right to control their future.¹¹⁶⁸

Brownsword and Beyleveld thus argue that human dignity requires that people should be treated as autonomous beings who can make their own decisions and must never be treated as mere things or instruments.¹¹⁶⁹ Relying on Clapham,¹¹⁷⁰ Brownsword argues that the protection of human dignity may comprise two aspects. First, it can involve respect for everyone's human dignity which involves direct attacks like "killing, torture, slavery, trafficking in persons, coercion, verbal

¹¹⁶⁵ The authors recognise that human dignity may also have a more prominent role where it is formulated as a specific human right. For example, section 10 of the Constitution which provides that "everyone has inherent dignity" (i.e. background role) and "the right to have their dignity respected and protected (i.e. foreground idea) (Beyleveld & Brownsword *Human dignity in bioethics* (2004) 13).

¹¹⁶⁶ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 15.

¹¹⁶⁷ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 15-16. See also Brownsword "Human dignity from a legal perspective" in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 3.

¹¹⁶⁸ Raz *Authority of law* (1979) 221 as quoted by Beyleveld & Brownsword *Human dignity in bioethics* (2004) 15-16. See also Brownsword "Human dignity from a legal perspective" in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 3.

¹¹⁶⁹ Beyleveld & Brownsword 1998 *Modern Law Review* 666.

¹¹⁷⁰ Clapham *Human rights in the private sphere* (1993) 148-149.

abuse, discrimination, maltreatment” and so forth.¹¹⁷¹ Secondly, it can also denote the creation of the necessary conditions for the realisation of human dignity which Brownsword describes as “the creation and protection of ‘the conditions for everyone’s self-fulfilment (or autonomy or self-realization)’”.¹¹⁷² For Beyleveld and Brownsword the second aspect denotes a negative “right against unwilled interventions by others that are damaging to the circumstances or conditions that are essential if one is to flourish as a human” and a positive “right to support and assistance to secure circumstances or conditions that are essential if one is to flourish as a human”.¹¹⁷³ Accordingly, the second aspect of human dignity involves indirect attacks that deny the opportunity for self-fulfilment and includes the rights to associate, take part in social life, express intellectual, artistic or cultural ideas and enjoy a decent standard of living and health care.¹¹⁷⁴ In this respect, human dignity also grounds and promotes socio-economic rights.¹¹⁷⁵ An oft-quoted example¹¹⁷⁶ of this approach to human dignity is article 22 of the Universal Declaration of Human Rights 1948¹¹⁷⁷ which provides as follows:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

¹¹⁷¹ Brownsword “Human dignity from a legal perspective” in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 4 referring to Clapham *Human rights in the private sphere* (1993) 149.

¹¹⁷² Brownsword “Human dignity from a legal perspective” in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 4 referring to Clapham *Human rights in the private sphere* (1993) 148.

¹¹⁷³ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 15.

¹¹⁷⁴ Clapham *Human rights in the private sphere* (1993) 149 as referred to with approval by Brownsword “Human dignity from a legal perspective” in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 4.

¹¹⁷⁵ Botha 2009 *Stell LR* 174.

¹¹⁷⁶ See e.g. Brownsword “Human dignity from a legal perspective” in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 4; Botha 2009 *Stell LR* 174; Clapham *Human rights in the private sphere* (1993) 148.

¹¹⁷⁷ GA Res 217A (III).

Therefore, they propose that the connection between human dignity and human rights can be summarised as follows:

1. The dignity of humans (the reason for their value or worth) resides in their capacity for autonomous action.
2. Humans express their value (dignity) when they act autonomously.
3. It follows that a setting in which humans are able to act autonomously is to be preferred to one in which they are not able to do so.
4. Thus, an autonomously-supporting regime of human rights not only signals respect for human dignity but assists in creating a context in which such dignity can be realized in practice.¹¹⁷⁸

This is referred to as human dignity as empowerment, because according to this conceptualisation respect for human dignity entails the empowerment of a person to live an autonomous life by making her own decisions and taking responsibility for those decisions.¹¹⁷⁹ Consequently, Brownsword provides the following description of human dignity as empowerment:

[I]t is because humans have a distinctive value (their intrinsic dignity) that they have rights *qua* humans. Commonly, it is the capacity for autonomous action that is equated with human dignity and this, in turn, generates a regime of human rights organised around the protection of individual autonomy. In this way, respect for human dignity empowers individuals by protecting their choices against the unwilling interferences of others.¹¹⁸⁰

¹¹⁷⁸ Beylvelde & Brownsword *Human dignity in bioethics* (2004) 23.

¹¹⁷⁹ Hawthorne 2011 *SUBB Jurisprudentia* para 4 2; Bhana & Pieterse 2005 *SALJ* 880-881; Lubbe 2004 *SALJ* 421; Feldman 1999 *Public Law* 685.

¹¹⁸⁰ Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 183. See also the description by Feldman 1999 *Public Law* 685: "[A] readiness to confront the realities of one's circumstances, including talents and physical and mental limitations, and make the best of them without losing hope and a sense that one's life is worthwhile, to live according to a set of normative standards, whether accepted from outside or imposed from within, accepting both burdens and benefits in full measure; and readiness to accept responsibility for the consequences of one's actions and decisions".

In other words, because a person has the capacity for autonomous action, and therefore human dignity, her choices must be respected by others. Therefore, both authors maintain that human dignity as empowerment is rights-driven because it grounds “a set of rights claims against others” and reinforces “claims to self-determination” rather than providing justification for the limitation of free choice and “social or collective constraint”.¹¹⁸¹ As pointed out by Brownsword, a rights-driven approach to human dignity places great importance on individual autonomy in that “individual freedom is to be maximised and cut back only for the sake of other rights-holders (or for some less direct rights-related reason)”.¹¹⁸² Accordingly, the idea of human dignity as empowerment is based on the political philosophies of individualism and economic liberalism which limits state interference in private transactions.¹¹⁸³

Applying the notion of human dignity as empowerment in a contract law setting, Brownsword explains that contracting parties are free to conclude contracts (as an expression of their autonomy) and that contracts freely entered into must be respected, failing which, there is an affront to the human dignity of the contracting parties.¹¹⁸⁴ Brownsword further elucidates as follows:

[T]here is a relatively familiar and widely accepted chain of thinking, linking human dignity with a right to individual autonomy that, in turn, expresses itself through the exercise of contractual freedom. Indeed, we

¹¹⁸¹ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 27-28.

¹¹⁸² Brownsword “Genetic engineering, free trade and human rights: global standards and local ethics” in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 297-298.

¹¹⁸³ Brownsword “Genetic engineering, free trade and human rights: global standards and local ethics” in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 298; Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 189.

¹¹⁸⁴ Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 193-194. See also Hawthorne 2011 *SUBB Iurisprudentia* para 4 2; Bhana 2007 *SALJ* 274; Bhana & Pieterse 2005 *SALJ* 881; Barnard *Critical legal argument for contractual justice* (2005) 231-232; Lubbe 2004 *SALJ* 421.

can trace this idea in nineteenth-century America where the proponents of the “free labour” ideology in the northern states were fond of contrasting “the dignity and vitality of the free white workers” with “the labouring man’s poverty, degradation, and lack of opportunity for advancement in the South”. On this view, respect for human dignity and freedom of contract forms a virtuous circle: without at least the right to make our own contracts, we lack dignity (being reduced to a mere status); with such a right, we recover our human dignity.¹¹⁸⁵

Hence this notion of human dignity finds expression in the classical law of contract which can also be linked to the political philosophies of individualism and economic liberalism.¹¹⁸⁶

3 2 3 3 *Human dignity as constraint*

While human dignity as empowerment enforces and promotes individual autonomy, human dignity as constraint refers to the limitation of individual autonomy where the protection and promotion of human dignity requires such limitation.¹¹⁸⁷ Beyleveld and Brownsword expound on this idea as follows:

[I]f we think of respect for human dignity as one of the constitutive values of our society (whether as an element of the public interest, or of *ordre public*, or as one of the fundamental values of our community), then those individual preferences and choices that are out of line with respect for human dignity are simply off limits.¹¹⁸⁸

¹¹⁸⁵ Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 188-189.

¹¹⁸⁶ Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 184-185; Brownsword “Genetic engineering, free trade and human rights: global standards and local ethics” in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 298. See also Hawthorne 2011 *SUBB jurisprudentia* para 4 2; Bhana 2007 *SALJ* 274; Bhana & Pieterse 2005 *SALJ* 881; Barnard *Critical legal argument for contractual justice* (2005) 232; Lubbe 2004 *SALJ* 421. Cf the discussion dealing with the classical law of contract in para 2 2 3 4 supra.

¹¹⁸⁷ Brownsword “Human dignity from a legal perspective” in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 1.

¹¹⁸⁸ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 29.

Beyleveld and Brownsword explain that while human dignity as empowerment aligns with a rights-driven theory of human rights, the idea of human dignity as constraint expresses a more duty-driven approach to human rights.¹¹⁸⁹ On a fundamental level, it refers to the correlating duty to respect the human dignity of others:

[These] are the duties that we (including officials of the State) owe to others (and, correlatively, the human rights that others have against us and that we have against others). Such duties are designed to articulate respect for the dignity-related interests of others; and if a duty-driven theory of human rights stopped here, it would be very close to a rights-driven theory.¹¹⁹⁰

In other words, this approach to human dignity denotes the duty to respect another's human dignity as given effect to by her specific human rights. As reflected in section 10 of the Constitution, this could include the explicit duty to respect another's human dignity as a specified human right.

In addition, the authors argue that human dignity as constraint may also recognise a further duty to one's community which would entail not only a direct duty to respect the human dignity of others but also an indirect duty "to respect their vision of human dignity".¹¹⁹¹ They state that this duty may arise "where there is a background ethic of care and concern for others (and, concomitantly, a sense of solidarity with and responsibility for others)" which results in "a regime of values that reflects not only a degree of control over one's own flourishing but also a measure of commitment to the flourishing of others".¹¹⁹² Accordingly, it could be argued that such a duty could denote an obligation on private individuals to assist in the creation of the necessary conditions for the realisation of others' human

¹¹⁸⁹ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 36.

¹¹⁹⁰ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 37. See also Brownsword "Genetic engineering, free trade and human rights: global standards and local ethics" in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 295; Beyleveld & Brownsword 1998 *Modern Law Review* 667-668 on the duty not to compromise the dignity of others.

¹¹⁹¹ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 37.

¹¹⁹² Beyleveld & Brownsword *Human dignity in bioethics* (2004) 41-42.

dignity.¹¹⁹³ Consequently, in this way human dignity as constraint may be used to promote socio-economic rights and substantive equality in the private sphere.¹¹⁹⁴

As was seen above,¹¹⁹⁵ human dignity as empowerment promotes a rights-driven approach to human rights which results in the maximisation of individual freedom and limits state intervention in the private sphere. In contrast, human dignity as constraint involves a more duty-driven approach to human rights which allows for a greater limitation of individual freedom:

[T]here is no pressure to maximise individual freedom. The first priority is to ensure that duty is done; there is no sense of loss as freedom is reduced for the sake of dignitarian duty; in the latter, freedom is simply what is left over to the individual when his or her duties have been fully itemised.¹¹⁹⁶

Consequently, human dignity as constraint envisages a paternalistic society¹¹⁹⁷ where the exercise of individual autonomy may be tempered where such actions are incompatible with the human dignity of others or in order to create the necessary conditions for the realisation thereof. As a result, it can be argued that human dignity as constraint envisages a society where not only the State but also private individuals are obliged to promote the realisation of the human dignity of others. In other words, the individual's autonomy may be limited where necessary to respect the human dignity of others and in order to promote the socio-economic rights and substantive equality of others which they need for the realisation of their human dignity.

¹¹⁹³ Clapham *Human rights in the private sphere* (1993) 148. See also Brownsword "Human dignity from a legal perspective" in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 4.

¹¹⁹⁴ See also Botha 2009 *Stell LR* 174.

¹¹⁹⁵ Cf the discussion in the text at n 1181 *supra*.

¹¹⁹⁶ Brownsword "Genetic engineering, free trade and human rights: global standards and local ethics" in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 297-298.

¹¹⁹⁷ See also Beyleveld & Brownsword *Human dignity in bioethics* (2004) 11 & 31 esp n 4. See also Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 194-195; Feldman 1999 *Public Law* 700.

Finally, Brownsword draws the inevitable conclusion that in a contract law setting, this notion of human dignity requires that even freely concluded contracts must be tested for conformity to human dignity.¹¹⁹⁸ Thus, this conception of human dignity is in line with the socialist values expressed in modern law of contract which make place for state intervention in contracts.¹¹⁹⁹

3 2 3 4 *Tension resulting from the dualistic approach to human dignity*

Thus in the paradigm as postulated by Beyleveld and Brownsword, the two notions of human dignity are in tension with each other as they pull in opposite directions.¹²⁰⁰ As was seen above, these authors argue that human dignity as empowerment supports contractual autonomy while human dignity as constraint results in the limitation of contractual autonomy.

As a practical example of the tension between human dignity as empowerment and constraint, Beyleveld and Brownsword refer to the famous French dwarf-throwing case.¹²⁰¹ This case concerned the banning of a dwarf-throwing attraction

¹¹⁹⁸ Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 194. See also Hawthorne 2011 *SUBB Jurisprudentia* para 4 2; Bhana 2007 *SALJ* 274; Bhana & Pieterse 2005 *SALJ* 881; Barnard *Critical legal argument for contractual justice* (2005) 231-232; Lubbe 2004 *SALJ* 421.

¹¹⁹⁹ See Feldman 1999 *Public Law* 699 who maintains that this conception of human dignity has been used to promote social justice & Brownsword "Genetic engineering, free trade and human rights: global standards and local ethics" in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 298 who states that this conception of human dignity can be used to limit free trade. See also Hawthorne 2011 *SUBB Jurisprudentia* para 4 2; Bhana & Pieterse 2005 *SALJ* 881; Lubbe 2004 *SALJ* 422. See the discussion on the modern law of contract in para 2 2 3 6 *supra*.

¹²⁰⁰ Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 194. See also Brownsword "Genetic engineering, free trade and human rights: global standards and local ethics" in Wüger & Cottier (eds) *Genetic engineering and the world trade system* (2008) 296.

¹²⁰¹ Conseil d'Etat (27 Oct 1995) req nos 136-727 (Commune de Morsang-sur-Orge) and 143-578 (Ville d'Ais-ex-Provence). See the references to this case in Beyleveld & Brownsword *Human dignity in bioethics* (2004) 25-27; Brownsword "Freedom of contract, human rights and human

in local clubs and the power of the local police to prevent activities that would contravene the ban. It was held that such action was lawful in order to secure the respect for human dignity and *ordre public*. However, one of the dwarfs (Wackenheim) challenged the legality of the bans and argued that he willingly and freely took part in these activities, that it provided him with an income and that if dwarf-throwing was banned he would be without employment. The council responded that in allowing himself to be used as a projectile (a mere thing), Wackenheim was compromising his own human dignity which could not be allowed. Hence, the ban was legal and the exercise of the power to prevent such activities lawful.¹²⁰²

Beyleveld and Brownsword maintain that Wackenheim's arguments were based on the concept of human dignity as empowerment. For Wackenheim, the ban infringed upon his human dignity because the ban prevented him from making the free choice to take part in the activities. In other words, the ban limited his autonomy. He further argued that he was not treated as a mere thing because others were not disregarding his ability to control the situation. Also, by banning the activities he was deprived of employment which was a condition for him to experience a sense of dignity.¹²⁰³ They further state that the council found support for their position in the concept of human dignity as constraint as expressed in the duty not to compromise one's own dignity and/or the dignity of others as fellow human beings in the community. Therefore, even though the dwarfs freely took

dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 192-193; Beyleveld & Brownsword 1998 *Modern Law Review* 662. Mr Wackenheim unsuccessfully brought his case before the UN Human Rights Committee in 2002 on the basis of the right to non-discrimination in art 26 of the International Covenant on Civil and Political Rights 1966 (GA res 2200A (XXI)) (*Manuel Wackenheim v France*, Communication No 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002)).

¹²⁰² Beyleveld & Brownsword *Human dignity in bioethics* (2004) 26-27; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 192-193.

¹²⁰³ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 26; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 192-193.

part in the activities, their actions were not allowed because it would run counter to their own and others' human dignity.¹²⁰⁴ Addressing how the counsel's reasoning can be reconciled with Wackenheim's argument that taking part in dwarf throwing activities provided him with a sense of dignity, Beyleveld and Brownsword propose that "presumably the Conseil judged that this must be a case of false consciousness; for surely, no genuine sense of self-esteem could be derived from participation in dwarf-throwing when ... such an undignified activity could not stand alongside respect for human dignity".¹²⁰⁵

A better illustration for the purposes of the research topic¹²⁰⁶ is the Supreme Court of Israel decision in *Jerusalem Community Burial Society v Kestenbaum*¹²⁰⁷ as analysed by Brownsword in his work dealing with the dualistic approach to human dignity in the law of contract.¹²⁰⁸ In this case, the respondent (Mr Kestenbaum) entered into a contract with the appellant (the burial society) for his wife's funeral arrangements. One of the terms in the standard form of contract signed by Mr Kestenbaum's brother (on his behalf) provided that the burial society would only engrave their tombstones in characters from the Hebrew alphabet. The respondent, in accordance with his wife's wishes, requested the appellant to engrave the tombstone with his wife's name and Gregorian dates of birth and death in Latin characters, which the burial society refused by relying on the above

¹²⁰⁴ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 27; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 193.

¹²⁰⁵ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 27; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 193.

¹²⁰⁶ Brownsword's approach to the case is critically investigated in the text at n 1242 *infra*.

¹²⁰⁷ *Jerusalem Community Burial Society v Kestenbaum* CA 294/91, [1992] IsrSC 46(2) 464 (Hebrew). I rely on a translation of this case by Yuval Abrams as available at <https://law.utexas.edu/transnational/foreign-law-translations/israeli/case.php?id=1391> (Date of use: 8 April 2017).

¹²⁰⁸ Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 182, 194-195. See also his discussion of this case in Brownsword "Human dignity from a legal perspective" in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 11.

contract term.¹²⁰⁹ The majority of the Supreme Court of Appeal annulled the contract term because it held that the term, among other things, infringed upon the respondent's freedom of expression, conscience and his human dignity.¹²¹⁰ In the dissenting judgment, it was held that respect for the free will of the parties to a contract is an essential principle of public policy and should not be departed from except in rare and exceptional cases. As the burial society's decision to engrave all its tombstones with Hebrew characters promoted the dignity of the cemetery and took account of the feelings of the community members that used it, the dissenting court argued that the term did not negate public policy.¹²¹¹ Therefore, human dignity was used to argue both for the enforcement and annulment of the contract term. In view of the above example, Brownsword concludes that there is a clear tension between the two concepts of human dignity.¹²¹²

3 2 4 Philosophical origins of the dualistic approach to human dignity in the law of contract

Beyleveld and Brownsword accept that both notions of human dignity can be derived from the work of the German philosopher Immanuel Kant.¹²¹³ The citation

¹²⁰⁹ See the summary of the facts of the case in the translation & Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 182.

¹²¹⁰ Per Shamgar P (opinion of the court) as found in the translation of the case & Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 182. In his concurring judgment, Justice Barak held that the contract term violated both the human dignity of the deceased and that of her family if neither the deceased (during her lifetime) nor her family is allowed to determine the inscription on the tombstone (Barak J (concurring judgment) para 28 as found in the translation of the case).

¹²¹¹ Per Elon DP (in dissent) as found in the translation of the case. See also Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 182.

¹²¹² Brownsword "Human dignity from a legal perspective" in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 11; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 194.

¹²¹³ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 52-53; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191. See also Bhana *Constitutionalising contract law* (2013) 112; Hawthorne

of Kant's work is not surprising as his work on the inherent dignity of human beings is regarded as the most substantial analysis of human dignity in Western philosophy, especially when dealing with human rights.¹²¹⁴

As Foster verbalises, Kant's work is opaque and subject to different interpretations:

Many discussions of Kant's view of dignity proceed on the basis of a pastiche of his views. His writing is so difficult, at least to me, that it is unsurprising that most of us use executive summaries prepared by others.¹²¹⁵

When dealing with the Kantian origins of the concept of human dignity in the law of contract, most South African legal scholars cite the work of Brownsword, and in some instances, also the work he produced in collaboration with Beyleveld.¹²¹⁶ In

2011 *SUBB jurisprudentia* para 4 2; Barnard *Critical legal argument for contractual justice* (2005) 233; Lubbe 2004 *SALJ* 421; Feldman 1999 *Public Law* 685.

¹²¹⁴ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 51-52. See also Cornell 2010 *SAPL* 384; Wood 2008 *Acta Juridica* 48.

¹²¹⁵ Foster *Human dignity in bioethics and law* (2011) 34. I am not a Kantian scholar, and therefore, I make no claims as to the best interpretation of Kant's work. Rather, my aim is to compare different interpretations of Kant in a way that illuminates how ubuntu can be used to harmonise good faith and ubuntu in the South African common law of contract. The South African common law of contract is influenced by the Anglo-analytical interpretation of Kant, in consequence this is my premise. Furthermore, because South African common law of contract's starting point is the Anglo-analytical interpretation it is not apposite to deal with Kant's role as the father of German idealism. As pointed out by Cornell and Fuller, "a Kantian informed understanding of freedom may help us think through the role of dignity in the competing rights situation that inevitable arises" (Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 16-17). For my purposes I rely on the work of Cornell and Wood as discussed in para 3 2 4 2 *infra*. For a proposed idealist reading of Kant resisting the dualistic readings of the classical law of contract, see Barnard-Naude 2008 *Constitutional Court Review* 155-208 & Barnard *Critical legal argument for contractual justice* (2005).

¹²¹⁶ For examples see Bhana *Constitutionalising contract law* (2013) 112; Hawthorne 2011 *SUBB jurisprudentia* para 4 2; Barnard *Critical legal argument for contractual justice* (2005) 233; Lubbe 2004 *SALJ* 421; Bhana & Pieterse 2005 *SALJ* 881.

their writings, these authors show how Kantian dignity can be used to support both conceptions of human dignity.¹²¹⁷ Thus, this specific section does not constitute a critical discussion of Kant's work itself, but rather sets out how Brownsword and Beyleveld have linked Kant's work to both conceptions of human dignity and how this results in a tension between human dignity as empowerment and human dignity as constraint. As will become clear, this tension results from an individualistic interpretation of Kantian dignity. This section is then followed by a critical discussion of Brownsword and Beyleveld's approach by drawing on the work of Cornell, and to some extent also that of Wood, as they both promote a more communitarian understanding of Kantian dignity.

3 2 4 1 *Brownsword and Beyleveld: individualistic interpretation of Kantian dignity*

As mentioned earlier, Beyleveld and Brownsword's conception of human dignity as empowerment is based on the premise that it is the inherent dignity of human beings that grounds human rights.¹²¹⁸ Brownsword points out that the idea that human beings have intrinsic value (dignity) finds support in Kantian thinking.¹²¹⁹ In *Groundwork of the metaphysic of morals*, Kant argues that everything either has a price or a dignity.¹²²⁰ If something has a price then that means "something else can be put in its place as an *equivalent*" which means it has a relative value.¹²²¹ In contrast, if it has a dignity, Kant maintains that "it is exalted above all price and so admits of no equivalent".¹²²² In other words, if something is beyond price it has an

¹²¹⁷ In particular the following three sources: Beyleveld & Brownsword *Human dignity in bioethics* (2004); Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 181-199 & Beyleveld & Brownsword 1998 *Modern Law Review* 661-680.

¹²¹⁸ Cf the discussion in the text at n 1164 *supra*.

¹²¹⁹ Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191.

¹²²⁰ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 96. Throughout this thesis, I use and refer to this translation of Kant's *Groundwork of the metaphysic of morals*.

¹²²¹ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 96.

¹²²² Paton (ed) *Moral Law: Kant's Groundwork* (1978) 96.

intrinsic value.¹²²³ Therefore, something has dignity because it has intrinsic value and is of inestimable worth.¹²²⁴

So what gives humans intrinsic value and therefore dignity? Kant states as follows:

Now morality is the only condition under which a rational being can be an end in himself; for only through this is it possible to be a law-making member in a kingdom of ends. Therefore morality, and humanity so far as it is capable of morality, is the only thing which has dignity.¹²²⁵

Beyleveld and Brownsword interpret this to mean that it is the capacity of rational beings to make moral laws and then abide by those laws that gives them dignity.¹²²⁶ As pointed out by Beyleveld and Brownsword (and quoting Kant), “the dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the law he makes”.¹²²⁷ Relying on this passage, they state that Kantian dignity can be used to explain why human beings have dignity (intrinsic worth).¹²²⁸ In this way, Kantian dignity is used in support of the premise that it is the inherent dignity of human beings that grounds human rights. Accordingly, as Kantian dignity is used to promote this premise, it

¹²²³ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 96.

¹²²⁴ See the references to this passage in Kant's work in Beyleveld & Brownsword *Human dignity in bioethics* (2004) 52; Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191; Beyleveld & Brownsword 1998 *Modern Law Review* 666.

¹²²⁵ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 96-97.

¹²²⁶ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 53. See also Beyleveld & Brownsword 1998 *Modern Law Review* 666.

¹²²⁷ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 52 & Beyleveld & Brownsword 1998 *Modern Law Review* 666 (both referring to Paton (ed) *Moral Law: Kant's Groundwork* (1978) 101).

¹²²⁸ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 53-54.

ultimately supports the concept of human dignity as empowerment which is based on this premise.¹²²⁹

Furthermore, as was seen above, human dignity as empowerment requires that human beings should be treated as autonomous beings who can make their own decisions and should never be treated as mere things or instruments.¹²³⁰ According to the authors, this view is reflected in Kant's second formulation of the categorical imperative¹²³¹ (also referred to as the "Formula of the End in Itself"):

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.¹²³²

They state that this passage can be used to argue "that it is wrong to treat persons as mere things rather than as autonomous ends".¹²³³ In this way, Kantian thinking can be used to support the idea that "human dignity empowers individuals by protecting their choices against the unwilled interferences of others".¹²³⁴

¹²²⁹ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 53 & Beyleveld & Brownsword 1998 *Modern Law Review* 666. See also Barnard *Critical legal argument for contractual justice* (2005) 233.

¹²³⁰ Cf the discussion in the text at n 1169 *supra*.

¹²³¹ The term "categorical imperative" refers to the moral law. For Kant, an imperative is a command that tells us what we must do (i.e. it is expressed by an "ought to"). A categorical imperative is a command that applies unconditionally or by virtue of our rationality without reference to our own specific goals and desires. In other words, the moral law tells us what to do irrespective of our goals and desires (see Paton (ed) *Moral Law: Kant's Groundwork* (1978) 76-80). See further Johnson, Robert & Creton, Adam "Kant's moral philosophy" in Zalta (ed) *Stanford encyclopedia of philosophy* (2017) para 4.

¹²³² Paton (ed) *Moral Law: Kant's Groundwork* (1978) 91 as quoted by Beyleveld & Brownsword 1998 *Modern Law Review* 666.

¹²³³ Beyleveld & Brownsword 1998 *Modern Law Review* 666. See also Lubbe 2004 *SALJ* 421.

¹²³⁴ Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 183.

Discussing how Kantian dignity is reflected in the idea of human dignity as constraint, Beyleveld and Brownsword¹²³⁵ refer to the following passage from Kant's *The metaphysics of morals*¹²³⁶ which was published more than a decade after the *Groundwork of the metaphysics of morals*:

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 (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all *things*. But just as 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.¹²³⁷

The authors find support in this passage for the notion of human dignity as constraint, specifically the duty to respect one's own dignity as reflected in Kant's statement that "he cannot give himself away for any price" because "this would conflict with his duty of self-esteem".¹²³⁸ This passage has also been used to support human dignity as constraint expressed in the duty to respect the human dignity of others.¹²³⁹ This is because Kant speaks of the duty not to "act contrary

¹²³⁵ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 52-53. See also Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191-192.

¹²³⁶ Throughout this thesis, I use and refer to Gregor's translation of this work (Gregor (ed) *Kant's metaphysics of morals* (1996)).

¹²³⁷ Gregor (ed) *Kant's metaphysics of morals* (1996) 209.

¹²³⁸ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 55; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191-192. See also Lubbe 2004 *SALJ* 421 n 190.

¹²³⁹ Lubbe 2004 *SALJ* 421-422. See also Barnard-Naude 2008 *Constitutional Court Review* 206.

to the equally necessary self-esteem of others, as human beings” and the “obligation to acknowledge in a practical way, the dignity of humanity in every other human being”.

In view of the above discussion it is argued that the interpretation of Kantian dignity to support the empowerment based conception of human dignity is based on the rationalism resulting from the Enlightenment. The latter gave birth to individualism and liberalism which accentuate autonomy. In basic terms, human dignity is defined with reference to autonomy, which in turn, denotes the freedom to make your own decisions without interference from others.¹²⁴⁰ As was seen above, human dignity as empowerment is based on the idea that human beings express their dignity when they act autonomously and make their own decisions.¹²⁴¹

The concept of human dignity as empowerment seems to be an elegant solution in protecting the free choices of persons against the unwilled interferences by others. However, the problem with such an interpretation of human dignity can be illustrated where the concept of human dignity as constraint comes into play. This was illustrated by the discussion of the Supreme Court of Israel decision in *Jerusalem Community Burial Society v Kestenbaum* above.¹²⁴² On an understanding of human dignity that denotes the freedom to make your own decisions without the interference of others, this means that your freedom (i.e. your dignity) is constrained to protect the dignity (i.e. freedom) of another. But surely, it doesn't make sense to constrain your own freedom (i.e. your own dignity) to protect the dignity (i.e. freedom) of another?¹²⁴³ Brownsword articulates this problem as follows:

¹²⁴⁰ See also Cornell & Fuller “Introduction” in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 8.

¹²⁴¹ See the discussion in the text at n 1178 *supra*.

¹²⁴² Cf the discussion on the tension between human dignity as empowerment and constraint in para 3 2 3 4 *supra*.

¹²⁴³ Using the dwarf-throwing case as illustration (also discussed in para 3 2 3 4 *supra*), the question can be framed as follows: How can your own freedom (i.e. dignity) be constrained to protect your own dignity (i.e. freedom)?

[T]he majority clearly relies on human dignity to prioritise freedom of choice over the cultural context (or, possibly, to redefine that context so as to privilege individual choice on this matter). Thus, had the contractors agreed that the tombstone should be engraved in accordance with the wishes of the deceased, it seems clear that the majority would have supported that agreement, the dignity of the cemetery notwithstanding. In the absence of such agreement, however, what remains to be explained is why, in the name of human dignity, the respondent should be empowered at the expense of the appellant.¹²⁴⁴

It is submitted that the problem of explaining why the respondent should be empowered at the expense of the appellant results from how human dignity (in particular its empowerment conception) is defined to denote unconstrained freedom. On the one hand, there is the dignity of the respondent, as relied upon by the majority, and which includes his freedom to determine how the gravestone of his wife should be engraved without interference from others. As stated by the majority, “every person has the right to properly respect his deceased loved ones ... in accordance with his lifestyle and tradition”.¹²⁴⁵ On the other hand, as relied upon by the minority, there is the dignity of the cemetery, which could be seen as the dignity of the community as represented by the appellant and denotes the community’s freedom to prescribe how the tombstones in the cemetery should be engraved without interference from others. As stated in the concurring judgment:

The exclusive use of the Hebrew language promotes the dignity of those who see that language as an expression of their personality.¹²⁴⁶

According to the conception of human dignity as empowerment, both parties’ dignity is defined as unconstrained freedom. Defining human dignity in this way results in the following difficulty: Why should the freedom (i.e. dignity) of the appellant be constrained to protect the dignity (i.e. freedom) of the respondent? In

¹²⁴⁴ Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 194-195.

¹²⁴⁵ Per Shamgar P (opinion of the court) as found in the translation of the case.

¹²⁴⁶ Per Barak J (concurring judgment) para 12 as found in the translation of the case.

other words, why should the dignity (read unconstrained freedom) of the respondent be protected rather than that of the appellant? Or as articulated by Brownsword: “Why, in the name of dignity, [should] the respondent ... be empowered at the expense of the appellant[?]”¹²⁴⁷ In other words, defining human dignity in this way always results in one of the parties’ dignity being protected while the dignity of the other party is compromised.

Therefore, due to the individualist meaning ascribed to human dignity as empowerment, there will always be a tension between human dignity as empowerment and human dignity as constraint. By giving a strong individualist interpretation to Kant, there is nowhere else to arrive at but the middle of a tightly pulled rope where human dignity pulls in opposite directions, either respecting and promoting freedom or limiting it. The question which arises now is whether there is another way to see freedom and/or human dignity that could possibly reconcile this tension between human dignity as empowerment and human dignity as constraint?

3 2 4 2 *Cornell and Wood: communitarian interpretation of Kantian dignity*

In order to address the problem identified with a strong individualistic reading of Kant, I will consider an alternative interpretation of Kant that provides a more communitarian understanding of human dignity. This is found in the work of Cornell which includes writings she produced with Fuller and Van Marle¹²⁴⁸ and also the writings of Wood.¹²⁴⁹ The above authors have interpreted Kantian dignity in such a manner that a comparison with ubuntu comes to the fore.¹²⁵⁰

¹²⁴⁷ Brownsword “Freedom of contract, human rights and human dignity” in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 195.

¹²⁴⁸ This section specifically draws from the following sources: Cornell & Fuller “Introduction” in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 3-20; Cornell 2010 *SAPL* 382-399; Cornell 2008 *Acta Juridica* 18-46; Cornell & Van Marle 2005 *AHRLJ* 195-220; Cornell 2004 *SAPL* 666-675.

¹²⁴⁹ This section specifically draws from the following source: Wood A “Human dignity, right and the realm of ends” 2008 *Acta Juridica* 47-65.

¹²⁵⁰ The relationship between Kantian dignity and ubuntu is explored in para 3 2 6 *infra*.

The first point to be highlighted is that Kant was not an individualist. As explained by Wood:

For various reasons, Kantian ethics is often characterised as “individualistic”. Among the valid reasons for this thought is Kant’s emphasis on individual rights, dignity and responsibility. At the same time, I think the use of this term also reflects an all too common tendency to read Kant through the lens of certain ideas about Western morality and a moralistic attitude toward the world, of which Kant is assumed to be the paradigm representative. On many subjects, this leads people to ignore important themes in Kantian ethics, and to misread others.¹²⁵¹

In consequence, the interpretation of Kantian dignity as set out by Beyleveld and Brownsword above is critically analysed on the basis of a more communitarian understanding of Kant as proposed by Cornell and Wood.

First, it has been shown that Kant distinguished between something that has a price (i.e. a relative value, and therefore, is replaceable) and something that has dignity (i.e. an inherent value, and as such, is irreplaceable). Kant argued that human beings have inherent worth, and therefore, dignity.¹²⁵² Both Cornell¹²⁵³ and Wood¹²⁵⁴ follow this interpretation of Kant and the idea that human dignity denotes the inherent worth of all persons is reflected in the Constitution and has been incorporated into South African constitutional jurisprudence.¹²⁵⁵

Beyleveld and Brownsword then stated that the following passage from Kant is used in support of the idea of human dignity as empowerment as it explains why human beings have inherent dignity, and therefore, are bearers of human rights:

¹²⁵¹ Wood 2008 *Acta Juridica* 60. See also Cornell 2008 *Acta Juridica* 30 where she argues that “Kant is often mischaracterised as an individualist”.

¹²⁵² Cf the discussion in the text at n 1220 *supra*.

¹²⁵³ Cornell 2004 *SAPL* 667; Cornell & Fuller “Introduction” in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 12.

¹²⁵⁴ Wood 2008 *Acta Juridica* 49.

¹²⁵⁵ The approach to the constitutional value of human dignity in the Constitution and by the Constitutional Court is discussed in paras 3 2 7 1 & 3 2 7 2 *infra*.

Now morality is the only condition under which a rational being can be an end in himself; for only through this is it possible to be a law-making member in a kingdom of ends. Therefore morality, and humanity so far as it is capable of morality, is the only thing which has dignity.¹²⁵⁶

It is here that divergent interpretations arise since, as will be illustrated by drawing on the work of Cornell and Wood, this passage has to be interpreted within the greater matrix of Kant's philosophy. At the source of the argument is the contention by both Cornell and Wood that Kant was not an individualist. Cornell points out that in order to understand Kantian dignity, it is necessary to understand Kant's conceptualisation of freedom and autonomy.¹²⁵⁷ According to Kant, freedom is a special type of causality that is a characteristic of human beings to the extent that they are rational.¹²⁵⁸ Kant then distinguishes between "negative" and "positive" freedom.¹²⁵⁹ In the *Groundwork for the metaphysic of morals*, Kant first explains his concept of negative freedom:

Freedom would then be the property this causality has of being able to work independently of *determination* by alien causes; just as *natural necessity* is a property characterising the causality of all non-rational beings – the property of being determined to activity by the influence of alien causes.¹²⁶⁰

Cornell explains that, for Kant, human beings (like animals) live their lives according to their needs and desires, but human beings (unlike animals) have the possible capacity to resist those needs and desires because they are capable of

¹²⁵⁶ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 96-97 as quoted in the text at n 1225 *supra*.

¹²⁵⁷ Cornell 2008 *Acta Juridica* 24-26.

¹²⁵⁸ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 107 where Kant states that "[w]ill is a kind of causality belonging to living beings so far as they are rational". See also Johnson, Robert & Creton, Adam "Kant's moral philosophy" in Zalta (ed) *Stanford encyclopedia of philosophy* (2017) para 10; Wood *Kant's ethical thought* (1999) 172.

¹²⁵⁹ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 107. See also Johnson, Robert & Creton, Adam "Kant's moral philosophy" in Zalta (ed) *Stanford encyclopedia of philosophy* (2017) para 10.

¹²⁶⁰ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 107.

rationality.¹²⁶¹ She notes that in conceptualising freedom in this way, Kant is not saying that human beings actually resist external influences or their own primal needs and desires.¹²⁶² Kant is also not arguing that human beings exercise their own freedom on a daily basis because it is impossible to determine whether or not this is actually the case.¹²⁶³ For Kant, it is the possibility of this capacity that forms the basis of our freedom.¹²⁶⁴ Therefore, negative freedom is the ability to resist outside influences and our own immediate natural impulses and desires (i.e. natural laws) that are in conflict with our own ends.¹²⁶⁵ Cornell provides the following explanation:

[Kant] is suggesting that human life is purposive and that when we take our humanity seriously as a being who can set ends for itself and can coordinate those ends as a direction for a life, then we are able to exercise a kind of freedom precisely in coordination with those ends so that we rationally guide who we seek to become.¹²⁶⁶

As a practical illustration, Cornell and Fuller use the example of a law student who has to study for his law examinations but also wants to go surfing. The student has to weigh up his short term desire to go surfing with his long term goal of becoming a lawyer (which could also include surfing) and must then decide which of the two is in the interests of his well-being at that moment. When he decides to study that morning rather than go surfing, he is exercising his negative freedom to achieve his long term goal of becoming a lawyer.¹²⁶⁷ Therefore, Kant is not proposing that freedom is equated merely to doing what you want and protecting your choices

¹²⁶¹ Cornell 2010 *SAPL* 384. See also Wood 2008 *Acta Juridica* 53.

¹²⁶² Cornell 2010 *SAPL* 384.

¹²⁶³ Cornell 2010 *SAPL* 384. See also Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 8.

¹²⁶⁴ Cornell 2010 *SAPL* 384.

¹²⁶⁵ Cornell 2008 *Acta Juridica* 24. See also Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 8.

¹²⁶⁶ Cornell 2008 *Acta Juridica* 24-25.

¹²⁶⁷ Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 8.

against unwilled interferences.¹²⁶⁸ Rather, freedom (in the negative sense) means resisting outside influences and your own immediate natural impulses and desires in order to act towards your own ends for your own long term well-being through practical reason.¹²⁶⁹

The other dimension of freedom is “positive freedom”.¹²⁷⁰ Positive freedom flows from the idea of negative freedom. If negative freedom refers to the idea of being able to make rational decisions by resisting outside influences and our own immediate natural impulses and desires (i.e. natural laws), then freedom in the positive sense can only refer to the idea that a free will is the ability to act in accordance with its own laws. This must be the case if freedom is seen as a type of causality that operates according to a law (i.e. it cannot be lawless).¹²⁷¹ Accordingly, freedom in the positive sense refers to the ability to make decisions in accordance with self-imposed laws. As explained by Kant:

Hence freedom of will, although it is not the property of conforming to laws of nature, is not for this reason lawless: it must rather be a causality conforming to immutable laws, though of a special kind; for otherwise a free will would be self-contradictory.¹²⁷²

¹²⁶⁸ Cornell 2010 *SAPL* 385; Cornell 2008 *Acta Juridica* 25. *Contra* the conception of autonomy from an individualistic perspective as discussed in para 3 2 4 1 *supra*).

¹²⁶⁹ Cornell 2008 *Acta Juridica* 25.

¹²⁷⁰ In Kant’s words: “The above definition of freedom is *negative* and consequently unfruitful as a way of grasping its essence; but there springs from it a *positive* concept, which, as positive, is richer and more fruitful” (Paton (ed) *Moral Law: Kant’s Groundwork* (1978) 107). See also Cornell 2008 *Acta Juridica* 25.

¹²⁷¹ Cornell & Fuller “Introduction” in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 9 where they state that Kantian freedom “must be law like”. See also Kant (Paton (ed) *Moral Law: Kant’s Groundwork* (1978) 107): “The concept of causality carries with it that of *laws* (*Gesetze*) in accordance with which, because of something we call cause, something else – namely, its effect – must be posited (*gesetzt*)”.

¹²⁷² Paton (ed) *Moral Law: Kant’s Groundwork* (1978) 107.

Therefore, for Kant, freedom is autonomy which he defines as “the property which will has of being a law to itself”.¹²⁷³

This leads Kant back to one of his earlier formulations of the categorical imperative, the Formula of Autonomy, which refers to “the Idea of *the will of every rational being as a will which makes universal law*” and can be described as an imperative in the following terms:

Act so that through your maxims you could be a legislator of universal laws.¹²⁷⁴

For Kant, autonomy does not refer to the idea that human beings can do what they want without interference from others, but rather, that they are bound only to those laws that they, as rational beings, could lay down unto themselves, provided such laws meet the standard of a universal law. For Kant, a universal law refers to “an objective principle valid for every rational being; and it is a principle on which he *ought to act* – that is, an imperative”.¹²⁷⁵ In other words, it must qualify as a moral law.

This formulation of the categorical imperative is for Kant the supreme principle of morality:

We need not now wonder, when we look back upon all the previous efforts that have been made to discover the principle of morality, why they have one and all been bound to fail. Their authors saw man as tied to laws by his duty, but it never occurred to them that he is subject only to *laws which are made by himself* and yet are *universal*, and that he is

¹²⁷³ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 107. See also Johnson, Robert & Creton, Adam “Kant’s moral philosophy” in Zalta (ed) *Stanford encyclopedia of philosophy* (2017) para 10; Cornell 2008 *Acta Juridica* 25; Wood *Kant's ethical thought* (1999) 172.

¹²⁷⁴ Johnson, Robert & Creton, Adam “Kant’s moral philosophy” in Zalta (ed) *Stanford encyclopedia of philosophy* (2017) para 7. Paton’s version reads as follows: “[A]ct that your will can regard itself at the same time as making universal law through its maxim” (Paton (ed) *Moral Law: Kant's Groundwork* (1978) 33).

¹²⁷⁵ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 84.

bound only to act in conformity with a will which is his own but has as nature's purpose for it the function of making universal law.¹²⁷⁶

As freedom is equated to autonomy and autonomy is the principle of morality, Kant argues that a free will is a will under moral law:

The proposition "Will is in all its actions a law to itself" expresses, however, only the principle of acting on no maxim other than the one which can have for its object itself as at the same time a universal law. This is precisely the formula of the categorical imperative and the principle of morality. Thus a free will and a will under moral laws are one and the same.¹²⁷⁷

Thus, Cornell's interpretation of Kant is that freedom can be found only in the realm of morality which means there is no tension between a person's freedom and subjecting herself to the moral law.¹²⁷⁸ This is because a human being, as a rational being, has the capacity to be a legislator of the moral law.¹²⁷⁹ Accordingly, she contends that positive freedom can be seen as "causality through norms":

For Kant, when we act as moral agents we lay down a law for ourselves: a law that allows us to act at least as if we were free from the constraints of the real world around us and had the power to determine ourselves in accordance with what "ought to be" and what we "ought to do" in such a world. It is a normative law, not a natural law. By acting under the law of the categorical imperative ... we can represent ourselves as acting as if we were able to actualise the power to determine ourselves in accordance with a law that we lay down to ourselves...¹²⁸⁰

¹²⁷⁶ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 94.

¹²⁷⁷ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 107-108.

¹²⁷⁸ Cornell 2004 *SAPL* 666 (referred to with approval by Barnard *Critical legal argument for contractual justice* (2005) 235-236 & Barnard 2005 *SAJHR* 288-289).

¹²⁷⁹ As Kant explains: "The will is therefore not merely subject to the law, but is so subject that it must be considered as also *making the law* for itself and precisely on this account as first of all subject to the law (of which it can regard itself as the author" (Paton (ed) *Moral Law: Kant's Groundwork* (1978) 93).

¹²⁸⁰ Cornell 2008 *Acta Juridica* 25. See also Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 9.

Therefore, Kantian freedom cannot be equated to doing what you want without interference from others. Rather, Kantian freedom is the capacity to lay down moral laws for yourself and being bound by those laws. Furthermore, it is precisely this possibility of positive freedom (i.e. the capacity to make moral law as a rational being and being subject to such laws) that gives human beings their infinite worth, in other words their dignity, and which results in the idea that they must be regarded as ends in themselves.¹²⁸¹ In other words, human dignity is grounded on this capacity of all human beings and does not depend on whether or not they actually exercise this capacity.¹²⁸²

Returning to Beyleveld and Brownsword's interpretation of Kant, it can be argued that Kantian dignity does not support the conception of human dignity as empowerment which denotes unconstrained freedom. Kantian dignity can explain why human beings have inherent worth, and therefore, dignity, but it does not equate this dignity to unconstrained freedom.¹²⁸³ In accordance with Cornell's interpretation, freedom in Kant denotes moral freedom. Therefore, Kantian dignity does not deny that human beings are autonomous beings who plot their own futures and make their own decisions. However, the freedom to set one's own ends is a moral freedom. Furthermore, although it would seem that Beyleveld and Brownsword's conception of human dignity as constraint is based on Kantian dignity it does not reflect that the constraint is self-imposed. The authors see such constraint as external and in tension with the freedom of the person being constrained:

In this version of what we have called 'human dignity as constraint', and in line with the Kantian scheme, we find 'free' action (as it would be characterized under human dignity as empowerment) distinctively limited.¹²⁸⁴

¹²⁸¹ Cornell 2010 *SAPL* 384; Cornell 2008 *Acta Juridica* 25; Wood 2008 *Acta Juridica* 54.

¹²⁸² Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 8; Cornell 2010 *SAPL* 385-386.

¹²⁸³ Cf the discussion of Kantian dignity by Beyleveld and Brownsword in the text at n 1228 *supra*.

¹²⁸⁴ Beyleveld & Brownsword *Human dignity in bioethics* (2004) 65.

As explained by Cornell, Kantian dignity is based on constraint, but this constraint is internal because it is self-imposed.

It was then shown that Beyleveld and Brownsword find support for the idea of human dignity as empowerment in Kant's second formulation of the categorical imperative (the Formula of the End in Itself):

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.¹²⁸⁵

According to their interpretation, this imperative requires that human beings should be treated as autonomous beings in that their choices should be protected against the unwilled interferences of others.¹²⁸⁶ First, the concept of “an end in itself” must be dealt with. As treating someone as an end in itself can be interpreted in different ways,¹²⁸⁷ it should be questioned what Kant means when he talks of “an end in itself”. Wood explains that “an end” is “anything we act for the sake of”.¹²⁸⁸ Kant distinguishes between “ends in themselves” and “ends to be produced”.¹²⁸⁹ Wood explains that “ends to be produced” are “objects, results or states of affairs we pursue in our actions”, and therefore, they are ends because “we act for the sake of bringing them about”.¹²⁹⁰ This is in contrast to an “end in itself” where we act for its own sake. Consequently, human beings are ends in themselves “because we act for their sake”.¹²⁹¹ As explained by Wood:

¹²⁸⁵ As quoted in the text at n 1232 *supra*.

¹²⁸⁶ Cf Beyleveld and Brownsword's interpretation of this formulation of the categorical imperative discussed in the text at n 1233 *supra*.

¹²⁸⁷ Wood 2008 *Acta Juridica* 53.

¹²⁸⁸ Wood 2008 *Acta Juridica* 53.

¹²⁸⁹ Kant (Paton (ed) *Moral Law: Kant's Groundwork* (1978) 99.

¹²⁹⁰ Wood 2008 *Acta Juridica* 53.

¹²⁹¹ Wood 2008 *Acta Juridica* 53.

A person, or humanity in a person, when regarded as an end in itself, is not a result to be produced but something already existing, for whose sake we value any result to be produced.¹²⁹²

Thus Wood interprets “as an end” as being related to humanity. Moving on to the term “humanity”, Wood points out that, for Kant, it has a technical meaning:

[It] refers to our *rational nature*, and specifically to the capacity to set ends for oneself, devise means to them, combine them into more comprehensive ends, setting priorities among them. Humanity for Kant develops in the social condition, and with it comes the freedom to set ends.¹²⁹³

Thus, respect for a person’s humanity as an end in itself would denote respect for a person’s capacity to set ends for herself and choose ways to achieve them in order to lead a purposive life through her practical reason.¹²⁹⁴ In other words, human dignity requires respect for the unique set of ends that an individual pursues. Accordingly, Wood arrives at the following understanding of what it entails to treat humanity in a person as an end in itself:

I think a more immediate conclusion from the fact that humanity is an end in itself is that human beings should never be treated in a manner that degrades or humiliates them, should not be treated as inferior in status to others, or made subject to the arbitrary will of others, or be deprived of control over their own lives, or excluded from participation in the collective life of the human society to which they belong.¹²⁹⁵

At first glance, Wood’s interpretation of Kant’s second categorical imperative seems to accord with that of Beyleveld and Brownsword because respect for a

¹²⁹² Wood 2008 *Acta Juridica* 53.

¹²⁹³ Wood 2008 *Acta Juridica* 53.

¹²⁹⁴ As explained by Wood 2008 *Acta Juridica* 53: “It is humanity – our capacity to set ends, choose means to them and combine them into an idea of happiness – that is an end in itself and that the Formula of Humanity [the Formula of the End in Itself] declares that we must always treat as an end, never merely as a means.”

¹²⁹⁵ Wood 2008 *Acta Juridica* 52.

person's unique set of ends entails respect for a person's freedom to make choices without the interference of others.¹²⁹⁶ Therefore, the question arises how this interpretation ties in with the idea of Kant's moral freedom as espoused by Cornell?¹²⁹⁷ Woolman provides the following explanation:

While Kant certainly contends that the defining feature of humanity is our capacity to overcome our instincts and that we are only truly free when we are moral, he maintains that we define ourselves – and our humanity – through the rational choice of *all* our ends and not just those that are explicitly moral. ... An individual's capacity to create meaning generates an entitlement to respect for the unique set of ends that the individual pursues.¹²⁹⁸

From Woolman's explanation it can be deduced that an individual's choices should be respected and not be interfered with provided such choices are not immoral. In other words, the freedom to set and pursue ends is still a moral freedom that should not violate the human dignity of others. This means that in pursuit of her own ends, an individual may not treat other human beings as merely a means to her own ends but must always also treat them as ends in themselves. Thus, Kant's second categorical imperative does not support the idea of unconstrained freedom as reflected in Beyleveld and Brownsword's idea of human dignity as empowerment. It is a moral freedom subject to the self-imposed constraint not to violate the human dignity of others in setting and pursuing one's own set of ends.

This leads the discussion to another formulation of Kant's categorical imperative, namely the Formula of the Kingdom of Ends. Cornell and Wood continue to integrate Kant's "kingdom of ends" in their interpretation of human dignity, introducing the social ideals of Kantian ethics.¹²⁹⁹ Kant's hypothetical "kingdom of ends" also referred to as the "realm of ends" is a formulation of the categorical

¹²⁹⁶ Cf the discussion dealing with Beyleveld & Brownsword's interpretation of Kant's second categorical imperative in the text at n 1231 *supra*.

¹²⁹⁷ Cf the discussion on Cornell's interpretation of Kantian dignity and freedom in the text at n 1257 *supra*.

¹²⁹⁸ Woolman "Dignity" in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.2(c).

¹²⁹⁹ Wood 2008 *Acta Juridica* 60; Cornell 2008 *Acta Juridica* 30.

imperative which flows directly from the Formula of Autonomy¹³⁰⁰ and provides as follows:

Act on the maxims of a member who makes universal laws for a merely possible kingdom of ends.¹³⁰¹

What is this hypothetical “kingdom of ends”? Kant states that it refers to “a systematic union of different rational beings under common laws”.¹³⁰² Wood provides the following description based on his interpretation of the relevant passage¹³⁰³ in Kant’s *Groundwork of the metaphysic of morals*:

The term “realm of ends” refers to an ideal community with all rational beings as its members, one involving a systematic harmony among the ends of all members of the community. The terms Kant uses most often to express the relationship between the rational beings that are members of a realm of ends are “system” (*System*) and “combination” (*Verbindung*). A collection of *ends* constitutes a “realm” if these ends are not in conflict or competition with one another, but are combined into a mutually supporting system. The *laws* of a realm of ends are those which, if followed, would *combine* all the rational beings, as ends in

¹³⁰⁰ Kant (Paton (ed) *Moral Law: Kant’s Groundwork* (1978) 95) states as follows:

The concept of every rational being as one who must regard himself as making universal law by all the maxims of his will, and must seek to judge himself and his actions from this point of view, leads to a closely connected and very fruitful concept – namely, that of a *kingdom of ends*.

The Formula of the Autonomy is discussed in the text at n 1274 *supra*.

¹³⁰¹ Paton (ed) *Moral Law: Kant’s Groundwork* (1978) 100.

¹³⁰² Paton (ed) *Moral Law: Kant’s Groundwork* (1978) 95.

¹³⁰³ Kant (Paton (ed) *Moral Law: Kant’s Groundwork* (1978) 95):

I understand by a “*kingdom*” a systematic union of different rational beings under common laws. Now since laws determine ends as regards their universal validity, we shall be able – if we abstract from the personal differences between rational beings, and also from all the content of their private ends – to conceive a whole of all ends in systematic conjunction (a whole of both rational beings as ends in themselves and also of the personal ends which each may set before himself); that is, we shall be able to conceive a kingdom of ends which is possible in accordance with the above principles.

themselves, and all the ends they set, into a mutually supporting *system* of shared collective ends. Kant's Formula of the Realm of Ends commands us to follow maxims involving ends that belong to this system, and it forbids us to adopt ends that would stand in the way of rational beings sharing a system of ends. Ends that are neither required for nor incompatible with the system are permissible.¹³⁰⁴

Cornell reasons that Kant's hypothetical kingdom of ends is based on the idea that, as rational beings, we not only have the possibility of aligning our own actions with our own ends, but also with the ends of other rational beings.¹³⁰⁵ She argues that when we harmonise our own ends with the ends of others, we are aspiring to the Kantian ideal of a kingdom of ends.¹³⁰⁶ According to Kant, the Formula of the Kingdom of Ends is also derived from the Formula of the End in Itself.¹³⁰⁷

For rational beings all stand under the *law* that each of them should treat himself and all others, *never merely as a means*, but always *at the same time as an end in himself*. But by so doing there arises a systematic union of rational beings under common objective laws – that is, a kingdom. Since these laws are directed precisely to the relation of such beings to one another as ends and means, this kingdom can be called a kingdom of ends (which is admittedly only an Ideal).¹³⁰⁸

Kant then states that as members of the kingdom of ends, we are at the same time legislators and subjects of the moral law:

A rational being belongs to the kingdom of ends as a *member*, when, although he makes its universal laws, he is also himself subject to these laws.¹³⁰⁹

¹³⁰⁴ Wood 2008 *Acta Juridica* 58.

¹³⁰⁵ Cornell 2008 *Acta Juridica* 384.

¹³⁰⁶ Cornell 2008 *Acta Juridica* 384.

¹³⁰⁷ The Formula of the End in Itself is discussed in the text at n 1232 *supra*.

¹³⁰⁸ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 95.

¹³⁰⁹ Paton (ed) *Moral Law: Kant's Groundwork* (1978) 95.

According to Cornell and Fuller, being a member of the kingdom of ends is directly derived from the possibility of our positive freedom i.e. our capacity to lay down self-imposed moral laws and being bound by such laws.¹³¹⁰ As pointed out by Cornell, this capacity for self-legislation also has a social dimension because we should attempt to harmonise our own ends with the ends of others:

In the kingdom of ends, we not only legislate for ourselves what is the right thing to do by rationally reflecting on the demands of the categorical imperative, but also, as members and as legislators in the kingdom of ends, we seek to harmonise our ends with one another so that we can aspire to live up to the ideal of justice, even if as an ideal it always remains beyond any actual existing legal system. Indeed, it is through the appeal to the kingdom of ends and from the imagined ideal standpoint of that kingdom that human beings have infinite worth precisely because they are each viewed as a *persona*; being such a *persona* allows them to subject themselves to moral, practical reason and aspire to a world of justice which demands nothing less than that each one of us tries to live up to the harmonisation of our ends with one another.¹³¹¹

In the above context, the passage¹³¹² interpreted by Beyleveld and Brownsword in support of the conception of human dignity as empowerment, becomes apt to a new meaning. The idea of human dignity as empowerment which denotes unconstrained freedom does not find support in Kantian ethics. In Kantian ethics, freedom always denotes moral freedom and the categorical imperative requires human beings to harmonise their ends with the ends of others in a rational and moral manner.

¹³¹⁰ Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 9.

¹³¹¹ Cornell 2008 *Acta Juridica* 30.

¹³¹² Paton (ed) *Moral Law: Kant's Groundwork* (1978) 96-97 (as also quoted in the text at n 1225 *supra*).

Now morality is the only condition under which a rational being can be an end in himself; for only through this is it possible to be a law-making member in a kingdom of ends. Therefore morality, and humanity so far as it is capable of morality, is the only thing which has dignity.

The internal realm of freedom within Kantian ethics is to be distinguished from the realm of external (legal) freedom which forms part of what Kant refers to as right (*Recht*).¹³¹³ In *The Metaphysics of morals*, Kant provides the following universal principle of right:

Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.¹³¹⁴

Kant then proceeds to explain how duties of rights and ethics differ from each other:

It ... cannot be required that this principle of all maxims be itself in turn my maxim, that is, it cannot be required that *I make it the maxim* of my action; for anyone can be free so long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it. That I make it my maxim to act rightly is a demand that ethics makes on me.¹³¹⁵

As emphasised by Wood, duties of right are normally enforced through the laws of the State, and hence, they are usually enforceable by coercion.¹³¹⁶ This is in contrast with ethical duties that are an expression of the individual's capacity to lay down self-imposed moral laws.¹³¹⁷ Therefore, the exact relationship between the internal (moral) and external (legal) realm of freedom is uncertain and the subject of much scholarly debate.¹³¹⁸ An argument in favour of the idea that both are based on a unified principle is that Kant grounds the right to freedom on the

¹³¹³ Wood 2008 *Acta Juridica* 54-55 explains that right (*Recht*) refers to "an entire system of legislation, and also to the natural or rational basis of any such system" and, that for Kant, it denotes "that part of moral legislation that protects the external freedom of rational beings". See also Cornell 2010 *SAPL* 387; Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 15.

¹³¹⁴ Gregor (ed) *Kant's metaphysics of morals* (1996) 24. See also Wood 2008 *Acta Juridica* 55.

¹³¹⁵ Gregor (ed) *Kant's metaphysics of morals* (1996) 24.

¹³¹⁶ Wood 2008 *Acta Juridica* 55.

¹³¹⁷ Wood 2008 *Acta Juridica* 55.

¹³¹⁸ Wood 2008 *Acta Juridica* 56; Cornell 2008 *Acta Juridica* 21. For a more detailed discussion on the distinction between Kantian ethics and rights see Wood 2008 *Acta Juridica* 54-58.

humanity of human beings, and therefore, on the Formula of the End in Itself (the second formulation of the categorical imperative):

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.¹³¹⁹

If it is accepted that the two realms are connected, how then is the internal (moral) realm of freedom represented in the external (legal) realm of freedom? Cornell answers this question as follows:

Kant's hypothetical experiment in the imagination, in which we configure the conditions in which human beings could aspire to the great ideal of the Kingdom of Ends, turns on the possibility that as creatures of practical reason we can harmonise our interests. For Kant, we represent the realm of external freedom through a hypothetical experiment of the imagination in which we configure the conditions of a social contract rooted in the respect for all other human beings. Under this experiment in the imagination, we imagine the conditions in which individuals are given the greatest possible space for freedom, as long as it can be harmonised with the freedom of all others. The social contract imagines us as moral beings that can exercise their practical reason and potentially guide their actions in accordance with its mandates.¹³²⁰

In this interpretation, the ideal of the kingdom of ends is utilised as a regulative ideal based on a moral social contract.¹³²¹ She states that when we harmonise our own ends with the ends of others as law-making members in the hypothetical kingdom of ends, we are in fact, reconciling our own freedom with the freedom of

¹³¹⁹ Gregor (ed) *Kant's metaphysics of morals* (1996) 30.

¹³²⁰ Cornell 2010 *SAPL* 387.

¹³²¹ Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 15. Although Wood 2008 *Acta Juridica* 57 argues that the Kantian realms of right and ethics are distinct systems with their own rational basis, he later argues that right can be used to further and promote the moral ideal of the kingdom of ends (at 61).

others.¹³²² This is because, as known, Kantian freedom is internally self-limiting because freedom is equated to autonomy which involves laying down self-imposed moral laws.¹³²³ Therefore, when freedom is viewed in this way, it results in the resolution of the tension between human dignity as empowerment and human dignity as constraint because respecting the dignity of others is represented as a moral law we have imposed on ourselves as law-making members in the imagined kingdom of ends.¹³²⁴ Consequently, when we disrespect the dignity of others i.e. their inherent worth as reflected in the fact that they are ends in themselves, we are actually failing to respect our own dignity as law-making members in the hypothetical kingdom of ends.¹³²⁵ This is because we are not legislating together in a community that aspires to the kingdom of ends, in other words a community where our ends are harmonised with the ends of others, and consequently, we are not free in the individual or collective sense.¹³²⁶ As previously argued, the duty to respect the dignity of others should not be seen as an external constraint on our freedom as proposed by Beyleveld and Brownsword's conception of human dignity as constraint. It should rather be represented as a self-imposed constraint which we are able to exercise as part of our positive freedom i.e. our capacity to make moral laws as a rational being, and ultimately, it is this capacity for positive freedom that gives us our dignity and our inherent worth.¹³²⁷ Thus, when we disrespect the dignity of another, we are, in fact, disrespecting our own dignity.¹³²⁸

¹³²² Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 15; Cornell 2008 *Acta Juridica* 26.

¹³²³ Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 14-15.

¹³²⁴ As succinctly explained by Cornell 2008 *Acta Juridica* 28: "Understanding freedom as integrally limited by the conditions of its exercise, the seeming paradox of unlimited freedom can be resolved internally". See also Barnard *Critical legal argument for contractual justice* (2005) 235.

¹³²⁵ Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 15; Cornell 2008 *Acta Juridica* 26.

¹³²⁶ Cornell & Fuller "Introduction" in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 15.

¹³²⁷ Cf the discussion in the text at n 1284 *supra*.

¹³²⁸ Cornell 2008 *Acta Juridica* 26.

Therefore, Cornell and Wood's interpretations of Kant's work results in a Kantian dignity which takes account of Kant's specific conception of freedom, humanity and the ideal of the kingdom of ends. This interpretation leads to a more communitarian concept of human dignity which results in an understanding of human dignity which is not based on unconstrained freedom but rather a moral freedom where an individual exercises her freedom to further her own ends in a manner that harmonises with the ends of others.¹³²⁹

3 2 4 3 *Is the communitarian interpretation of Kantian dignity enough?*

Although Cornell and Wood's more communitarian interpretation of Kantian dignity provides a way to resolve the tension created by Beyleveld and Brownsword's conceptions of human dignity as empowerment and constraint, there are still a number of problems with Kantian dignity that must be addressed.¹³³⁰ Cornell mentions four points of criticism against Kantian dignity in order to compare Kantian dignity with ubuntu.¹³³¹

First, the author argues that Kantian dignity is a Western conception of dignity and does not take into account how indigenous communities view human dignity. In other words, basing the constitutional value of human dignity on purely Western philosophy undermines proper legal pluralism as envisioned by the Constitution.¹³³²

Secondly, she states that Kantian dignity does not take account of human beings who do not have the ability to act rationally – whether they were never born with the ability due to a birth defect or lost it later on in life due to old age or illness for

¹³²⁹ See also Barnard *Critical legal argument for contractual justice* (2005) 236.

¹³³⁰ Cornell 2010 *SAPL* 388.

¹³³¹ Cornell 2010 *SAPL* 388.

¹³³² Cornell 2008 *Acta Juridica* 19. See also Mokgoro & Woolman 2010 *SAPL* 402; Wood 2008 *Acta Juridica* 60-61. Cf the discussion on the unequal relationship between the common and customary law in para 1 8 3 3 *supra*.

instance. Hence, Kantian dignity does not affirm the human dignity of all human beings.¹³³³

Thirdly, she points out that Kantian dignity is generally criticised because it is based on human beings' capacity for rationality and following their practical reason, while in reality human beings do not always use this potential. Thus she argues that Kantian dignity does not really appreciate or take account of the realities of human nature.¹³³⁴

Fourthly, Kantian dignity is generally criticised as being too individualistic. As was shown above, such criticisms may ignore or misunderstand the more social or communitarian ideas in Kantian ethics. However, as acknowledged by Cornell, Kantian dignity is based on the individual's capacity for reason. Therefore, Kant's hypothetical moral social contract envisaged through the ideal of the kingdom of ends begins with imagined, already individuated, individuals who, as free persons, contract with each other for their own constraint in order to respect each other's dignity.¹³³⁵ As was seen above, this moral social contract ultimately results in the maximisation of everyone's unconstrained freedom in the external realm of right.¹³³⁶ Consequently, as pointed out by Cornell and Van Marle, this results in individual correlating rights and duties:

My rights are also my duties to you, but my duties to you, since they are limited by the very rights they entail, will never go beyond this one-to-one correspondence between rights and duties.¹³³⁷

On account of the above criticisms, Cornell and Van Marle contend that it is difficult to use the Kantian imagined social contract to justify socio-economic rights

¹³³³ Cornell 2010 *SAPL* 388. See also Wood 2008 *Acta Juridica* 54; Beyleveld & Brownsword *Human dignity in bioethics* (2004) 54.

¹³³⁴ Cornell 2010 *SAPL* 388.

¹³³⁵ Cornell 2010 *SAPL* 388-389; Cornell & Van Marle 2005 *AHRLJ* 211; Cornell 2004 *SAPL* 668.

¹³³⁶ Cf the discussion in the text at n 1319 *supra*. See also Cornell 2010 *SAPL* 388-389; Cornell & Van Marle 2005 *AHRLJ* 211; Cornell 2004 *SAPL* 668.

¹³³⁷ Cornell & Van Marle 2005 *AHRLJ* 211.

and the idea of substantive equality.¹³³⁸ The reason being that substantive equality involves a greater constraint on the freedom of certain members of the community in order to ensure and promote social and economic equality for all members of the community, especially those in social and economic disadvantaged positions.¹³³⁹ Hence, substantive equality goes further than mere individual correlation of rights and duties and is incompatible with the maximisation of unconstrained freedom of everyone. In addition, substantive equality requires an understanding of the existing social and economic differences within a society which involves taking account of the actual lived social and economic conditions of the community members.¹³⁴⁰ This is different from Kantian dignity which is based on human beings' capacity for practical reason whether they actually use this capacity or not. Accordingly, Kantian dignity is based on an ideal and does not take account of the actual lived circumstances of human beings.¹³⁴¹

Although Wood concedes that Kantian dignity does not automatically implicate measures to address social inequality, he argues that it may have a role to play in addressing existing institutionally accepted inequalities:

An egalitarianism of the equal worth of persons does not, however, immediately entail any egalitarian rules of right for the distribution of any of the many things human beings want, such as welfare or happiness, or any of the things for which they compete – such [sic] wealth, income power, honour or even social opportunities or capabilities. ...

Nevertheless, I do think that social, political or legal conceptions based on the idea of human dignity do inevitably take on egalitarian implications in regard to the distribution of goods. This happens mainly on account of the ways in which *inequalities*, especially large and systematic ones, that are known to all and have come to be institutionally accepted, can

¹³³⁸ Cornell & Van Marle 2005 *AHRLJ* 211; Cornell 2004 *SAPL* 667-668. See also Kamchedzera & Banda 2009 *SAJHR* 78 citing this criticism against Kantian dignity in the Malawian context.

¹³³⁹ Cf the discussion dealing with substantive equality in para 1 8 2 2(b) *supra*.

¹³⁴⁰ Cf the discussion dealing with substantive equality in para 1 8 2 2(b) *supra*.

¹³⁴¹ Cornell 2004 *SAPL* 667.

contradict, belie or undermine the value of equal human worth, and hence of human dignity.¹³⁴²

Consequently, Wood argues that the Kantian ideal of the kingdom of ends can be used as a critique against the ideologies underlying the free market economy.¹³⁴³ This is because the free market economy portrays human dignity as unconstrained freedom while in reality the weaker contracting party in an unequal bargaining relationship cannot be regarded as free or equal:

In the real world, markets are above all a way for agents to make unrestrained use of all sorts of bargaining advantages they may have over others. In this way, the workings of the market are systematically destructive of the human dignity of many human beings, because market agents are never free or equal when there are great inequalities between them in information, wealth or other resources.¹³⁴⁴

Finally, it is important to note that, in contrast to Cornell and Van Marle's view, Beyleveld and Brownsword's conception of human dignity as empowerment and constraint takes account of socio-economic rights.¹³⁴⁵

3 2 5 Human dignity through ubuntu

It is not my intention nor is it possible to make an original contribution to the interpretation and understanding of ubuntu in African philosophy. In this section, the focus remains on the judicial descriptions of ubuntu as found in South African law.¹³⁴⁶ In this respect, I predominantly draw on the important work of Cornell including writings she produced in collaboration with Muvangua.¹³⁴⁷ In these works, the authors rely on prominent scholars in African philosophy and African

¹³⁴² Wood 2008 *Acta Juridica* 61.

¹³⁴³ Wood 2008 *Acta Juridica* 62-64.

¹³⁴⁴ Wood 2008 *Acta Juridica* 63.

¹³⁴⁵ Cf the discussion on human dignity as constraint in para 3 2 3 3 *supra*.

¹³⁴⁶ The reasons for this approach was explained in para 1 8 4 1 *supra*.

¹³⁴⁷ Specifically, the following two sources: Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) & Cornell 2010 *SAPL* 382-399.

jurisprudence to elucidate the role and meaning of ubuntu in the law and bring a comparison between Kantian dignity and ubuntu to the fore.

In chapter one, it was shown how ubuntu has been linked to the moral theory of humanism and the political and economic theory of socialism.¹³⁴⁸ These connections are also noticeable in judicial descriptions of ubuntu. From its inception as a legal concept, the Constitutional Court has associated ubuntu with human dignity. As was seen previously, in *S v Makwanyane*, it was held that ubuntu's "spirit emphasises respect for human dignity",¹³⁴⁹ and that "[r]espect for the dignity of every person" is an integral aspect thereof.¹³⁵⁰ Since then, the Constitutional Court has reiterated this link between ubuntu and human dignity on a number of occasions¹³⁵¹ and in *Hoffmann v South African Airways* the Constitutional Court stated that "[u]buntu is the recognition of human worth and respect for the dignity of every person".¹³⁵² In *S v Makwanyane*, ubuntu was also linked to the ideal of social justice¹³⁵³ and in a number of cases thereafter it was used to promote the realisation of socio-economic rights.¹³⁵⁴

While it can be deduced that ubuntu emphasises respect for human dignity and the promotion of social justice, it is necessary to establish how these ideas are

¹³⁴⁸ Cf the discussion dealing with the underlying values of the customary law in para 1 3 2 2 *supra*.

¹³⁴⁹ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308 (Justice Mokgoro). See the detailed discussion of this case in para 1 8 4 2(b) *supra*.

¹³⁵⁰ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 225 (Justice Langa).

¹³⁵¹ For example, *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W); *Dikoko v Mokhatla* 2006 6 SA 235 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) as discussed in para 1 8 4 3 *supra*.

¹³⁵² *Hoffmann v South African Airways* 2011 1 SA 1 (CC) para 38 n 31. See also Ackermann *Human dignity* (2013) 113.

¹³⁵³ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 237 (Justice Madala).

¹³⁵⁴ For example, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) & *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) discussed in para 1 8 4 3(a) *supra*.

understood in African thinking. Justice Mokgoro's definition of ubuntu in *S v Makwanyane* provides a good basis for such a discussion:

Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.¹³⁵⁵

In the first place, Justice Mokgoro defines ubuntu as humaneness which she translates as “personhood” and “morality”. To understand what she means with the terms “personhood” and “morality”, Cornell argues that it is necessary to understand how ubuntu denotes the moral development of the individual and the African social bond.¹³⁵⁶ In this respect, she relies¹³⁵⁷ on the following explanation by Menkiti:

In the stated journey of the individual toward personhood, let it therefore be noted that the community plays a vital role both as catalyst and as prescriber of norms. The idea is that in order to transform what was initially biologically given into full personhood, the community, of necessity, has to step in, since the individual, himself or herself, cannot carry through the transformation unassisted. But then what are the implications of this idea of a biologically given organism having first to go through a process of social and ritual transformation, so as to attain the full complement of excellences seen as definitive of the person?

One conclusion appears inevitable, and it is to the effect that personhood is the sort of thing which has to be achieved, the sort of thing at which

¹³⁵⁵ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308.

¹³⁵⁶ Cornell 2010 *SAPL* 392. See also Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 3.

¹³⁵⁷ Cornell 2010 *SAPL* 392. See also Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 3-4.

individuals could fail. I suppose that another way of putting the matter is to say that the approach to persons in traditional thought is generally speaking a maximal, or more exacting, approach, insofar as it reaches for something beyond such minimalist requirements as the presence of consciousness, memory, will, soul, rationality, or mental function. The project of being or becoming persons, it is believed, is a truly serious project that stretches beyond the raw capacities of the isolated individual, and it is a project which is laden with the possibility of triumph, but also of failure.¹³⁵⁸

Relying on Menkiti's remarks, the author draws the conclusion that a human being is intertwined in ethical relations with other community members and that her humaneness is embedded in the community from birth.¹³⁵⁹ She emphasises that this social bond is a social fact and not an imagined social contract as found in Kantian dignity.¹³⁶⁰ She further cautions that this social bond should not be seen as simple communitarianism which denies individual interests.¹³⁶¹ As further explained by Murungi:

African jurisprudence takes human beings in their social setting. Contrary to the claims of Western modernity, such a setting is not a social construction. Human beings are not social beings because they socialize with one another. They socialize with one another because they are social beings. The claim that human beings are social beings is not to be taken as denying individuality. That is, it is not to be taken as denying individual rights or individual autonomy. Individual rights or individual autonomy in a social vacuum are theoretical constructions that are

¹³⁵⁸ Menkiti "On the normative conception of a person" in Wiredu (ed) *Companion to African philosophy* (2004) 326.

¹³⁵⁹ Cornell 2010 *SAPL* 392. See also Cornell & Van Marle 2015 *Verbum et Ecclesia* 2; Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 3; Murungi "The question of an African jurisprudence: some hermeneutic reflections" in Wiredu (ed) *Companion to African philosophy* (2004) 522.

¹³⁶⁰ Cornell 2010 *SAPL* 392. See also Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 3. Cf the discussion on the social contract as imagined by Kant through the ideal of the kingdom of ends in para 3 2 4 2 *supra*.

¹³⁶¹ Cornell 2010 *SAPL* 392. See also Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 3; Bohler-Muller 2007 *Obiter* 592-593.

removed from human reality. In Africa, legality is not a social construction. It is a natural social setting in which the African has her or his being.¹³⁶²

Therefore, it is only through actual ethical relations and engagement with community members and with their support that a person can and must develop towards becoming an individuated moral being.¹³⁶³ Accordingly, Cornell and Muvangua state that the reason why Justice Mokgoro links the term “humaneness” to personhood and morality is to denote how a person’s development into a unique being (his personhood) is inseparable from her moral development.¹³⁶⁴ Ultimately, this leads Cornell to argue that a person’s dignity is rooted in her personhood (uniqueness) and her embeddedness in the community which is in contrast to Kantian dignity which is based on the capacity for rationality.¹³⁶⁵ As the community must respect and support the moral development of the individual into a unique being, the community has a duty to respect the human dignity of the individual. In the same way, the individual has a duty to respect the human dignity of the other community members. As reflected in the remarks of Justice Langa in *S v Makwanyane*:

It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse however. The

¹³⁶² Murungi “The question of an African jurisprudence: some hermeneutic reflections” in Wiredu (ed) *Companion to African philosophy* (2004) 523. See also Masolo “Western and African communitarianism: a comparison” in Wiredu (ed) *Companion to African philosophy* (2004) 493.

¹³⁶³ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 3; Cornell 2010 *SAPL* 392; Masolo “Western and African communitarianism: a comparison” in Wiredu (ed) *Companion to African philosophy* (2004) 493.

¹³⁶⁴ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 8. Cf the definition of ubuntu by Justice Mokgoro in *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308 (quoted in n 1355 *supra*).

¹³⁶⁵ Cornell 2010 *SAPL* 298. See also the remark by Justice Mokgoro in *S v Makwanyane and another* 1995 3 SA 391 (CC) para 309 where she links the inherent dignity of every person to ubuntu (cf the discussion in the text at n 511 *supra*).

person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community.¹³⁶⁶

Therefore, like Kantian dignity, ubuntu emphasises the link between morality and freedom as the development of a person's personhood and her unique destiny is inseparable from her moral development.¹³⁶⁷ Also, ubuntu accords with the idea of human dignity as constraint as reflected in the correlating duty to respect the human dignity of others.¹³⁶⁸

Cornell further asserts that when the community supports the individuation and unique destiny of each community member, then each community member is in turn obligated to support and promote the community that supports her.¹³⁶⁹ Masolo calls this the ethics of participatory difference that acknowledges that each person is different but places a demand on each person to make a difference and share in the responsibility of bringing about an ethical, and therefore, humane world.¹³⁷⁰ According to Masolo (relying on Wiredu) the ethics of participatory difference results in "a thick system of rights and obligations".¹³⁷¹ Accordingly, Cornell maintains that the ethical ideal of participatory difference entails more than an individual duty that correlates with a specific individual right.¹³⁷² In other words, it goes further than the harmonisation of individual freedoms to maximise the unconstrained freedom of everyone as reflected in the Kantian right to

¹³⁶⁶ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 224 as also quoted in the text at n 502 *supra*.

¹³⁶⁷ Cornell 2010 *SAPL* 397.

¹³⁶⁸ Cf the discussion on human dignity as constraint in the text at n 1190 *supra*.

¹³⁶⁹ Cornell 2010 *SAPL* 393. See also Cornell & Van Marle 2015 *Verbum et Ecclesia* 2; Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 4.

¹³⁷⁰ Masolo "Western and African communitarianism: a comparison" in Wiredu (ed) *Companion to African philosophy* (2004) 495.

¹³⁷¹ Masolo "Western and African communitarianism: a comparison" in Wiredu (ed) *Companion to African philosophy* (2004) 495 relying on Wiredu *Cultural universals and particulars* (1996) 159 where Wiredu speaks of "a wider set of rights and obligations".

¹³⁷² Cornell 2010 *SAPL* 393. See also Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 3.

freedom.¹³⁷³ As further elucidated by the Constitutional Court in *Bhe v Magistrate, Khayelitsha*:

A sense of community prevailed from which developed an elaborate system of reciprocal duties and obligations among the family members. This is manifest in the concept of *ubuntu* — *umuntu ngumuntu ngabantu* – a dominant value in African traditional culture. This concept encapsulates communality and the inter-dependence of the members of a community. As Langa DCJ put it, it is a culture which “regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights”. It is this system of reciprocal duties and obligations that ensured that every family member had access to basic necessities of life such as food, clothing, shelter and healthcare.¹³⁷⁴

For Cornell, there is an inherent activism in the ethics of participatory difference because it denotes an ethical demand to bring about a humane world.¹³⁷⁵ She contends that *ubuntu* “has an aspirational and ideal edge” because bringing about a humane world and becoming a moral person in that world is a never-ending task.¹³⁷⁶ In *S v Makwanyane* Justice Langa emphasised that *ubuntu* is always “mentioned in the context of it being something to be desired, a commendable attribute which the nation should strive for”.¹³⁷⁷ However, unlike the Kantian ideal of the kingdom of ends that is a regulative ideal,¹³⁷⁸ *ubuntu* is embedded in the social reality and materialises in the ethical actions between community

¹³⁷³ Cf the discussion on Kant’s right to freedom in para 3 2 4 2 and the criticisms against Kantian dignity as discussed in para 3 2 4 3 *supra*.

¹³⁷⁴ *Bhe and others v Magistrate, Khayelitsha, and others (Commission for Gender Equality as amicus curiae); Shibi v Sithole and others; South African Human Rights Commission and another v President of the Republic of South Africa and another* 2005 1 SA 580 (CC) para 163 referring to *S v Makwanyane and another* 1995 3 SA 391 (CC) para 224 as quoted in the text at n 502 *supra*.

¹³⁷⁵ Cornell 2010 *SAPL* 396. See also Cornell & Van Marle 2015 *Verbum et Ecclesia* 2; Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 6.

¹³⁷⁶ Cornell 2010 *SAPL* 396. See also Cornell & Van Marle 2015 *Verbum et Ecclesia* 2; Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 6.

¹³⁷⁷ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 227.

¹³⁷⁸ Cf the discussion on Kant’s kingdom of ends in para 3 2 4 2 *supra*.

members.¹³⁷⁹ It is especially concerned with the well-being and welfare of community members because it recognises that the identity and dignity of a human being is embedded in the community.¹³⁸⁰ Hence, it takes account of the actual social and economic circumstances of community members. This is also reflected in the Constitutional Court's jurisprudence, for example in *Port Elizabeth Municipality v Various Occupiers* where Justice Sachs insisted that the particular circumstances of each case must be taken into account:

The combination of circumstances may be extremely intricate, requiring a nuanced appreciation of the specific situation in each case. ... Each case accordingly has to be decided not on generalities but in the light of its own particular circumstances. Every situation has its own history, its own dynamics, its own intractable elements that have to be lived with (at least for the time being), and its own creative possibilities that have to be explored as far as reasonably possible.¹³⁸¹

In view of the above, Cornell concludes that ubuntu demands the "moralisation of social relationships" which entails constant and never-ending social transformation.¹³⁸² In other words, ubuntu is a moral demand for social justice and harmony, and therefore, it promotes the realisation of socio-economic rights.¹³⁸³ Cornell and Muvangua argue that this obligation is reflected in Justice Mokgoro's description of ubuntu where she states that the phrase *umuntu ngumuntu ngabantu* refers to "the significance of group solidarity on survival issues so

¹³⁷⁹ Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 6; Cornell 2010 *SAPL* 396.

¹³⁸⁰ More "Philosophy in South Africa under and after apartheid" in Wiredu (ed) *Companion to African philosophy* (2004) 157.

¹³⁸¹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 31 as quoted in the text at n 536 *supra*.

¹³⁸² Cornell 2010 *SAPL* 396. See also Cornell & Van Marle 2015 *Verbum et Ecclesia* 2; Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 6.

¹³⁸³ Cornell 2010 *SAPL* 396-397. See also Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 6 & 10.

central to the survival of communities”.¹³⁸⁴ For Cornell and Muvangua this means that ubuntu emphasises that “survival is dependent on mutual support” which they link to Murungi’s succinct statement that “[w]hat is essential to [African] law is what secures human beings in their being”.¹³⁸⁵ Accordingly, ubuntu can be linked to the idea of human dignity as constraint as reflected in a duty on the individual to realise the human dignity of other persons through the promotion of socio-economic rights and substantive equality.¹³⁸⁶ As further elucidated by Bohler-Muller:

[A]dherence to the value of *ubuntu*, whether implicitly or explicitly, demands that we deal with individuals in the context of their historical and current disadvantage and that equality issues must address *the actual conditions of human life*.¹³⁸⁷

Thus ubuntu resonates with the ideas of transformative constitutionalism¹³⁸⁸ which are further elaborated upon below.¹³⁸⁹

Cornell and Muvangua¹³⁹⁰ also extend Masolo’s idea of participatory difference to Wiredu’s principle of sympathetic impartiality which is defined as “the ability to

¹³⁸⁴ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 8 referring to *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308 (quoted in n 1355 *supra*).

¹³⁸⁵ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 8 referring to Murungi “The question of an African jurisprudence: some hermeneutic reflections” in Wiredu (ed) *Companion to African philosophy* (2004) 525.

¹³⁸⁶ Cf the discussion dealing with human dignity as constraint in the text at n 1193 *supra*.

¹³⁸⁷ Bohler-Muller 2007 *Obiter* 595.

¹³⁸⁸ Cornell 2010 *SAPL* 396 who describes ubuntu as “a transformative ethic at its core”. See also Himonga *et al* 2013 *PELJ* 370; Himonga “Exploring the concept of ubuntu in the South African legal system” in Kischel & Kirchner (eds) *Ideologie und Weltanschauung im Recht* (2012) 14; Keep & Midgley “The emerging role of *ubuntu-botho* in developing a consensual South African legal culture” in Bruinsma & Nelken (eds) *Recht der werkelijkheid* (2007) 37. Cf the discussion dealing with transformative constitutionalism in para 1 8 2 3 *supra*.

¹³⁸⁹ See the discussion on how ubuntu informs the constitutional value of the rule of law in para 3 5 *infra*.

¹³⁹⁰ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 4.

imagine ourselves empathetically in the shoes of others” and “not to desire for others what we would not desire for ourselves”.¹³⁹¹ Wiredu argues that this ability is developed through ethical engagement with others and part of a person’s moral development into personhood.¹³⁹² Accordingly, both authors argue that we develop this empathy for others because we are intertwined in ethical relations with them and they are, in a sense, a part of ourselves.¹³⁹³ It is in this sense that the expression “*umuntu ngumuntu ngabantu*” (“a person is a person through other persons”) should be understood.¹³⁹⁴ As expounded upon by More:

Fundamental to African political philosophy and ontology is the view that an individual is not a human being except as he or she constitutes part of a social order. That is a conception of self as intrinsically linked to, and forming a part of, the community. In this communal orientation the self is dependent on other selves and is defined through its relationships to other selves.¹³⁹⁵

For Cornell and Muvangua, this is further elucidated by the Constitutional Court’s remarks in *MEC for Education, KwaZulu-Natal v Pillay*. As was seen in chapter one,¹³⁹⁶ Justice Langa stated that the phrase *umuntu ngumuntu ngabantu* emphasised that “every individual is an extension of others” and referred to Gyekye who argued that “an individual human person cannot develop and achieve

¹³⁹¹ Masolo “Western and African communitarianism: a comparison” in Wiredu (ed) *Companion to African philosophy* (2004) 496 referring to Wiredu “Morality and religion in Akan thought” Oruka & Masolo (eds) *Philosophy and cultures* (1983) 6-13.

¹³⁹² Masolo “Western and African communitarianism: a comparison” in Wiredu (ed) *Companion to African philosophy* (2004) 496 referring to Wiredu “Morality and religion in Akan thought” Oruka & Masolo (eds) *Philosophy and cultures* (1983) 6-13. See also Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 4.

¹³⁹³ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 4.

¹³⁹⁴ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 5. Cf the definition of ubuntu by Justice Mokgoro in *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308 (quoted in n 1355 *supra*).

¹³⁹⁵ More “Philosophy in South Africa under and after apartheid” in Wiredu (ed) *Companion to African philosophy* (2004) 157 (also quoted in the text at n 64 *supra*).

¹³⁹⁶ Cf the discussion of this case in para 1 8 4 3(a) *supra*.

the fullness of his/her potential without the concrete act of relating to other individual persons”.¹³⁹⁷ According to Justice Langa:

This thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one’s sense of self-worth is defined by one’s identity. Cultural identity is one of the most important parts of a person’s identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community’s practices and traditions.¹³⁹⁸

Therefore, a person’s identity, and therefore her human dignity, is embedded in the community and the community members are, in a sense, a part of her, because her moral development into personhood happens through her engagement with other community members and her participation in the community’s practices and traditions.¹³⁹⁹ Ultimately, Cornell emphasises that the individual’s embeddedness in the community results in two obligations: first, the obligation on each person in the community to become her own person through her ethical engagement with others, and secondly, the obligation to recognise and support this ethical humanness in others.¹⁴⁰⁰

Coming back to Justice Mokgoro’s definition of ubuntu, it should be noted that the obligation to respect and promote the ethical humaneness of the other community members is not more important than the obligation to become an ethical being within the community. This is because she emphasises that although ubuntu refers to “the significance of group solidarity on survival issues so central to the survival of communities” and embraces values like “group solidarity, compassion,

¹³⁹⁷ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 53.

¹³⁹⁸ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 53.

¹³⁹⁹ Cornell 2010 *SAPL* 393. See also Muvangua & Cornell “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 4; Masolo “Western and African communitarianism: a comparison” in Wiredu (ed) *Companion to African philosophy* (2004) 493.

¹⁴⁰⁰ Cornell 2010 *SAPL* 393. See also See also Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 5.

respect, human dignity, conformity to basic norms and collective unity”, she then proceeds to stress that ubuntu “in its fundamental sense” refers to “humanity and morality”.¹⁴⁰¹ Accordingly, Cornell argues that group solidarity is always tempered by the idea of humanity which is inseparable from morality:

Although others support me, and an ethical action is by definition ethical because it is an action in relationship to another human being, it is still up to me to realise my own personal destiny and to become a person in the ethical and moral sense of the word. Thus, it is humanity, as Justice Mokgoro emphasises in her own definition of Ubuntu, and not just my community that is at stake in my actions. ... The concept of uBuntu is an ethical concept. A self-regarding or self-interested human being is one that has not only fallen away from her sociality with others; she has lost touch with her humanity.¹⁴⁰²

In this respect, she¹⁴⁰³ also draws on the work of Murungi:

Certainly, in Africa, but not only in Africa, personhood is social. African jurisprudence is a part of African social anthropology. Social cohesion is an essential element of African jurisprudence. Areas of jurisprudence such as criminology and penology, law of inheritance, and land law, for example, focus on the preservation and promotion of social cohesion. This cohesion is a cohesion that is tempered by justice. Justice defines a human being as a human being. Thus, injustice in Africa is not simply a matter of an individual breaking a law that is imposed on him or her by other individuals, or by a collection of individuals who act in the name of the state. It is a violation of the individual's duty to him or herself, a violation of the duty of the individual to be him or herself – the duty to be a social being.¹⁴⁰⁴

¹⁴⁰¹ *S v Makwanyane and another* 1995 3 SA 391 (CC) para 308 (quoted in n 1355 *supra*).

¹⁴⁰² Cornell 2010 *SAPL* 393. See also Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 5.

¹⁴⁰³ Cornell 2010 *SAPL* 393. See also Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 5.

¹⁴⁰⁴ Murungi “The question of an African jurisprudence: some hermeneutic reflections” in Wiredu (ed) *Companion to African philosophy* (2004) 522-523.

Finally, the idea that the well-being and human dignity of the individual is tied up with the well-being and human dignity of the other community members can also be identified in the jurisprudence of the Constitutional Court and is sometimes referred to as human dignity as a collective responsibility or concern.¹⁴⁰⁵ As can be expected in view of the above discussions, it has been utilised by the Constitutional Court to promote the realisation of socio-economic rights. Although Justice Mokgoro did not explicitly refer to ubuntu in *Khosa v The Minister of Social Development*, dealing with the State's refusal to provide social welfare benefits to permanent residents, it has been argued¹⁴⁰⁶ that her following remark is based on ubuntu:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.¹⁴⁰⁷

It can also be identified in the following extract from *Port Elizabeth Municipality v Various Occupiers* in which Justice Sachs explicitly relied upon ubuntu:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.¹⁴⁰⁸

¹⁴⁰⁵ See e.g. Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 344 & Mokgoro & Woolman 2010 *SAPL* 403 n 10.

¹⁴⁰⁶ Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 344; Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 20; Mokgoro & Woolman 2010 *SAPL* 403; Cornell & Van Marle 2005 *AHRLJ* 213ff.

¹⁴⁰⁷ *Khosa and others v The Minister of Social Development and others; Mahlaule and others v Minister of social Development and others* 2004 6 SA 505 (CC) para 74.

¹⁴⁰⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 18 (also quoted in the text at n 546 *supra*). See also *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) para 63 as discussed in text at n 551 *supra*.

3 2 6 Harmonisation of Kantian dignity and ubuntu

3 2 6 1 *Similarities between Kantian dignity and ubuntu*

In view of the analysis above, Cornell identifies two similarities between Kantian dignity and ubuntu.¹⁴⁰⁹ First, both emphasise the link between freedom and morality. In Kantian dignity, a person can only be free and set ends for herself within the moral realm.¹⁴¹⁰ In ubuntu, the development of a person's personhood and her unique destiny is inseparable from her moral development.¹⁴¹¹ Secondly, both concepts promote human dignity in that they both emphasise the inseparableness of personhood and morality.¹⁴¹²

3 2 6 2 *Differences between Kantian dignity and ubuntu*

Cornell identifies two important differences between Kantian dignity and ubuntu.¹⁴¹³ First, where Kantian dignity is based on the rational capacity of human beings,¹⁴¹⁴ dignity through ubuntu is based on the uniqueness of human beings and their embeddedness in the community.¹⁴¹⁵ As was seen above, the fact that Kantian dignity is based on human beings' capacity for rationality has been criticised because it does not take account of human beings who do not have this capacity.¹⁴¹⁶ This problem does not arise with ubuntu because a person's dignity is based on the fact that she is a unique member of the community and not

¹⁴⁰⁹ Cornell 2010 *SAPL* 397.

¹⁴¹⁰ Cf the discussion in para 3 2 4 2 *supra*.

¹⁴¹¹ Cf the discussion in para 3 2 5 *supra*.

¹⁴¹² Cornell 2010 *SAPL* 398. See also Silungwe "On 'African' legal theory: A possibility, an impossibility or mere conundrum?" in Onazi (ed) *African legal theory and contemporary problems* (2014) 28 who are of the view that ubuntu and Kantian dignity both define human being-ness and acknowledge the inherent worth of every human being.

¹⁴¹³ Cornell 2010 *SAPL* 398-399.

¹⁴¹⁴ Cf the discussion in para 3 2 4 2 *supra*.

¹⁴¹⁵ Cf the discussion in para 3 2 5 *supra*.

¹⁴¹⁶ Cf the discussion dealing with the criticisms against Kantian dignity in para 3 2 4 3 *supra*.

dependent on a specific characteristic or capacity.¹⁴¹⁷ Therefore, ubuntu recognises the inherent dignity of all human beings.

Secondly, the social bond is construed differently in African thinking than that envisaged by Kantian dignity.¹⁴¹⁸ The Kantian ideal of the kingdom of ends begins with imagined, already individuated individuals, who enter into a moral social contract which ultimately results in the maximisation of everyone's unconstrained freedom in the external realm of right.¹⁴¹⁹ As was explained above,¹⁴²⁰ Cornell argues that this construct of the moral social contract makes it difficult to justify socio-economic rights and substantive equality through Kantian dignity. In contrast, ubuntu is not based on a hypothetical social contract but relies on a social bond that is a social fact. Each person is born into the community and as part of the community she is obliged to recognise and support the ethical humanness of others and share in the responsibility of bringing about an ethical humane world.¹⁴²¹ Therefore, ubuntu does promote the realisation of socio-economic rights, and therefore, substantive equality.¹⁴²²

As was also mentioned above,¹⁴²³ Wood proposed that the ideal of the kingdom of ends could assist in attacking the ideologies underlying the free market economy because in reality these ideologies are used in a way to undermine the human dignity of persons. For Wood, the Kantian ideal of the kingdom of ends resonates with the concept of ubuntu, specifically the idea that a human person becomes a person through other human beings.¹⁴²⁴ As was seen above,¹⁴²⁵ this notion forms

¹⁴¹⁷ Cf the discussion in para 3 2 5 *supra*.

¹⁴¹⁸ Cornell 2010 *SAPL* 399.

¹⁴¹⁹ Cf the discussion in para 3 2 4 2 *supra*.

¹⁴²⁰ Cf the discussion dealing with the criticisms against Kantian dignity in para 3 2 4 3 *supra*.

¹⁴²¹ As stated by Cornell & Van Marle 2015 *Verbum et Ecclesia* 3: "For ubuntu, the very notion of the social contract misses the idea that human beings are born into an affective network that is constantly being transformed by the participants themselves."

¹⁴²² Cf the discussion in para 3 2 5 *supra*.

¹⁴²³ Cf the discussion dealing with the criticisms against Kantian dignity in para 3 2 4 3 *supra*.

¹⁴²⁴ Wood 2008 *Acta Juridica* 60.

¹⁴²⁵ Cf the discussion in para 3 2 5 *supra*.

the basis of the African social bond that is based on a social fact and takes account of the social and economic realities of persons. Wood argued that “there is much promise in the aim of relating the Kantian conception of the realm of ends to *ubuntu* as a way of interpreting the South African Constitution’s commitment to the inherent dignity of every human being”.¹⁴²⁶ It is perhaps in this light that Wood’s proposal, that Kant’s kingdom of ends could be used to critique the individualistic notion of human dignity which informs the ideologies of individualism and free trade can be seen. Hence, it can be argued that it is through ubuntu that the Kantian ideal of the kingdom of ends can be developed to take account of and promote socio-economic rights and substantive equality. As will be seen below,¹⁴²⁷ the Constitutional Court also relied on Kant’s kingdom of ends in promoting socio-economic rights and substantive equality within a larger understanding of human dignity as informed by ubuntu.

3 2 7 Human dignity as interpreted in the legal sphere

This section critically investigates the approach to the constitutional value of human dignity in the South African common law of contract. This is done in three parts, namely (1) the approach to human dignity in the Constitution, (2) the approach to human dignity by the Constitutional Court generally and (3) the approach to human dignity in the common law of contract.

3 2 7 1 The approach to human dignity in the Constitution

As already mentioned, human dignity is regarded as the core value of the Constitution and the most important human right from which all the other human rights derive.¹⁴²⁸ Ackermann explains that the importance of human dignity in the Constitution becomes clear in view of South Africa’s history of apartheid during which the human dignity of the majority of the population was denied:

¹⁴²⁶ Wood 2008 *Acta Juridica* 60-61.

¹⁴²⁷ Cf the discussion of *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) in para 3 2 7 2 *infra*.

¹⁴²⁸ Cf the discussion dealing with human dignity as a constitutional value in para 1 8 2 1 *supra*.

The state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through ones (*sic*) own powers and to act freely as a moral agent pursuant to such understanding or self-definition. Blacks were treated as means to and (*sic*) end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.¹⁴²⁹

Consequently, section 10 of the Constitution now confirms that everyone “has inherent dignity”, and in this sense, the Constitution now legally recognises the inherent human dignity of everyone.¹⁴³⁰ Furthermore, human dignity cannot be limited in terms of section 36 of Constitution or suspended in a state of emergency (section 37(5)(c) of the Constitution).¹⁴³¹ Therefore, it has been argued that the Kantian conception of dignity which recognises the intrinsic worth of human beings is reflected in the constitutional provisions.¹⁴³² It is submitted that the fact that

¹⁴²⁹ Ackermann 2000 *HJIL* 540. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 326; Woolman “Dignity” in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.2; Cameron “Dignity and disgrace: moral citizenship and constitutional protection” in McCrudden (ed) *Understanding human dignity* (2013) 468; Botha 2009 *Stell LR* 201.

¹⁴³⁰ De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 418; Cameron “Dignity and disgrace: moral citizenship and constitutional protection” in McCrudden (ed) *Understanding human dignity* (2013) 476. See also Botha 2009 *Stell LR* 197 who makes the point that this wording indicates that human dignity is not dependent on a specific characteristic or attribute.

¹⁴³¹ See also Cameron “Dignity and disgrace: moral citizenship and constitutional protection” in McCrudden (ed) *Understanding human dignity* (2013) 474; Hawthorne 2011 *SUBB Iurisprudentia* para 3; Hawthorne 2011 *SAPL* 432; Botha 2009 *Stell LR* 198; Ackermann 2004 *New Zealand Law Review* 653-654; Ackermann 2000 *HJIL* 543-544.

¹⁴³² Ackermann 2000 *HJIL* 541 who states that human dignity in the Constitution refers to “innate, priceless and infeasible human worth”. In a later article, he refers specifically to Kant’s differentiation between dignity and price when dealing with the concept of human dignity in the Constitution (Ackermann 2004 *New Zealand Law Review* 649). See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 326-327; Woolman “Dignity” in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.2(a); Hawthorne 2011 *SUBB Iurisprudentia* para 3.

section 10 applies to everyone without the requirement of rationality is a reflection of ubuntu.¹⁴³³

As section 10 recognises the inherent dignity of everyone and their right to have their dignity respected and protected, it can be argued that the right to human dignity in section 10 grounds “a set of rights claims against others” and “reinforce claims to self-determination” as envisaged by the concept of human dignity as empowerment.¹⁴³⁴ However, Ackermann argues that section 10 must be read with section 7(2) of the Constitution which provides that the State must respect, protect, promote and fulfil all the rights in the Bill of Rights, including the right to human dignity.¹⁴³⁵ Viewed in light of the Constitution’s commitment to substantive equality and the promotion of socio-economic rights,¹⁴³⁶ the Constitution follows an approach which recognises the State’s duty to realise and promote the human dignity of everyone through the realisation and promotion of socio-economic rights and substantive equality.¹⁴³⁷ This includes the duty of the courts to promote and realise the human dignity of everyone when interpreting and/or developing legislation, the common law and the customary law in terms of section 39(2) of the Constitution. Thus, the courts have a duty to ensure the protection and realisation of human dignity in the private sphere. In other words, the courts have a duty to ensure the protection and realisation of the human dignity of contracting parties when developing the common law of contract and when interpreting and applying the provisions of the CPA. In other words, in the field of contract law, the courts should follow a more duty-driven approach to human dignity as conceptualised through the concept of human dignity as constraint which could entail the limitation

¹⁴³³ Cf the discussion dealing with the differences between Kantian dignity and ubuntu in para 3 2 6 2 *supra*.

¹⁴³⁴ Cf Beyleveld and Brownsword’s discussion of human dignity as empowerment in the text at n 1181 *supra*.

¹⁴³⁵ Ackermann *Human dignity* (2013) 95. See also Hawthorne 2011 *SUBB Iurisprudentia* para 3.

¹⁴³⁶ Cf the discussion dealing with the constitutional value of equality in para 1 8 2 2(b) *supra*.

¹⁴³⁷ Cf the discussion dealing with human dignity as constraint in the text at n 1193 *supra*.

of a party's contractual autonomy to ensure the respect and promotion of the other party's human dignity.¹⁴³⁸

Ackermann further views the connection between human dignity in the Constitution and Kantian dignity as follows:

It is significant that s 10 first proclaims that “everyone *has* inherent dignity” before entrenching the right of “everyone ... to have their dignity respected and protected”. This underscores, in my view, the recognition by the Constitution that human dignity is not merely a protected and entrenched right, but that the concept of human dignity is definitional to what it means to be a human – that all humans have inherent dignity as an attribute independent of and antecedent to any constitutional protection thereof. It is, I would argue, accepted as a categorical constitutional imperative.¹⁴³⁹

In other words, Ackermann is arguing that human beings do not acquire their human dignity from the constitutional provisions because it is something that already exists in every human being.¹⁴⁴⁰ Relying on Ackermann's interpretation of human dignity as a categorical imperative¹⁴⁴¹ and the Kantian idea that dignity is priceless, irreplaceable and of inestimable worth,¹⁴⁴² Cornell and Fuller argue that human dignity should not be weighed up or balanced against the other constitutional values like freedom or equality but should rather inform the meaning of these constitutional values.¹⁴⁴³

¹⁴³⁸ How the courts have utilised the constitutional value of human dignity in the common law of contract is critically investigated in para 3 2 7 3 *infra*.

¹⁴³⁹ Ackermann *Human dignity* (2013) 95; Ackermann 2004 *New Zealand Law Review* 647.

¹⁴⁴⁰ Ackermann *Human dignity* (2013) 95. See also Botha 2009 *Stell LR* 197-198.

¹⁴⁴¹ For Kant, a categorical imperative is a command that applies unconditionally and without reference to our own specific goals and desires. In other words, it refers to the moral law (cf the explanation of a categorical imperative in n 1231 *supra*).

¹⁴⁴² Cf the discussion of the Kantian differentiation between something that has dignity and something that has price in para 3 2 4 1 *supra*.

¹⁴⁴³ Cornell & Fuller “Introduction” in Cornell *et al* (eds) *Dignity jurisprudence of the Constitutional Court* (2013) 12. See also Cornell 2004 *SAPL* 667.

3 2 7 2 *The approach to human dignity by the Constitutional Court*

The Constitutional Court in *S v Makwanyane* confirmed that human dignity refers to the intrinsic worth of all human beings which means that they are entitled to equal respect and concern and may not be treated in a degrading or dehumanising way.¹⁴⁴⁴ Specifically, the Kantian idea that dignity is beyond price and of incalculable worth,¹⁴⁴⁵ as well as Kant's second formulation of the categorical imperative (the Formula of an End in Itself),¹⁴⁴⁶ was explicitly imported into our constitutional jurisprudence by Justice Ackermann in *S v Dodo*:

Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end.¹⁴⁴⁷

In the constitutional court case of *Khumalo v Holomisa* Justice O'Regan confirmed that human dignity does not only refer to a person's own self-worth but also how she is valued and treated by the members of the community:

The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.¹⁴⁴⁸

¹⁴⁴⁴ *S v Makwanyane and another* 1995 3 SA 391 (CC) paras 26 (Justice Chaskalson), 271 & 281 (Justice Mohamed), 313-316 (Justice Mokgoro) & 328 (Justice O'Regan). See also Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 327; Botha 2009 *Stell LR* 202.

¹⁴⁴⁵ Cf the discussion of the Kantian differentiation between something that has dignity and something that has price in para 3 2 4 1 *supra*.

¹⁴⁴⁶ Cf the discussion of this formulation of the categorical imperative in para 3 2 4 *supra*.

¹⁴⁴⁷ *S v Dodo* 2001 3 SA 382 (CC) para 38. See also Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 327 n 28; Botha 2009 *Stell LR* 202.

¹⁴⁴⁸ *Khumalo and others v Holomisa* 2002 5 SA 401 (CC) para 27.

Therefore, the court confirmed the inherent and equal worth of all human beings which result in their entitlement to equal respect and concern.¹⁴⁴⁹

In *MEC for Education, KwaZulu-Natal v Pillay* the court further explained what it means to treat human beings as an end in themselves.¹⁴⁵⁰ In the first place, the court emphasised the importance of freedom in defining human dignity¹⁴⁵¹ by quoting from Justice Ackermann's minority judgment in *Ferreira v Levin* where he stated as follows:

Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.¹⁴⁵²

Justice Langa then continued as follows:

A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues'. One of those ends is the voluntary religious and cultural practices in which we participate. That we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.¹⁴⁵³

The court's conception of what it means to treat a human being as an end in herself reflects Wood's interpretation of Kant's second categorical imperative. As was shown above,¹⁴⁵⁴ Wood's interpretation proposed that treating a person's

¹⁴⁴⁹ See the discussion of this case in *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 172.

¹⁴⁵⁰ The facts and decision of this case is discussed in para 1 8 7 *supra*.

¹⁴⁵¹ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 63.

¹⁴⁵² *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 49.

¹⁴⁵³ *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 64.

¹⁴⁵⁴ Cf the discussion in the text at n 1293 *supra*.

humanity as an end in itself entails respecting her capacity to set her own ends and choose ways to achieve them in order to lead a purposive life through her practical reason. In other words, it would entail respecting the unique set of ends a person sets for herself. For Wood, like Beylerveld and Brownsword, this means that the autonomy of a person must be respected by not subjecting another's arbitrary will onto that person. Furthermore, Wood emphasised that this would include that a person should not be excluded from participating in community life.¹⁴⁵⁵ Hence, respecting a person as an end in herself would include respect for a person's participation in religious or cultural practices. In his discussion of the case, Botha interpreted the court's finding to mean that respecting a person as an end in herself "demands the creation of a space within which individuals are free to forge their own autonomous identities".¹⁴⁵⁶ The court, therefore, has developed the constitutional value of human dignity to reflect its empowerment conception which denotes a right to the creation of a space in which a person's human dignity can flourish.¹⁴⁵⁷ In this respect, the court also confirmed the State's duty to create and protect such a space for individual autonomy as reflected in the notion of human dignity as constraint although this duty aligns more closely with a rights-driven approach to human rights because it promotes individual autonomy as reflected in the notion of human dignity as empowerment.¹⁴⁵⁸

In a number of recent cases, the Constitutional Court has emphasised this link between human dignity and autonomy. In *MM v MN* the Constitutional Court had to decide (among other things) whether the right to dignity would require a man in a customary marriage to obtain the consent of his existing wife before he could take a second wife.¹⁴⁵⁹ In arriving at its decision, the court made the following statement:

¹⁴⁵⁵ Cf the discussion in the text at n 1295 *supra*.

¹⁴⁵⁶ Botha 2007 *Stell LR* 203-204 commenting on *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC).

¹⁴⁵⁷ Cf the discussion dealing with human dignity as empowerment in para 3 2 3 2 *supra*.

¹⁴⁵⁸ Cf the discussion dealing with human dignity as constraint in para 3 2 3 3 *supra*.

¹⁴⁵⁹ *MM v MN and another* 2013 4 SA 415 (CC). However, the decision of the court has been criticised for not dealing with the human dignity of the second wife (Kruuse & Sloth-Nielsen 2014 *PELJ* 1724).

[T]he right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's personal circumstances are a fundamental aspect of human dignity.¹⁴⁶⁰

In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* the court stated that human dignity acknowledged the value of a person's choices.¹⁴⁶¹ And, in *South African Police Service v Solidarity obo Barnard* Justice Van der Westhuizen, in his separate but concurring judgment, confirmed that human dignity includes the idea that a person should be permitted to develop their unique talents¹⁴⁶² by quoting the following passage from Justice Ackermann's minority judgment in *Ferreira v Levin*:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally.¹⁴⁶³

Although the Constitutional Court sees human dignity as creating and promoting a space for the individual to make her own decisions and pursue her own unique set of ends as promoted by the idea of human dignity as empowerment, this does not

¹⁴⁶⁰ *MM v MN and another* 2013 4 SA 415 (CC) paras 73-74.

¹⁴⁶¹ *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2014 2 SA 168 (CC) para 56. Referred to by approval in the minority judgment in *AB and another v Minister of Social Development* 2017 3 SA 570 (CC) para 110, esp n 118.

¹⁴⁶² *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 173.

¹⁴⁶³ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 49.

mean that the individual is viewed “as an isolated and unencumbered being”.¹⁴⁶⁴ In dealing with the right to privacy in *Bernstein v Bester*, Justice Ackermann emphasised the correlating nature of rights and duties:

The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. *The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. ... This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen.*¹⁴⁶⁵

It would seem that Justice Ackermann was influenced by Kantian ethics, specifically Kant’s imagined kingdom of ends as he refers to Kant’s “community of humanity” which “demands mutual respect as a universal moral duty towards persons as *moral persons*”.¹⁴⁶⁶ Therefore, it is submitted that the Constitutional Court has developed both aspects of human dignity i.e. human dignity as empowerment¹⁴⁶⁷ and human dignity as constraint, the latter constituting the individual’s correlating duty to respect the human dignity of others.¹⁴⁶⁸

The Constitutional Court has also relied on ubuntu to emphasise that “human beings are social beings whose humanity is expressed through their relationships with others”.¹⁴⁶⁹ As was seen above,¹⁴⁷⁰ in *MEC for Education, KwaZulu-Natal v*

¹⁴⁶⁴ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 174. See also *Bernstein and others v Bester and others NNO* 1996 2 SA 751 (CC) paras 65; Ackermann *Human dignity* (2013) 109-111.

¹⁴⁶⁵ *Bernstein and others v Bester and others NNO* 1996 2 SA 751 (CC) para 67 (my emphasis).

¹⁴⁶⁶ *Bernstein and others v Bester and others NNO* 1996 2 SA 751 (CC) para 66 (esp n 93).

¹⁴⁶⁷ Cf the discussion on human dignity as empowerment in para 3 2 3 2 *supra*.

¹⁴⁶⁸ Cf the discussion on human dignity as constraint in the text at n 1190 *supra*.

¹⁴⁶⁹ *Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others* 2000 3 SA 936 (CC) para 30 (esp n 42).

¹⁴⁷⁰ Cf the reference to this case when discussing how ubuntu promotes human dignity in para 3 2 5 *supra*.

Pillay the court used ubuntu to emphasise that a person's moral development into a unique human being can only happen through engagement with other community members, and therefore, that participating in the practices and traditions of the community is inseparably linked to a person's human dignity. As the court also referred to Kant's second categorical imperative to promote the idea that human dignity denotes respect for a person's unique set of ends¹⁴⁷¹ this case illustrates how both Kantian dignity and ubuntu promote human dignity in a way that protects a person's individuality and provides a space for that person to pursue her personhood and unique destiny (ubuntu) or her unique set of ends (Kantian dignity) within and through engagement with the community.¹⁴⁷²

As was seen above,¹⁴⁷³ ubuntu's greatest impact has been to give content to the constitutional value of human dignity when dealing with the socio-economic rights entrenched in the Constitution which accords with Cornell's view that ubuntu is more appropriate than Kantian dignity in promoting the realisation of socio-economic rights.¹⁴⁷⁴ Furthermore, this means that ubuntu has been used to infuse the constitutional value of human dignity with a duty on the State to promote the realisation of socio-economic rights in order to create the necessary conditions for the realisation of everyone's human dignity.¹⁴⁷⁵

More recently, the Constitutional Court in *South African Police Service v Solidarity obo Barnard* also embraced the construct of human dignity that reflects the duties to respect the human dignity of others and the creation of the necessary conditions for the realisation of human dignity through socio-economic rights.¹⁴⁷⁶ Specifically, Justice van der Westhuizen extended the application of this construct of human dignity to individuals when dealing with substantive equality. He relied

¹⁴⁷¹ Cf the discussion of this case in the text at n 1450 *supra*.

¹⁴⁷² See also Botha 2007 *Stell LR* 205.

¹⁴⁷³ Cf the discussion on human dignity through ubuntu in para 3 2 5 *supra*.

¹⁴⁷⁴ Cf the discussions in paras 3 2 4 3, 3 2 5 & 3 2 6 2 *supra*.

¹⁴⁷⁵ Cf the discussion on human dignity through ubuntu in para 3 2 5 *supra*. Cf the discussion dealing with human dignity as constraint in para 3 2 3 3 *supra*.

¹⁴⁷⁶ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 174-175.

on both Kantian dignity¹⁴⁷⁷ and ubuntu¹⁴⁷⁸ as elucidated in the cases discussed above. Thus, the justice made the following statement:

In the context of socio-economic rights, this Court has affirmed that the responsibility for the difficulties of poverty is shared equally as a community because “wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole”. This would also hold in the context of substantive equality. First, the way in which individuals interact with social groups and society generally has a direct bearing on their dignity. This is true for members of both advantaged and disadvantaged groups. Second, this idea also gives effect to another Kantian way of understanding dignity – that it “asks us to lay down for ourselves a law that embraces every other individual in a manner that extends beyond the interests of our more parochial selves”.¹⁴⁷⁹

This statement indicates that the court is following the more communitarian interpretation of Kantian dignity as put forward by Cornell.¹⁴⁸⁰ She argued that Kantian dignity should not be equated to unconstrained freedom but that it rather denotes the capacity to lay down moral laws for ourselves and being bound by

¹⁴⁷⁷ Specifically, Justice Van der Westhuizen referred to the following cases that incorporate aspects of Kantian dignity into South African law: *Khumalo and others v Holomisa* 2002 5 SA 401 (CC); *S v Dodo* 2001 3 SA 382 (CC); *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 1 SA 6 (CC); *Ferreira v Levin NO and others*; *Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC); *Bernstein and others v Bester and others NNO* 1996 2 SA 751 (CC); *S v Makwanyane and another* 1995 3 SA 391 (CC).

¹⁴⁷⁸ Specifically, Justice Van der Westhuizen referred to the following cases that relied on ubuntu to develop the constitutional value of human dignity: *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Dawood and another v Minister of Home Affairs and others*; *Shalabi and another v Minister of Home Affairs and others*; *Thomas and another v Minister of Home Affairs and others* 2000 3 SA 936 (CC).

¹⁴⁷⁹ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 175 quoting from *Khosa and others v The Minister of Social Development and others*; *Mahlaule and others v Minister of social Development and others* 2004 6 SA 505 (CC) para 74.

¹⁴⁸⁰ See the discussion of Cornell's interpretation of Kantian dignity in para 3 2 4 2 *supra*.

those laws. Accordingly, her interpretation of Kantian dignity is that freedom can be found only in the realm of morality which means there is no tension between our freedom and subjecting ourselves to the moral law. Relying on Kant's concept of the kingdom of ends, she reached the conclusion that when we disrespect the dignity of others we are actually failing to respect our own dignity as law-making members in the hypothetical kingdom of ends. These ideas are also reflected in Justice van der Westhuizen's reasoning when he makes the following statement:

The dignity of all South Africans is augmented by the fact that the Constitution is the foundation of a society that takes seriously its duties to promote equality and respect for the worth of all. Because affirmative substantive equality measures are one way in which these duties are given effect, these measures can enhance the dignity of individuals, even those who may be adversely affected by them.¹⁴⁸¹

Therefore, it can be argued that the Constitutional Court is developing the constitutional value of human dignity to include a duty on the individual to assist in the creation of the necessary conditions for the realisation of the human dignity of other community members through the promotion of substantive equality as reflected in the idea of human dignity as constraint.¹⁴⁸²

Two comments must be made in respect of the Justice van der Westhuizen's reliance on Kantian dignity to justify and promote substantive equality, especially as Cornell and Van Marle contend that Kantian dignity does not provide adequate justification for the promotion of substantive equality.¹⁴⁸³ In the first place, the court's reference to Kant is taken from Woolman's work on human dignity in which he was relying on Rawls' understanding of Kant.¹⁴⁸⁴ Although Cornell concedes that Rawls applied Kantian dignity to argue for greater substantive equality, she remains unconvinced that any type of imagined social contract between imagined, already individuated, individuals can provide adequate justification for socio-

¹⁴⁸¹ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 175.

¹⁴⁸² Cf the discussion dealing with human dignity as constraint in para 3 2 3 3 *supra*.

¹⁴⁸³ Cf the discussion dealing with criticism levied against Kantian dignity in para 3 2 4 3 *supra*.

¹⁴⁸⁴ Woolman "Dignity" in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.2(e) n 43.

economic rights.¹⁴⁸⁵ Secondly, Woolman's reference to Kant was made in response to the Constitutional Court's statement in *Khosa v The Minister of Social Development* that human dignity is a collective responsibility concerned with collective well-being.¹⁴⁸⁶ However, as was seen above, a number of scholars (including Woolman himself) have linked the court's reasoning in *Khosa v The Minister of Social Development* to ubuntu.¹⁴⁸⁷

3 2 7 3 *The approach to human dignity in the common law of contract*

Both aspects of human dignity (empowerment and constraint) also feature prominently in the common law of contract.¹⁴⁸⁸ As will be explained below, the Supreme Court of Appeal favours a rights-driven approach to human dignity as reflected in the empowerment-based interpretation. In contrast, it is submitted that the Constitutional Court follows a multi-faceted approach to human dignity which views human dignity both as empowerment and constraint and aligns with its approach as discussed in the previous section.

As pointed out above,¹⁴⁸⁹ the empowerment-based view of human dignity supports the classical model of contract law as it promotes individual liberty and limits state intervention in contracts. It further equates human dignity with the capacity for autonomous action and results in the protection of individual choices against the unwilling interferences of others. This is the conception of human dignity favoured by the Supreme Court of Appeal.¹⁴⁹⁰ Quoting appeal judge

¹⁴⁸⁵ Cornell 204 SAPL 668.

¹⁴⁸⁶ *Khosa and others v The Minister of Social Development and others; Mahlaule and others v Minister of social Development and others* 2004 6 SA 505 (CC) para 74. This was also the case referred by the court in *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 175 when it invoked Kantian dignity in its reasoning.

¹⁴⁸⁷ Cf the discussion in the text at n 1406 *supra*.

¹⁴⁸⁸ Hawthorne 2011 *SUBB Jurisprudentia* para 4 1; Bhana & Pieterse 2005 *SALJ* 881; Lubbe 2004 *SALJ* 421; Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 191.

¹⁴⁸⁹ See the discussion in para 3 2 3 2 *supra* dealing with human dignity as empowerment.

¹⁴⁹⁰ Cf the discussion of the Supreme Court of Appeal's approach to fairness in the common law of contract in paras 2 3 2 2 & 2 3 2 4 *supra*.

Cameron's minority judgment in *Brisley v Drotsky*,¹⁴⁹¹ the court in *Afrox Healthcare v Strydom* stated that contractual autonomy is part of the constitutional value of freedom and informs the constitutional value of human dignity.¹⁴⁹² The court further elevated contractual freedom into a constitutional value which demands respect for the sanctity of contracts.¹⁴⁹³ Consequently, the court reduced good faith to an abstract value underlying the substantive common law of contract which means it cannot be used to set aside an unfair contract term or prevent the unfair enforcement of a contract term.¹⁴⁹⁴

The approach by the Supreme Court of Appeal is a reflection of the idea of human dignity as empowerment in that a person should be free to make her own decisions and take responsibility for those decisions.¹⁴⁹⁵ Specifically, the appeal court equated a person's contractual autonomy i.e. the capacity to decide whether to contract, with whom to contract and on what terms to contract to that person's human dignity.¹⁴⁹⁶ As mentioned above,¹⁴⁹⁷ the classical law of contract is founded on the ideologies of individualism and capitalism.¹⁴⁹⁸ A striking example of how the court's approach is based on an individualistic interpretation of Kant is reflected in Jordaan's brief version of Kantian dignity:

Kant's reasoning can be encapsulated as follows: Since our species possesses the capacity to reason, every (adult) person has the capacity

¹⁴⁹¹ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 94 as discussed in para 2 3 2 2 *supra*.

¹⁴⁹² *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 22 as discussed in para 2 3 2 2 *supra*.

¹⁴⁹³ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 23 as quoted in the text at n 841 *supra*.

¹⁴⁹⁴ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 32. See also *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22.

¹⁴⁹⁵ See the discussion in para 3 2 3 2 *supra* dealing with human dignity as empowerment. See also Hawthorne 2011 *SUBB Jurisprudentia* para 4.2; Brand 2009 *SALJ* 85; Bhana 2007 *SALJ* 274; Lubbe 2004 *SALJ* 420-421.

¹⁴⁹⁶ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 22 as discussed in para 2 3 2 2 *supra*.

¹⁴⁹⁷ Cf the discussion of this case in the text at n 850 *supra*.

¹⁴⁹⁸ Cf the discussion of this case in the text at n 846 *supra*.

to differentiate between right and wrong and make moral judgments. Every person is therefore perceived as a moral agent with moral autonomy. Having the status of being a moral agent endows every human with unconditional incomparable worth, also known as dignity. Moral autonomy relates to every action by a moral agent, and therefore includes actions that relate to contracting. *Infringing contractual autonomy thus infringes moral autonomy, which in return infringes dignity. To disregard contractual autonomy is to disregard dignity.*¹⁴⁹⁹

The importance of contractual autonomy in promoting human dignity is not disputed.¹⁵⁰⁰ As reflected in the constitutional jurisprudence discussed above,¹⁵⁰¹ human dignity demands and promotes a space for an individual to make her own decisions in order to pursue her unique set of ends as based on Kantian dignity or her personhood and unique destiny as based on ubuntu. This would include the freedom to enter into contracts in pursuit of such unique ends or personhood. Therefore, both Kantian dignity and ubuntu as incorporated in the Constitutional Court's jurisprudence support the idea of contractual autonomy as essential in respecting the human dignity of persons as reflected in the concept of human dignity as empowerment. Nevertheless, the jurisprudence of the Constitutional Court as discussed above,¹⁵⁰² also recognises that an individual does not pursue her unique set of ends or her personhood in a social vacuum. This is especially

¹⁴⁹⁹ Jordaan 2004 *De Jure* 59-60 (my emphasis). See also Barnard-Naude 2008 *Constitutional Court Review* 164 who states that “[i]n the context of the law of contract, individualism believes that the parties create their own law through agreement (consensus) which is itself a manifestation of the individual’s autonomy”.

¹⁵⁰⁰ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 24 who state that “freedom of contract is grounded in the respect for dignity of persons”.

¹⁵⁰¹ Cf the discussions of *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC); *Ferreira v Levin NO and others*; *Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC); *MM v MN and another* 2013 4 SA 415 (CC); *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2014 2 SA 168 (CC); *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) in para 3 2 7 2 *supra*.

¹⁵⁰² Cf the discussion of *Bernstein and others v Bester and others NNO* 1996 2 SA 751 (CC); *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC); *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) in para 3 2 7 2 *supra*.

true in the sphere of contract law where such ends or personhood are always pursued through relationships with other persons and within a specific social reality.¹⁵⁰³ Accordingly, the Constitutional Court has developed a concept of human dignity endorsing both aspects of human dignity viz autonomy and constraint. The latter as reflected in the duty to respect the human dignity of others which duty the court has linked to both Kantian dignity and ubuntu.¹⁵⁰⁴ Moreover, the Constitutional Court has been inspired by ubuntu to develop socio-economic rights and promote substantive equality in order to create the necessary conditions for the realisation of human dignity.¹⁵⁰⁵ Therefore, the harmonisation of Kantian dignity and ubuntu in the constitutional jurisprudence has led to the endorsement of both facets of human dignity as empowerment and constraint. The latter as reflected in the State and the individual's duties to respect the human dignity of others and to share in the responsibility of creating the necessary conditions for the realisation of others' human dignity through the promotion of socio-economic rights and substantive equality.

In consequence, a proper appreciation of the constitutional value of human dignity does not follow a purely rights-driven approach as reflected in human dignity as empowerment.¹⁵⁰⁶ The constitutional value of human dignity also includes the idea of human dignity as constraint as reflected in both duties referred to above. However, this constraint is not seen as an external constraint that results in a

¹⁵⁰³ Barnard 2006 *Law and Critique* 170.

¹⁵⁰⁴ Cf the discussion in the text at n 1468 *supra*.

¹⁵⁰⁵ Cf the discussions of *Khosa and others v The Minister of Social Development and others; Mahlaule and others v Minister of social Development and others* 2004 6 SA 505 (CC); *Bhe and others v Magistrate, Khayelitsha, and others (Commission for Gender Equality as amicus curiae)*; *Shibi v Sithole and others; South African Human Rights Commission and another v President of the Republic of South Africa and another* 2005 1 SA 580 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) in para 3 2 5 *supra* and the discussion of *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) in para 3 4 2 *supra*.

¹⁵⁰⁶ As pointed out above, the rights-driven approach to human dignity as empowerment results in the maximisation of the freedom of individuals (cf the discussions of human dignity as empowerment and constraint in paras 3 2 3 2 & 3 2 3 3 *supra*).

tension between the human dignity of two persons,¹⁵⁰⁷ but as an internal constraint reflecting the idea of moral freedom which can be used to resolve the abovementioned tension.¹⁵⁰⁸ The idea of moral freedom, also referred to as human dignity as a collective responsibility or concern, is the result of a harmonisation between Kantian dignity and ubuntu. First, it is based on the communitarian interpretation of Kantian dignity which has been incorporated into the constitutional jurisprudence.¹⁵⁰⁹ According to this interpretation of Kant, freedom can only be found in the moral realm, and therefore, following moral laws should be seen as an internal constraint on a person's freedom. In other words, a person can only be truly free by subjecting herself to the moral law which moral law demands that she respects the human dignity of others. Secondly, as also reflected in the constitutional jurisprudence,¹⁵¹⁰ ubuntu recognises that an individual, and therefore, her human dignity, is embedded in the community which means that the community is, in a sense, a part of her. Therefore, the well-being and human dignity of the individual is tied up with the well-being and human dignity of the other community members. Consequently, when the individual is not respecting the human dignity of others or supporting the realisation of the human dignity of the other community members she is also disrespecting her own human dignity.

¹⁵⁰⁷ Cf the discussion on human dignity as empowerment in para 3 2 3 2 *supra*.

¹⁵⁰⁸ Cf the discussion dealing with the communitarian interpretation of Kantian dignity in para 3 2 4 2 *supra*.

¹⁵⁰⁹ Cf the discussion of *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) in para 3 2 7 2 *supra*.

¹⁵¹⁰ Cf the discussions of *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC); *Bhe and others v Magistrate, Khayelitsha, and others (Commission for Gender Equality as amicus curiae)*; *Shibi v Sithole and others*; *South African Human Rights Commission and another v President of the Republic of South Africa and another* 2005 1 SA 580 (CC); *Khosa and others v The Minister of Social Development and others*; *Mahlaule and others v Minister of social Development and others* 2004 6 SA 505 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) in para 3 2 5 *supra* which deals with human dignity through ubuntu. See also the discussion of *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) in para 3 2 7 2 *supra*.

In the law of contract, this should mean that a contracting party can only be truly free when she exercises her contractual freedom in a way that respects and supports the human dignity of the other contracting party.¹⁵¹¹ Accordingly, when a contracting party fails to respect or support the human dignity of the other contracting party, she is not only disrespecting the human dignity of the other contracting party but also failing to respect her own human dignity. Accordingly, contractual freedom has to denote moral freedom in that a contracting party can only exercise her contractual freedom in a way that respects and supports the human dignity of the other contracting party. This view accords with that of Hawthorne who argues that human dignity as constraint provides justification for limiting contractual autonomy where contract terms freely entered into violate one of the party's human dignity.¹⁵¹² This is also reflected in Judge Cameron's minority judgment in the Supreme Court of Appeal decision of *Brisley v Drotzky* where he stated as follows:

The 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.¹⁵¹³

Except for Judge Cameron's remarks above, the Supreme Court of Appeal has been silent on the notion of human dignity as constraint and how it could be applied in the common law of contract. It is therefore necessary to look at two high court cases decided shortly after the enactment of the Constitution in which the idea of human dignity as constraint was promoted in the common law of contract.

In chapter two,¹⁵¹⁴ it has been discussed how the court in *Coetzee v Comitis* held that a contract term that infringed upon one of the contracting party's human

¹⁵¹¹ Barnard-Naude 2008 *Constitutional Court Review* 205.

¹⁵¹² Hawthorne 2011 *SUBB Jurisprudentia* para 4 2. See also Brownsword "Freedom of contract, human rights and human dignity" in Friedmann & Barak-Erez (eds) *Human rights in private law* (2001) 194.

¹⁵¹³ *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 95.

¹⁵¹⁴ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) as discussed in para 2 3 2 1 *supra*.

dignity would be considered contrary to public policy and therefore invalid and unenforceable.¹⁵¹⁵ Woolman has pointed out that the court's judgment was based on Kant's second categorical imperative as the court stated that the contract infringed upon the soccer player's human dignity because in terms of the contract he was "helpless" and "treated just like an object",¹⁵¹⁶ and hence, not treated as an end in himself.¹⁵¹⁷ The high court's interpretation preceded the more recent judgments of the Constitutional Court that incorporate the Kantian categorical imperative that respect for the human dignity of a person means that she should be treated as end in herself and never merely as a means to an end.¹⁵¹⁸ Specifically, the court in *Coetzee v Comitis* held that the NLS rules as incorporated into the contract "are akin to treating players as goods and chattels who are at the mercy of their employer once their contract has expired".¹⁵¹⁹ Therefore, the court's definition of what it means to treat a person as an end in herself accords with Wood's interpretation of Kant as endorsed by the Constitutional Court in *MEC for Education, KwaZulu-Natal v Pillay*.¹⁵²⁰ As was seen above, Wood argued that treating a person as an end in herself denotes respect for the person's unique set of ends which would include that a person should not be deprived of control over her life.¹⁵²¹ As the NSL rules incorporated into the contract left the player helpless and at the mercy of his former employer, the contract deprived him of control over his life which constituted an infringement on his human dignity, and consequently the court held that the contract was contrary to public policy.

¹⁵¹⁵ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) paras 34 & 41. See also Lubbe 2004 SALJ 422.

¹⁵¹⁶ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 34.

¹⁵¹⁷ Woolman "Dignity" in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.4(f). See also Lubbe 2004 SALJ 422.

¹⁵¹⁸ Cf the discussion of *S v Dodo* 2001 3 SA 382 (CC) & *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) in para 3 2 7 2 *supra*.

¹⁵¹⁹ *Coetzee v Comitis and others* 2001 1 SA 1254 (C) para 38.

¹⁵²⁰ Cf the discussion of *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) in para 3 2 7 2 *supra*.

¹⁵²¹ Cf the discussion in the text at n 1292 *supra*.

In *Mort v Henry Shields-Chiat* the same court *obiter* linked the constitutional value of human dignity to the principle of good faith.¹⁵²² Specifically, the court linked the value of human dignity to Lubbe's proposal that where a contract term constitutes an unreasonable and one-sided promotion of one party's interests at the expense of the other party it may be contrary to the principles of good faith and consequently also against public policy.¹⁵²³ Originally, Lubbe made this proposal in the aftermath of the court's decision in *Sasfin v Beukes* which was decided before the enactment of the Constitution.¹⁵²⁴ In this case, the deed of cession concluded between the parties placed Sasfin in complete control of Beukes' earnings to the extent that the contract relegated Beukes to the position of a slave.¹⁵²⁵ The court acknowledged that public policy generally favours freedom and sanctity of contract but held that the court is also obliged to take account of "doing simple justice between man and man".¹⁵²⁶ In balancing these policy considerations, the court held that the provisions of the contract were so unfair and unreasonable towards Beukes that the contract was contrary to public policy and therefore unenforceable.¹⁵²⁷ In commenting on the case, Lubbe argued that the contract terms constituted an unreasonable infringement upon Beukes' freedom to exercise his professional trade and therefore it was contrary to good faith and hence against public policy.¹⁵²⁸ Specifically, Lubbe argued that good faith requires that in pursuing her own interests, a party had to show a measure of respect and regard for the interests of the other party.¹⁵²⁹ After the enactment of the Constitution, Lubbe linked the decision in *Sasfin v Beukes* to the constitutional value of human dignity.¹⁵³⁰ This link is highly appropriate as the facts in *Sasfin v Beukes*, like those in *Coetzee v Comitis*, constitute a good example of a contract that infringes upon the human dignity of one of the contracting parties. It could be

¹⁵²² *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) as discussed in para 2 3 2 1 *supra*.

¹⁵²³ Lubbe 1990 *Stell LR* 20-21.

¹⁵²⁴ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) as discussed in para 2 2 4 3 *supra*.

¹⁵²⁵ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 13.

¹⁵²⁶ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9.

¹⁵²⁷ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 18-19.

¹⁵²⁸ Lubbe 1990 *Stell LR* 21.

¹⁵²⁹ Lubbe 1990 *Stell LR* 20.

¹⁵³⁰ Lubbe 2004 *SALJ* 422.

argued that as the terms of the contract deprived Beukes of control over his life to such an extent that it relegated him to the position of a slave, the contract treated Beukes merely as a means to an end and not as an end in himself, and therefore, infringed upon his human dignity.¹⁵³¹

In dealing with the role of human dignity in the law of contract, Lubbe further emphasised that Kant's second categorical imperative does not mean that a contracting party should never treat the other contracting party as a means to her own ends, but rather that she must never treat the other contracting party merely as a means, but always also as an end.¹⁵³² Accordingly, he argued that Kant's second categorical imperative, like good faith, "suggests that in the pursuit of one's own ends, a minimum level of regard for the interests of others is indicated".¹⁵³³ This is because contracts are typically bilateral co-operative ventures in terms of which both parties have to perform and both benefit from the contractual relationship in some manner. In other words, each party's contractual performance contributes to the other party's pursuit of her unique ends, while at the same time, each party also uses the other party as a means in pursuit of her own unique ends. Hence, the contract terms will always reflect two unique set of ends that must be harmonised with each other.¹⁵³⁴ Ultimately, this means that when determining whether a contract term infringes the human dignity of one of the parties, a court has to balance the interests of both parties in order to determine whether the contract term constitutes an unfair infringement of that party's interests and hence violates her human dignity.¹⁵³⁵ This led Barnard to

¹⁵³¹ See also Floyd "Legality" in Hutchison & Pretorius (eds) *Contract* (2012) 186.

¹⁵³² Lubbe 2004 *SALJ* 421 n 188 referring to Beylvelde & Brownsword 1998 *Modern Law Review* 666 n 30. See also Woolman "Dignity" in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.2(b). Cf the formulation of Kant's second categorical imperative as quoted in the text at n 1232 *supra*.

¹⁵³³ Lubbe 2004 *SALJ* 421 n 188.

¹⁵³⁴ See also Lubbe 1990 *Stell LR* 20 who speaks of the need to harmonise conflicting individual interests. Cf Cornell's interpretation of Kant's kingdom of ends which entails the harmonisation of ends as discussed in the text at n 1305 *supra*.

¹⁵³⁵ Lubbe 1990 *Stell LR* 20 proposes a similar test based on good faith: "Die implikasie is egter dat die onredelike bevordering van eiebelang ten koste van die ander party tot die kontraktuele

argue that human dignity as constraint can find expression through the principle of good faith:

Dignity as constraint “may subvert, rather than enhance choice” 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.¹⁵³⁶

In view of the above analysis, it is submitted that the idea of human dignity as constraint would require the development of the principle of good faith into a substantive rule that can be used to set aside an unfair contract term because it infringes the human dignity of one of the contracting parties. In other words, the idea of human dignity as constraint supports a general equitable jurisdiction to declare an unfair contract term invalid. However, as was seen above, the Supreme Court of Appeal favours the idea of human dignity as empowerment which prohibited the revival of good faith in the common law of contract and denied any equitable jurisdiction to declare unfair contract terms invalid.¹⁵³⁷

It has been shown that the Constitutional Court is developing the constitutional value of human dignity as both empowerment and constraint which came about from the harmonisation of Kantian dignity and ubuntu.¹⁵³⁸ In view of the Supreme Court of Appeal’s preference for the conception of human dignity as empowerment which continued the limited role of good faith in addressing contractual unfairness, it is submitted that the Constitutional Court in *Barkhuizen v Napier* relied on

verhouding strydig mag wees met die *bona fides*” (The implication is that the unreasonable promotion of self-interest at the expense of the other contracting party may be contrary to the *bona fides*).

¹⁵³⁶ Barnard *Critical legal argument for contractual justice* (2005) 232. See also Barnard 2005 *SAJHR* 289.

¹⁵³⁷ See the discussions dealing with the Supreme Court of Appeal decisions in paras 2 3 2 2 & 2 3 2 4 *supra*.

¹⁵³⁸ Cf the discussion dealing with the Constitutional Court’s approach to human dignity in para 3 2 7 2 *supra*.

ubuntu to import the concept of human dignity as constraint into the common law of contract.¹⁵³⁹

In order to place my interpretation of *Barkhuizen v Napier* into context it is necessary to summarise the *communis opinio* (if any) on this case. It is generally accepted that the Constitutional Court laid down a two-part test for fairness dealing with the fairness of the clause itself and the enforcement of the clause.¹⁵⁴⁰ The first part of the test requires a balancing act between the policy considerations of freedom and sanctity of contract which gives effect to the constitutional values of freedom and human dignity on the one hand, and another policy consideration as reflected in a constitutional right or value in support of the non-enforcement of the contract on the other. This examination is objective in nature. If the court finds that the clause objectively does not violate public policy, the court then has to determine whether the clause violates public policy in light of the relative situation of the contracting parties which would include an assessment of the bargaining position of the parties which determination is subjective in nature. The second part of the test for fairness investigates whether, in spite of the fact that the clause itself does not violate public policy, enforcement of the clause would be fair in light of the circumstances which prevented compliance therewith. The second part of the test is therefore subjective in nature. However, the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa*¹⁵⁴¹ interpreted the Constitutional Court's decision as requiring an objective investigation in both parts of the test.

As was mentioned above, the objective test for fairness requires a balancing act between freedom and sanctity of contract as an expression of the constitutional values of freedom and human dignity on the one hand and another policy consideration as reflected in a constitutional value or right in favour of non-enforcement on the other. In this respect, the court in *Barkhuizen v Napier* stated that “[s]elf-autonomy, or the ability to regulate one’s own affairs, even to one’s own

¹⁵³⁹ Cf the discussions of this case in paras 2 3 2 3 & 2 3 3 2 *supra*.

¹⁵⁴⁰ Cf the discussion in the text at n 873 *supra*.

¹⁵⁴¹ Cf the discussion in the text at n 906 *supra*.

detriment, is the very essence of freedom and a vital part of dignity”.¹⁵⁴² Therefore, the court recognised the importance of contractual freedom in respecting the human dignity of a contracting party.¹⁵⁴³ However, the court’s view that the ability to regulate your own affairs (even to your own detriment) gives effect to the constitutional values of freedom and human dignity has been criticised as another attempt to give constitutional entrenchment to the classical liberal conception of freedom and sanctity of contract as reflected in the idea of human dignity as empowerment.¹⁵⁴⁴ The court did not take into consideration the idea of human dignity as constraint as reflected in the duty to respect the human dignity of the other contracting party and which would provide justification for setting aside a freely concluded contract term or the enforcement of such a term where it violates one of the contracting party’s human dignity.¹⁵⁴⁵ In other words, the court did not recognise that the constitutional value of, or right to, human dignity can also be invoked on the other side of the balancing scale to limit contractual freedom and that this would necessarily implicate the notion of fairness because it entails a balancing act of the different parties’ interests as reflected in the contract terms themselves.

It is submitted that the objective test for fairness as laid down in *Barkhuizen v Napier* will always entail a weighing up between the human dignity of the contracting party who wants to enforce the contract term as expressed through the maxims of freedom and sanctity of contract and the human dignity of the other contracting party who avers that the contract term infringes her human dignity as expressed in the demand that a human being should never be treated merely as a means to an end, but always also as an end.¹⁵⁴⁶ Nevertheless, it can be argued

¹⁵⁴² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57. Cf the discussion of this case in para 2 3 2 3 *supra*.

¹⁵⁴³ Cornell & Muvangua “Introduction” in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 24.

¹⁵⁴⁴ Hawthorne 2014 *PELJ* 2822; Hawthorne 2012 *THRHR* 347; Davis 2011 *Stell LR* 854; Davis & Klare 2010 *SAJHR* 478; Davis 2010 *SAJHR* 93; Brand 2009 *SALJ* 85-86; Bhana 2008 *SAJHR* 315; Lubbe 2004 *SALJ* 420-421.

¹⁵⁴⁵ Brand 2009 *SALJ* 85; Bhana 2007 *SALJ* 274; Lubbe 2004 *SALJ* 420-421.

¹⁵⁴⁶ Cf the discussion in the text at n 1532 *supra* (dealing with Lubbe’s postulation on how human dignity can be conceptualised through good faith).

that the court did import the idea of human dignity as constraint into the subjective test for fairness (whether dealing with the term itself or the enforcement of the term) by relying on the concept of ubuntu. This interpretation is proposed by Cornell and Muvangua:

To make the next step in the analysis, Justice Ngcobo turns to *ubuntu* in that *ubuntu* demands that values like justice and reasonableness must be taken into account when assessing any specific contract, and the actual relations of power between the parties.¹⁵⁴⁷

Although the court did not explicitly link ubuntu to the constitutional value of human dignity, it is submitted that the court's formulation of the subjective test reflects the concept of human dignity as constraint as informed by the concept of ubuntu. The Constitutional Court stated that public policy takes account of the necessity to do simple justice between man and man which is informed by the concept of ubuntu.¹⁵⁴⁸ As previously discussed, in the pre-constitutional appeal court decision of *Sasfin v Beukes*,¹⁵⁴⁹ the policy consideration of simple justice between man and man was used to set aside an unfair contract where it was found that the terms itself were so unfair as to be considered against public policy. Accordingly, in *Sasfin v Beukes* the test was objective in nature as the court balanced the interests of the parties as reflected in the contract terms itself and did not take account of relative situation of the contracting parties at contract conclusion or enforcement. As submitted before,¹⁵⁵⁰ it could be argued that the court's decision in *Sasfin v Beukes* provides support for the notion of human dignity as constraint as reflected in the duty of a contracting party to respect the human dignity of the other contracting party which has been linked to the principle of good faith. By using ubuntu to inform the concept of public policy to take account of the need to do justice between the contracting parties, it is submitted that the Constitutional Court in *Barkhuizen v Napier* has now recognised that a contracting party must respect and promote the human dignity of the other

¹⁵⁴⁷ Cornell & Muvangua "Introduction" in Cornell & Muvangua (eds) *uBuntu and the law* (2012) 24.

¹⁵⁴⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 51.

¹⁵⁴⁹ Cf the discussion of this case in the text at n 774 *supra*.

¹⁵⁵⁰ Cf the discussion of this case in the text at n 1524 *supra*.

contracting party. By relying on ubuntu, the court recognised the interdependence of contracting parties and how they are intertwined in ethical relations with each other which result in an obligation on each contracting party to respect and promote the human dignity of the other contracting party.¹⁵⁵¹ Bhana and Broeders argue that in the sphere of contract law ubuntu “highlights the (increasing) reality of human interdependence and solidarity in parties’ dealings with each other, operating in the post-apartheid constitutional context”.¹⁵⁵² Consequently, the subjective part of the test for fairness obliges the court to determine the fairness of the contract term and its enforcement by taking into account the parties’ relative bargaining powers and the actual circumstances which prevented compliance with the contract term.¹⁵⁵³ This implies that through the concept of ubuntu the court is now required to “take better account of the lived realities” of the parties.¹⁵⁵⁴ Therefore, the subjective test for fairness recognises and promotes substantive equality¹⁵⁵⁵ in order to promote and realise the human dignity of the contracting parties. Phrased differently, it is submitted that the court introduced the idea of human dignity as constraint as reflected in one contracting party’s duties to respect the human dignity of the other contracting party and to promote the realisation of the human dignity of that contracting party in view of the surrounding circumstances of the contract and the bargaining position of the parties when determining whether the contract term or its enforcement would be unfair. However, as a result of the Constitutional Court’s reticence to elaborate the concept of human dignity as constraint, the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa* interpreted the decision in *Barkhuizen v Napier* as not holding that fairness is a requirement for the enforcement of a contract term.¹⁵⁵⁶ Instead, the Supreme Court of Appeal held that fairness and reasonableness only become relevant when another

¹⁵⁵¹ Cf the discussion of human dignity through ubuntu in para 3 2 5 *supra*.

¹⁵⁵² Bhana & Broeders 2014 *THRHR* 175.

¹⁵⁵³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59.

¹⁵⁵⁴ Bhana & Broeders 2014 *THRHR* 175.

¹⁵⁵⁵ Hawthorne 2010 *De Jure* 399. See also Hawthorne 2014 *PELJ* 2829; Bhana 2008 *SAJHR* 316.

¹⁵⁵⁶ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 50-53.

constitutional value or right is implicated.¹⁵⁵⁷ As the court relied on the decision in *Barkhuizen v Napier* to embrace the view that human dignity only supported the idea of freedom and sanctity of contract¹⁵⁵⁸ it is safe to assume that the court did not envisage that this other constitutional value or right could be human dignity as well.

In consideration of the above analysis, it can be seen why the Constitutional Court questioned the limited role of good faith in the common law of contract.¹⁵⁵⁹ As was argued previously,¹⁵⁶⁰ good faith can also be understood as human dignity as constraint reflected in the duty to respect the human dignity of the other contracting party. Phrased differently, theoretically good faith can be used to determine whether a contract term violates the human dignity of one of the contracting parties because it unfairly infringes upon the interests of that contracting party as reflected in the terms of the contract itself. Furthermore, it can be argued that the Constitutional Court envisaged that such development of good faith would be informed by ubuntu as an underlying constitutional value, in view of the previous decisions of the Supreme Court of Appeal that reaffirmed the limited role of good faith after the enactment of the Constitution.¹⁵⁶¹ However, after the judgment in *Barkhuizen v Napier*, the Supreme Court of Appeal reiterated that good faith is not a substantive rule to be used to set aside an unfair contract term or the unfair enforcement thereof.¹⁵⁶² Nonetheless, the Constitutional Court's subsequent *obiter* but unanimous statement in *Everfresh Market Virginia v*

¹⁵⁵⁷ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 47.

¹⁵⁵⁸ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 50.

¹⁵⁵⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82.

¹⁵⁶⁰ Cf the discussion in the text at n 1536 *supra*.

¹⁵⁶¹ Cf the discussion of *Brisley v Drotzky* 2002 4 SA 1 (SCA) & *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) in para 2 3 2 2 *supra*.

¹⁵⁶² Cf the discussion of *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and others* 2011 3 SA 511 (SCA) para 28; *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) paras 23-24; *Potgieter and another v Potgieter NO and others* 2012 1 SA 637 (SCA) paras 32-33 in para 2 3 2 4 *supra*.

Shoprite Checkers that the concept of good faith must be infused by ubuntu as an underlying constitutional value left the door open in this respect.¹⁵⁶³

It is therefore regrettable that the Constitutional Court did not rely on ubuntu in the subsequent case of *Botha v Rich*¹⁵⁶⁴ although it is submitted that the court endorsed the idea of human dignity as constraint which in this instance was conceptualised through the principle of good faith. It is important to note that Botha contended that the cancellation of the contract, in other words, the enforcement of the cancellation clause by the trustees were contrary to public policy because it violated her constitutional rights.¹⁵⁶⁵ It is not stated which constitutional rights Botha implicated in her application before the Constitutional Court. However, it can be argued that she most probably relied upon her rights to dignity and equality.¹⁵⁶⁶ It is further submitted that the court implicated the constitutional value of human dignity¹⁵⁶⁷ when it referred to the constitutional demand that contracting parties must be treated with equal worth and concern.¹⁵⁶⁸ Accordingly, it is submitted Botha and the court did implicate a policy consideration as reflected in a specific constitutional right or value in favour of the non-enforcement of the relevant clause as envisaged by the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa*.¹⁵⁶⁹

¹⁵⁶³ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 71 as discussed in the text at n 983 *supra*.

¹⁵⁶⁴ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) as discussed in para 2 3 2 5 *supra*.

¹⁵⁶⁵ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 19.

¹⁵⁶⁶ These were the rights cited by the applicant in her appeal to the Supreme Court of Appeal (*Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 15).

¹⁵⁶⁷ The Constitutional Court has held that human dignity refers to the inherent and equal worth of human beings in a number of cases. Cf the discussion dealing with the Constitutional Court's approach to human dignity in para 3 2 7 2 *supra*.

¹⁵⁶⁸ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 40.

¹⁵⁶⁹ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 47 as discussed in the text at n 907 *supra*.

In *Botha v Rich*, the court emphasised that public policy generally requires freedom and sanctity of contract as an expression of the constitutional values of freedom and human dignity¹⁵⁷⁰ which accords with the idea of human dignity as empowerment. It is submitted that the court then applied the idea of human dignity as constraint which it conceptualised through the principle of good faith:

The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interest. Good faith is the lens through which we come to understand contracts in that way.¹⁵⁷¹

This statement was made in respect of the application of the *exceptio non adimpleti contractus* to the facts of the case, but later the court stated that the enforcement of the cancellation clause and the concomitant forfeiture of the purchase price already paid was unfair¹⁵⁷² for the same reasons because it constituted a disproportionate penalty in circumstances where three-quarters of the purchase price has already been paid.¹⁵⁷³

In the first instance, it can be argued that by referring to both parties' human dignity¹⁵⁷⁴ the court recognised that determining the fairness of a contract term or the enforcement thereof will always entail a balancing act between the human dignity of the contracting party who wants to enforce the contract term as expressed through the maxims of freedom and sanctity of contract and the human

¹⁵⁷⁰ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 23 esp n 38.

¹⁵⁷¹ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 46.

¹⁵⁷² The court specifically speaks of the "fairness of awarding cancellation" (*Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 51).

¹⁵⁷³ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 51.

¹⁵⁷⁴ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 46 where the court speaks of the "reciprocal recognition of the dignity ... of the respective contracting parties".

dignity of the other contracting party who avers that the contract term infringes her human dignity as expressed in the demand that a human being should never be treated merely as a means to an end, but always also as an end.¹⁵⁷⁵ This is further supported by the court's statement that bilateral contracts typically entail performances by and benefits to both parties. As was seen above,¹⁵⁷⁶ this means that the unique set of ends of both parties must be harmonised which entails that the court has to weigh up the interests of both parties in order to determine whether the contract term constitutes an unfair infringement of one of the party's interests and hence violates her human dignity. It is submitted that the Constitutional Court relied upon human dignity as constraint as conceptualised through good faith and endorsed Lubbe's proposal that good faith requires that in the pursuit of her own interests, a party must have regard to the interests of the other party. This is supported by the court's statement that "[t]he principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others".¹⁵⁷⁷

Consequently, it is submitted that the court impliedly invoked the concept of human dignity as constraint which enabled the court to apply the subjective test for fairness in determining whether the enforcement of the cancellation clause was unfair. In coming to the decision that the enforcement of the cancellation clause was unfair, the court took specific notice of the fact that the cancellation in the specific circumstances of the case would entail the forfeiture of almost three-quarters of the purchase price that was already paid by Botha. As the court explicitly linked good faith to both duties as reflected in human dignity as constraint, namely to respect and promote the human dignity of the other contracting party, the decision relies by implication on ubuntu. As was argued

¹⁵⁷⁵ Cf the discussion in the text at n 1545 *supra* (in the context of the decision in *Barkhuizen v Napier* 2007 5 SA 323 (CC)).

¹⁵⁷⁶ Cf the discussion in the text at n 1532 *supra* (dealing with Lubbe's postulation on how human dignity can be conceptualised through good faith).

¹⁵⁷⁷ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 46.

above,¹⁵⁷⁸ the subjective part of the test for fairness which includes substantive equality is an expression of ubuntu, as it requires an investigation into the contracting parties' actual social and economic conditions. Accordingly, ubuntu can be construed as the subtext. In terms of this interpretation further factors in favour of the non-enforcement of the cancellation clause would have come to the fore. For example, Hawthorne argued that the parties were in an unequal bargaining relationship:

To enter into an instalment sales contract in terms of which the purchaser agrees to losing everything in the event of defaulting is a clear indication that the purchaser, Botha (and every other instalment purchaser), had little negotiating power in reaching this agreement. If she had been in a stronger position she would have qualified for a mortgage initially.¹⁵⁷⁹

A further possible factor is the fact that Botha used the property to operate a laundry service through a closed corporation of which she was the sole member.¹⁵⁸⁰ Losing the property would probably mean that she would no longer be able to operate her business which provided her with a substantial part (if not the sole source) of her income.¹⁵⁸¹ Therefore, enforcement of the cancellation clause, coupled with the forfeiture of the purchase price already paid, might well have resulted in the deprivation of Botha's livelihood. Whether this would actually have been the result of enforcement of the cancellation clause cannot be ascertained from the court's decision but supports the argument that various other factors relating to the actual social and economic position of the parties would have been relevant in determining the fairness of the enforcement of the cancellation clause.

¹⁵⁷⁸ Cf the discussions in the text at n 969 & n 1547 *supra*.

¹⁵⁷⁹ Hawthorne 2016 *THRHR* 299.

¹⁵⁸⁰ *Botha and another v Rich NO and others* 2014 4 SA 124 (CC) para 3.

¹⁵⁸¹ The relevance of these factors are evidenced by Bhana & Meerkotter's contention that the facts of the case could have implicated the right to property (s 25) & the right to freedom of trade, occupation and profession (section 22) (see Bhana & Meerkotter 2015 *SALJ* 505).

The above analysis validates the submission that the Constitutional Court is in the process of developing the aspect of human dignity as constraint in the common law of contract which is the result of the harmonisation of Kantian dignity and ubuntu. In this respect, human dignity as constraint would refer to the duty to respect the human dignity of the other party as based on Kantian dignity and ubuntu, and the duty to promote the realisation of the other party's human dignity through the idea of substantive equality as based on ubuntu. Therefore, ubuntu as an underlying value of the Constitution has provided the Constitutional Court with the means to develop the constitutional value of human dignity into a multifaceted concept of human dignity of which both aspects, empowerment and constraint, must find expression in the common law of contract in a way that promotes substantive equality.

In conclusion it is submitted that recognition of human dignity as constraint in the common law of contract through the open norm of public policy inevitably results in a balancing act between human dignity as empowerment versus human dignity as constraint; the contracting party who wishes to enforce the contract term relies on freedom and sanctity of contract as opposed to the other contracting party who avers that the contract term infringes her human dignity, as expressed in the demand that a human being should never be treated merely as a means to an end, but always also as an end. Accordingly, the court will always have to balance the interests of the contracting parties in order to determine whether a contract term or its enforcement constitutes an unfair infringement of one of the party's interests and hence violates her human dignity. Therefore, the application of human dignity as constraint in the common law of contract means that notions of fairness and reasonableness are always implicated when the court has to determine whether a contract term or its enforcement is contrary to public policy. Consequently, it is submitted that the proper appreciation of the constitutional value of human dignity in the common law of contract results in a general equitable discretion to declare unfair contract terms or the unfair enforcement of contract terms invalid. Furthermore, it is submitted that this would entail the development of good faith into a substantive rule that can be used to set aside unfair contract terms or the unfair enforcement of contract terms.

3 3 EQUALITY

3 3 1 Introduction

As mentioned in chapter one,¹⁵⁸² equality is enshrined in the Constitution as both a founding constitutional value and a substantive right. The focus in this thesis is on the role of equality as a foundational constitutional value as the Constitutional Court has followed that approach when dealing with constitutional challenges to contractual terms.¹⁵⁸³ In addition, Albertyn and Goldblatt argue that in contrast to the right to equality, the constitutional value of equality is open to “a more expansive meaning” and “unencumbered by more practical considerations manifest in the doctrine of the separation of powers and related concerns regarding institutional competence”.¹⁵⁸⁴ Furthermore, this section does not constitute a comprehensive discussion of the equality jurisprudence of the Constitutional Court but focusses on the relevant aspects needed to address the research problem.

3 3 2 The approach to equality in the Constitution

The importance of the constitutional value of equality is underscored by the vast inequalities prevalent in South African society which are a result of South Africa’s history of colonialism and apartheid.¹⁵⁸⁵ Accordingly, the Constitution reflects not only a commitment to formal equality but also aims to achieve substantive equality.¹⁵⁸⁶ As was shown in chapter one,¹⁵⁸⁷ formal equality entails that

¹⁵⁸² Cf the discussion dealing with the constitutional value of equality in para 1 8 2 2 *supra*.

¹⁵⁸³ Cf the discussion of *Barkhuizen v Napier* 2007 5 SA 323 (CC) in the text at n 1114 *supra*. For an investigation into the implications of the right to equality in the common law of contract see Bhana 2017 SALJ 141-161.

¹⁵⁸⁴ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(b). See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 331.

¹⁵⁸⁵ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(a). The creation of these inequalities were also referred to throughout ch 1 (esp para 1 4 – 1 7) *supra*.

¹⁵⁸⁶ Cf the discussion on the constitutional value of equality in para 1 8 2 2 *supra*.

everyone should be treated the same and prohibits any irrational or arbitrary differentiation in treatment. The notion of formal equality is reflected in section 9(1) of the Constitution which provides that “[e]veryone is equal before the law and has the right to equal protection and benefit of the law”. In contrast, the idea of substantive equality¹⁵⁸⁸ requires an understanding of the social and economic conditions that create and reinforce inequality within society and involves an investigation into the context, specifically the actual lived, social and economic conditions of the relevant persons or groups. The notion of substantive equality is supported by the Preamble,¹⁵⁸⁹ sections 1(a)¹⁵⁹⁰ and 9(2)¹⁵⁹¹ of the Constitution and the various socio-economic rights entrenched in the Bill of Rights.

Albertyn and Goldblatt note that the idea of substantive equality as reflected in the Constitution does not provide a clear answer to the question “equality of what?”¹⁵⁹² These authors argue that the constitutional value of equality should at least embrace both the ideas of “equality of opportunities” and “equality of outcomes” which would entail the “redistribution of power and resources and the elimination of material disadvantage”.¹⁵⁹³

¹⁵⁸⁷ Cf the discussion on formal equality in para 1 8 2 2(a) *supra*.

¹⁵⁸⁸ Cf the discussion dealing with substantive equality in para 1 8 2 2(b) *supra*.

¹⁵⁸⁹ As reflected in the aims of the Constitution to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” and “[i]mprove the quality of life of all citizens and free the potential of each person”.

¹⁵⁹⁰ As reflected in the “achievement of equality” as a founding constitutional value.

¹⁵⁹¹ The section provides as follows: “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

¹⁵⁹² Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(a)-(b). See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 333.

¹⁵⁹³ Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(b). See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 333.

3 3 3 The approach to equality by the Constitutional Court

The importance of the constitutional value of equality in addressing the unequal past of South Africa has been acknowledged by Justice Kriegler in *President of the RSA v Hugo*:

The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle.¹⁵⁹⁴

The Constitutional Court (per Justice Goldstone) further emphasised the link between human dignity and equality when it made the following statement:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded *equal dignity and respect* regardless of their membership of particular groups.¹⁵⁹⁵

With specific reference to Canadian law the court held that equality does not allow for “distinctions that treat certain people as “second-class citizens”, “demean them”, “treat them as less capable for no good reason” or offends “fundamental human dignity”.¹⁵⁹⁶ The notion that all human beings have equal moral worth and must be treated with equal concern and respect is a reflection of Kantian

¹⁵⁹⁴ *President of the RSA v Hugo* 1997 4 SA 1 (CC) para 74. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 330.

¹⁵⁹⁵ *President of the RSA v Hugo* 1997 4 SA 1 (CC) para 41 (my emphasis). See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 327; De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 426.

¹⁵⁹⁶ *President of the RSA v Hugo* 1997 4 SA 1 (CC) para 41 referring to *Egan v Canada* (1995) 29 CRR (2d) 104-105.

dignity.¹⁵⁹⁷ If all human beings have the same inherent dignity, they are equal in dignity and should be treated as such. As further explained by Wood:

Human dignity, however, requires that all people be treated as alike in dignity; however they might differ in other properties. Equality based on human dignity is also not like the equality of two bills or coins you might find in your pocket. For these are equal only in what Kant would call “price”. Human dignity is equal only in the sense that as a value that is absolute, it is a value that cannot be compared or exchanged, hence a value that cannot be unequal.¹⁵⁹⁸

The link between dignity and equality was reiterated in a number of constitutional court cases dealing with the right to equality.¹⁵⁹⁹ Specifically, Albertyn points out that the Kantian conception of human dignity was emphasised in the equality jurisprudence of the Constitutional Court dealing with gay and lesbian rights.¹⁶⁰⁰ Consequently, this approach was criticised for “its narrow, individualist focus on individual personality issues rather than a group-based understanding of material

¹⁵⁹⁷ Cf the discussion in the text at n 1444 *supra*. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 326-327; De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 427; Woolman “Dignity” in Woolman & Bishop (eds) *Constitutional law* (2014) para 36.2(b); Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(d)(i); Botha 2009 *Stell LR* 203.

¹⁵⁹⁸ Wood 2008 *Acta Juridica* 50. See also Ackermann *Human dignity* (2013) 55-56; Cornell 2010 *SAPL* 385; Cornell 2008 *Acta Juridica* 36.

¹⁵⁹⁹ See e.g. *Prinsloo v Van der Linde and another* 1997 3 SA 1012 (CC) paras 31-33; *Harksen v Lane No and others* 1998 1 SA 300 (CC) para 50. See also De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 427.

¹⁶⁰⁰ Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 327-328. She refers to the following cases: *Minister of Home Affairs v Fourie*; *Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 1 SA 524 (CC); *J v Director-General, Department of Home Affairs* 2003 5 SA 621 (CC); *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198 (CC); *Satchwell v President of the Republic of South Africa* 2003 4 SA 266 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC); *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 1 SA 6 (CC).

disadvantage and the systemic nature of inequality”.¹⁶⁰¹ Therefore, the Kantian conception of dignity as incorporated into the jurisprudence of the Constitutional Court has been regarded as inadequate to promote the realisation of socio-economic rights, and hence substantive equality, as provided for in the Constitution.¹⁶⁰² However, in *Soobramoney v Minister of Health, KwaZulu-Natal* dealing with the right to healthcare¹⁶⁰³ Justice Chaskalson explicitly linked the constitutional value of human dignity with the promotion of socio-economic rights:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be *human dignity*, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.¹⁶⁰⁴

Similarly, in respect of the right to housing,¹⁶⁰⁵ Justice Yacoob in *Government of the Republic of South Africa v Grootboom* stated that human dignity (together with freedom and equality) “are denied those who have no food, clothing or shelter”

¹⁶⁰¹ Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 328. See further De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 427-428; Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(d)(i); Albertyn & Goldblatt 1998 *SAJHR* 248, 247-258.

¹⁶⁰² Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 328. See also De Vos “Equality, human dignity and privacy rights” in De Vos & Freedman (eds) *South African constitutional law* (2014) 427-428; Albertyn & Goldblatt “Equality” in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.1(d)(i). Cf the discussion dealing with the criticisms levied against Kantian dignity in para 3 2 4 3 *supra*.

¹⁶⁰³ S 27 of the Constitution.

¹⁶⁰⁴ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8 (my emphasis). See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 328.

¹⁶⁰⁵ S 26 of the Constitution.

and that “[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality”.¹⁶⁰⁶ As was shown above,¹⁶⁰⁷ the Constitutional Court has relied upon the underlying constitutional value of ubuntu to develop an understanding of human dignity that promotes the realisation of the socio-economic rights entrenched in the Constitution. In emphasising the link between human dignity and equality in promoting the realisation of socio-economic rights, the Constitutional Court has endorsed the idea of substantive equality as denoting a concern with what Albertyn and Goldblatt have referred to as “equality of outcomes”,¹⁶⁰⁸ specifically in respect of people’s basic human needs.¹⁶⁰⁹ In *Khosa v The Minister of Social Development*, Justice Mokgoro spoke of the need “to ensure that people are afforded their basic needs”.¹⁶¹⁰ Also, in *Government of the Republic of South Africa v Grootboom* the court held that “[a] society must seek to ensure that the basic necessities of life are provided to all”.¹⁶¹¹

In *Bato Star Fishing v Minister of Environmental Affairs and Tourism*¹⁶¹² Justice Ngcobo confirmed the Constitution’s commitment to substantive equality as

¹⁶⁰⁶ *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) paras 23 & 44. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 328.

¹⁶⁰⁷ Cf the discussions dealing with human dignity through ubuntu in para 3 2 5 & the approach to human dignity by the Constitutional Court in para 3 2 7 2 *supra*.

¹⁶⁰⁸ Cf the discussion in the text at n 1593 *supra*.

¹⁶⁰⁹ Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 328. See also Bhana & Pieterse 2005 SALJ 881.

¹⁶¹⁰ *Khosa and others v The Minister of Social Development and others; Mahlaule and others v Minister of social Development and others* 2004 6 SA 505 (CC) para 52.

¹⁶¹¹ *Government of the Republic of South Africa and others v Grootboom and others* 2001 1 SA 46 (CC) para 44. See also Hawthorne 2011 SAPL 434-435.

¹⁶¹² This case concerned the allocation of fishing quotas in the fishing industry, including the interpretation and application of section 18(5) of the Marine Living Resources Act 18 of 1998 which provided that when allocating fishing quotas particular regard must be given to “historically disadvantaged sectors of society”.

reflected in sections 1(a) and 9(2) of the Constitution.¹⁶¹³ The justice explained the substantive meaning of equality as follows:

The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one “in which there is equality between men and women and people of all races”. In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities.¹⁶¹⁴

The learned justice further acknowledged that this would entail a balancing act between the adverse effects of the transformation on historically privileged community members and the goal to promote the substantive equality of previously disadvantaged members of the community:

There are profound difficulties that will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them. The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities. It may well be that other considerations may have to yield in favour of achieving the goal we fashioned for ourselves in the Constitution.¹⁶¹⁵

In *Minister of Finance v Van Heerden*,¹⁶¹⁶ Justice Moseneke confirmed the Constitution’s commitment to substantive equality to promote social justice by

¹⁶¹³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 4 SA 490 (CC) para 75. Cf the discussion dealing with substantive equality in para 1 8 2 2(b) *supra*.

¹⁶¹⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 4 SA 490 (CC) para 74.

¹⁶¹⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 4 SA 490 (CC) para 76. See also Albertyn “Values in the South African Constitution” in Davis *et al Inquiry into the existence of global values* (2015) 332.

¹⁶¹⁶ This case concerned the constitutionality of a scheme to subsidise the pension contributions of members of parliament appointed after 1994 in order to address inequality between privileged and disadvantaged parliament members.

addressing the injustices of the past¹⁶¹⁷ and held that the notion of substantive equality requires an investigation into the surrounding circumstances of the case.¹⁶¹⁸ Specifically, the court endorsed¹⁶¹⁹ the idea of restitutionary (or remedial) equality described by Justice Ackermann in *National Coalition for Gay and Lesbian Equality and another v Minister of Justice* as follows:

Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.¹⁶²⁰

In this respect, in *Minister of Finance v Van Heerden* the court held that section 9(1) which endorses the idea of formal equality must be read in conjunction with section 9(2) which promotes the idea of substantive equality:

Equality before the law protection in s 9(1) and measures to promote equality in s 9(2) are both necessary and mutually reinforcing but may

¹⁶¹⁷ *Minister of Finance and another v Van Heerden* 2004 6 SA 121 (CC) paras 25-26. See further Albertyn & Goldblatt "Equality" in Woolman & Bishop (eds) *Constitutional law* (2014) para 35.4(a); Currie & De Waal *Bill of rights handbook* (2014) 214; De Vos "Equality, human dignity and privacy rights" in De Vos & Freedman (eds) *South African constitutional law* (2014) 422-423; Botha 2001 *THRHR* (3) 535.

¹⁶¹⁸ *Minister of Finance and another v Van Heerden* 2004 6 SA 121 (CC) para 27. See also De Vos "Equality, human dignity and privacy rights" in De Vos & Freedman (eds) *South African constitutional law* (2014) 422-423. Cf the discussion on substantive equality in para 1 8 2 2(b) *supra*.

¹⁶¹⁹ *Minister of Finance and another v Van Heerden* 2004 6 SA 121 (CC) para 30.

¹⁶²⁰ *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others* 1999 1 SA 6 (CC) para 60. See Currie & De Waal *Bill of rights handbook* (2014) 214; Liebenberg *Socio-economic rights* (2010) 26-27 where she cites various statistics to illustrate the continuing existence of various inequalities in South African society; Bhana & Pieterse 2005 *SALJ* 880.

sometimes serve distinguishable purposes, which I need not discuss now. However, what is clear is that our Constitution and in particular s 9 thereof, read as a whole, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.¹⁶²¹

Consequently, Alibertyn argued that the court's approach suggested that "the value of substantive equality can be prioritised over a more individualised version of dignity".¹⁶²²

More recently, in *South African Police Service v Solidarity obo Barnard*, Justice Moseneke (for the majority) stressed the importance of the constitutional values of human dignity and equality in endorsing a substantive approach to equality.¹⁶²³ With reference to the above decisions,¹⁶²⁴ the court emphasised that the correct balance must be found between the adverse effects of the transformation on historically privileged community members and the goal to promote the substantive equality of previously disadvantaged members of the community:

Remedial measures must be implemented in a way that advances the position of people who have suffered past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if

¹⁶²¹ *Minister of Finance and another v Van Heerden* 2004 6 SA 121 (CC) para 30. Referred to with approval by Justice Van der Westhuizen in *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 136.

¹⁶²² Alibertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 333. See also Bhana & Pieterse 2005 SALJ 881.

¹⁶²³ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 28 (Justice Moseneke) & para 135 (Justice Van der Westhuizen)

¹⁶²⁴ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 30 referring to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 4 SA 490 (CC) (as discussed in the text at n 1612 *supra*) & *Minister of Finance and another v Van Heerden* 2004 6 SA 121 (CC) (as discussed in the text at n 1616 *supra*).

we are truly to achieve a non-racial, non-sexist and socially inclusive society.¹⁶²⁵

As previously explained,¹⁶²⁶ in his separate judgment in *South African Police Service v Solidarity obo Barnard*, Justice van der Westhuizen developed the constitutional value of human dignity to include a duty on the individual to assist in the creation of the necessary conditions for the realisation of the human dignity of the other community members through the promotion of substantive equality. This development can be viewed as the result of the harmonisation between Kantian dignity and ubuntu. In this respect, Justice van der Westhuizen further held that such a constraint of an individual's freedom should be viewed as enhancing the individual's human dignity as well.

Finally, when dealing with the idea of substantive equality in the context of the right to equality, it could be argued that the Constitutional Court has endorsed both notions of substantive equality i.e. "equality of opportunities" and "equality of outcomes" as promoted by Albertyn and Goldblatt above.¹⁶²⁷ In *Bato Star Fishing v Minister of Environmental Affairs and Tourism*, Justice O'Regan linked the constitutional value of equality to the Constitution's aim to create a society "in which all people have equal access to economic opportunities".¹⁶²⁸ More recently, in *South African Police Service v Solidarity obo Barnard*, it would seem that Justice Moseneke endorsed the idea of equality that is more concerned with the material outcome of the inequality. Although the court recognised that much has been done "to equalise opportunities for social progress", it held that the prevalent inequalities require that "[r]emedial measures must be implemented in a way that advances the position of the people who have suffered past discrimination".¹⁶²⁹

¹⁶²⁵ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) paras 30-32.

¹⁶²⁶ Cf the discussion in the text at n 1476 *supra*.

¹⁶²⁷ Cf the discussion in the text at n 1593 *supra*.

¹⁶²⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 4 SA 490 (CC) para 92. See also Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 333.

¹⁶²⁹ *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 29 read with para 32.

3 3 4 The approach to equality in the common law of contract

As previously explained,¹⁶³⁰ the classical law of contract emphasises the principles of freedom and sanctity of contract and is based on the political philosophies of individualism and economic liberalism. It assumes that the contracting parties are in an equal bargaining position and is based on formal equality, which is equality before the law. Accordingly, the classical law of contract is not concerned with the respective bargaining positions of the parties or the resulting unfairness of the bargain but views any inequality between the contracting parties as the result of the parties' natural differences and capabilities. Where there is a conflict between the values of freedom and equality, preference is given to the value of freedom.¹⁶³¹ As explained by Hawthorne, “[f]reedom combined with equality results in the liberal equality of equal opportunity, which accepts the dominance of freedom”.¹⁶³²

As discussed in chapter two,¹⁶³³ the Supreme Court of Appeal followed the classical law of contract in *Brisley v Drotsky* which case concerned the enforcement of a non-variation clause. Specifically, the court endorsed a formal approach to equality when it held that because the non-variation clause was the result of the parties' “free choice” and provided both parties with protection, the potential inequality of the parties' bargaining position was irrelevant.¹⁶³⁴ Therefore, the court did not consider the social and economic realities and systematic inequalities to which the weaker party could possibly be exposed, especially where “economic survival and basic needs are at stake”.¹⁶³⁵ Because the classical model of contract law ignores the reality of unequal bargaining relationships, the adherence to a strict doctrine of contractual autonomy does not advance

¹⁶³⁰ Cf the discussion on the classical law of contract in para 2 2 3 4 *supra*.

¹⁶³¹ Bhana & Pieterse 2005 *SALJ* 880.

¹⁶³² Hawthorne 1995 *THRHR* 159.

¹⁶³³ Cf the detailed discussion of this case in para 2 3 2 2 *supra*.

¹⁶³⁴ *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 26.

¹⁶³⁵ Liebenberg *Socio-economic rights* (2010) 360. See also Hawthorne 1995 *THRHR* 166.

egalitarian ideals, but rather confirms and results in social inequalities which allows for possible exploitation of one party by the other.¹⁶³⁶

However, in modern contract law increasing recognition is given to the fact that the formal conception of equality does not prevent exploitation of a contracting party in a weaker bargaining position and that freedom of contract should be limited where it is necessary to protect more vulnerable individuals and groups against economic and social exploitation.¹⁶³⁷ Therefore, modern law of contract tends to promote substantive equality¹⁶³⁸ and fits perfectly with South African constitutional provisions¹⁶³⁹ and the jurisprudence of the Constitutional Court.¹⁶⁴⁰ Bhana and Pieterse maintain that the transformative aim of the Constitution to establish a more egalitarian society means that the founding constitutional value of equality may require the limitation of individual freedom in different manners and under different circumstances.¹⁶⁴¹ This approach accords with the Constitutional Court's view that individual freedoms may need to be limited to promote the greater constitutional aim of an egalitarian society.¹⁶⁴² Consequently, freedom will not always take precedence over equality as reflected in the classical law of contract.¹⁶⁴³

¹⁶³⁶ Hawthorne 1995 *THRHR* 163 & 166. See also Barnard-Naudé 2013 *SAJHR* 476.

¹⁶³⁷ Cf the discussion dealing with the modern law of contract in para 2 2 3 6 *supra*.

¹⁶³⁸ Cf the discussion on substantive equality in para 1 8 2 2(b) *supra*. See also Bhana & Pieterse 2005 *SALJ* 880.

¹⁶³⁹ Cf the discussion dealing with the approach to equality in the Constitution in para 3 3 2 *supra*.

¹⁶⁴⁰ Cf the discussion dealing with the approach to equality by the Constitutional Court in para 3 3 3 *supra*.

¹⁶⁴¹ Bhana & Pieterse 2005 *SALJ* 880. In this respect they refer to the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which they state "declares both the imposition of contractual 'terms, conditions or practices' that have the effect of perpetuating the consequences of past unfair discrimination and the unfair limiting or denial of contract opportunities to be practices which may amount to (prohibited) unfair discrimination".

¹⁶⁴² Cf Albertyn's interpretation of the decision in *Minister of Finance and another v Van Heerden* 2004 6 SA 121 (CC) para 30 as discussed in the text at n 1622 *supra*.

¹⁶⁴³ Bhana & Pieterse 2005 *SALJ* 880; Hawthorne 1995 *THRHR* 159.

Although, in *Afrox Healthcare Bpk v Strydom*, the Supreme Court of Appeal recognised that the unequal bargaining position of the parties is a relevant factor when deciding whether a term in a contract is contrary to public policy, it held that its presence alone will not result in the contract term being contrary to public policy.¹⁶⁴⁴ In conjunction with the appeal court's tendency to use the constitutional value of human dignity in support of the policy considerations of freedom and sanctity of contract, this has resulted in a conservative interpretation of constitutional values which has been largely unsuccessful in addressing the effects of systematic and substantive inequality.¹⁶⁴⁵ As explained by Botha:

[W]hile it has been conceded that dignity and equality may have a role to play in trimming the excesses of contractual freedom – for instance, in cases of unequal bargaining power – the courts' actual decisions show that the exercise of this power will be confined to such extreme cases that it is likely to have a minimal effect in combating inequality and protecting consumers.¹⁶⁴⁶

This has led to greater calls for the courts to take account of the social and economic circumstances of the contracting parties in assessing whether a contract term or its enforcement is against public policy.¹⁶⁴⁷ In other words, it was argued that the appeal court's expression of the founding constitutional value of equality in the common law of contract should be redefined in light of the more substantive conception of equality as promoted by both modern contract theory and the Constitution.

In *Barkhuizen v Napier*,¹⁶⁴⁸ the Constitutional Court developed the open norm of public policy to take account of the relevant situation of the contracting parties when assessing whether a contract term is contrary to public policy. Following the

¹⁶⁴⁴ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12 as discussed in detail in para 2 3 2 2 *supra*. See also Hawthorne 2014 *PELJ* 2824; Sharrock 2014 *Obiter* 136.

¹⁶⁴⁵ Cf the discussion in the text at n 854 *supra*.

¹⁶⁴⁶ Botha 2009 *Stell LR* 212.

¹⁶⁴⁷ See e.g. Barnard-Naudé 2013 *SAJHR* 476; Liebenberg *Socio-economic rights* (2010) 360; Bhana & Pieterse 2005 *SALJ* 879-880; Lubbe 2004 *SALJ* 422.

¹⁶⁴⁸ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59 as discussed in the text at n 879 *supra*.

approach of the Supreme Court of Appeal in *Afrox Healthcare v Strydom*, it held that an unequal bargaining relationship is a relevant factor when making such a determination, especially in view of South Africa's history of inequality. It further held that when determining whether the enforcement of a contract term is unfair, the court should consider the circumstances which prevented compliance with the contract term.¹⁶⁴⁹ Both these enquiries are subjective in nature and promote substantive equality because the surrounding circumstances of the contract must be taken into account when determining the fairness of the contract term or its enforcement.¹⁶⁵⁰ Furthermore, it has been argued that the subjective test for fairness is based upon ubuntu.¹⁶⁵¹ This means that ubuntu has been used to transform the formal understanding of equality in the law of contract into a more substantive understanding of equality which takes the social and economic circumstances of the parties into account. Accordingly, it can be argued that the Constitutional Court's decision promotes better substantive equality in the law of contract as informed by the underlying constitutional value of ubuntu.

Nevertheless, this subjective test only becomes applicable after an objective test has been applied. This test requires a balancing act between the policy considerations of freedom and sanctity of contract which gives effect to the constitutional values of freedom and human dignity and another policy consideration as reflected in a constitutional right or value.¹⁶⁵² This is so whether dealing with the fairness of the contract term itself¹⁶⁵³ or the enforcement thereof.¹⁶⁵⁴ Furthermore, both the Constitutional Court and the Supreme Court of Appeal seemed to have held that human dignity only supports the ideas of freedom and sanctity of contract,¹⁶⁵⁵ and that an unequal bargaining relationship is

¹⁶⁴⁹ *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56, 58 & 70 as discussed in the text at n 882 *supra*.

¹⁶⁵⁰ Cf the discussion in the text at n 895 *supra*.

¹⁶⁵¹ Cf the discussions in the text at n 969 & n 1543 *supra*.

¹⁶⁵² *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 57 as discussed in the text at n 875 *supra*.

¹⁶⁵³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 59 as discussed in text at n 879 *supra*.

¹⁶⁵⁴ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) paras 43-50 as discussed in the text at n 906 *supra*.

¹⁶⁵⁵ Cf the discussions in the text at n 1542 & n 1556 *supra*.

merely a relevant factor that cannot on its own lead to the decision that the contract term or its enforcement is contrary to public policy.¹⁶⁵⁶ Thus, the application of the subjective test for fairness is limited to cases where another constitutional right or value in support of non-enforcement is implicated. Therefore, it did not seem that the Constitutional Court or the Supreme Court of Appeal agreed with the high court's remark in *Mort v Henry-Shields Chiat* that the constitutional values of human dignity and equality would require that a contract term or its enforcement must be fair.¹⁶⁵⁷ However, it is submitted that an interpretation of the constitutional value of human dignity as based on Kantian individualistic dignity¹⁶⁵⁸ and communitarian ubuntu¹⁶⁵⁹ as well as an understanding of the constitutional value of equality through the lens of ubuntu¹⁶⁶⁰ should lead to the development of a general equitable discretion to declare unfair contract terms or the unfair enforcement of contract terms invalid.

Although the Constitutional Court in *Botha v Rich* did not make explicit reference to the underlying constitutional value of ubuntu, it was argued that the court's decision was based, by implication, on ubuntu and has led to the possibility of a general equitable discretion to be implemented by development of good faith into a substantive rule which could be used to set aside an unfair contract term or its unfair enforcement.¹⁶⁶¹ In this decision, the court endorsed a substantive understanding of the constitutional value of equality which accords with its general approach to equality as discussed above.¹⁶⁶² Thus, the Constitutional Court

¹⁶⁵⁶ Cf the discussions in the text at n 842 & n 879 *supra*.

¹⁶⁵⁷ *Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C) 475 as discussed in the text at n 813 *supra*.

¹⁶⁵⁸ As was seen above, even the communitarian interpretation of Kantian dignity is still too individualistic as it fails to take cognisance of the socio-economic realities of persons, and hence, it is difficult to use Kantian dignity to justify the promotion of socio-economic rights and substantive equality (cf the discussion dealing with the criticisms levied against Kantian dignity in para 3 2 4 3 *supra*).

¹⁶⁵⁹ As proposed and set out in para 3 2 7 *supra*.

¹⁶⁶⁰ Cf the discussion of the approach to equality in the Constitution in para 3 3 2 and by the Constitutional Court in para 3 3 3 *supra*,

¹⁶⁶¹ Cf the discussion of this decision in the text at n1564 *supra*.

¹⁶⁶² Cf the discussion on the Constitutional Court's approach to equality in para 3 3 3 *supra*.

extended its general approach to the constitutional value of equality to the law of contract. Since it took specific notice of the fact that the enforcement of the cancellation clause in the circumstances of the case would lead to the forfeiture of almost three-quarters of the purchase price already. Therefore, it is submitted that the Constitutional Court is in the process of constitutionalising the common law of contract which process is reflected in a more substantive understanding of equality as informed by the underlying constitutional value of ubuntu. Furthermore, it is submitted that the court's approach to substantive equality not only promotes equality of opportunities, but also supports Albertyn and Goldblat's proposition¹⁶⁶³ that substantive equality is concerned with equality of outcomes, because the financial consequences of enforcing the specific contract term was also considered when assessing fairness.¹⁶⁶⁴

3 4 FREEDOM

3 4 1 The approach to freedom in the Constitution

Freedom is a founding constitutional value¹⁶⁶⁵ and finds expression in a number of human rights and freedoms including the right to freedom from slavery, servitude and forced labour (section 13) and the rights of freedom of religion, belief and opinion (section 15); expression (section 16); association (section 18); political choices (section 19); movement and residence (section 21) and trade, occupation or profession (section 22). As a self-standing right, it is enshrined in section 12 which provides that "[e]veryone has the right to freedom and security of the person".¹⁶⁶⁶

¹⁶⁶³ See the discussion in the text at n 1593 *supra*.

¹⁶⁶⁴ See also Hawthorne 2015 *SUBB Jurisprudentia* 14 who argues for an understanding of substantive equality in the law of contract which takes account of what she refers to as "equality of exchange".

¹⁶⁶⁵ S 1(a) of the Constitution.

¹⁶⁶⁶ See also Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 334.

3 4 2 The approach to freedom by the Constitutional Court

The most prominent case dealing with the Constitutional Court's theoretical approach to freedom is *Ferreira v Levin*¹⁶⁶⁷ which concerned the application of the right to freedom and security under the interim Constitution. In this respect, the wording of this right was similar to that contained in section 12 under the final Constitution.¹⁶⁶⁸

In his leading but separate judgment, Justice Ackermann held that the right to “freedom” should be read disjunctively from the right to “security of person” in that the right to freedom “must be construed as a separate and independent right”.¹⁶⁶⁹ After emphasising human dignity as the core value underlying the Constitution,¹⁶⁷⁰ the eminent justice emphasised the connection between human dignity and freedom as follows:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their 'humanness' to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.¹⁶⁷¹

¹⁶⁶⁷ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC).

¹⁶⁶⁸ S 11(1) of the Interim Constitution provided that “[e]very person shall have the right to freedom and security of the person which shall include the right not to be detained without trial”.

¹⁶⁶⁹ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 46.

¹⁶⁷⁰ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) paras 47-48.

¹⁶⁷¹ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 46.

Relying on Isaiah Berlin's conception of negative freedom, the justice then stated that freedom denotes the space within which a human being "is or should be left to do or be what he is able to do or be, without interference by other persons".¹⁶⁷² Nevertheless, he recognised the need for "state intervention in the economic as well as the civil and political spheres" to "resolve the paradox of unlimited freedom" but argued that such interventions must comply with the limitation clause in terms of section 33(1) of interim Constitution which provides that any limitation of the right to freedom in section 11(1) must be reasonable and necessary.¹⁶⁷³ Although Justice Ackermann also relied on Kant's right to freedom as discussed above,¹⁶⁷⁴ he ultimately followed Berlin's conception of negative freedom when he defined the right to freedom in section 11(1) as a negative "right of individuals not to have 'obstacles to possible choices and activities placed in their way ... by the State'".¹⁶⁷⁵ In other words, his reading of section 11(1) resulted in the protection of residual freedom rights not explicitly protected elsewhere in the interim Constitution which would include the right to freedom of contract.¹⁶⁷⁶ Thus, according to Justice Ackermann's interpretation of section 11(1) any limitation of the right to freedom of contract would not only have to be reasonable but also necessary.

¹⁶⁷² *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 52.

¹⁶⁷³ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 52.

¹⁶⁷⁴ Kant's definition of the right to freedom (as quoted in the text at n 1319) provides as follows: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity". However, as pointed out by Cornell 2008 *Acta Juridica* 24, negative freedom as defined by Isiah Berlin differs from Kant's conception of negative freedom (cf the discussion dealing with Kant's conception of freedom in para 3 2 4 2 *supra*).

¹⁶⁷⁵ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 54. See also the discussion of this case by Bhana & Pieterse 2005 *SALJ* 878.

¹⁶⁷⁶ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) paras 57 & 66. See also Bhana & Pieterse 2005 *SALJ* 878.

In contrast, Justice Chaskalson speaking for the majority of the court interpreted section 11(1) to be principally concerned with the protection of the physical integrity of persons, and hence, the protection of “physical liberty” and “physical security”.¹⁶⁷⁷ Nevertheless, the court conceded that this does not imply that section 11(1) is only concerned with physical liberty but held that the question whether it can be defined more broadly should be determined in the context of the other constitutional provisions.¹⁶⁷⁸ Consequently, the court referred to a number of other enumerated rights that promote freedom.¹⁶⁷⁹ In terms of section 33(1) certain human rights may only be limited to the extent “reasonable”, while the limitation of others (including section 11(1)) must meet the criteria of “reasonable” and “necessary”.¹⁶⁸⁰ This led the court to the following conclusion:

Limitations of s 11(1) are subject to the ‘necessary’ test, which is an indication that the section in [*sic*] concerned with a freedom of a higher order than those enumerated freedoms which are not subjected to such an onerous test. A guarantee of the physical integrity of all persons is a freedom of the highest order which calls for the more onerous test of limitation. I am not persuaded, however, that this could be said of s 11(1) generally if it is given as wide a meaning as Ackermann J gives it in para [54] of his judgment.¹⁶⁸¹

¹⁶⁷⁷ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 170.

¹⁶⁷⁸ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 170.

¹⁶⁷⁹ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 171 referring to the rights to “equality, life, human dignity, privacy, religion, belief, opinion (including academic freedom in institutes of higher learning), freedom of expression, freedom of assembly, freedom of demonstration and petition, freedom of association, freedom of movement, freedom of residence, freedom to enter, remain in and leave the Republic of South Africa, political rights, access to courts, access to information, and administrative justice” and “guarantees and protection in respect of fair arrest, detention and trial procedures, economic activity, labour relations, property, the environment, language and culture, education and the rights of children”.

¹⁶⁸⁰ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 173.

¹⁶⁸¹ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 173.

Specifically, the court was of the view that if Justice Ackermann's interpretation of section 11(1) was to be followed, then "all regulatory laws" would need to be justified as "necessary" which would result in the court overstepping its boundaries by deciding issues that are fundamentally political in nature.¹⁶⁸² The court explained this problem as follows:

Implicit in the social welfare state is the acceptance of regulation and redistribution in the public interest. If in the context of our Constitution freedom is given the wide meaning that Ackermann J suggests it should have, the result might be to impede such policies. Whether or not there should be regulation and redistribution is essentially a political question which falls within the domain of the Legislature and not the Court. It is not for the Courts to approve or disapprove of such policies. What the Courts must ensure is that the implementation of any political decision to undertake such policies conforms with the Constitution. It should not, however, require the Legislature to show that they are necessary if the Constitution does not specifically require that this be done.¹⁶⁸³

Although the majority of the court rejected Justice Ackermann's conception of a residual negative right to freedom, it was shown above that the Constitutional Court incorporated his statements on the integral link between human dignity and freedom in its subsequent jurisprudence.¹⁶⁸⁴ In the analysis of *South African Police Service v Solidarity obo Barnard* it has been submitted that the Constitutional Court is in the process of developing the constitutional value of human dignity to denote a moral freedom as informed by Kantian dignity and

¹⁶⁸² *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 174.

¹⁶⁸³ *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) para 180. See also Cornell 2008 *Acta Juridica* 27; Bhana & Pieterse 2005 *SALJ* 878.

¹⁶⁸⁴ Cf the discussions of the constitutional court decisions of *MEC for Education, KwaZulu-Natal, and others v Pillay* 2008 1 SA 474 (CC) para 63 in the text at n 1451 & *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development and another* 2014 2 SA 168 (CC) para 173 in the text at n 1462 *supra*.

ubuntu.¹⁶⁸⁵ Justice Van der Westhuizen held that such moral freedom imposes a duty on each member of the community to respect the human dignity of others as well as a duty to promote the substantive equality of other community members to ensure the realisation of their human dignity; both duties being the result of the harmonisation of Kantian dignity and ubuntu.¹⁶⁸⁶ These duties are also reflected in Albertyn's call for the further development of the constitutional value of freedom:

More so than the other fundamental values, therefore, freedom requires particular development both in relation to the nature and the role of the state and the rights and responsibilities of the individual. Not only does the Constitution appear to envision a more proactive, and protective state, but it also suggests that individuals bear some responsibility for others.¹⁶⁸⁷

3 4 3 The approach to freedom in the common law of contract

Contractual freedom is most closely related to the founding constitutional value of freedom.¹⁶⁸⁸ In terms of the classical liberal tradition, freedom of contract enhances individual autonomy.¹⁶⁸⁹ Following this approach, the appeal court in *Afrox Healthcare Bpk v Strydom*, quoting Justice Cameron's minority judgment in *Brisley v Drotzky*, stated as follows:

¹⁶⁸⁵ Cf the discussion of the separate but concurring judgment of Justice Van der Westhuizen in *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) as discussed in the text at n 1476 *supra*.

¹⁶⁸⁶ Cf the discussion of the separate but concurring judgment of Justice Van der Westhuizen in *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) as discussed in the text at n 1481 *supra*.

¹⁶⁸⁷ Albertyn "Values in the South African Constitution" in Davis *et al Inquiry into the existence of global values* (2015) 338.

¹⁶⁸⁸ Bhana & Pieterse 2005 SALJ 877.

¹⁶⁸⁹ Bhana & Pieterse 2005 SALJ 877; Hawthorne 1995 THRHR 165. Cf the discussion dealing with the classical law of contract in para 2 2 3 4 *supra*.

[C]ontractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity.¹⁶⁹⁰

Therefore, the Supreme Court of Appeal is of the view that the common law principle of contractual autonomy informs the founding constitutional values of freedom and human dignity. Furthermore, the court elevated contractual freedom into a constitutional value itself when it stated that “[t]he *constitutional value* of contractual freedom includes, in turn, again the principle which finds expression in the maxim *pacta sunt servanda*”.¹⁶⁹¹

The Supreme Court of Appeal’s elevation of contractual autonomy into a constitutional value and its view that contractual autonomy informs the constitutional values of freedom and human dignity are open to criticism. In the first place, freedom of contract is not listed in the Constitution as a constitutional value.¹⁶⁹² The right to freedom of contract is also not expressly protected in the Constitution¹⁶⁹³ and it is submitted that the provisions of the Constitution do not support the recognition of a constitutionally entrenched right to freedom of contract. It seems unlikely that the Constitutional Court will read a right to freedom of contract into section 12 in view of the majority decision in *Ferreira v Levin*.¹⁶⁹⁴ This contention is further supported by the decision in *Barkhuizen v Napier* in which the court preferred indirect horizontal application of the Constitution when dealing with constitutional challenges to contractual terms.¹⁶⁹⁵ Furthermore, although freedom of contract was initially put forward as a fundamental human

¹⁶⁹⁰ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 22 as discussed in para 2 3 2 2 *supra*.

¹⁶⁹¹ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 23 (my emphasis and translated from Afrikaans) as discussed in para 2 3 2 2 *supra*.

¹⁶⁹² Bhana & Pieterse 2005 SALJ 877.

¹⁶⁹³ Bhana & Pieterse 2005 SALJ 877.

¹⁶⁹⁴ Cf the discussion of *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 1 SA 984 (CC) in para 3 4 2 *supra*.

¹⁶⁹⁵ Cf the discussion of *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 28 in the text at n 861 *supra*.

right and became the basic underlying principle of the common law of contract during the nineteenth century,¹⁶⁹⁶ its inability to provide practical solutions in cases of blatant inequality led to legislative intervention and judicial interpretations which resulted in a more limited conception of freedom and sanctity of contract as reflected in the principles underlying the modern law of contract.¹⁶⁹⁷ As a result, the common law of contract provides for a number of restrictions on contractual freedom already.¹⁶⁹⁸

The second point of criticism concerns the way in which the Supreme Court of Appeal has interpreted the founding constitutional values of freedom and human dignity with reference to the principle of contractual autonomy as reflected in classical contract theory. As put forward by Bhana and Pieterse, the common law conception of freedom of contract must conform to the provisions in the Bill of Rights, including the founding constitutional values.¹⁶⁹⁹ As was seen in chapter one,¹⁷⁰⁰ section 39(3) of the Constitution does not deny the existence of any other rights or freedoms that are recognised by the common law but only to the extent that they are consistent with the Constitution. Thus the question whether the common law conception of freedom of contract is consistent with the Constitution and the extent to which it will be constitutionally acknowledged depends on what content is given to the constitutional value of freedom, which content should be informed by the other founding constitutional values and not common law values.¹⁷⁰¹ Furthermore, as human dignity is regarded as the core value underlying the Constitution and the most important human right from which all other human rights derive, the constitutional value of human dignity should

¹⁶⁹⁶ Hawthorne 1995 *THRHR* 162.

¹⁶⁹⁷ Hawthorne 1995 *THRHR* 167. These developments were due to the introduction of the modern law of contract which is discussed in para 2 2 3 6 *supra*.

¹⁶⁹⁸ Bhana & Pieterse 2005 *SALJ* 879 and the examples listed in n 70; Hawthorne 1995 *THRHR* 167 and the examples listed there.

¹⁶⁹⁹ Bhana & Pieterse 2005 *SALJ* 878.

¹⁷⁰⁰ Cf the discussion on the constitutional recognition of common and customary law in para 1 8 3 1 *supra*.

¹⁷⁰¹ Bhana & Pieterse 2005 *SALJ* 878; Lubbe 2004 *SALJ* 420; Chaskalson 2000 *SAJHR* 202.

dictate what content should be given to the constitutional value of freedom.¹⁷⁰² Accordingly, contractual autonomy should not be used to inform the constitutional values of freedom and human dignity although the link between contractual autonomy and these constitutional values is not disputed.¹⁷⁰³ Rather, the interpretation of the constitutional value of human dignity should dictate what content should be given to the constitutional value of freedom, and in turn, these constitutional values should inform the interpretation of the common law conception of contractual autonomy.¹⁷⁰⁴ Thus, it is submitted that the Supreme Court of Appeal over-emphasised the constitutional importance of contractual autonomy.¹⁷⁰⁵ It did not consider how the constitutional value of freedom (as given meaning to by the constitutional value of human dignity) should inform contractual autonomy, but rather used the existing ideas on contractual autonomy in the common law of contract to inform these constitutional values.¹⁷⁰⁶ As argued above,¹⁷⁰⁷ this approach in conjunction with the appeal court's formal approach to equality has enabled the Supreme Court of Appeal to grant constitutional endorsement to the classical liberal conception of contractual autonomy in a manner that leaves little room for fairness to play any substantive role in contractual dealings. As stated by Davis and Klare:

The freedom-of-contract judgments deliver too much *pacta* and not enough *ubuntu*. The vision of liberty and human freedom informing the contractual-freedom judgments is a thinly updated version of ideas rooted in classical liberal philosophy. The ethos is individualist and libertarian. It prefers limited government and a negative conception of

¹⁷⁰² Cf the discussion dealing with the approach to human dignity in the Constitution in the text at n 1439 *supra*.

¹⁷⁰³ Cf the discussion dealing in the text at n 1500 *supra*.

¹⁷⁰⁴ Cf the discussion dealing with the approach to human dignity in the Constitution in the text at n 1439 *supra*.

¹⁷⁰⁵ Lewis 2013 *THRHR* 82; Hawthorne 2006 *Fundamina* 79-80; Bhana & Pieterse 2005 *SALJ* 865; Pretorius 2003 *THRHR* 644.

¹⁷⁰⁶ Lewis 2013 *THRHR* 82; Hawthorne 2006 *Fundamina* 79-80; Bhana & Pieterse 2005 *SALJ* 865; Pretorius 2003 *THRHR* 644.

¹⁷⁰⁷ Cf the discussions in paras 3 2 7 3 (the approach to human dignity in the law of contract) & 3 3 4 (the approach to equality in the law of contract) *supra*.

liberty. It narrows 'autonomy' to freedom from governmental compulsion and elides the problem of socio-economic domination. It seems highly implausible that the Constitution is founded on this bleak social vision.¹⁷⁰⁸

As submitted previously,¹⁷⁰⁹ a South African, transformative interpretation of the constitutional values of human dignity and equality should result in a more limited conception of the constitutional value of freedom. As emphasised by Chaskalson:

Freedom does not mean total freedom. In a democratic society freedom can never be absolute. It must be exercised with due regard to the legitimate interests of other members of the society, and the countervailing claims of other constitutional values.¹⁷¹⁰

Furthermore it was argued¹⁷¹¹ that the Constitutional Court relied upon Kantian dignity and ubuntu to develop the constitutional value of human dignity into a multi-faceted concept of which both aspects, empowerment and constraint, must be applied in the common law of contract which results in a more limited conception of contractual freedom. As argued by Judge Davis in *Advtech Resourcing t/a Communicate Personnel Group v Kuhn* dealing with the enforcement of a restraint of trade clause:

[T]he concept of contractual autonomy ... must mean something distinct from a libertarian connotation, particularly if the concept of *ubuntu* is to play any role in our law.¹⁷¹²

It was also submitted¹⁷¹³ that on the basis of such interpretation the open norm of public policy should be developed in the law of contract to reflect the juxtaposition

¹⁷⁰⁸ Davis & Klare 2010 *SAJHR* 479. See also Davis & Klare 2010 *SAJHR* 473-474; Davis 2008 *SAJHR* 325; Bhana & Pieterse 2005 *SALJ* 882.

¹⁷⁰⁹ Cf the discussions in paras 3 2 7 3 (the approach to human dignity in the law of contract) & 3 3 4 (the approach to equality in the law of contract) *supra*.

¹⁷¹⁰ Chaskalson 2000 *SAJHR* 202. See also Bhana & Pieterse 2005 *SALJ* 879.

¹⁷¹¹ Cf the discussion of the Constitutional Court's approach to human dignity in para 3 2 7 2 *supra*.

¹⁷¹² *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and another* 2008 2 SA 375 (C) para 31 as quoted by Barnard-Naude 2008 *Constitutional Court Review* 205.

of the human dignity of the contracting party wishing to enforce the contract term on the basis of freedom and sanctity of contract on the one hand, and the human dignity of the other contracting party who avers that her human dignity is infringed because she is treated merely as a means to an end. It was further submitted that this approach implicates notions of fairness and reasonableness when determining whether a contract term or its enforcement is against public policy which by necessity results in a more limited conception of contractual freedom. Following the same argument, it was proposed that the Constitutional Court's development of the constitutional value of equality into a notion of substantive equality has been the result of harmonisation between Kantian dignity and ubuntu,¹⁷¹⁴ and similarly supports a more limited conception of contractual freedom, leading to a more substantive realisation of fairness in the law of contract.¹⁷¹⁵

Although the Constitutional Court in *Barkhuizen v Napier* supported the Supreme Court of Appeal's views on the role of human dignity in support of freedom and sanctity of contract, the above submissions have found support in the Constitutional Court decision in *Botha v Rich*, in which case the notion of human dignity as constraint was given recognition in the law of contract.¹⁷¹⁶ Hence, a more limited conception of freedom of contract was recognised which has opened the door to the creation of a general equitable jurisdiction. Such equitable jurisdiction depends on the development of good faith into a substantive rule that can be used to set aside an unfair contract term or its unfair enforcement. This development is the desired result of the harmonisation of Kantian dignity and ubuntu as reflected in the constitutional jurisprudence and denotes a duty on a contracting party to respect the human dignity of the other contracting party as well as a duty to promote the human dignity of the latter through the application of

¹⁷¹³ Cf the discussion dealing with the approach to human dignity in the law of contract in para 3 2 7 3 *supra*.

¹⁷¹⁴ Cf the discussion on the Constitutional Court's approach to equality in para 3 3 3 *supra*.

¹⁷¹⁵ Cf the discussion dealing with the approach to equality in the law of contract in para 3 3 4 *supra*.

¹⁷¹⁶ Cf the discussion of this case in the text at n 1570 *supra*.

the notion of substantive equality. Therefore, it is submitted that the Constitutional Court has transformed the formal idea of freedom of contract, the central foundational principle of classical law of contract, into a more constrained concept of freedom of contract as reflected in modern law of contract. It is further submitted that this development is the result of a harmonisation of Kantian dignity and ubuntu.

3 5 RULE OF LAW

3 5 1 The approach to rule of law in the Constitution and by the Constitutional Court

The approach to the rule of law in the Constitution and by the Constitutional Court has been discussed in chapter one.¹⁷¹⁷ It was shown how the constitutional conception of the rule of law does not only denote formal equality but also embraces a substantive meaning which means that the law should be interpreted and developed in line with constitutional values. This approach, generally referred to as transformative constitutionalism, requires an interpretation of law that promotes social transformation, and hence substantive equality, in the private sphere. Furthermore, it entails a normative approach that involves value judgments by the courts in line with constitutional values.

Previously, it was shown how ubuntu can be linked to the idea of transformative constitutionalism.¹⁷¹⁸ Like transformative constitutionalism, ubuntu supports a more normative approach to law which involves the promotion of socio-economic rights and substantive equality with the aim to bring about a more humane society. Thus, the Constitutional Court has relied upon ubuntu to promote a transformative constitutional approach to law, especially when dealing with socio-economic rights.¹⁷¹⁹ Therefore, it is submitted that the Constitutional Court has developed a substantive approach to the rule of law that promotes socio-economic rights and

¹⁷¹⁷ Cf the discussion on the constitutional value of rule of law in para 1 8 2 3 *supra*.

¹⁷¹⁸ Cf the discussion dealing with human dignity through ubuntu in para 3 2 5 *supra*.

¹⁷¹⁹ See for e.g. the discussions of *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) in the text at n 543 *supra* & *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 1 SA 78 (W) in the text at n 549 *supra*.

substantive equality in order to realise the human dignity of all the community members which approach has been informed by the underlying constitutional value of ubuntu.

3 5 2 The approach to rule of law in the common law of contract

As was seen throughout chapter two,¹⁷²⁰ the Supreme Court of Appeal is leaning towards a more classical understanding of the rule of law. It would appear that this belief is founded on the fear that open norms such as good faith and fairness may run counter to the principle of legality and it is submitted that this fear has resulted in the limited role of good faith in the common law of contract.¹⁷²¹ In *Brisley v Drotzky* the court stated that not limiting good faith's role to an underlying value would mean that whether a contract would be enforceable or not would depend on what a particular judge viewed as fair and just and that this would lead to commercial uncertainty.¹⁷²² After the Constitutional Court in *Barkhuizen v Napier* questioned whether this restricted role of good faith is appropriate under the Constitution,¹⁷²³ the Supreme Court of Appeal constitutionally endorsed the classical rule of law in *Bredenkamp v Standard Bank of South Africa*.¹⁷²⁴ In this respect, the court expressly rejected the idea of an equitable discretion because it would defeat the principle of rule of law entrenched as a founding constitutional value. In the subsequent decision of *Potgieter v Potgieter*, the Supreme Court of Appeal emphasised that providing a judge with an equitable discretion "will give rise to intolerable legal uncertainty".¹⁷²⁵

¹⁷²⁰ Cf the discussions dealing with the Supreme Court of Appeal's approach to contractual fairness in paras 2 3 2 2 & 2 3 2 4 *supra*.

¹⁷²¹ See also Barnard *Critical legal argument for contractual justice* (2005) 15-16; Barnard 2005 SAJHR 282.

¹⁷²² *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 24 as discussed in the text at n 825 *supra*.

¹⁷²³ *Barkhuizen v Napier* 2007 5 SA 323 (CC) para 82 as discussed in the text at n 889 *supra*.

¹⁷²⁴ *Bredenkamp and others v Standard Bank of South Africa Ltd* 2010 4 SA 468 (SCA) para 39 as discussed in the text at n 913 *supra*.

¹⁷²⁵ *Potgieter and another v Potgieter NO and others* 2012 1 SA 637 (SCA) para 34. See also *Maphango and others v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) para 23. See further the extrajudicial concerns expressed by Supreme Court of Appeal Judge Wallis in 2016 SALJ 545ff.

Now it is true that the rule of law is enshrined as one of the foundational values of the Constitution, and as was shown previously,¹⁷²⁶ that the rule of law under the Constitution does embody the principle of legality which would prohibit arbitrary decisions and the abuse of a discretionary power. However, it was also argued that the meaning of the rule of law under the Constitution goes further than the classical conception based on formal equality before the law as it is also concerned with substantive equality and committed to egalitarian social transformation in the private sphere. In the previous section, it was shown how this conception of the rule of law which is committed to the achievement of substantive equality and social transformation has been informed by ubuntu.¹⁷²⁷

Therefore, the appeal court's persistent limitation of the role of good faith to address contractual unfairness is what Klare refers to as "a 'disconnect' between the Constitution's transformative aspirations and the conservative character of South African legal culture".¹⁷²⁸ As further explained by Klare and Davis:

[T]he common law as it stands today largely reflects, constitutes, and sustains existing social relationships, power structure, and inequalities. The common law's cherished value of individual autonomy remains meaningless and unfulfilled in a society as radically unequal as South Africa, where millions live in conditions of absolute deprivation. Untransformed, the common law supports and shields this distributional status quo. Unless their legal foundations are transformed, social arrangements constituted (in part) by the common law will exercise a permanent inhibiting effect on the Constitution's transformative project, possibly subverting it altogether.¹⁷²⁹

Furthermore, Davis and Klare argue that the Supreme Court of Appeal's insistence on limiting the role of good faith because freedom and sanctity of contract would require it ignores the inherent tension between these concepts.

¹⁷²⁶ See the discussion on the constitutional value of the rule of law in para 1 8 2 3 *supra*.

¹⁷²⁷ Cf the discussion in para 3 5 1 *supra*.

¹⁷²⁸ Klare 1998 *SAJHR* 151. See also Davis & Klare 2010 *SAJHR* 468ff.

¹⁷²⁹ Davis & Klare 2010 *SAJHR* 411.

They argue that any contract judgment will necessarily always take cognisance of the relevant policy considerations underlying the facts of the case and involve the weighing up of conflicting values.¹⁷³⁰ Where freedom of contract refers to freedom and autonomy, sanctity of contract entails a constraint on this freedom to protect legitimate expectations and ensure commercial and legal certainty.¹⁷³¹ Therefore, the court will always need to balance these conflicting values and cannot merely rely on freedom of contract and ignore the constraints on that freedom by enforcing the contract.¹⁷³² They argue that the weight attached to the relevant values in a specific set of facts will always be determined by policy considerations and cannot be “*deduced* from the concept of contract” alone.¹⁷³³ The only difference is that now the policy considerations must be grounded in the underlying values of the Constitution and must promote the spirit, purport and objects of the Bill of Rights.¹⁷³⁴ In other words, the objective criteria that should be used to determine whether a contract term or the enforcement thereof is unfair must now be found with reference to the Constitution and its underlying values.

Throughout this chapter, it has been submitted that the proper appreciation of the founding constitutional values of human dignity,¹⁷³⁵ equality¹⁷³⁶ and freedom¹⁷³⁷ in the common law of contract, as informed by the underlying constitutional value of ubuntu, should lead to the creation of a general equitable jurisdiction and the development of good faith into a substantive rule that can be used to set aside an unfair contract term or its unfair enforcement. It was further submitted, that the constitutional court decision of *Barkhuizen v Napier*, in spite of the interpretation thereof by the Supreme Court of Appeal in *Bredenkamp v Standard Bank of South Africa*, has been further developed by the Constitutional Court in *Botha v Rich* and

¹⁷³⁰ Davis & Klare 2010 *SAJHR* 440, 471. Davis and Klare do not explicitly refer to sanctity of contract, but it would seem that this is what they mean.

¹⁷³¹ Davis & Klare 2010 *SAJHR* 440.

¹⁷³² Davis & Klare 2010 *SAJHR* 440.

¹⁷³³ Davis & Klare 2010 *SAJHR* 441. See also Hawthorne 2006 *Fundamina* 77-78.

¹⁷³⁴ Davis & Klare 2010 *SAJHR* 471.

¹⁷³⁵ As critically analysed in para 3 2 *supra*.

¹⁷³⁶ As critically analysed in para 3 3 3 2 *supra*.

¹⁷³⁷ As critically analysed in para 3 4 *supra*.

has created the possibility of an equitable jurisdiction as the result of a more substantive role for good faith to set aside unfair contract terms and the unfair enforcement of contract terms. However, the Constitutional Court did not expressly override the Supreme Court of Appeal's view in *Bredenkamp v Standard Bank of South Africa* that denies the existence of the court's equitable discretion.¹⁷³⁸ As stated by Brownsword:

One of the arguments that figures in the debates about general clauses in contract law is that, in the absence of such clauses, judges resort to indirect strategies to achieve results that could have been achieved directly had such clauses been in play. It is said, in other words, that such clauses promote honesty, transparency and integrity in adjudication. ... What these arguments add up to is the claim that litigants and the public have a right to transparent and accurate reasons for legal decisions – and so, where (rightly or wrongly) decision-makers are going to reason from human dignity, this needs to be expressly represented in the law.¹⁷³⁹

Finally, acknowledging the equitable discretion of the courts should not necessarily lead to large scale legal and commercial uncertainty.¹⁷⁴⁰ The contents of open norms can be developed over time and this can be done in an incremental manner:

By its very nature, however, the system does not lend itself to radical change. It has an inherent restraint, in that judges who take steps forward do so in the knowledge that they are not only deciding the cases before them, but that they are laying down the ground rules for deciding tomorrow's cases as well. The result is that changes by the courts are implemented incrementally – as far as possible – within the framework of existing legal principles.¹⁷⁴¹

¹⁷³⁸ Cf the discussion of this decision in the text at n 948 *supra*.

¹⁷³⁹ Brownsword "Human dignity from a legal perspective" in Düwell *et al* (eds) *Cambridge handbook of human dignity* (2014) 20.

¹⁷⁴⁰ Brand 2009 *SALJ* 87-88. However, see Wallis 2016 *SALJ* 553 where the author argues that the decision in *Barkhuizen v Napier* 2007 5 SA 323 (CC) is "spreading contractual uncertainty".

¹⁷⁴¹ Brand 2009 *SALJ* 72. See also Hawthorne 2016 *THRHR* 72; Lubbe 2004 *SALJ* 408.

This would also accord with the Constitutional Court's approach to the development of the common law.¹⁷⁴² In addition, as was mentioned above, the open norm of fairness has now been incorporated into the South African law of contract in contracts governed by the CPA.¹⁷⁴³ This movement is in line with international developments and follows other legal systems that have incorporated and use open norms in their law of contract to deal with contractual unfairness.¹⁷⁴⁴

Consequently, the open norms in the common law of contract involve a never-ending process of concretisation which ensures compliance with the requirements of the rule of law.¹⁷⁴⁵ At the end of the day, this constant process of concretisation is merely a manifestation of the law of contract's dynamic nature in order to keep up with the community's changing values¹⁷⁴⁶ which values now find expression in the founding constitutional values¹⁷⁴⁷ as informed by the underlying constitutional value of ubuntu.

3 6 CONCLUSION

The Supreme Court of Appeal's constitutional endorsement of the classical model of contract law and the classical conception of the rule of law means that all the

¹⁷⁴² Cf the discussion of *Carmichele v Minister of Safety and Security and another (Centre for Applied Legal Studies intervening)* 2001 4 SA 938 (CC) para 36 in the text at n 460 *supra*.

¹⁷⁴³ Cf the discussion dealing with the provisions in the CPA in para 2 3 4 *supra*.

¹⁷⁴⁴ A detailed comparative study with other legal systems in respect of the use of open norms in the law of contract is outside the scope of this thesis but a succinct yet valuable overview of the position in European, German, Australian, Dutch and English law can be found in Naudé "Section 48" in Naudé & Eiselen (eds) *Commentary on the Consumer Protection Act* (RS 1, 2016) para 22-30.

¹⁷⁴⁵ Hawthorne 2014 *PELJ* 2824; Hawthorne 2014 *THRHR* 414-415.

¹⁷⁴⁶ Van Huyssteen *et al Contract* (2016) para 1.42 as quoted in the text at n 599 *supra*. See also Barnard-Naude 2008 *Constitutional Court Review* 184 who argues that the fact that there are rules in the law of contract that is based on good faith indicates that the courts have used good faith to develop new rules over the years, and hence, the courts have relied directly on the principle of good faith where necessary to supplement and correct the existing legal rules where necessary.

¹⁷⁴⁷ Van Huyssteen *et al Contract* (2016) paras 14.43 & 1.47.

relevant foundational constitutional values, namely human dignity, equality, freedom and the rule of law are informed by this specific model. Consequently, the Supreme Court of Appeal's approach to fairness in the common law of contract gives "the impression that on the whole the common law of contract has passed constitutional muster".¹⁷⁴⁸ However, as was shown above, the Supreme Court of Appeal is merely paying lip-service to constitutional values instead of actively engaging in the duty to develop the common law of contract in line with the values in the Constitution, especially as informed by the underlying constitutional value of ubuntu.¹⁷⁴⁹ In addition, the appeal court's approach leaves little room for the proper use of open norms to achieve greater contractual fairness. By constitutionally endorsing the classical model of contract law, the Supreme Court of Appeal continually attempts to restrict the open norm of good faith and prevent its development into an independent substantive rule that can be used to strike down or prevent the enforcement of a contract term that would otherwise be enforceable. Nevertheless, it has been shown that the Constitutional Court is in the process of developing the founding constitutional values in the common law of contract with reference to the underlying constitutional value of ubuntu. After a critical analysis of these developments, it is submitted that the court's approach has inserted the thin edge of the wedge for the development of good faith into a substantive rule that can be used to set aside an unfair contract term or the unfair enforcement of a contract term.

¹⁷⁴⁸ Lubbe 2004 *SALJ* 410.

¹⁷⁴⁹ Bhana 2007 *SALJ* 275 as supported by Kohn 2014 *Speculum Juris* 76 n 20. See also Bennett 2010 *PELJ* 46; Davis 2008 *SAJHR* 328-329.

CHAPTER 4 THE EMERGING ROLE OF UBUNTU IN THE SOUTH AFRICAN COMMON LAW OF CONTRACT AS ILLUMINATED BY A CONTEXTUAL LEGAL HISTORY OF GOOD FAITH IN THE ROMAN LAW OF CONTRACT

By understanding what is wrong, we may be able not only to understand our history, but also to shape it. If we lost something long ago which we have been unable to do without, we should try to remember what it was like. We should consider why it was so important.¹⁷⁵⁰

4 1 INTRODUCTION

In the previous chapter, it was proposed that the Constitutional Court is in the process of developing the expression of the founding constitutional values in the common law of contract by relying on the underlying constitutional value of ubuntu. Furthermore, it was submitted that the court's approach has opened the door for the development of good faith from an abstract principle underlying the common law of contract into a substantive rule that can be used to set aside an unfair contract term or the unfair enforcement of a contract term. In other words, it was argued that the Constitutional Court is in the process of developing the principle of good faith to reflect an equitable discretion in the law of contract through the underlying constitutional value of ubuntu. Returning once again to Justice Yacoob's remarks in *Everfresh Market Virginia v Shoprite Checkers*, it is submitted that these developments are a reflection of the constitutionalisation, and hence, also the Africanisation of the common law of contract:

The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the

¹⁷⁵⁰ Gordley *Philosophical origins of modern contract law* (1991) 9.

approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.¹⁷⁵¹

Nevertheless, as was illustrated in the previous chapters, it is unlikely that the Supreme Court of Appeal would welcome such a development. As further reflected in the recent extrajudicial remarks by Supreme Court of Appeal Judge Wallis:

In *Makwanyane*, Mokgoro J said that ubuntu is humanness, humanity and morality. I do not suggest that there are not circumstances in which they may play a role in commercial relationships – for example the law sets its face against fraud and misrepresentation – but when articulated merely as high principle in the absence of a particular context it does not conduce to clarity. Does it merely mean, as Davis J has suggested, that “in some measure” – I should add *uncertain* measure – “public policy embraces the concept of good faith and reasonableness”. If so, the mountain has laboured mightily to produce a constitutional mouse. But the concern is that these are the rumblings of a volcano that will in due course erupt.¹⁷⁵²

It would appear that the main reservation against the use of ubuntu in the common law of contract is levied at its open-endedness.¹⁷⁵³ In other words, infusing the common law of contract with ubuntu would lead to unacceptable legal uncertainty. In addition, it would seem that Judge Wallis denies that ubuntu, as an underlying constitutional value, would require any development of good faith. In commenting on the above remarks by Justice Yacoob, he states as follows:

The implications of these musings for the law of contract are simply baffling. Our courts have repeatedly stressed that the law of contract is

¹⁷⁵¹ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) para 23 (also quoted in the text at n 2 *supra*).

¹⁷⁵² Wallis 2016 *SALJ* 560-561.

¹⁷⁵³ Cf the discussion dealing with general criticisms against the use of ubuntu in the legal sphere in para 1 8 4 1 *supra*. See also the discussion on the rule of law in para 3 5 *supra*.

underpinned by concepts of good faith. So it is unclear why Yacoob J thought that it needed to be developed.¹⁷⁵⁴

The resistance against the use of good faith as an open norm in the common law of contract was traced back to the importation of English law into the South African legal system during the early nineteenth century¹⁷⁵⁵ which resulted in the introduction of the classical model of contract law into the South African common law of contract a few decades later.¹⁷⁵⁶ Prior to these changes, good faith played a more prominent role in addressing contractual unfairness in the South African common law of contract.¹⁷⁵⁷ Furthermore, it was shown¹⁷⁵⁸ that the Roman-Dutch law that arrived at the Cape during the seventeenth century had an equitable spirit which was expressed in the law of contract through the principle of good faith (*bona fides*). All contracts were regarded as *bonae fidei* which meant that the contracting parties were bound to everything which good faith reasonably and equitably demanded. In this respect, *bona fides* played a subsidiary and corrective role where the existing rules did not cater for the specific situation or where the application of the existing rules would result in unfairness and injustice. In other words, good faith functioned as an open norm.

Good faith (*bona fides*) originated in Roman law and the Romans developed this principle into an open norm that could be used to address contractual unfairness. This development was the result of changes in the political, economic and social environment during the later Roman Republic:

During the later Republic, the expansion of the Roman power in the Mediterranean world and the social and economic changes by which it

¹⁷⁵⁴ Wallis 2016 SALJ 558.

¹⁷⁵⁵ Cf the discussion dealing with the influence of the English law on the South African law in general in paras 1 5 2 3 (administration of the law) & 1 5 2 4 (substantive law) *supra*.

¹⁷⁵⁶ Cf the discussion dealing with the gradual negation of good faith and the importation of the classical model of contract law in para 2 2 3 4 *supra*.

¹⁷⁵⁷ Cf the discussion on good faith in the early South African common law of contract in para 2 2 3 3 *supra*.

¹⁷⁵⁸ Cf the discussion on the characteristics and nature of the Roman-Dutch law of contract that arrived at the Cape in paras 1 4 2 2 & 2 2 3 2 *supra*.

was accompanied had a profound effect on the character and development of Roman law. By the end of this period the old system of law had partly been abolished or changed in such a way that its scope was extended to meet the needs of a complex and highly sophisticated society. It was in response to changed social, economic and political conditions that Roman law broke through the barrier of formalism, was secularised and internationalised, and from a system that was strictly and often unjustly applied, became a highly developed system marked by its flexibility and adaptability to new and changing conditions.¹⁷⁵⁹

In fact, Schermaier argues that the story of good faith in Roman law is the first illustration of how “equitable ideas” can revolutionise a legal system.¹⁷⁶⁰

It has been proposed that by investigating the principles underlying the Roman law of contract within their greater historical context, Roman law “can offer solutions, or at least give assistance for the solution, of modern legal problems”.¹⁷⁶¹ Therefore, the aim of this chapter is to investigate the introduction and development of good faith (*bona fides*) in the Roman law of contract in order to illuminate the emerging role of ubuntu in the South African common law of contract. Four main themes are explored in order to construct a more contextual legal history of good faith in Roman contract law and compared to the emerging role of ubuntu in the South African common law of contract, namely:

- (a) addressing legal pluralism;
- (b) the use of open norms to supplement and correct the existing law;
- (c) harmonising values from different legal systems; and
- (d) the ultimate goal of law: achieving justice.

¹⁷⁵⁹ Mousourakis *Historical context of Roman law* (2003) 181. See also Van Warmelo *Principles of Roman civil law* (1980) paras 12, 25; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 23.

¹⁷⁶⁰ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 65.

¹⁷⁶¹ Erasmus 1989 *SALJ* 677 quoting Beinart 1971 *Acta Juridica* 140.

Each theme is explored with reference to the introduction and development of good faith in the Roman law of contract.¹⁷⁶² After the Roman law developments relevant to a specific theme have been discussed, a comparison is then drawn with the emerging role of ubuntu in the South African common law of contract.

4 2 ADDRESSING LEGAL PLURALISM

4 2 1 The role of good faith in addressing legal pluralism in Rome

4 2 1 1 Introduction

The exact age and origin of the *bonae fidei* actions are unknown and remain contentious.¹⁷⁶³ However, today, the more generally accepted theory is that these actions were introduced by the peregrine praetor who had jurisdiction over disputes between foreigners.¹⁷⁶⁴ This suggests that *bona fides* played an important role in dealing with legal pluralism in Rome and this is the idea that will be explored in this section. However, in order to understand where the *bonae fidei* actions fit into the greater history of Roman law, some historical context of the pre-existing Roman law is necessary.

4 2 1 2 An historical overview of the *ius civile*

For the purposes of this chapter, the story of the *ius civile* starts in the early republic of Rome.¹⁷⁶⁵ Prior to this period, Rome was a monarchy until 509 BC

¹⁷⁶² These sections consist mainly of the traditional account on the development of *bona fides* as found in most standard Roman law sources. However, as a detailed study of Roman law no longer forms part of the law curriculum in South Africa it was considered necessary to provide a detailed overview of the development of *bona fides* in this chapter.

¹⁷⁶³ Schermaier & Dedek “*Bona fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 1155; Watson *Law making* (1974) 35-36, 42-44. See further Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 68.

¹⁷⁶⁴ Schermaier & Dedek “*Bona fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 1155; Du Plessis *Borkowski’s Roman law* (2015) 266; Kelly *Kunkel’s Introduction to Roman history* (1985) 76; De Zulueta *Institutes of Gaius part 2* (1975) 253, 167. See further the discussion at and sources referred to in n 1813 *infra*.

¹⁷⁶⁵ The Republican period was from 510 BC to 27 BC (Du Plessis *Borkowski’s Roman law* (2015) xii; Van Warmelo *Principles of Roman civil law* (1980) para 11).

when the king was expelled from Rome.¹⁷⁶⁶ The early republic was characterised by the struggle of the orders between the patricians and the plebeians.¹⁷⁶⁷ In the early republic, private law was based on customs (more than legislation)¹⁷⁶⁸ and all state affairs were managed by two consuls selected annually from the patrician class.¹⁷⁶⁹ As a result, the patricians controlled the content and administration of

¹⁷⁶⁶ Robinson *Sources of Roman law* (1997) 1; Kelly *Kunkel's Introduction to Roman history* (1985) 13; Van Warmelo *Principles of Roman civil law* (1980) para 11; Van Warmelo *Oorsprong van die Romeinse reg* (1978) paras 6, 11; Watson *Law of the ancient Romans* (1970) 3; Nicholas *Introduction to Roman law* (1962) 3. This period (753 BC to 510 BC) is commonly referred to as the Monarchy or the period of the kings (Du Plessis *Borkowski's Roman law* (2015) xii; Van Warmelo *Principles of Roman civil law* (1980) para 6). The founding date of the city of Rome is traditionally cited as 753 BC (Robinson *Sources of Roman law* (1997) 1; Nicholas *Introduction to Roman law* (1962) 1; Van Warmelo *Principles of Roman civil law* (1980) para 6; Watson *Law of the ancient Romans* (1970) 3).

¹⁷⁶⁷ Robinson *Sources of Roman law* (1997) 1; Kelly *Kunkel's Introduction to Roman history* (1985) 6; Van Warmelo *Principles of Roman civil law* (1980) para 19; Warmelo *Oorsprong van die Romeinse reg* 31; Nicholas *Introduction to Roman law* (1962) 3. Roman society was hierarchical in character and different classes of persons existed. The patricians (*patricii*) were the Roman aristocracy who possessed the most power and riches and constituted the minority of the population. In the early republic, the most important positions were filled by persons from the patrician class. The plebeians (*plebeii*) were the underprivileged and poor masses who were subject to the political and economic power exerted by the patricians. See Robinson *Sources of Roman law* (1997) 1; Kelly *Kunkel's Introduction to Roman history* (1985) 6; Van Warmelo *Principles of Roman civil law* (1980) para 19; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 7; Cushing *Introduction to Roman law* (1854) 29.

¹⁷⁶⁸ D 1 2 2 3 Pomponius, *Manual, sole book* where it is said that the law at the beginning of the Roman republic worked "with customs of a sort rather than with legislation" (quoted from Watson *Digest of Justinian* (2009-2011)). Mousourakis *Historical context of Roman law* (2003) 118; Kelly *Kunkel's Introduction to Roman history* (1985) 25; Van Warmelo *Principles of Roman civil law* (1980) para 9.

¹⁷⁶⁹ D 1 2 2 3 Pomponius, *Manual, sole book*: "Then, after the ejection of the kings, it was established that there be two consuls in whom a statue laid down that the supreme authority should be vested" (quoted from Watson *Digest of Justinian* (2009-2011)). There were initially known as *praetores* but later referred to as *consules* (presumably after the introduction of the office of the praetor by the *leges Liciniae Sextiae* in 367 BC). See also Mousourakis *Historical context of Roman law* (2003) 84; Kelly *Kunkel's Introduction to Roman history* (1985) 15-16, 20; Van Warmelo *Principles of Roman civil law* (1980) para 11; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 11.

the law.¹⁷⁷⁰ One of the plebeians' grievances was that they wanted the existing law to be made public so that they could have better access to justice.¹⁷⁷¹ Consequently, one of the results of the struggle of the orders was the law of the Twelve Tables.¹⁷⁷² The law of the Twelve Tables dealt with private, public and sacral law with special focus on the procedures that must be followed.¹⁷⁷³ Although the law of the Twelve Tables was probably more a publication of the

¹⁷⁷⁰ Mousourakis *Historical context of Roman law* (2003) 118-119; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 24.

¹⁷⁷¹ Mousourakis *Historical context of Roman law* (2003) 118-119; Robinson *Sources of Roman law* (1997) 2; Van Warmelo *Principles of Roman civil law* (1980) para 26; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 24; Nicholas *Introduction to Roman law* (1962) 15.

¹⁷⁷² A history of the introduction of the Law of the Twelve Tables is given in D 1 2 2 4, Pomponius, *Manual, sole book*: "After that, to put an end to this state of affairs, it was decided that there be appointed, on the authority of the people, a commission of ten men by whom were to be studied the laws of the Greek city states and by whom their own city was to be endowed with laws. They wrote out the laws in full on ivory tablets and put the tablets together in front of the *rostra*, to make the laws all the more open to inspection. They were given during that year sovereign rights in the *civitas*, to enable them to correct the laws, if there should be a need for that, and to interpret them without liability to any appeal such as lay from the rest of the magistracy. They themselves discovered a deficiency in that first batch of laws, and accordingly, they added two tablets to the original set. It was from this addition that the laws of the *Twelve Tables* got their name" (quoted from Watson *Digest of Justinian* (2009-2011)). See also Robinson *Sources of Roman law* (1997) 2; Kelly Kunkel's *Introduction to Roman history* (1985) 23-25; Dannenbring *Kaser's Roman private law* (1984) 15; Van Warmelo *Principles of Roman civil law* (1980) para 27-29; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 13; Nicholas *Introduction to Roman law* (1962) 15. The date of the introduction of the Law of the Twelve Tables is estimated between 451 to 449 BC (Mousourakis *Historical context of Roman law* (2003) 119; Watson 1984 *Law and History Review* 2; Kelly Kunkel's *Introduction to Roman history* (1985) 23; Van Warmelo *Principles of Roman civil law* (1980) para 27; Nicholas *Introduction to Roman law* (1962) 15). No original or ancient copy of the Twelve Tables survived but a modern English compilation (from quotes and references in other historical sources) can be found in Johnson *et al Roman statutes* (1961) doc 8.

¹⁷⁷³ Mousourakis *Historical context of Roman law* (2003) 121, Kelly Kunkel's *Introduction to Roman history* (1985) 24, 26; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 24; Nicholas *Introduction to Roman law* (1962) 15-16. The first three tables dealt with procedural issues and Du Plessis *Borkowski's Roman law* (2015) 31 argues that this indicates that procedure was important to the Romans.

existing rather than new law,¹⁷⁷⁴ later Romans viewed the law of the Twelve Tables as the source and origin of all Roman law and with the interpretations given to it by the pontiffs (and later the jurists) it comprised the *ius civile*.¹⁷⁷⁵ The *ius civile* was strict, rigid and formalistic in nature.¹⁷⁷⁶ As explained by Gaius:

The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes ... or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word “vines”, had lost his claim, because he ought to have said “trees”, seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general.¹⁷⁷⁷

¹⁷⁷⁴ Mousourakis *Historical context of Roman law* (2003) 121; Kelly *Kunkel's Introduction to Roman history* (1985) 24; Van Warmelo *Principles of Roman civil law* (1980) para 27; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 24; Nicholas *Introduction to Roman law* (1962) 15.

¹⁷⁷⁵ D 1 2 2 6 Pomponius, *Manual, sole book*: “Then about the same time actions-at-law whereby people could litigate among themselves were composed out of these statutes [the laws of the *Twelve Tables*]. To prevent the citizenry from initiating litigation any old how, the lawmakers' will was that the actions-at-law be in fixed and solemn terms. This branch of-law has the name *legis actiones*, that is, statutory actions-at-law. And so these three branches of law came into being at almost the same time: once the statute law of the Twelve Tables was passed, the *jus civile* started to emerge from them, and *legis actiones* were put together from the same source. In relation to all these statutes, however, knowledge of their authoritative interpretation and conduct of the actions at law belonged to the College of Priests, one of whom was appointed each year to preside over private matters” (quoted from Watson *Digest of Justinian* (2009-2011)). See also Du Plessis *Borkowski's Roman law* (2015) 30-31; Mousourakis *Historical context of Roman law* (2003) 124; Zimmerman *Law of obligations* (1990) 83; Robinson *Sources of Roman law* (1997) 31; Kelly *Kunkel's Introduction to Roman history* (1985) 23, 30, 81; Dannenbring *Kaser's Roman private law* (1984) 18, 31; Van Warmelo *Principles of Roman civil law* (1980) para 9; Van Warmelo *Oorsprong van die Romeinse reg* (1978) paras 24, 79.

¹⁷⁷⁶ Du Plessis 2002 *THRHR* 398; Kelly *Kunkel's Introduction to Roman history* (1985) 26; Dannenbring *Kaser's Roman private law* (1984) 43; Van Warmelo *Principles of Roman civil law* (1980) paras 10, 24; Van Warmelo *Oorsprong van die Romeinse reg* (1978) paras 24, 79.

¹⁷⁷⁷ Gaius *Inst* 4 11 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Gaius *Inst* 4 30 where he states that “the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case” (quoted from De Zulueta

As illustrated by the above example, the formulas of the *legis actiones* (based on specific combinations of spoken words and gestures) had to be followed exactly and any deviation (however slight) would result in the rejection of the claim.¹⁷⁷⁸ More importantly, the *ius civile* could only be used where both parties to the dispute were Roman citizens.¹⁷⁷⁹

As already mentioned, the content and administration of the law was controlled by the patricians as the consuls were appointed from the patrician class. In 367 BC, the *leges Liciniae Sextiae* were passed in terms of which one of the consuls had to be appointed from the plebeian class and this was a further victory for the plebeians in the struggle of the orders.¹⁷⁸⁰ Another consequence of the *leges*

Institutes of Gaius part 1 (1958)). See further Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92; Schulz *Roman legal science* (1953) 24-25.

¹⁷⁷⁸ Du Plessis *Borkowski's Roman law* (2015) 67; Mousourakis *Historical context of Roman law* (2003) 132, 198; Du Plessis 2002 *THRHR* 398; Zimmerman *Law of obligations* (1990) 82-83; Kelly *Kunkel's Introduction to Roman history* (1985) 30; Dannenbring *Kaser's Roman private law* (1984) 43, 392; Van Warmelo *Principles of Roman civil law* (1980) para 717; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 84; Schulz *Roman legal science* (1953) 24-25; Buckland *Manual of Roman private law* (1947) 362. For some examples, see Van Warmelo *Principles of Roman civil law* (1980) para 718ff; Cushing *Introduction to Roman law* (1854) 54-57. For more detail on the *legis actio* procedure see Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 84ff.

¹⁷⁷⁹ In Gaius *Inst* 1 1 it is said that the "law which a people establishes for itself is peculiar to it, and is called *ius civile* (civil law) as being the special law of that *civitas* (State)" (quoted from De Zulueta *Institutes of Gaius part 1* (1958)); cf D 1 1 9, Gaius, *Institutes, book 1* where it is stated that "law which each nation has set up as a law unto itself is special to that particular *civitas* and is called *jus civile*, civil law, as being that which is proper to the particular civil society (*civitas*)" (quoted from Watson *Digest of Justinian* (2009-2011)). See also Du Plessis *Borkowski's Roman law* (2015) 34; Mousourakis *Historical context of Roman law* (2003) 132, 198; Kelly *Kunkel's Introduction to Roman history* (1985) 75; Dannenbring *Kaser's Roman private law* (1984) 19, 392; Schiller *Roman law mechanisms* (1978) 525-527; De Zulueta *Institutes of Gaius part 2* (1975) 12; Berger *Encyclopedic dictionary of Roman law* (1953) 527 sv "*ius civile*". However, there were exceptions to this rule which are discussed in n 1793 *infra*.

¹⁷⁸⁰ Mousourakis *Historical context of Roman law* (2003) 84; Brennan *Praetorship* (2000) 58; Kelly *Kunkel's Introduction to Roman history* (1985) 20; Van Warmelo *Oorsprong van die Romeinse*

Licinia Sextiae were the creation of the office of the praetor who was later referred to as the urban praetor (*praetor urbanus*).¹⁷⁸¹ The urban praetor took over the duties of the consuls in respect of the administration of civil disputes between Roman citizens.¹⁷⁸² The urban praetor was elected annually and was invested with extensive powers (*imperium*).¹⁷⁸³ In terms of these powers, he had the power to regulate legal proceedings.¹⁷⁸⁴ At the beginning of his term of office, the praetor would issue his edict for the year.¹⁷⁸⁵ The main purpose of the edict was to set out the rules and procedures that would be followed to resolve private law disputes

reg (1978) para 13; Schiller *Roman law mechanisms* (1978) 402; Nicholas *Introduction to Roman law* (1962) 6.

¹⁷⁸¹ D 1 2 2 27, Pomponius, *Manual, sole book*: “And when the consuls were being called away to the wars with neighbouring peoples, and there was no one in the *civitas* empowered to attend to legal business in the city, what was done was that a praetor also was created, called the urban praetor on the ground that he exercised jurisdiction within the city” (quoted from Watson *Digest of Justinian* (2009-2011)). See also Mousourakis *Historical context of Roman law* (2003) 86; Kelly Kunkel’s *Introduction to Roman history* (1985) 17, 84; Van Warmelo *Principles of Roman civil law* (1980) para 14; Schiller *Roman law mechanisms* (1978) 403; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 18; Watson *Law making* (1974) 63; Nicholas *Introduction to Roman law* (1962) 4. For a detailed discussion on the creation of the praetorship see Brennan *Praetorship* (2000) ch 3.

¹⁷⁸² Mousourakis *Historical context of Roman law* (2003) 86; Kelly Kunkel’s *Introduction to Roman history* (1985) 17, 84; Van Warmelo *Principles of Roman civil law* (1980) para 30; Schiller *Roman law mechanisms* (1978) 411; Nicholas *Introduction to Roman law* (1962) 4; Buckland & McNair *Roman law & common law* (1952) 3; Cushing *Introduction to Roman law* (1854) 69.

¹⁷⁸³ Van Warmelo *Principles of Roman civil law* (1980) para 15; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 18.

¹⁷⁸⁴ Mousourakis *Historical context of Roman law* (2003) 87; Van Warmelo *Principles of Roman civil law* (1980) para 30; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 18; De Zulueta *Institutes of Gaius part 2* (1975) 17.

¹⁷⁸⁵ Gaius *Inst* 1 6 where it is stated that “[t]he right of issuing edicts is possessed by magistrates of the Roman people” (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See further Mousourakis *Historical context of Roman law* (2003) 87-88; Kelly Kunkel’s *Introduction to Roman history* (1985) 91; Dannenbring *Kaser’s Roman private law* (1984) 20; Van Warmelo *Principles of Roman civil law* (1980) para 33; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 24; De Zulueta *Institutes of Gaius part 2* (1975) 18; Nicholas *Introduction to Roman law* (1962) 21; Buckland & McNair *Roman law & common law* (1952) 3.

during his term in office.¹⁷⁸⁶ The praetor also had the right to grant a new remedy during his year in office if he thought it necessary.¹⁷⁸⁷ He further had to ensure that the dispute between the parties was formulated correctly after which he had to appoint a judge (*iudex*) to adjudicate the dispute.¹⁷⁸⁸ The urban praetor's edict was based upon the existing *ius civile* and consequently contained remedies based on the strict and formal *legis actiones*.¹⁷⁸⁹ Consequently, these actions are generally referred to as the *stricti iuris* (strict law) actions.¹⁷⁹⁰

¹⁷⁸⁶ D 1 2 2 10, Pomponius, *Manual, sole book*: "At the same time, the magistrates also were settling matters of legal right, and in order to let the citizens know and allow for the jurisdiction which each magistrate would be exercising over any given matter, they took to publishing edicts. These edicts, in the case of the praetors, constituted the *jus honorarium* (honorary law): 'honorary' is the term used, because the law in question had come from the high honor of praetorian office" (quoted from Watson *Digest of Justinian* (2009-2011)). See also Mousourakis *Historical context of Roman law* (2003) 185; Van Warmelo *Principles of Roman civil law* (1980) para 31; Schiller *Roman law mechanisms* (1978) 411-412; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 18; De Zulueta *Institutes of Gaius part 2* (1975) 18; Watson *Law of the ancient Romans* (1970) 21; Nicholas *Introduction to Roman law* (1962) 21.

¹⁷⁸⁷ Kelly *Kunkel's Introduction to Roman history* (1985) 92; Dannenbring *Kaser's Roman private law* (1984) 20; Van Warmelo *Principles of Roman civil law* (1980) para 32; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 26; Nicholas *Introduction to Roman law* (1962) 22; Cushing *Introduction to Roman law* (1854) 59-60. For more on the exercise of this power by the urban praetor see the discussion in para 4 3 1 *infra*.

¹⁷⁸⁸ Mousourakis *Historical context of Roman law* (2003) 185; Kelly *Kunkel's Introduction to Roman history* (1985) 86; Van Warmelo *Principles of Roman civil law* (1980) para 30; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 84; Nicholas *Introduction to Roman law* (1962) 23-24; Buckland & McNair *Roman law & common law* (1952) 3; Buckland *Manual of Roman private law* (1947) 362.

¹⁷⁸⁹ Mousourakis *Historical context of Roman law* (2003) 186; Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 72; Kelly *Kunkel's Introduction to Roman history* (1985) 87; Van Warmelo *Principles of Roman civil law* (1980) para 31; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 84; Nicholas *Introduction to Roman law* (1962) 20.

¹⁷⁹⁰ Du Plessis *Borkowski's Roman law* (2015) 256; Dannenbring *Kaser's Roman private law* (1984) 174; Buckland & McNair *Roman law & common law* (1952) 271.

4 2 1 3 The development of the *ius honorarium* by the peregrine praetor

During the third century BC the number of foreigners (*peregrini*)¹⁷⁹¹ living in Rome increased dramatically which resulted in a rise in business transactions between Roman citizens and foreigners.¹⁷⁹² These foreigners could not institute any of the *legis actiones* because the *ius civile* was only available to Roman citizens.¹⁷⁹³ This meant, for the most part, that foreigners residing in Rome could not take part in legal transactions or institute any legal proceedings.¹⁷⁹⁴ Therefore, an additional praetor, called the peregrine praetor (*praetor peregrinus*) was appointed in 242 BC¹⁷⁹⁵ to administer civil disputes where foreigners were involved.¹⁷⁹⁶

¹⁷⁹¹ The term *peregrini* refers to freemen (as opposed to slaves) who were not Roman citizens (Roby *Roman Private Law vol 1* (2000) 19).

¹⁷⁹² D 1 2 2 28, Pomponius, *Manual, sole book*: "Some years thereafter that single praetor became insufficient, because a great crowd of foreigners had come into the *civitas* as well, and so another praetor was established, who got the name peregrine praetor, because he mainly exercised jurisdiction as between foreigners (*peregrini*)" (quoted from Watson *Digest of Justinian* (2009-2011)). See also Du Plessis *Borkowski's Roman law* (2015) 34; Mousourakis *Historical context of Roman law* (2003) 86-87, 186; Kelly *Kunkel's Introduction to Roman history* (1985) 75; Van Warmelo *Principles of Roman civil law* (1980) para 14; De Zulueta *Institutes of Gaius part 2* (1975) 12; Stein (1996) "Equitable principles in Roman law" in Newman (ed) *Equity in the world's legal systems* (1973) 75; Nicholas *Introduction to Roman law* (1962) 7; Powell 1956 *Current Legal Problems* 19.

¹⁷⁹³ Du Plessis *Borkowski's Roman law* (2015) 34; Mousourakis *Historical context of Roman law* (2003) 22, 186; Schermaier "*Bona fides* in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 77; Kelly *Kunkel's Introduction to Roman history* (1985) 75; Dannenbring *Kaser's Roman private law* (1984) 32; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 18. There were exceptions to this rule. For example, where a person was granted *commercium* (i.e. the capacity to conclude certain Roman transactions) or *conubium* (the capacity to contract a marriage which was valid under the *ius civile*) (Dannenbring *Kaser's Roman private law* (1984) 31). As a further example, a fiction of Roman citizenship could be attributed to a foreigner, specifically in the case of the *actio furti* (action for theft) and the *actio legis Aquiliae* (action for wrongful damage) (Gaius *Inst* 4 37; Dannenbring *Kaser's Roman private law* (1984) 33).

¹⁷⁹⁴ Mousourakis *Historical context of Roman law* (2003) 186; Powell 1956 *Current Legal Problems* 19.

¹⁷⁹⁵ Du Plessis *Borkowski's Roman law* (2015) 33; Mousourakis *Historical context of Roman law* (2003) 87, 186; Kelly *Kunkel's Introduction to Roman history* (1985) 84; Van Warmelo *Principles of Roman civil law* (1980) para 14; Schiller *Roman law mechanisms* (1978) 403; Van

However, where the urban praetor applied the formal and strict *ius civile* between Roman citizens, the same could not prevail in the peregrine praetor's forum.¹⁷⁹⁷ Many of the foreigners in Rome were traders and their disputes resulted from their commercial dealings with each other and Roman citizens.¹⁷⁹⁸ A more informal and effective procedure was required to deal with these commercial transactions which

Warmelo *Oorsprong van die Romeinse reg* (1978) para 18; De Zulueta *Institutes of Gaius part 2* (1975) 17; Watson *Law of the ancient Romans* (1970) 23; Nicholas *Introduction to Roman law* (1962) 4. Although most sources cite 242 BC as the year the peregrine praetor was introduced, this remains a contentious issue (see Brennan *Praetorship* (2000) 85-89).

¹⁷⁹⁶ D 1 2 2 28, Pomponius, *Manual, sole book* (quoted in n 1792 *supra*). See also Du Plessis *Borkowski's Roman law* (2015) 33; Mousourakis *Historical context of Roman law* (2003) 87, 186; Kelly *Kunkel's Introduction to Roman history* (1985) 76, 84; Van Warmelo *Principles of Roman civil law* (1980) para 14; Schiller *Roman law mechanisms* (1978) 403; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 18; Watson *Law making* (1974) 63; Stein (1996) "Equitable principles in Roman law" in Newman (ed) *Equity in the world's legal systems* (1973) 75; Nicholas *Introduction to Roman law* (1962) 4; Cushing *Introduction to Roman law* (1854) 69. The exact jurisdiction of the peregrine praetor is uncertain (Watson *Law of the ancient Romans* (1970) 23-24). First, there is a difference of opinion whether the jurisdictions of the two praetors were based on the status of the parties or convenience (see Bablitz *Actors and audience* (2007) 206 n 4 & 210 n 71; Brennan *Praetorship* (2000) 85-89; 461-462; Gilbert 1939 *Res Judicatae* 50-58). Secondly, if the first view is preferred there is a difference of opinion whether the peregrine praetor had jurisdiction over disputes between foreigners as well as disputes between Roman citizens and foreigners from the start. Daube argues that initially the peregrine praetor had jurisdiction over disputes between foreigners only which was later expanded to include disputes between foreigners and citizens (Daube 1951 *Journal of Roman Studies* 66-70 supported by Watson 1962 *Revue Internationale des Droits de l'Antiquité* 431 n 2; see also Watson *Law making* (1974) 64-82). Despite the objections by Daube, it is generally accepted that the peregrine praetor's jurisdiction included disputes between foreigners as well as disputes between Roman citizens and foreigners from the start (see Brennan *Praetorship* (2000) 133-134 & Schiller *Roman law mechanisms* (1978) 403 for a summary of the criticisms raised against Daube's view; see also Kelly *Kunkel's Introduction to Roman history* (1985) 76, 84; Van Warmelo *Principles of Roman civil law* (1980) para 14).

¹⁷⁹⁷ Du Plessis *Borkowski's Roman law* (2015) 34; Kelly *Kunkel's Introduction to Roman history* (1985) 75.

¹⁷⁹⁸ Du Plessis *Borkowski's Roman law* (2015) 72; Mousourakis *Historical context of Roman law* (2003) 87-88, 198; Berger *Encyclopedic dictionary of Roman law* (1953) 528 sv "Ius gentium".

were governed by informal trade usages and customs.¹⁷⁹⁹ As explained by Powell, the existing Roman law remedies were not accessible or suitable for use by foreigners:

The parties to these old actions had to define the issue between them in a precise form of words, in Latin, and sometimes with oaths invoking the Roman gods. That was all very well for Roman citizens who spoke Latin and who worshipped the Roman gods. But it meant a complete denial of justice to the foreigner whose Latin was non-existent or imperfect and upon whom the Roman religion was not binding.¹⁸⁰⁰

This resulted in the development of the formulary (*per formulam*) procedure¹⁸⁰¹ by the peregrine praetor.¹⁸⁰² The formulary procedure was characterised by “its simplicity, economy, and adaptability”.¹⁸⁰³ Similar to the *legis actiones* procedure,

¹⁷⁹⁹ Powell 1956 *Current Legal Problems* 19. See also Du Plessis *Borkowski’s Roman law* (2015) 72; Mousourakis *Historical context of Roman law* (2003) 87-88, 198; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 73; Kelly *Kunkel’s Introduction to Roman history* (1985) 75; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 25.

¹⁸⁰⁰ Powell 1956 *Current Legal Problems* 19.

¹⁸⁰¹ The introduction date of the formulary procedure is uncertain (Nicholas *Introduction to Roman law* (1962) 20). However, Birks 1969 *Irish Jurist* 357 proposes that the formulary procedure predates the introduction of the peregrine praetor in 242 BC (see further n 1802 *infra*).

¹⁸⁰² Du Plessis *Borkowski’s Roman law* (2015) 34; Mousourakis *Historical context of Roman law* (2003) 198; Kelly *Kunkel’s Introduction to Roman history* (1985) 89; Dannenbring *Kaser’s Roman private law* (1984) 19, 395; Van Warmelo *Principles of Roman civil law* (1980) para 726; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92 and the sources referred to in n 1; De Zulueta *Institutes of Gaius part 2* (1975) 252-253; Stein (1996) “Equitable principles in Roman law” in Newman (ed) *Equity in the world’s legal systems* (1973) 75. Birks 1969 *Irish Jurist* 357 proposes that the formulary procedure was developed by the urban praetor. Again, this is a contentious issue (see Brennan *Praetorship* (2000) 134-135; Schiller *Roman law mechanisms* (1978) 405).

¹⁸⁰³ Nicholas *Introduction to Roman law* (1962) 20. See also Du Plessis *Borkowski’s Roman law* (2015) 34; Dannenbring *Kaser’s Roman private law* (1984) 394; Van Warmelo *Principles of Roman civil law* (1980) para 726-727; Schulz *Roman legal science* (1953) 50. See further Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 73-74; Du Plessis 2002 *THRHR* 398; Dannenbring *Kaser’s Roman private law* (1984) 401ff; Nicholas *Introduction to Roman law* (1962) 24-25 for a more detailed discussion

the parties had to formulate their claim before the praetor who then appointed a judge once he was satisfied with the formula.¹⁸⁰⁴ However, while the formulas of the *legis actiones* consisted of spoken words and gestures that had to be followed exactly, the formulary procedure required that the dispute between the parties be reduced to writing which meant that the parties did not need to follow formal words and rituals in setting out their claim.¹⁸⁰⁵ Through this flexibility, the peregrine praetor obtained a large discretion to influence the law.¹⁸⁰⁶ This influence was indirect as the praetor had no legislative powers and could not introduce new legal rights.¹⁸⁰⁷ However, the praetor was responsible for setting out the legal procedures for the administration of justice in his edict, and as a result, he had the power to introduce new remedies.¹⁸⁰⁸ The new body of rules that emerged from the peregrine praetor's edict became known as the *ius honorarium* or *ius praetorium*.¹⁸⁰⁹ These rules took account of the customs which governed

on how the formulary procedure worked. See further Schulz *Roman legal science* (1953) 50-51 on the flexibility of the formulary procedure.

¹⁸⁰⁴ Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92.

¹⁸⁰⁵ Du Plessis *Borkowski's Roman law* (2015) 34; Van Warmelo *Principles of Roman civil law* (1980) para 727; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92. Cf De Zulueta *Institutes of Gaius part 2* (1975) 251. For a detailed discussion of how the formulary procedure worked in practice see Van Warmelo *Principles of Roman civil law* (1980) para 728ff; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92; Buckland *Manual of Roman private law* (1947) 362.

¹⁸⁰⁶ Du Plessis *Borkowski's Roman law* (2015) 34; Van Warmelo *Principles of Roman civil law* (1980) para 727; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92.

¹⁸⁰⁷ Mousourakis *Historical context of Roman law* (2003) 185, 199; Kelly *Kunkel's Introduction to Roman history* (1985) 90.

¹⁸⁰⁸ Mousourakis *Historical context of Roman law* (2003) 185, 199; Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 74; Schulz *Roman legal science* (1953) 50.

¹⁸⁰⁹ D 1 1 7 1, Papinian, *Definitions, book 2*: "Praetorian law (*jus praetorium*) is that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile*. This is also called honorary law (*jus honorarium*), being so named for the high office (*honos*) of the praetors" (quoted from Watson *Digest of Justinian* (2009-2011)); D 1 2 2 10, Pomponius, *Manual, sole book* (quoted in n 1786 *supra*). See furthermore Mousourakis *Historical context of Roman law* (2003) 187; Cushing *Introduction to Roman law* (1854) 76. For

commercial dealings with foreigners,¹⁸¹⁰ were “based largely on common sense, expediency and fairness” and became known as the *ius gentium*.¹⁸¹¹

It is possible that the *bonae fidei iudiciae* (*bona fide* actions) were introduced¹⁸¹² in the peregrine praetor’s edict.¹⁸¹³ The most well-known *bonae fidei* contracts are the consensual contracts, namely sale (*emptio venditio*), letting and hiring (*locatio*

a contrary view see Watson *Law making* (1974) 64ff who argues that the *ius honorarium* mainly derived from the urban praetor’s edict.

¹⁸¹⁰ Berger *Encyclopedic dictionary of Roman law* (1953) 528 sv “*Ius gentium*”.

¹⁸¹¹ Mousourakis *Historical context of Roman law* (2003) 186. See also Hahlo & Kahn *South African legal system* (1991) 134; Kelly *Kunkel’s Introduction to Roman history* (1985) 76; Dannenbring *Kaser’s Roman private law* (1984) 32; Van Warmelo *Principles of Roman civil law* (1980) paras 25, 82; Schiller *Roman law mechanisms* (1978) 527; De Zulueta *Institutes of Gaius part 2* (1975) 12, 253; Stein (1996) “Equitable principles in Roman law” in Newman (ed) *Equity in the world’s legal systems* (1973) 75; Berger *Encyclopedic dictionary of Roman law* (1953) 528 sv “*Ius gentium*”.

¹⁸¹² There is uncertainty as to when the *bona fide iudiciae* emerged (see a summary of the various arguments by Schermaier “*Bona fides in Roman contract law*” in Zimmerman & Whittaker (eds) *Good faith* (2000) 71-72).

¹⁸¹³ Schermaier & Dedek “*Bona fides*” in Bagnall et al (eds) *Encyclopedia of ancient history* (2013) 1155; Du Plessis *Borkowski’s Roman law* (2015) 266; Kelly *Kunkel’s Introduction to Roman history* (1985) 76; Dannenbring *Kaser’s Roman private law* (1984) 19; De Zulueta *Institutes of Gaius part 2* (1975) 253, 167. This is a departure from Schermaier’s earlier view that the *bonae fidei iudicia* “did not originate in legal relations between foreigners and Roman citizens” (Schermaier “*Bona fides in Roman contract law*” in Zimmerman & Whittaker (eds) *Good faith* (2000) 77). There are other scholars who argue that the *bonae fidei iudiciae* is the work of the urban praetor (Watson 1984 *Law and History Review* 10ff; Schiller *Roman law mechanisms* (1978) 422; Watson 1964 *Tijdschrift voor Rechtsgeschiedenis* 254ff). This remains a contentious issue (Schiller *Roman law mechanisms* (1978) 527-530). For the purposes of this thesis, the answer to this question is vital as it is generally accepted that the development of the *ius honorarium* was in part due to the expansion of Rome, the influx of foreigners into the city and the subsequent increase in foreign trade (Mousourakis *Historical context of Roman law* (2003) 181; Van Warmelo *Principles of Roman civil law* (1980) para 25; for a general account see Walton 1893 *Juridical Review* 332-351). For more on the role of the urban praetor in the development of the *ius honorarium* see para 4.3.1 *infra*.

conductio), mandate (*mandatum*) and partnership (*societas*).¹⁸¹⁴ These contracts required no formalities and their validity was based on the agreement (*consensus*) between the parties.¹⁸¹⁵ The *formulae* of the *bona fide* actions included a clause at the end of the formula instructing the judge to decide the case according to what the defendant ought to do or give “*ex fide bona*” (in good faith).¹⁸¹⁶ Hence, the judge had to decide the case on the basis of the principle of good faith.¹⁸¹⁷ Gaius explains that “the *iudex* appears to be allowed complete discretion in assessing, on the bases of justice and equity, how much ought to be made good to the plaintiff”.¹⁸¹⁸ In this context, good faith referred to honesty and fairness,¹⁸¹⁹ which

¹⁸¹⁴ Gaius *Inst* 3 135: “Obligations are created by consent in sale, hire, partnership, and mandate” (quoted from De Zulueta *Institutes of Gaius part 1* (1958)); cf Just *Inst* 3 22: “Consensual obligations arise in sales (*emptio venditio*), letting and hirings (*locatio conductio*), partnerships (*societas*) and mandates (*mandata*)” (quoted from Thomas *Institutes of Justinian* (1975)). See also Du Plessis *Borkowski’s Roman law* (2015) 266; Kelly Kunkel’s *Introduction to Roman history* (1985) 76; Van Warmelo *Principles of Roman civil law* (1980) para 441; Watson (1974) *Law of the ancient Romans* 66; Nicholas *Introduction to Roman law* (1962) 171; Buckland *Manual of Roman private law* (1947) 277.

¹⁸¹⁵ Gaius *Inst* 3 136: “The reason why we say that in these cases the obligations are contracted by consent is that no formality whether of words or writing is required, but it is enough that the persons dealing have consented” (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Van Warmelo *Principles of Roman civil law* (1980) para 441; Buckland *Manual of Roman private law* (1947) 277.

¹⁸¹⁶ Du Plessis *Borkowski’s Roman law* (2015) 263; Mousourakis *Historical context of Roman law* (2003) 200-201; Zimmerman *Law of obligations* (1990) 140, 761-762; Dannenbring *Kaser’s Roman private law* (1984) 174; Van Warmelo *Principles of Roman civil law* (1980) para 441; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 95; Stein “Equitable principles in Roman law” in Newman (ed) *Equity in the world’s legal systems* (1973) 81; Schulz *Roman legal science* (1953) 51.

¹⁸¹⁷ Mousourakis *Historical context of Roman law* (2003) 21; Du Plessis 2002 *THRHR* 398; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 77; Van Warmelo *Principles of Roman civil law* (1980) para 441; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 95.

¹⁸¹⁸ Gaius *Inst* 4 61 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)).

¹⁸¹⁹ Berger *Encyclopedic dictionary of Roman law* (1953) 374 sv “*Bona fides*”.

in turn denoted an objective and ethical standard of behaviour that was expected from the parties.¹⁸²⁰

Thus it can be concluded that good faith played an important role in addressing the changing political, social and economic environment in Rome. The Romans showed an exceptional adaptability to deal with the changing environment by developing a separate flexible and fair legal system to govern legal transactions between Romans and foreigners. As will be seen below,¹⁸²¹ it did not take long before these flexible procedures and normative principles were incorporated into the existing *ius civile*.

4 2 2 The role of ubuntu in addressing legal pluralism in South Africa

The South African story of legal pluralism is still in the making and relatively new compared to the Roman one. As discussed in chapter one, South Africa is characterised by a multicultural and multiracial society in which different legal systems have been observed for the last four centuries. It is peculiar and ironic,¹⁸²² but due to South Africa's history of colonialism and apartheid, that the term "common law" in South African law refers to the system of law based on Roman-Dutch and English law that was imported to South Africa under colonial rule and which was developed by legislation and legal precedents over time.¹⁸²³ Therefore, the term "common law" does not include the indigenous legal systems

¹⁸²⁰ Gaius *Inst* 3 137: "Further, in these contracts [consensual contracts] the parties are reciprocally liable for what each is bound in fairness and equity to perform for the other..." (quoted from De Zulueta *Institutes of Gaius part 1* (1958)); D 16 3 31*pr* where it is stated that "[t]he good faith that is required in contracts calls for level dealing in the highest degree" (quoted from Watson *Digest of Justinian* (2009-2011)). See further Földi 2014 *Fundamina* 318 n 37; Földi 2007 *Annales Univ Budapest* 58; Du Plessis 2002 *THRHR* 399, Van Warmelo *Principles of Roman civil law* (1980) para 394.

¹⁸²¹ Cf the discussion on the role of good faith in developing the *ius civile* in para 4 3 1 *infra*.

¹⁸²² Cornell *Law and revolution in South Africa* (2014) 76.

¹⁸²³ Cf the definition of common law in n 442 *supra*.

collectively referred to as customary law,¹⁸²⁴ which are followed by the majority of the population who are regarded as the indigenous peoples of South Africa.¹⁸²⁵

It was shown that during the pre-constitutional era,¹⁸²⁶ customary law in South Africa was treated as inferior to common law. Where customary laws were recognised they were subject to a repugnancy clause which meant that they were applied as far as they were not repugnant to the principles of public policy and natural justice as shaped by common law ideals. As a result, common law influenced customary law, but no such influence was exercised in turn by customary law on common law. This situation was compounded by the conservative, positivistic and formalistic legal culture that was developed under British rule¹⁸²⁷ and further exacerbated under apartheid.¹⁸²⁸ With the advent of the new constitutional order, customary law was finally recognised as a separate legal system with the same status as that of common law.¹⁸²⁹ However, as illustrated before,¹⁸³⁰ customary law is not treated the same as common law because customary law is seen through the lens of common law rules and values, while common law is rarely assessed from the viewpoint of customary rules and values. This differentiation is seen as a failure to develop a plural legal culture which is necessary to legitimise the new legal system in South Africa.

As was shown throughout chapter two, the South African common law of contract is no exception. For a long time, the classical model of contract law has been followed as underpinned by the philosophies of individualism and economic

¹⁸²⁴ Cf the discussion on the nature and characteristics of customary law in para 1 3 2 1 *supra*.

¹⁸²⁵ Cf the discussion in para 1 3 1 *supra*.

¹⁸²⁶ Cf the discussion dealing with the recognition of the customary law after the arrival of the Dutch (para 1 4 3), during the British colonisation (paras 1 5 2 5, 1 5 3 2, 1 5 4 2 & 1 5 5 2), the union years (para 1 6 3) & apartheid (para 1 7 4) *supra*.

¹⁸²⁷ Cf the discussion on the British influences on the administration of justice in para 1 5 2 3 *supra*.

¹⁸²⁸ Cf the discussion dealing with the legal culture under apartheid in para 1 7 2 *supra*.

¹⁸²⁹ Cf the discussion on the constitutional recognition of common and customary law under the Constitution in para 1 8 3 1 *supra*.

¹⁸³⁰ Cf the discussion on the unequal relationship between common and customary law in para 1 8 3 3 *supra*.

liberalism that arrived at the Cape with the British¹⁸³¹ which model is still endorsed by the Supreme Court of Appeal today.¹⁸³² The classical theory of contract law can be summarised as follows: Freedom of contract entails that the parties can decide whether, with whom and on what terms to contract which finds expression through consensus. This leads to the principle of sanctity of contract. Accordingly, good faith requires that the court should give effect to that which is agreed between the parties, which ensures formal equality and commercial and legal certainty as based on the classical conception of the rule of law. This forms the basis of a formalistic approach to contracts which means that substantive fairness is not a ground for setting aside a contract or preventing its enforcement.

Nevertheless, the classical model of contract law has been under attack for some time as reflected in the move towards modern contract theory.¹⁸³³ These attacks reflect greater changes in the political, economic and social environment as a result of inequalities created by the industrial age and as further compounded by apartheid. Accordingly, the modern theory of contract involves a paternalistic approach through state intervention in private contracts in order to correct injustices resulting from unequal bargaining relationships. As a result, a normative approach must be followed which includes the use of open norms to fill in *lacunae* in the existing legal rules and correct injustices which result from the latter's strict application. In this respect, modern contract theory accords with the idea of transformative constitutionalism which promotes substantive equality in the private legal sphere.¹⁸³⁴

In Roman law, the introduction of the open norm of good faith was necessary to deal with the influx of foreigners into Rome who had limited access to justice under the Roman *ius civile*. It was argued that it is possible that good faith was

¹⁸³¹ Cf the discussion dealing with the role of good faith the British colonisation in para 2 2 3 4 *supra*.

¹⁸³² Cf the discussion with the Supreme Court of Appeal's approach to contractual fairness in paras 2 3 2 2 & 2 3 2 4 *supra*.

¹⁸³³ Cf the discussion dealing with movement towards modern law of contract in para 2 2 3 6 *supra*.

¹⁸³⁴ Cf the discussion dealing with transformative constitutionalism in para 1 8 2 3 *supra*.

introduced by the peregrine praetor to deal with the increasing number of foreign traders and consumers who played an increasingly important role in the Roman economy and development. Good faith functioned as an open norm and allowed the judge an equitable discretion in resolving contractual disputes. The situation in South Africa is different but similar themes may be identified. Under colonialism and apartheid the majority of the indigenous people were treated unequally in many respects and this prevented them from taking part in the South African economy on the same level as their white counterparts.¹⁸³⁵ With the introduction of the Constitution, the indigenous people were granted equal right of access to the economy but they are expected to do so in terms of existing laws that are based on common law values that sustain and propound the existing inequalities. By relying on the underlying constitutional value of ubuntu, the Constitutional Court is in the process of addressing these inequalities with the view to establish a more egalitarian society and plural legal culture.¹⁸³⁶ As was proposed throughout chapter three, in the common law of contract this should result in the development of good faith into an equitable discretion to set aside an unfair contract term or the unfair enforcement of a contract term. Such an equitable discretion would require the courts to consider the contracting parties' economic and social circumstances within the post-apartheid constitutional context which promotes substantive equality as envisaged by the Constitution and accords with modern contract theory.

4 3 THE ROLE OF OPEN NORMS IN SUPPLEMENTING AND CORRECTING THE EXISTING LAW

4 3 1 The role of good faith in supplementing and correcting the existing *ius civile*

Initially, Roman citizens did not enjoy the advantages of the flexible formulary procedure that incorporated the principles of good faith and equity.¹⁸³⁷ As was

¹⁸³⁵ Cf the discussion dealing with the apartheid era in para 1 7 *supra*.

¹⁸³⁶ Cf the discussion dealing with the introduction and development of ubuntu in the law generally in para 1 8 4 *supra*.

¹⁸³⁷ Du Plessis *Borkowski's Roman law* (2015) 34; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92.

seen earlier, the urban praetor's edict was based upon the existing *ius civile* and consequently contained remedies based on the strict and formal *legis actiones*.¹⁸³⁸ However, it was not long before the new flexible formulary procedure was adopted by the urban praetor and incorporated into the *ius civile*.¹⁸³⁹ In *circa* 150 BC¹⁸⁴⁰ the *lex Aebutia* was passed in terms of which the formulary procedure was made available to Roman citizens.¹⁸⁴¹ With the introduction of the flexible formulary procedure and the power to introduce new remedies,¹⁸⁴² the urban praetor was granted an opportunity to incorporate the *ius honorarium* into the existing Roman *ius civile*.¹⁸⁴³ Van Warmelo argues that as time passed the urban praetor exercised this discretion where it was necessary to address the changing needs of the society and that he looked to the *ius gentium* for guidance in making these

¹⁸³⁸ Cf the discussion at n 1789 *supra*.

¹⁸³⁹ Du Plessis *Borkowski's Roman law* (2015) 34; Van Warmelo *Principles of Roman civil law* (1980) para 726; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92; De Zulueta *Institutes of Gaius part 2* (1975) 253.

¹⁸⁴⁰ The exact date of the *Lex Aebutia* is uncertain (Schermaier "*Bona fides* in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 72 n 72; Schiller *Roman law mechanisms* (1978) 405; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92; De Zulueta *Institutes of Gaius part 2* (1975) 250-251).

¹⁸⁴¹ Du Plessis *Borkowski's Roman law* (2015) 35; Mousourakis *Historical context of Roman law* (2003) 199; Kelly *Kunkel's Introduction to Roman history* (1985) 90; Van Warmelo *Principles of Roman civil law* (1980) para 726; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92. As stated by Gaius in *Inst* 4 30: "But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case. Consequently by the *L. Aebutia* and the two *LI. Iuliae* they were abolished, and litigation by means of adapted pleadings, that is by *formula*, was established" (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92 & Birks 1969 *Irish Jurist* 357 argue that the formulary procedure was already used in cases between Roman citizens prior to the enactment of the *Lex Aebutia*. See also Schiller *Roman law mechanisms* (1978) 406 for a summary of the different arguments regarding the role of the *Lex Aebutia* & Dannenbring *Kaser's Roman private law* (1984) 395 for a different theory in respect of the *Lex Aebutia*.

¹⁸⁴² Cf the discussion at n 1787 *supra*.

¹⁸⁴³ Van Warmelo *Principles of Roman civil law* (1980) para 727; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 93; Nicholas *Introduction to Roman law* (1962) 19; De Zulueta *Institutes of Gaius part 2* (1975) 18-19. See also the discussion of Schiller *Roman law mechanisms* (1978) 424-425 on the nature of the *ius honorarium* of the urban praetor.

changes.¹⁸⁴⁴ This meant that the urban praetor introduced remedies where the *ius civile* did not provide any or refused remedies where the *ius civile* would normally provide relief.¹⁸⁴⁵ The urban praetor exercised this discretion in accordance with what he considered right and equitable.¹⁸⁴⁶ Therefore, the new remedies introduced by the urban praetor were less concerned with the formal and rigid requirements of the traditional *ius civile* and rather aimed to achieve fairness and justice between the parties.¹⁸⁴⁷ As with the peregrine praetor, the body of rules developed by the urban praetor was also referred to as the *ius honorarium*.¹⁸⁴⁸

A good example of such a supplementation or correction of the *ius civile* is the case of a contract induced by fraud.¹⁸⁴⁹ Initially, a *stricti iuris* contract induced by fraud was valid and binding as long as the formal procedures were followed.¹⁸⁵⁰

¹⁸⁴⁴ Van Warmelo *Principles of Roman civil law* (1980) para 33; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 26.

¹⁸⁴⁵ Du Plessis *Borkowski's Roman law* (2015) 35; Mousourakis *Historical context of Roman law* (2003) 199; Du Plessis 2002 *THRHR* 399-400; Kelly *Kunkel's Introduction to Roman history* (1985) 90-91; Dannenbring *Kaser's Roman private law* (1984) 19; Van Warmelo *Principles of Roman civil law* (1980) paras 33, 731; Schiller *Roman law mechanisms* (1978) 418; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 26, 93; De Zulueta *Institutes of Gaius part 2* (1975) 253; Watson *Law making* (1974) 42; Watson *Law of the ancient Romans* (1970) 22-23; Nicholas *Introduction to Roman law* (1962) 19, 26; Buckland *Manual of Roman private law* (1947) 362.

¹⁸⁴⁶ Mousourakis *Historical context of Roman law* (2003) 199; Kelly *Kunkel's Introduction to Roman history* (1985) 90-91; Van Warmelo *Principles of Roman civil law* (1980) para 33; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 93.

¹⁸⁴⁷ Kelly *Kunkel's Introduction to Roman history* (1985) 90; Van Warmelo *Principles of Roman civil law* (1980) para 33.

¹⁸⁴⁸ Kelly *Kunkel's Introduction to Roman history* (1985) 91; Van Warmelo *Principles of Roman civil law* (1980) para 33.

¹⁸⁴⁹ For further examples see Van Warmelo *Principles of Roman civil law* (1980) para 731-732; Schiller *Roman law mechanisms* (1978) 423-427; Stein (1996) "Equitable principles in Roman law" in Newman (ed) *Equity in the world's legal systems* (1973) 76-76.

¹⁸⁵⁰ Du Plessis *Borkowski's Roman law* (2015) 263; Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 520-521; Zimmerman *Law of obligations* (1990) 663; Van Warmelo *Principles of Roman civil law* (1980) para 424; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 97; Nicholas *Introduction to Roman*

However, fraud was actionable in *bonae fidei* contracts.¹⁸⁵¹ The discrepancy between *bonae fidei* and *stricti iuris* contracts was addressed with the introduction of the defence of fraud (*exceptio doli*) for the *stricti iuris* contracts in 66 BC.¹⁸⁵² The *exceptio doli* provided for the insertion of the clause “if in this matter nothing has been or is being done *dolo malo* by Aulus Agerius” into the formula on the request of the defendant.¹⁸⁵³ Zimmerman distinguishes between two instances that are contained in the formula, namely “fraudulent behaviour before the institution of the action” (referring to the words “nothing has been ... done”) and “cases where the bringing of the action itself could be taken to constitute *dolus*” (referring to the words “is being done”).¹⁸⁵⁴ The first instance is commonly referred to as the *exceptio doli specialis*, while the latter is called the *exceptio doli generalis*.¹⁸⁵⁵ Initially, the *exceptio doli* was limited to fraudulent behaviour¹⁸⁵⁶ but as time passed the insertion of this defence (especially the *exceptio doli generalis*) “provided the judge with the same far-ranging discretion that he already had in *bonae fidei iudicia*”.¹⁸⁵⁷ In other words, the judge acquired an equitable discretion

law (1962) 164. Early Roman law agreements were usually concluded by the formal legal act of stipulation (*stipulatio* or *sponsio*), which is discussed in more detail in para 4 5 *infra*.

¹⁸⁵¹ Watson *Law of the ancient Romans* (1970) 60; Buckland *Manual of Roman private law* (1947) 252.

¹⁸⁵² Thomas 2003 *De Jure* 107; Zimmerman *Law of obligations* (1990) 663-664; Watson *Law of the ancient Romans* (1970) 60. For a detailed discussion of the introduction and development of the *exceptio doli* see Zimmerman *Law of obligations* (1990) 663ff; Van Warmelo *Principles of Roman civil law* (1980) para 698-704; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 97.

¹⁸⁵³ Gaius *Inst* 4 119 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 520; De Wet *Estoppel by representation* (1939) 83.

¹⁸⁵⁴ Zimmerman “Good faith and equity in modern Roman-Dutch contract law” in Rabello (ed) *Aequitas and equity* (1997) 520. See also Aronstam 1979 *THRHR* 28; De Wet *Estoppel by representation* (1939) 83.

¹⁸⁵⁵ Hutchison “The nature and basis of contract” in Hutchison & Pretorius (eds) *Contract* (2012) 27; De Wet *Estoppel by representation* (1939) 83. This distinction is a modern one and did not exist in Roman law (Aronstam 1979 *THRHR* 28).

¹⁸⁵⁶ Zimmerman *Law of obligations* (1990) 665; Buckland *Manual of Roman private law* (1947) 252.

¹⁸⁵⁷ Zimmerman *Law of obligations* (1990) 667. See also Zimmerman “Good faith and equity in modern Roman-Dutch law” in Rabello (ed) *Aequitas and equity* (1997) 520; Dannenbring

to resolve the contractual dispute in a fair and reasonable manner¹⁸⁵⁸ and therefore the *exceptio doli generalis* functioned as an open norm. As reflected many years later in the following passage of the Digest:

The praetor established this defence [*sic*] to the end that a person's fraud should not benefit him through the medium of the civil law but *contrary to natural equity*.¹⁸⁵⁹

By introducing these new remedies, the urban praetor (like the peregrine praetor)¹⁸⁶⁰ was creating new legal rights despite his lack of legislative power.¹⁸⁶¹ While his influence was indirect, it was not small:

In this way he managed to change the whole character of Roman law. For all practical purposes he created a vast branch of law which extended and corrected the existing law, and filled in gaps in it.¹⁸⁶²

A further result of these developments was that the flexible formulary procedure was preferred over the rigid and formal *legis actio* procedure and gradually the *legis actiones* were replaced by the formulary procedure.¹⁸⁶³ Finally, in 17 BC the

Kaser's Roman private law (1984) 176. For a detailed discussion of the introduction and development of the *exceptio doli* see Zimmerman *Law of obligations* (1990) 663ff; Van Warmelo *Principles of Roman civil law* (1980) para 698-704; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 97.

¹⁸⁵⁸ Du Plessis *Borkowski's Roman law* (2015) 263; Zimmerman "Good faith and equity in modern Roman-Dutch law" in Rabello (ed) *Aequitas and equity* (1997) 520; Zimmerman *Law of obligations* (1990) 668.

¹⁸⁵⁹ D 44 4 1, Paul, *Edict, book 71* (quoted from Watson *Digest of Justinian* (2009-2011)), my emphasis. The original text speaks of "contra naturalem aequitatem" (for more on the meaning of "aequitas" see para 4 4 1 2 *infra*). See also Erasmus 1989 SALJ 674.

¹⁸⁶⁰ Cf the discussion at n 1806 *supra*.

¹⁸⁶¹ Dannenbring *Kaser's Roman private law* (1984) 19; Van Warmelo *Principles of Roman civil law* (1980) para 34; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 26; Nicholas *Introduction to Roman law* (1962) 20.

¹⁸⁶² Van Warmelo *Principles of Roman civil law* (1980) para 33. See also Kelly *Kunkel's Introduction to Roman history* (1985) 91.

¹⁸⁶³ Gaius *Inst* 4 30 (as quoted in n 1841 *supra*). See also Du Plessis *Borkowski's Roman law* (2015) 34; Van Warmelo *Principles of Roman civil law* (1980) para 726; Van Warmelo

leges luliae iudiciorum publicorum et privatorum were passed which abolished the *legis actio* procedure¹⁸⁶⁴ except for certain cases.¹⁸⁶⁵ As the years passed, the edicts of the urban and peregrine praetor became more similar in content.¹⁸⁶⁶ This explains why many years later the Digest describes the *ius honorarium* as “that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile*.”¹⁸⁶⁷

Finally, as pointed out by Van Warmelo, these developments meant that the entire Roman law became more flexible and fair.¹⁸⁶⁸ He argues that this created a place

Oorsprong van die Romeinse reg (1978) para 92; Schulz *Roman legal science* (1953) 76; Buckland *Manual of Roman private law* (1947) 362.

¹⁸⁶⁴ Gaius *Inst* 4 30 (as quoted in n 1841 *supra*). See also Du Plessis *Borkowski’s Roman law* (2015) 72; Mousourakis *Historical context of Roman law* (2003) 199; Kelly *Kunkel’s Introduction to Roman history* (1985) 90; Dannenbring *Kaser’s Roman private law* (1984) 396; Van Warmelo *Principles of Roman civil law* (1980) para 726; Schiller *Roman law mechanisms* (1978) 409; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92.

¹⁸⁶⁵ The exceptions were cases falling under the jurisdiction of the centumviral court and cases involving *damnum infectum* (a threat of damage to another’s property). Gaius *Inst* 4 31: “In two cases only may one proceed by *legis actio*, namely for *damnum infectum* and where the trial is to be before the centumviral court” (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Mousourakis *Historical context of Roman law* (2003) 199; Kelly *Kunkel’s Introduction to Roman history* (1985) 90; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 92.

¹⁸⁶⁶ Kelly *Kunkel’s Introduction to Roman history* (1985) 82; Schiller *Roman law mechanisms* (1978) 532. Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 67 n 21 explains that the *bona fide* actions were eventually regarded as part of the *ius civile*.

¹⁸⁶⁷ D 1 1 7 1, Papinian, *Definitions, book 2* (quoted from Watson *Digest of Justinian* (2009-2011)). In addition, Marcian is quoted in D 1 1 8, *Institutes, book 1* as stating that “the *jus honorarium* itself is the living voice of the *jus civile*” (quoted from Watson *Digest of Justinian* (2009-2011)). See also Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 65; Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 79; Nicholas *Introduction to Roman law* (1962) 26-27.

¹⁸⁶⁸ Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 26.

for the application of *aequitas* (fairness) in Roman law.¹⁸⁶⁹ The concept of *aequitas* is discussed in the next Roman law section.¹⁸⁷⁰

4 3 2 The role of ubuntu in developing the South African common law of contract

Open norms are necessary where the application of the existing rules results in injustice despite the fact that their application is difficult to reconcile with the requirement of the rule of law especially in its classical conception.¹⁸⁷¹ Nicholas articulately describes this difficulty as follows:

For the lawyer in any system, be he judge or jurist, is in the dilemma that he sees – and wishes to see – the law as something which has its own life, which exists independently of himself and is merely applied by him, and yet he must on occasion in practice make law, either by laying down a rule for a case which has never previously arisen or by altering a rule which has become unjust or inconvenient.¹⁸⁷²

In other words, open norms are necessary because they provide the necessary means to develop the formal rules of the law of contract in order to keep up with the community's changing values as a result of political, economic and social developments. The introduction and development of good faith in Roman law is an excellent example in this regard. The Romans realised that their existing formal and rigid laws could not address the changing legal needs of the community due to the influx of foreigners (especially foreign traders) into Rome. In reaction to the changing commercial environment, they introduced flexible legal procedures and a more normative approach to these legal transactions to achieve fairness and justice between the contracting parties. This worked so well, that the new flexible procedures and normative principles were transferred to the existing formalistic

¹⁸⁶⁹ Van Warmelo *Oorsprong van die Romeinse reg* (1978) para 26.

¹⁸⁷⁰ Cf the discussion dealing with the role of *bona fides* to correct and adapt the *ius civile* in para 4 1 2 *infra*.

¹⁸⁷¹ Cf the discussions dealing with the rule of law in paras 1 8 2 3 & 3 5 *supra*.

¹⁸⁷² Nicholas *Introduction to Roman law* (1962) 48.

law applicable to Roman citizens. Gradually, the existing *ius civile* became subject to a more normative interpretation in the interests of justice.

The need for open norms in the law of contract is also illustrated by the historical development of fairness in the South African common law of contract as set out in chapter two. A number of open norms have been utilised throughout the years to address unfairness in the South African common law of contract. In the pre-constitutional era these open norms included the *exceptio doli generalis*¹⁸⁷³ and good faith (*bona fides*)¹⁸⁷⁴ which originated in Roman law and the rules concerning legality of contracts and public policy¹⁸⁷⁵ which were imported from English law. Despite the inclusion of these open norms in the South African common law of contract, their potential to ensure contractual justice was severely limited by the positivistic and formalistic approach by the courts as reflected in the classical model of contract law.¹⁸⁷⁶ As emphasised throughout this thesis,¹⁸⁷⁷ this model is informed by the ideologies of individualism and capitalism which arrived with the British colonisation and was adopted and subsequently developed in the South African legal system during the union years and apartheid. This formalistic and rigid approach to the common law of contract resulted in one commentator comparing the South African common law of contract to the rigid and formal *ius civile* prior to the changes effected by good faith:

We 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.¹⁸⁷⁸

¹⁸⁷³ As discussed in para 2 2 2 *supra*.

¹⁸⁷⁴ As discussed in para 2 2 3 *supra*.

¹⁸⁷⁵ As discussed in para 2 2 4 *supra*.

¹⁸⁷⁶ See esp the discussion dealing with the classical model of contract law in para 2 2 3 4 *supra*.

¹⁸⁷⁷ Cf the discussions throughout para 2 2 *supra*.

¹⁸⁷⁸ Hoffmann as quoted in SALC *Report on unreasonable stipulations in contracts* (1998) 36. See also the references to this quote in Barnard *Critical legal argument for contractual justice* (2005) 239 & Barnard 2005 *SAJHR* 290.

This call for change is the result of the movement towards modern contract theory and the egalitarian aims of the Constitution in view of the great societal discrepancies in wealth and power as sustained by systemic inequalities created by the industrial age and further exacerbated by apartheid.¹⁸⁷⁹ Nevertheless, despite these changes in community values as reflected in modern contract theory and the Constitution, the Supreme Court of Appeal remains trapped in the classical liberal tradition which resists the use of open norms in the common law of contract and has resulted in the limited role of good faith to ensure substantive contractual fairness.¹⁸⁸⁰ The introduction and development of the customary value of ubuntu into an underlying constitutional value is not only a reflection of the move towards a plural legal culture but also confirms the Constitutional Court's commitment to a normative approach to law.¹⁸⁸¹ As submitted above, ubuntu is an open norm that enables value judgments,¹⁸⁸² and as an underlying constitutional value it should be used to develop the common law of contract in line with the constitutional values as mandated by section 39(2) of the Constitution.¹⁸⁸³ As proposed in the previous chapter, ubuntu should be used to develop the principle of good faith in the common law of contract into an open norm that can be used to set aside an unfair contract term or the unfair enforcement of a contract term.

Returning to the issue of how open norms can be reconciled with the principle of the rule of law, it was argued that the recognition of open norms in the common

¹⁸⁷⁹ Cf the discussion on the modern contract law theory in para 2 2 3 6 and the constitutional aim of substantive equality in para 1 8 2 2(b) *supra*.

¹⁸⁸⁰ Cf the Supreme Court of Appeal's approach to fairness in the law of contract as discussed in paras 2 3 2 2 & 2 3 2 4 and critically analysed throughout ch 3.

¹⁸⁸¹ Cf e.g. the discussion of Justice Mokgoro's judgment in *S v Makwanyane and another* 1995 3 SA 391 (CC) para 302 in the text at n 516 *supra*. See also the approach of Justice Sachs in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) as discussed in para 1 8 4 3(a) *supra*. See further the influence of ubuntu on the constitutional value of the rule of law as discussed in para 3 5 *supra*.

¹⁸⁸² Cf the discussion dealing the open-endedness of ubuntu in para 1 8 4 1 *supra*.

¹⁸⁸³ Cf the discussion dealing with the role of ubuntu in the private law in para 1 8 4 3(b) and its role in the common law of contract in particular as discussed in para 2 3 3 *supra*.

law of contract would not lead to unacceptable legal uncertainty.¹⁸⁸⁴ The reason is that such open norms should not be informed by the judge's personal conception of fairness but rather by the objective normative value system established in terms of the Constitution. After critically analysing the expression of the founding constitutional values of human dignity, equality and freedom in the common law of contract, it was found that these values, as informed by ubuntu, support the development of good faith into an equitable discretion. Hence, the proper appreciation of the founding constitutional values in the common law of contract results in a more substantive understanding of the rule of law which permits a normative approach in the common law of contract in order to promote the constitutional vision of an egalitarian society.¹⁸⁸⁵

Finally, as was seen above,¹⁸⁸⁶ fairness as an open norm in the law of contract is now reflected in section 48 of the CPA when dealing with an unfair clause or the unfair enforcement of a clause in a contract governed by the Act. This is also a reflection of the move towards modern contract theory and the constitutional imperative to promote substantive equality.

4 4 HARMONISING VALUES FROM DIFFERENT LEGAL SYSTEMS

4 4 1 Good faith: Harmonisation between Roman and Greek ideas?

It is generally accepted that Greek culture exerted some influence on Roman life during the later Republic.¹⁸⁸⁷ It has been argued that this influence can also be identified in the Roman legal system and laws.¹⁸⁸⁸ Yet, the extent to which Roman

¹⁸⁸⁴ Cf the discussion on the expression of the constitutional value of the rule of law in the common law of contract in para 3 5 2 *supra*.

¹⁸⁸⁵ Cf the critical analysis of the constitutional value of the rule in the law of contract in para 3 5 *supra*.

¹⁸⁸⁶ Cf the discussion in para 2 3 4 2 *supra*.

¹⁸⁸⁷ Kelly *Kunkel's Introduction to Roman history* (1985) 98-99; Dannenbring *Kaser's Roman private law* (1984) 3-4; Nicholas *Introduction to Roman law* (1962) 8.

¹⁸⁸⁸ Kelly *Kunkel's Introduction to Roman history* (1985) 99; Dannenbring *Kaser's Roman private law* (1984) 4; Wieacker 1981 *Boston College International and Comparative Law Review* 268; Kelly *Kunkel's Introduction to Roman history* (1985) 75-77; Schulz *Roman legal science* (1953) 38-39 who refers to this period in Roman law as the "Hellenistic period". For a general account

law was influenced by Greek ideas remains a controversial issue, and this is also the case when determining the origin and development of the concept of *bona fides*. One of the main theories states that the concept originated from the Roman concept of *fides* and is therefore indigenous to Roman law. It has also been argued that Greek influences can be identified in the development of *bona fides*, especially in correcting and adapting the *ius civile*. The next section attempts to trace the development from *fides* to *bona fides* after which the following section considers the possible foreign influences on *bona fides* as used to correct and adapt the *ius civile*.

4 4 1 1 *From fides to bona fides*

Law (*ius*) was not the only code that governed Roman society. Outside the sphere of law, there were various customs (*mores*)¹⁸⁸⁹ that determined the social status of each Roman and prescribed his rights and duties:

[T]he need of the Roman for liberty demands restraint in the matter of the creation and recognition of legal principles. He demands a wide space free of legal rules because of the number and power of extra-legal restrictions. The Romans were enmeshed in a web of such restrictions
...¹⁸⁹⁰

Zimmerman explains that Roman law tended to interfere with these social aspects of Roman life as little as possible because they were already governed by their own regulatory devices, one of which was *fides*.¹⁸⁹¹ According to legend *fides* was the oldest virtue in Rome to be personified as a goddess.¹⁸⁹² Roman literary

of possible Greek influences on Roman law see Kelly *Kunkel's Introduction to Roman history* (1985) 98-105; Yntema 1967 *American Journal of Comparative Law* 107ff.

¹⁸⁸⁹ Berger *Encyclopedic dictionary of Roman law* (1953) 587 sv "Mores (mos)".

¹⁸⁹⁰ Schulz *Principles of Roman law* (1936) 21. See also Dannenbring *Kaser's Roman private law* (1984) 28-29.

¹⁸⁹¹ Zimmerman *Law of obligations* (1990) 350.

¹⁸⁹² Verboven "*Fides*" in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670. See also Schermaier "*Bona fides* in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 78-79 n 96 where he argues that the goddess "*Fides* was probably an idolisation of the concept of *fides*".

tradition dates the cult of *Fides* to the early monarchy when it was introduced by the second king of Rome, Numa Pompilius (*circa* 700 BC).¹⁸⁹³ Furthermore, it is known that a temple was built in her honour in the city of Rome (*circa* 250 BC).¹⁸⁹⁴ The religious origin of *fides* illustrates the importance of *fides* to the Romans,¹⁸⁹⁵ and it would seem that *fides* played an important role from the time of the kings and continued to do so during the republican period.¹⁸⁹⁶

It has been argued that despite its religious origins *fides* developed into a moral and social construction,¹⁸⁹⁷ which manifested in various aspects of Roman society.¹⁸⁹⁸ As a result, it had various meanings depending on the context in which

¹⁸⁹³ Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670; Lind “The republic and Roman morality” in De Vos *Regsgeskiedenis literature* (1989) 6; Gruen 1982 *Athenaeum* 59.

¹⁸⁹⁴ Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670; Griffin & Atkins (eds) *Cicero on duties* (1991) 140 n 4; Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 6; Gruen 1982 *Athenaeum* 59; Schulz *Principles of Roman law* (1936) 224.

¹⁸⁹⁵ Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 7; Gruen 1982 *Athenaeum* 59.

¹⁸⁹⁶ Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670; Sič 2008 *Zbornik Radova* 164-165; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 77-79; Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 6-7.

¹⁸⁹⁷ Sič 2008 *Zbornik Radova* 164-165; Litvinoff 1997 *Tulane Law Review* 1651; Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 6. There is uncertainty in regard to the original meaning of *fides* and various theories exist. As explained by Gruen 1982 *Athenaeum* 51: “The original meaning of *fides* to the Roman mind is wrapped in the obscurity of the antique past. Some have seen it as a kind of contract, a promise, an assurance, a guarantee in the widest sense, in which one can place secure trust – but morally neutral. That interpretation has not won universal acceptance. Different analyses find the moral component of *fides* is central and present from the start, a principal characteristic of the Roman mentality. In another formulation, *fides* has a social dimension at its core, mutual confidence and obligations as the cement of society”.

¹⁸⁹⁸ Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 7.

it was used.¹⁸⁹⁹ At its most essential, *fides* was described as “keeping one’s word” or “to be bound by one’s word”.¹⁹⁰⁰ In this context, Cicero is often quoted:

Moreover, the keeping of faith [*fides*] is fundamental to justice, that is constancy and truth in what is said and agreed. Therefore, ... let us trust that keeping faith (*fides*) is so called because what has been said is actually done (*fiat*).¹⁹⁰¹

Fides was considered a central virtue in Roman society¹⁹⁰² and it was of utmost importance for a Roman citizen to keep his word.¹⁹⁰³ Fidelity was one of the standard principles of Roman life¹⁹⁰⁴ and failure to remain faithful to one’s word would result in a social blot against one’s reputation.¹⁹⁰⁵ In this context *fides* recognises the moral duties of fidelity and faithfulness.¹⁹⁰⁶

A more social construction of *fides* maintains that *fides* has always combined two meanings, namely trust and trustworthiness.¹⁹⁰⁷ A relationship based on *fides*

¹⁸⁹⁹ Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 78; Schulz *Principles of Roman law* (1936) 223.

¹⁹⁰⁰ Schulz *Principles of Roman law* (1936) 223 who describes this definition of *fides* as the essential meaning of *fides*. See also Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 78; Dannenbring *Kaser’s Roman private law* (1984) 33.

¹⁹⁰¹ Cicero *De Officiis* 1 23 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁰² Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670; Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 8; Kelly 1966 *Irish Jurist* 352; Schulz *Principles of Roman law* (1936) 223.

¹⁹⁰³ Zimmerman *Law of obligations* (1990) 115.

¹⁹⁰⁴ Schulz *Principles of Roman law* (1936) 223.

¹⁹⁰⁵ Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670; Schulz *Principles of Roman law* (1936) 224.

¹⁹⁰⁶ Sič 2008 *Zbornik Radova* 165; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 77; Schulz *Principles of Roman law* (1936) 223; Powell 1956 *Current Legal Problems* 20.

¹⁹⁰⁷ Sič 2008 *Zbornik Radova* 165 esp n 67, 168; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 79; Griffin & Atkins (eds) *Cicero on duties*

meant a relationship between two parties where “the one trusted and relied upon the other”.¹⁹⁰⁸ In this context, it has been argued that *fides* required that a person should keep his word and display consideration and leniency towards those under his protection¹⁹⁰⁹ or towards those to whom he had a social obligation.¹⁹¹⁰ In this context *fides* was a principle that prescribed the expected behaviour in daily life, and in particular what behaviour was expected in specific social relationships.¹⁹¹¹ As both parties were bound by the principles of *fides*, there existed a mutual confidence between the parties which was reciprocal in nature.¹⁹¹² In this framework, *fides* manifested as a principle that underlies social relations.¹⁹¹³ A good example of a Roman relationship that was governed by *fides* is the relationship between a patron and his clients (*clientela*).¹⁹¹⁴ Clients were poor Roman citizens (for example peasants, artisans or workers) who entered into a special relationship with a wealthy Roman citizen (a patron) for whom they executed work and in turn received social and legal protection.¹⁹¹⁵ The relationship based on *clientela* created reciprocal duties which were governed by *fides* rather than law.¹⁹¹⁶ This meaning of *fides* was also accentuated in the old fiduciary relationships (for example between guardian and ward) which later

(1991) xlvi; Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 7.

¹⁹⁰⁸ Griffin & Atkins (eds) *Cicero on duties* (1991) xlvi. See also Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 79.

¹⁹⁰⁹ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 79.

¹⁹¹⁰ Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670.

¹⁹¹¹ Sič 2008 *Zbornik Radova* 165.

¹⁹¹² Lind “The republic and Roman morality” in Deroux (ed) *Studies in Latin literature* (1989) 6.

¹⁹¹³ Verboven “*Fides*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 2670.

¹⁹¹⁴ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 79; Zimmerman *Law of obligations* (1990) 350-351; Schulz *Principles of Roman law* (1936) 231; Berger *Encyclopedic dictionary of Roman law* (1953) 391 sv “*Clientes*” .

¹⁹¹⁵ Winkel 2010 *Fundamina* 582; Zimmerman *Law of obligations* (1990) 350-351; Berger *Encyclopedic dictionary of Roman law* (1953) 391 sv “*Clientes*”.

¹⁹¹⁶ Zimmerman *Law of obligations* (1990) 351. See also Berger *Encyclopedic dictionary of Roman law* (1953) 391 sv “*Clientes*”.

developed into legal actions with the development of the *bonae fidei iudicia*.¹⁹¹⁷ These relationships were also characterised by a specific standard of behaviour that was required from both parties (for example the guardian had to administer his ward's affairs as if they were his own).¹⁹¹⁸

It could be asked how the indigenous Roman principle of *fides*¹⁹¹⁹ that applied between Romans became a principle of the *ius gentium* which could be applied where foreigners were involved. Especially, as in early Rome, Roman *fides* was contrasted to the *fides* of other nations (including the Greeks).¹⁹²⁰ It has been argued that Roman *fides* developed into a universal principle that applied to all nations as evidenced by its use in international treaties where the parties took a solemn oath to keep to the covenants of the treaty faithfully and without malice.¹⁹²¹ This use of *fides* emphasised the essential meaning of *fides*, namely to keep one's word.¹⁹²² Furthermore, those who surrendered to a Roman conqueror would place themselves under his *fides* (and thus his protection) which accentuated the idea of *fides* that incorporated both the ideas of keeping one's word and leniency and consideration to those under one's protection.¹⁹²³ As *fides* was used in international relations it has been argued that it developed into a universal principle that applied to all nations (and not only Romans) and became part of the

¹⁹¹⁷ Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 80.

¹⁹¹⁸ Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 80.

¹⁹¹⁹ Lind "The republic and Roman morality" in Deroux (ed) *Studies in Latin literature* (1989) 6.

¹⁹²⁰ Sič 2008 *Zbornik Radova* 165 n 68; Lind "The republic and Roman morality" in Deroux (ed) *Studies in Latin literature* (1989) 8; Schulz *Principles of Roman law* (1936) 223. Buckland & McNair *Roman law & common law* (1952) 280 explains the difference between Roman *fides* and Greek *fides* as follows: "[N]o Greek trusted another unless he had the matter set down in writing".

¹⁹²¹ Sič 2008 *Zbornik Radova* 165, esp n 71.

¹⁹²² Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 78-78; Lind "The republic and Roman morality" in Deroux (ed) *Studies in Latin literature* (1989) 7.

¹⁹²³ Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 78-79.

ius gentium. Thereafter, the *ius gentium* exerted an influence on the Roman *fides* by transforming it from a moral obligation into a legally bounding one:

It was particularly in the contractual field that the *ius gentium* exercised its influence, primarily by strengthening the element of reciprocal confidence (*fides*) without which relations with foreigners were hardly possible.¹⁹²⁴

The question remains how the concept of *fides* developed into *bona fides*. There is much uncertainty in this respect,¹⁹²⁵ but an attractive theory is proposed by Schermaier. He argues that the peregrine praetor probably modelled the *bona fidei iudiciae* on the Roman fiduciary relationships.¹⁹²⁶ One of the fiduciary relationships, *fiducia*¹⁹²⁷ was legally enforceable and did not rely on *fides* alone.¹⁹²⁸ The formula of the *actio fiduciae* demanded *bene agere* from the transferee (i.e. that he do well).¹⁹²⁹ This required that the transferee should act “carefully and prudently” and with respect for the interests of the other party.¹⁹³⁰ Schermaier argues that this standard of behaviour corresponds to that required under the *bonae fidei iudiciae* which indicates that the *actio fiduciae* was most

¹⁹²⁴ Berger *Encyclopedic dictionary of Roman law* (1953) 529 sv “Ius gentium”. See also Dannenbring *Kaser’s Roman private law* (1984) 33; Buckland *Manual of Roman private law* (1947) 260.

¹⁹²⁵ Sič 2008 *Zbornik Radova* 166 n 75.

¹⁹²⁶ Cf the discussion at n 1917 *supra*.

¹⁹²⁷ *Fiducia* can be described as “[a]n agreement (*pactum fiduciae*) in addition to a transfer of property through *mancipatio* (or *in iure cessio*) by which the transferee assumes certain duties as to the property transferred or the later retransfer thereof to the transferor” (Berger (1953) *Encyclopedic dictionary of Roman law* 471 sv “Fiduciae”). See further Dannenbring *Kaser’s Roman private law* (1984) 126-127; Buckland *Manual of Roman private law* (1947) 260-261.

¹⁹²⁸ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 80.

¹⁹²⁹ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 82.

¹⁹³⁰ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 82. See also Dannenbring *Kaser’s Roman private law* (1984) 126-127.

likely the forerunner of the *bonae fidei iudicia*.¹⁹³¹ He further argues that the term *bona fides* was probably used to emphasise the required standard of behaviour.¹⁹³² Therefore, it referred not only to the meaning of *fides* of “keeping one’s word” but also that one acts in accordance with a required standard of behaviour.¹⁹³³

4 4 1 2 *Bona fides* as used to correct and adapt the *ius civile*

Even if it is accepted that the *bonae fidei iudiciae* can be traced back to the Roman concept of *fides*, some Greek influences can be identified in the use of *bona fides* to correct and adapt the *ius civile*. At the beginning of the *Digest* it is stated “*ius est ars boni et aequi*”¹⁹³⁴ which can be translated as “the law is the art of goodness and fairness”.¹⁹³⁵ It has been argued that this text refers to the function of *aequitas* in the development of Roman law:

When the legal norms established in earlier law, written or not written, became inadequate to the social and economic necessities of the later age, the *aequitas* went into operation both in private law and in civil procedure as well as in judicial practice.¹⁹³⁶

In this section, the function of *bona fides* as an expression of *aequitas* to correct the injustices of the formal law (*summum ius*) is investigated. Specific consideration is given to Cicero’s *De Officiis*. First, because it provides examples

¹⁹³¹ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 82.

¹⁹³² Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 82. See also Sič 2008 *Zbornik Radova* 166 n 75; Földi 2007 *Annales Univ Budapest* 58; Coing 1987 *Washington University Law Quarterly* 713; Schulz *Principles of Roman law* (1936) 228.

¹⁹³³ Cf the discussion at and sources referred to in n 614-615 *supra*.

¹⁹³⁴ D 1 1 1 *pr* (quoted from Mommsen & Krueger (eds) *Digest of Justinian* (1985)).

¹⁹³⁵ Quoted from Watson *Digest of Justinian* (2009-2011). See also Berger *Encyclopedic dictionary of Roman law* (1953) 354 sv “*Aequitas* (aequum)”.

¹⁹³⁶ Berger *Encyclopedic dictionary of Roman law* (1953) 354 sv “*Aequitas* (aequum)”. See also Biscardi “On *Aequitas* and *epieikeia*” in Rabello (ed) *Aequitas and equity* (1997) 7-8; Schiller *Roman law mechanisms* (1978) 553-554.

of this function of *bona fides* during the later republican period, and secondly, because it has been argued that Cicero's use of the term *aequitas* led to its use as a legal term.¹⁹³⁷

The phrase *summum ius* is an abbreviation for the maxim *summum ius summa iniuria* which has been translated as "the more Justice, the more injustice".¹⁹³⁸ A more eloquent translation is "more law less justice".¹⁹³⁹ It refers to the over-literal interpretation of laws that ultimately leads to injustice. In the first book of *De Officiis*, Cicero refers to the example of a man who, after agreeing to a thirty day truce, destroys the enemy's fields at night and then justifies his behaviour by arguing that the truce referred to days and therefore did not include nights.¹⁹⁴⁰ Consequently, Cicero argued that strict adherence to the law could lead to injustice.¹⁹⁴¹

Two further examples from Cicero have been used as evidence that the Romans treated *bona fides* as an expression of *aequitas* that was used to correct the injustices of the *summum ius*.¹⁹⁴² First, Cicero tells of a case where the augurs were going to take an augury on the citadel and they ordered Tiberius Claudius Centumalus, whose house was on the Caelian Hill, to demolish that part of his house that was obstructing the auspices.¹⁹⁴³ Claudius advertised the house and then sold it to Publius Calpurnius Lanarius after which the augurs made the same

¹⁹³⁷ Tuori "Aequitas" in Bagnall *et al* (eds) *Encyclopædia of ancient history* (2013) 132. Thomas 2003 *De Jure* 105 further argues that the *De Officiis* is an important source on Roman moral philosophy.

¹⁹³⁸ Quoted by Cicero *De Officiis* 1 33 (as translated by Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹³⁹ Hiemstra & Gonin *Trilingual legal dictionary* (2008) 294.

¹⁹⁴⁰ Cicero *De Officiis* 1 33 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁴¹ Tuori "Aequitas" in Bagnall *et al* (eds) *Encyclopædia of ancient history* (2013) 132.

¹⁹⁴² Tuori "Aequitas" in Bagnall *et al* (eds) *Encyclopædia of ancient history* (2013) 132; Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 70. See further Winkel 1996 *Fundamina* 114; Schiller *Roman law mechanisms* (1978) 553-554.

¹⁹⁴³ Cicero *De Officiis* 3 66 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

demand of Calpurnius and he complied.¹⁹⁴⁴ When Calpurnius learned that Claudius had advertised the house after he was ordered to demolish a part of it, he compelled Claudius to go before an arbitrator as to “what compensation he ought to have made in accordance with the demands of good faith”.¹⁹⁴⁵ Calpurnius had to formulate the action on good faith, as the *ius civile* did not provide him with a remedy.¹⁹⁴⁶ Cicero explains that in accordance with the Law of the Twelve Tables “it was enough that one [the buyer] should accept responsibility for those faults that were verbally specified” and “if the seller had denied these, he should face a double penalty”.¹⁹⁴⁷ This meant that the seller was only responsible for the defects whose existence he expressly denied.¹⁹⁴⁸ Accordingly, Claudius would only be responsible for Calpurnius’ loss if he denied that there was any demand by the augurs for the demolition of part of the house. The judge ordered Claudius to compensate Calpurnius for the loss he incurred because Claudius had known the facts when he sold the house to Calpurnius and had not informed him.¹⁹⁴⁹ In other words, if the seller knew about a fault or defect in the property but kept quiet about it, then he was responsible for it.¹⁹⁵⁰ Consequently, Cicero argues that the judge “established that it was a part of good faith that the buyer should learn of any fault that the seller knew”.¹⁹⁵¹ This example illustrates how *bona fides* was used to correct and adapt the *ius civile* by developing new rules to cater for new circumstances. Then, in a further example, Cicero illustrates how a rule developed by the concept of *bona fides* could itself become unjust and require further

¹⁹⁴⁴ Cicero *De Officiis* 3 66 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁴⁵ Cicero *De Officiis* 3 66 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁴⁶ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 67.

¹⁹⁴⁷ Cicero *De Officiis* 3 65 (quoted from Griffin & Atkins (eds) *Cicero on duties* (1991)). See further the discussion by Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 67.

¹⁹⁴⁸ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 67.

¹⁹⁴⁹ Cicero *De Officiis* 3 66 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁵⁰ Cicero *De Officiis* 3 65 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁵¹ Cicero *De Officiis* 3 67 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

development in terms of the *bona fides*.¹⁹⁵² He refers to the case where Marcus Marius Gratidianus sold a house to Gaius Sergius Orata which he had bought from Orata a few years before.¹⁹⁵³ The house was under a liability (i.e. a third person had some right over the property) but Marius did not state this in the contract of sale.¹⁹⁵⁴ When the matter went to court, Orata's representatives argued that the court should adhere to the rule that the buyer should learn of any fault that the seller knew.¹⁹⁵⁵ In other words, he was arguing that the court should merely apply the existing rule (which rule derived from the *bona fides*) in accordance with the words and without further reference to the concept of *bona fides*. However, Gratidianus' representative argued for the application of *aequitas* (fairness) in that Orata was not deceived because as the previous owner he knew that the property was subject to a liability.¹⁹⁵⁶ Therefore, he was arguing for the adaptation of the rule in accordance with the principle of *aequitas* (fairness) in order to achieve justice.

Cicero's use of the term *bona fides* together with the term *aequitas* indicates that Cicero regarded *bona fides* as an expression of *aequitas* which could be used to correct and adapt the *ius civile* where it would otherwise lead to injustice.¹⁹⁵⁷ In other words, the use of *bona fides* in this context refers to the idea of *aequitas*. This is so because *aequitas* in the legal sense is usually described as a concept which refers to fairness and which is specifically contrasted with the strict following of the letter of the law.¹⁹⁵⁸ In turn, the Roman concept of *aequitas* has its origin in

¹⁹⁵² Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 68.

¹⁹⁵³ Cicero *De Officiis* 3 67 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁵⁴ Cicero *De Officiis* 3 67 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁵⁵ Cicero *De Officiis* 3 67 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁵⁶ Cicero *De Officiis* 3 67 (Griffin & Atkins (eds) *Cicero on duties* (1991)).

¹⁹⁵⁷ Schermaier "Bona fides in Roman contract law" in Zimmerman & Whittaker (eds) *Good faith* (2000) 70.

¹⁹⁵⁸ Tuori "Aequitas" in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 132; Biscardi "On Aequitas and epieikeia" in Rabello (ed) *Aequitas and equity* (1997) 7; Hahlo & Kahn *South African legal system* (1991) 133; Berger *Encyclopedic dictionary of Roman law* (1953) 354 sv "Aequitas (aequum)".

the Greek concept of *epieíkeia* (equity).¹⁹⁵⁹ Aristotle defined *epieíkeia* as “a correction of law where it is defective owing to its universality”¹⁹⁶⁰ and stated that:

[It] makes up for the defects of a community's written code of law. This is what we call equity; people regard it as just; it is, in fact, the sort of justice which goes beyond the written law.¹⁹⁶¹

Cicero and the other Roman orators understood *aequitas* as referring to *epieíkeia*.¹⁹⁶² This is can be deduced from the fact that Cicero uses the term *aequitas* to refer to “fairness” which he contrasts with the strict following of the letter of the law.¹⁹⁶³ In other words, where *bona fides* was used to correct and adapt the *ius civile*, it was with reference to these Greek philosophical ideas. So while it would appear that the Romans used existing indigenous concepts to develop a more equitable law of contract, there is evidence that they borrowed

¹⁹⁵⁹ Shanske 2005 *Stanford Law Review* 2061; Mousourakis *Historical context of Roman law* (2003) 32 n 96; Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 65 n 9; Stein *Buckland's text-book of Roman law* (1996) 55; Hahlo & Kahn *South African legal system* (1991) 133-134; Yntema 1967 *American Journal of Comparative Law* 110ff; Allen *Law in the making* (1964) 393; Schulz *Roman legal science* (1953) 74;. However, the extent of the Greek influence on the Roman concept of *aequitas* is the subject of extensive academic debate (see for example Tuori “*Aequitas*” in Bagnall *et al* (eds) *Encyclopedia of ancient history* (2013) 132; Crook *Legal advocacy* (1995) 9; Schiller *Roman law mechanisms* (1978) 551-552; Shalgi 1971 *Israel Law Review* 62-64; Allen *Law in the making* (1964) 392; Jolowicz *Roman foundations* (1957) 55-56).

¹⁹⁶⁰ Aristototele *Ethica Nicomachea* 1137^b27 (quoted from Ross “*Ethica Nicomachea*” in Ross (ed) *Works of Aristotle* (1963)). See further Mousourakis *Historical context of Roman law* (2003) 32 n 96.

¹⁹⁶¹ Aristotle *Rhetorica* 1374^a24-27 (quoted from Roberts “*Rhetorica*” in Ross (ed) *Works of Aristotle* (1963)).

¹⁹⁶² Schulz *Roman legal science* (1953) 74; Stein *Buckland's text-book of Roman law* (1996) 55. Jolowicz *Roman foundations* (1957) 56 argues that Cicero and other rhetorical writers were aware of the indigenous origin of *aequitas* although he concedes that their thinking reflects a Greek influence.

¹⁹⁶³ Cicero *De Officiis* 3 67 (Griffin & Atkins (eds) *Cicero on duties* (1991)) (see again the discussion at n 1956 *supra*). See also Dannenbring *Kaser's Roman private law* (1984) 28 who maintains that *aequitas* “denoted justice, especially that justice which the praetor applied by using his magisterial law to overcome the rigidity of the *ius civile*”.

from Greek philosophy in order to develop their existing rigid and formalistic legal system into a fairer and more flexible system that incorporated normative considerations based on fairness.

4 4 2 The harmonisation of good faith and ubuntu in the South African common law of contract

Although ubuntu as an underlying constitutional value should be used to develop the common law of contract in line with the Constitution, it was also shown that the common law of contract has proved less than enthusiastic in this respect.¹⁹⁶⁴ Bennett argued that the reason why the common law of contract has shown resistance towards the use of ubuntu may be because the contract law principles and rules already contain the necessary mechanisms to deal with the issues that ubuntu has been used for.¹⁹⁶⁵ Specifically, he mentioned the principle of good faith and public policy as informed by the objective normative value system established under the Constitution.

There are a number of reasons why this argument cannot be accepted. In the first place, such an approach ignores the vital need to establish a plural legal culture to legitimise the post-apartheid South African legal system.¹⁹⁶⁶ Secondly, the Supreme Court of Appeal has persistently limited the role of good faith to address contractual unfairness, even after the establishment of the new constitutional order, so it is difficult to see how good faith on its own can be developed into an open norm to address contractual unfairness.¹⁹⁶⁷ Thirdly, in conjunction with the previous point, the Supreme Court of Appeal has used the founding constitutional values to endorse the classical model of contract law in a way which leaves almost no scope for the development of fairness into a freestanding requirement for the

¹⁹⁶⁴ Cf the discussion dealing with the role of ubuntu in developing the private law in para 1 8 4 3(b) *supra*.

¹⁹⁶⁵ Cf the discussion in the text at n 959 *supra*.

¹⁹⁶⁶ Cf the discussion dealing with the unequal relationship between the common and customary law in para 1 8 3 3 *supra*.

¹⁹⁶⁷ Cf the approach of the Supreme Court of Appeal to fairness in the common law of contract in paras 2 3 2 2 & 2 3 2 4 *supra*.

validity or exercise of a contractual right.¹⁹⁶⁸ Finally, there is a grave danger in assuming that fairness in terms of good faith can be equated to fairness in terms of ubuntu as will be argued under the next theme.¹⁹⁶⁹

Although there is evidence that the Romans developed *bona fides* from the indigenous Roman concept of *fides*, the concept of *bona fides* as an expression of *aequitas* was influenced by Greek philosophy. This influence can be observed in the role of *bona fides* to correct and adapt the *ius civile* to achieve justice and keep pace with the changing political, social and economic environment. In a similar manner, ubuntu as a reflection of the values of the indigenous community and the new constitutional order should be imported into the common law of contract to develop the role of good faith in line with the spirit, purport and objects of the Bill of Rights. This is necessary in order to develop the principle of good faith into a substantive rule that can be used to set aside unfair contract terms and the unfair enforcement of contract terms in view of the Supreme Court of Appeal's continued resistance to the development of good faith into an open norm after the enactment of the Constitution. Therefore, the harmonisation of good faith and ubuntu in the common law of contract is essential not only to establish a plural legal culture but also to develop the common law of contract in line with the Constitution.

4 5 THE ULTIMATE GOAL OF LAW: ACHIEVING JUSTICE

4 5 1 Good faith: Balancing reciprocal individual rights and duties

Prior to the introduction of the *bonae fidei* contracts, the closest the early Roman law came to recognising an agreement was through the formal legal act of stipulation (*stipulatio*) which was already in use by the time of the law of the Twelve Tables.¹⁹⁷⁰ As explained by Gaius, it entailed a formal verbal exchange of

¹⁹⁶⁸ Cf the approach of the Supreme Court of Appeal to fairness in the common law of contract in paras 2 3 2 2 & 2 3 2 4 *supra*.

¹⁹⁶⁹ Cf the discussion dealing with ubuntu's aim to achieve justice in para 4 5 2 *infra*.

¹⁹⁷⁰ Nicholas *Introduction to Roman law* (1962) 159. See also Zimmerman *Law of obligations* (1990) 68; Watson 1984 *Law and History Review* 3; Van Warmelo *Principles of Roman civil*

questions and answer between the debtor and creditor. He mentions the following forms:

“Do you solemnly promise conveyance? I solemnly promise conveyance”; “Will you convey? I will convey”; “Do you promise? I promise”; “Do you promise on your honour? I promise on my honour”; “Do you guarantee on your honour? I guarantee on my honour?”; “Will you do? I will do.”¹⁹⁷¹

As the *stipulatio* was a *stricti iuris* contract which formed part of the *ius civile*,¹⁹⁷² the validity of the *stipulatio* came from the form used and not the agreement itself.¹⁹⁷³ For example, it was still valid where it was induced by fraud, fear or

law (1980) para 420; De Zulueta *Institutes of Gaius part 2* (1975) 151; Watson *Law of the ancient Romans* (1970) 5, 58; Buckland *Manual of Roman private law* (1947) 251, 262.

¹⁹⁷¹ Gaius *Inst* 3 92 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Zimmerman *Law of obligations* (1990) 68; Dannenbring *Kaser's Roman private law* (1984) 49; Watson 1984 *Law and History Review* 4; Van Warmelo *Principles of Roman civil law* (1980) para 420; Nicholas *Introduction to Roman law* (1962) 159; Buckland *Manual of Roman private law* (1947) 251, 262.

¹⁹⁷² Du Plessis *Borkowski's Roman law* (2015) 297; Zimmerman *Law of obligations* (1990) 91; Van Warmelo *Principles of Roman civil law* (1980) para 422; De Zulueta *Institutes of Gaius part 2* (1975) 151.

¹⁹⁷³ Zimmerman *Law of obligations* (1990) 82-84; Dannenbring *Kaser's Roman private law* (1984) 207; Van Warmelo *Principles of Roman civil law* (1980) para 422; Watson *Law of the ancient Romans* (1970) 5; Nicholas *Introduction to Roman law* (1962) 159. However, immoral, illegal or impossible stipulations were not valid (Watson *Law of the ancient Romans* (1970) 60-61).

mistaken belief.¹⁹⁷⁴ On the other hand, if the debtor used the wrong verb the creditor could not rely on the underlying agreement.¹⁹⁷⁵

The *stipulatio* was a unilateral contract which can be defined as a contract “which creates only rights in one party and only duties in the other”.¹⁹⁷⁶ As Zimmerman explains:

One party (the debtor) would be bound to perform towards the other (the creditor), but could not, under the same stipulation, acquire a counterclaim. Or, the other way round: the stipulation granted the creditor a right, without, at the same time, imposing a duty on him.¹⁹⁷⁷

Where the parties wanted to enter into a bilateral contract (for example a sale) the parties had to create two stipulations, i.e. two unilateral contracts, one where the buyer promised to pay the price and another where the seller promised to deliver the thing.¹⁹⁷⁸ This meant that the buyer could claim the thing even though he had

¹⁹⁷⁴ Cf the discussion at n 1850 *supra*. For further examples see Gaius *Inst* 3 97-101. See also Watson 1984 *Law and History Review* 4; Van Warmelo *Principles of Roman civil law* (1980) paras 424, 699; Watson *Roman private law 200 BC* (1971) 129; Stein (1996) “Equitable principles in Roman law” in Newman (ed) *Equity in the world’s legal systems* (1973) 81; Watson *Law of the ancient Romans* (1970) 5-6, 59; Nicholas *Introduction to Roman law* (1962) 160.

¹⁹⁷⁵ Zimmerman *Law of obligations* (1990) 70; Watson 1984 *Law and History Review* 4; Van Warmelo *Principles of Roman civil law* (1980) para 422; Nicholas *Introduction to Roman law* (1962) 160; Buckland *Manual of Roman private law* (1947) 264.

¹⁹⁷⁶ Nicholas *Introduction to Roman law* (1962) 162. As explained by Gaius “in verbal obligations the one party puts and the other gives the stipulatory promise” (Gaius *Inst* 3 137 (quoted from De Zulueta *Institutes of Gaius part 1* (1958))). See also Zimmerman *Law of obligations* (1990) 91; Dannenbring *Kaser’s Roman private law* (1984) 169; Watson 1984 *Law and History Review* 4; Van Warmelo *Principles of Roman civil law* (1980) para 420; De Zulueta *Institutes of Gaius part 2* (1975) 151; Stein (1996) “Equitable principles in Roman law” in Newman (ed) *Equity in the world’s legal systems* (1973) 81; Watson *Law of the ancient Romans* (1970) 58; Buckland & McNair *Roman law & common law* (1952) 271; Buckland *Manual of Roman private law* (1947) 250.

¹⁹⁷⁷ Zimmerman *Law of obligations* (1990) 91.

¹⁹⁷⁸ Zimmerman *Law of obligations* (1990) 91; Van Warmelo *Principles of Roman civil law* (1980) para 422; Nicholas *Introduction to Roman law* (1962) 162.

not paid the price and the seller would be obliged to deliver.¹⁹⁷⁹ If the seller wanted to claim the price, he would need to institute a separate action and run the risk that the buyer could be insolvent at that time.¹⁹⁸⁰ This meant that in an action based on the stipulation to pay the price, the judge would not be permitted to take any account of the other stipulation for the delivery of the thing. Later, with the introduction and development of the *exceptio doli*, the seller would be able to defend an action by the buyer.¹⁹⁸¹

In contrast, a *bona fide* contract was bilateral in nature.¹⁹⁸² In other words, a contract “which gives rise to reciprocal obligations, each party having both rights and duties”.¹⁹⁸³ In addition, as known, the judge in a *bona fide* action was directed to determine the case in accordance with the principle of good faith (*ex fide bona*).¹⁹⁸⁴ This enabled the judge to strike a balance between the interests of the parties which was not possible where a unilateral contract was used. Specifically Gaius states that “this involves that he [the judge] may take into account any counter-obligation due from the plaintiff under the same transaction, and may condemn the defendant only in the difference”.¹⁹⁸⁵ Schermaier argues that this required the judge to look at the relationship between the parties “in its origin and

¹⁹⁷⁹ Nicholas *Introduction to Roman law* (1962) 162.

¹⁹⁸⁰ Nicholas *Introduction to Roman law* (1962) 162.

¹⁹⁸¹ Van Warmelo *Principles of Roman civil law* (1980) paras 424, 699-704; Watson *Roman private law 200 BC* (1971) 129 n 4; Watson *Law of the ancient Romans* (1970) 6; Nicholas *Introduction to Roman law* (1962) 162 n 3. However, as mentioned earlier, the *exceptio doli* was introduced in 66 BC when the *bona fide iudiciae* existed already (see para 4 3 1 *supra*).

¹⁹⁸² Also referred to as synallagmatic contracts (Van Warmelo *Principles of Roman civil law* (1980) para 441).

¹⁹⁸³ Nicholas *Introduction to Roman law* (1962) 162. See also Gaius *Inst* 3 137 (quoted in n 615 *supra*); Van Warmelo *Principles of Roman civil law* (1980) para 441; Stein (1996) “Equitable principles in Roman law” in Newman (ed) *Equity in the world’s legal systems* (1973) 81; Buckland *Manual of Roman private law* (1947) 250.

¹⁹⁸⁴ See para 4 2 1 3 *supra*.

¹⁹⁸⁵ Gaius *Inst* 4 61 (quoted from De Zulueta *Institutes of Gaius part 1* (1958)). See also Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 82; Nicholas *Introduction to Roman law* (1962) 164.

all its effects, within the framework of all surrounding circumstances and the conduct of the parties”.¹⁹⁸⁶

Although the judge would attempt to achieve justice and fairness between the parties, it is important to note that the judge would not consider the social and economic position or bargaining power of the parties when determining what would be considered fair and equitable:

The Roman lawyers worked within the framework of the existing social and procedural structures. Problems resulting from unequal bargaining power fell outside their sphere of competence and experience – as did social reform or social engineering in general.¹⁹⁸⁷

Nevertheless, Winkel argues that the concept of *bona fides* did provide the judge with the necessary discretion to “take forms of undue influence or duress into account and so protect a weaker party”.¹⁹⁸⁸ Hence *bona fides* could be used to protect a weaker party against exploitation by a stronger party and ensure justice and fairness between the parties. However, good faith did not focus on addressing the greater political, social and economic inequalities prevalent in Roman society itself. In other words, although *bona fides* could be used to protect a weaker party against exploitation by a stronger party in specific instances it was not used to address the underlying unequal relationship between the parties in order to achieve a more egalitarian society. As remarked by Kelly:

[T]he end result was not to turn the Republic into an egalitarian democracy in the modern sense. In the late Republic, wide differences of wealth and prestige existed ... and political power was shared and disputed among a relatively small number of important families, who

¹⁹⁸⁶ Schermaier “*Bona fides* in Roman contract law” in Zimmerman & Whittaker (eds) *Good faith* (2000) 84 n 129. See also Zimmerman *Law of obligations* (1990) 140, 428; Dannenbring *Kaser’s Roman private law* (1984) 174-175.

¹⁹⁸⁷ Zimmerman *Law of obligations* (1990) 349-350.

¹⁹⁸⁸ Winkel 2010 *Fundamina* 578-579.

exercised it by operating a complicated system of alliance and dependence.¹⁹⁸⁹

4 5 2 Ubuntu: Bringing about a more humane world

As was seen above, under Roman law the bilateral nature of the *bonae fidei* contracts entitled a judge to strike a balance between the interests of the parties on the basis of justice and equity. However, when balancing these different interests to determine what would be considered fair and equitable the judge did not take account of the social and economic position or bargaining power of the contracting parties.

In the seminal pre-constitutional appeal court judgment of *Sasfin v Beukes*,¹⁹⁹⁰ the court stated that determining whether a contract term is contrary to public policy entails a balancing act between the public policy considerations of freedom and sanctity of contract and the need to do simple justice between the parties. Lubbe argued that the latter consideration refers to a balancing act between the specific interests of the contract parties which he linked to the principle of good faith.¹⁹⁹¹ He then argued that where a contractual term constitutes an unreasonable and one-sided promotion of one party's own interests at the expense of the other party it may be contrary to the principles of good faith and consequently also against public policy.¹⁹⁹² Important to note is that the court itself confined this balancing act to the specific interests of the parties as reflected in the contract terms and did not take account of any inequality in the bargaining relationship of the contract parties. In other words, the court's conception of what fairness between contracting parties would entail is similar to that in Roman law in that the enquiry into fairness would not include any consideration of the social and economic circumstances of the contracting parties. This reluctance to take account of the relative situation of the contracting parties outside the terms of the contract can

¹⁹⁸⁹ Kelly *Roman litigation* (1966) 1.

¹⁹⁹⁰ Cf the discussion of *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9 as discussed in the text at n 773 *supra*.

¹⁹⁹¹ Lubbe 1990 *Stell LR* 17 as discussed in the text at n 779 *supra*.

¹⁹⁹² Lubbe 1990 *Stell LR* 20-21 as discussed in the text at n 783 *supra*.

also be identified in the Supreme Court of Appeal decisions after the enactment of the Constitution. In *Brisley v Drotzky*, the court stated that the principles in *Sasfin v Beukes* should not be extended to the unfair enforcement of a contract term except in exceptional cases.¹⁹⁹³ And in *Afrox Healthcare v Strydom*, the court held that the unequal bargaining position of the parties is merely a relevant factor in determining whether a contract term is against public policy.¹⁹⁹⁴

It was in *Barkhuizen v Napier*¹⁹⁹⁵ that the Constitutional Court extended the enquiry into fairness to include the relative situation of the contracting parties as reflected in the subjective test of fairness which takes account of the bargaining position of the parties as well as the surrounding circumstances at both contract conclusion and enforcement. In other words, the subjective test for fairness was held to be relevant when determining the fairness of the clause itself and the enforcement of the clause. The subjective test for fairness means that the court recognised substantive equality in the law of contract and it was submitted that this subjective test for fairness is based upon ubuntu. As was stated previously,¹⁹⁹⁶ ubuntu does not entail a duty only on a contracting party to respect the human dignity of the other contracting party which duty has been linked to the principle of good faith, but also includes a duty on a contracting party to promote the realisation of the other contracting party's human dignity through the concept of substantive equality as informed by the post-apartheid constitutional context. It was further argued that the Constitutional Court impliedly relied on ubuntu when it followed this approach in *Botha v Rich* although it conceptualised its approach through the principle of good faith.¹⁹⁹⁷ Accordingly, it was argued that the court's decision is based upon the harmonisation of good faith and ubuntu because it

¹⁹⁹³ Cf the discussion of *Brisley v Drotzky* 2002 4 SA 1 (SCA) para 31 as discussed in the text at n 832 *supra*.

¹⁹⁹⁴ Cf the discussion of *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 12 as discussed in the text at n 842 *supra*.

¹⁹⁹⁵ Cf the discussion of *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 56-59 as discussed in the text at n 872 *supra*.

¹⁹⁹⁶ Cf the discussion in the text at n 1547 *supra*.

¹⁹⁹⁷ Cf the discussion of this case in the text at n 1570 *supra*.

reflects a commitment to contractual fairness which includes the idea of substantive equality in the common law of contract.

Thus, it is submitted that the harmonisation of good faith and ubuntu in the common law of contract results in a conception of fairness that is not concerned with balancing the individual interests of the contracting parties only, but reflects a conception of fairness which includes a greater commitment towards an egalitarian society, and hence, a more humane world as envisioned by ubuntu.

4 6 CONCLUSION

This chapter investigated the introduction and development of good faith in the Roman law of contract within the relevant historical context in order to clarify the emerging role of ubuntu in the South African common law of contract. It was shown how the introduction of good faith in Roman law was necessary to deal with legal pluralism and resulted in the development of the rigid and formalistic *ius civile* into a legal system that embraced normative considerations of fairness and flexibility to ensure better contractual justice. It was further shown how these normative considerations were probably imported from Greek philosophy as the existing Roman legal system did not have the necessary inherent mechanisms to deal with these changes. It was argued that in a similar way, ubuntu can be used to deal with legal pluralism in the South African legal system and its application as an underlying constitutional value should result in the better use of the open norm of good faith in the common law of contract to address unfair contract terms and the unfair enforcement of contract terms. It was further argued that the harmonisation of ubuntu and good faith in the common law of contract is essential for such a development of good faith as the Supreme Court of Appeal has closed all other doors in this respect.

Despite these similarities between the historical development of good faith in the Roman law of contract and the emerging role of ubuntu in the South African common law of contract, it was shown that what constituted fairness in terms of good faith in Roman law cannot be equated to fairness as envisaged by ubuntu. While fairness in terms of good faith was limited to the balancing of the individual

interests of the contract parties without further consideration of the political, social and economic inequalities in Roman society, fairness in terms of ubuntu must be understood as aspiring towards an egalitarian society which entails the development of the existing legal rules in order to achieve greater substantive equality and fairness between contracting parties within the post-apartheid constitutional context.

CHAPTER 5 THE GOLDEN THREAD: HUMAN DIGNITY

At the heart of contract lies the idea that I have an interest in something of yours and that you have an interest in something of mine. The hegemonic capitalist over-emphasis on the *things* and the utter neglect of the *persons* who have these things, has provided an extremely distorted version of what the word “interest” in the above formulation originally entails.¹⁹⁹⁸

5 1 INTRODUCTION

The main theme that has emerged in addressing the harmonisation of good faith and ubuntu in the South African common law of contract is human dignity. While good faith has been linked to human dignity in its Western conception as based on Kantian dignity, ubuntu provides an African understanding thereof that can be used to inform its Western counterpart. In this respect, ubuntu performs an important role in the achievement of two legal aims that have been referred to throughout this thesis. First, it plays an important role in promoting human rights in the South African common law of contract, and secondly, in establishing a plural legal culture that is to inform the development of the common law of contract.

5 2 PROMOTING HUMAN RIGHTS IN THE COMMON LAW OF CONTRACT

In South Africa and globally, the year of 1948 appears to be a watershed that had serious repercussions in the political, social and economic spheres as reflected in the legal developments of that time.¹⁹⁹⁹ Internationally, humanitarian efforts in the aftermath of the Second World War culminated in the acceptance of the Universal Declaration of Human Rights which is grounded in the recognition of the inherent and equal human dignity of all human beings and sets out a number of fundamental human rights that should enjoy universal protection across the globe. In contrast, the South African government set out in the opposite direction

¹⁹⁹⁸ Barnard-Naude 2008 *Constitutional Court Review* 207.

¹⁹⁹⁹ Cf the discussion dealing with the introduction of apartheid in South African in para 1 7 1 *supra*.

choosing apartheid as its policy. The government's policy of apartheid was implemented through apartheid laws which denied the human dignity, equality and freedom of the indigenous people. These human rights violations were aggravated by the prevailing constitutional system i.e. the Westminster system of parliamentary sovereignty, which meant that the courts had no authority over the morality or substance of government enacted legislation.²⁰⁰⁰ The government's implementation of racial segregation resulted in an extremely unequal society that privileged the white community and left the indigenous people without political power and subject to appalling social and economic conditions.²⁰⁰¹

In other parts of the world, the modern human rights culture grounded in human dignity and aimed at the protection and promotion of equality led to concomitant developments in law, amongst others the introduction of modern contract theory in the law of contract.²⁰⁰² South Africa's conservative legal culture and its cultural isolation as a result of the international condemnation of apartheid may explain why modern contract theory found no adherence in the South African common law of contract except for Judge Jansen's minority judgment in *Bank of Lisbon and South Africa v De Ornelas* during the final throes of the apartheid regime.²⁰⁰³

The Constitution with its progressive Bill of Rights which is grounded in the recognition of human dignity set South Africa on the course to correct the injustices of the past.²⁰⁰⁴ The Constitutional Court's commitment to the constitutional imperative for social justice and the establishment of an egalitarian society has resulted in a highly regarded and sophisticated²⁰⁰⁵ jurisprudence on

²⁰⁰⁰ Cf the discussion dealing with the legal culture under apartheid in para 1 7 2 *supra*.

²⁰⁰¹ Cf the discussion on the development during the South African republic in para 1 7 3 *supra*.

²⁰⁰² Cf the discussions on human dignity as empowerment (para 3 2 3 2) and constraint (para 3 2 3 3) *supra*.

²⁰⁰³ Cf the discussion of this case in para 2 2 3 6 *supra*.

²⁰⁰⁴ Cf the discussions on the enactment of the Constitution (para 1 8 1) and its objective normative value system (para 1 8 2) *supra*.

²⁰⁰⁵ Cornell & Muvangua "Preface" in Cornell & Muvangua (eds) *uBuntu and the law* (2012).

human dignity.²⁰⁰⁶ In particular, the content of the constitutional value of human dignity was enriched in the field of socio-economic rights and the promotion of substantive equality by drawing on ubuntu as an ethical and social concept.²⁰⁰⁷ This has resulted in the transformation of many fields of law but the common law of contract has lagged behind. Its resistance to constitutional transformation can be ascribed to legal tradition as reflected in the Supreme Court of Appeal's continued reliance on the classical model of contract law²⁰⁰⁸ which can be traced back to English law and was imported into South African law during the second half of the nineteenth century.²⁰⁰⁹ Nevertheless, it would appear that the appeal court's main concern is that the use of open norms in the common law of contract may fall foul of the constitutional value of the rule of law and will result in large scale legal and commercial uncertainty which will have a detrimental effect on the South African economy.²⁰¹⁰

This thesis has attempted to address this problem and moreover has taken the African context into consideration by drawing on the underlying constitutional value of ubuntu to achieve an appropriate outcome. It was shown that by relying on ubuntu the Constitutional Court has developed the interpretation of the founding constitutional values of human dignity, equality, freedom and the rule of law in a way which supports the modern theory of contract. Since ubuntu²⁰¹¹ and modern contract theory²⁰¹² are aimed at promoting substantive equality in the private sphere in order to create the necessary conditions for the realisation of everyone's human dignity. The Constitutional Court's reliance on ubuntu has

²⁰⁰⁶ The Constitutional Court's approach to human dignity was critically analysed in para 3 2 7 2 *supra*.

²⁰⁰⁷ For a discussion dealing with the philosophical foundations of ubuntu's modern legal appearance see para 3 2 5 *supra*.

²⁰⁰⁸ Cf the discussions dealing with the Supreme Court of Appeal's approach to fairness in the common law of contract in paras 2 3 2 2 & 2 3 2 4 *supra*.

²⁰⁰⁹ Cf the discussion dealing with the classical model of contract law in para 2 2 3 4 *supra*.

²⁰¹⁰ Cf the discussion dealing with the approach to the rule of law in the common law of contract in para 3 5 2 *supra*.

²⁰¹¹ Cf the discussion on human dignity through ubuntu in para 3 2 5 *supra*.

²⁰¹² Cf the discussion on the modern theory of contract law in para 2 2 3 6 *supra*.

resulted in a multifaceted approach to human dignity²⁰¹³ that promotes substantive equality²⁰¹⁴ in the private sphere while respecting freedom²⁰¹⁵ and the rule of law²⁰¹⁶ albeit in a modern form. It was argued that this approach to human dignity should result in the development of good faith into a substantive rule that can be used to set aside an unfair contract term or the unfair enforcement thereof. This is also in line with the approach to fairness in consumer contracts as reflected in section 48 of the CPA,²⁰¹⁷ which in turn, follows international trends in this respect.²⁰¹⁸

5 3 AFRICANISATION (OR DECOLONISATION) OF THE COMMON LAW OF CONTRACT

Coming full circle, this thesis has attempted to make a contribution in addressing the complex problem of the Africanisation or decolonisation of the South African common law of contract. As reflected in Justice Yacoob's remarks in *Everfresh Market Virginia* which introduced the research problem of this thesis,²⁰¹⁹ the common law of contract is shaped predominantly by common law ideals and customary law has exerted no influence on the common law of contract prior to the new constitutional dispensation.²⁰²⁰ The common law and its underlying values were always treated as superior and more civilised than their customary counterparts.

Under the Constitution, formal equal recognition was granted to common and customary law²⁰²¹ but the failure to import customary values into the common law

²⁰¹³ Cf the critical analysis of the constitutional value of human dignity in para 3 2 *supra*.

²⁰¹⁴ Cf the critical analysis of the constitutional value of equality in para 3 3 *supra*.

²⁰¹⁵ Cf the critical analysis of the constitutional value of freedom in para 3 4 *supra*.

²⁰¹⁶ Cf the critical analysis of the constitutional value of the rule of law in para 3 5 *supra*.

²⁰¹⁷ Cf the discussion of the open norm of fairness in s 48 of the CPA in para 2 3 4 2 *supra*.

²⁰¹⁸ Cf the discussion in the text at n 1744 *supra*.

²⁰¹⁹ Cf the discussion in para 1 1 *supra*.

²⁰²⁰ This has been illustrated in respect of the common law of contract in general (paras 1 4–1 7) and the role of fairness in the common law of contract (para 2 2) *supra*.

²⁰²¹ Cf the discussion of the constitutional recognition of common and customary law in para 1 8 3 1 *supra*.

of contract undermines the constitutional aim to establish a plural legal culture which can go some way to restore the human dignity of the indigenous people who suffered great injustice under colonial and apartheid rule.²⁰²² By including the customary notion of ubuntu in the post-amble of the interim Constitution as a tool for restorative justice, an opportunity was created for the adoption of African values and ideas into the South African law outside the field of customary law.²⁰²³ Following the judgments of the Constitutional Court in *S v Makwanyane*²⁰²⁴ under the interim Constitution and *Port Elizabeth Municipality v Various Occupiers*²⁰²⁵ under the final Constitution, ubuntu was firmly established as an underlying constitutional value that should be used in developing the common law to promote constitutional values as mandated by section 39(2).²⁰²⁶

The constitutional value of human dignity proved to be fertile ground for the harmonisation of African and Western values which has resulted in the Constitutional Court's development of a sophisticated understanding of human dignity as based on Kantian dignity and ubuntu.²⁰²⁷ As hoped for by Cornell and Van Marle, this harmonisation not only addresses the pre-constitutional marginalisation of customary values but also provides possible solutions to existing legal problems originating from the liberal legal tradition:

More importantly, it [ubuntu] would provide a nuanced jurisprudence that would not only include African or South African values and ideals as important to the new South Africa, as a matter of fairness to those whose ideals have been marginalised, but also because those principles, ideals

²⁰²² Cf the discussion dealing with the unequal relationship between common and customary law in para 1 8 3 3 *supra*.

²⁰²³ Cf the discussion dealing with the introduction of ubuntu in the interim Constitution in para 1 8 4 2(a) *supra*.

²⁰²⁴ *S v Makwanyane and another* 1995 3 SA 391 (CC) as discussed in para 1 8 4 2(b) *supra*.

²⁰²⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) as discussed in para 1 8 4 3(a) *supra*.

²⁰²⁶ Cf the discussion dealing with the role of ubuntu in the private law in para 1 8 4 3(b) *supra*.

²⁰²⁷ Cf the critical analysis of the constitutional value of human dignity as developed by the Constitutional Court in para 3 2 7 2 *supra*.

and values may well provide with solutions to dilemmas in South Africa that are not solvable by liberalism.²⁰²⁸

As mentioned in the previous section, the Constitutional Court found support in ubuntu to develop the constitutional value of human dignity to reflect a commitment to substantive equality in the private sphere while respecting freedom and the rule of law. The proposition put forward in this thesis is that if this approach to human dignity is also applied in the common law of contract it should result in the development of good faith into a substantive rule that can be used to set aside an unfair contract term or the unfair enforcement thereof.

5 4 CONCLUSION

The harmonisation of good faith and ubuntu in the South African common law of contract emphasises how the values, principles and rules of the common law of contract play an important role in the recognition and promotion of human dignity as the core value of the new constitutional dispensation. The harmonisation of these two notions is not an easy task and plays out against South Africa's complex history of colonialism and apartheid as well as modern tensions between individualism and socialism. Nevertheless, ubuntu as a source of African values is well situated to address inequality that has resulted from colonial and apartheid rule and which flourished within the individualist and capitalist environment during this time. As such, I share the hopes of former Justice Mokgoro that ubuntu:

if consciously harnessed can become central to the process of harmonising all existing legal values and practices with the Constitution ... [and] the revival of sustainable African values as part of the broader process of the African renaissance.²⁰²⁹

²⁰²⁸ Cornell & Van Marle 2005 *AHRLJ* 220.

²⁰²⁹ Mokgoro 1998 *PELJ* 11.

And that, ultimately, this will result in Biko's vision for a more humane world:

We believe that in the long run the special contribution to the world by Africa will be in this field of human relationship. ... the great gift still has to come from Africa – giving the world a more human face.²⁰³⁰

²⁰³⁰ Biko *I write what I like* (2004) 51.

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TABLE OF ABBREVIATIONS

<i>AHRLJ</i>	<i>African Human Rights Law Journal</i>
<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
<i>HJIL</i>	<i>Heidelberg Journal of International Law (Zeitschrift für ausländisches öffentliches rech und Völkerrecht)</i>
<i>JAL</i>	<i>Journal of African Law</i>
<i>JJS</i>	<i>Journal for Juridical Science (Tydskrif vir Regswetenskap)</i>
<i>MLJ</i>	<i>Malawi Law Journal</i>
<i>PELJ</i>	<i>Potchefstroom Electronic Law Journal</i>
<i>SAJHR</i>	<i>South African Journal on Human Rights</i>
<i>SA Journal of Philosophy</i>	<i>South African Journal of Philosophy</i>
<i>SALJ</i>	<i>South African Law Journal</i>
<i>SA Merc LJ</i>	<i>South African Mercantile Law Journal</i>
<i>SAPL</i>	<i>South African Public Law</i>
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
<i>SUBB Iurisprudentia</i>	<i>Studia Universitatis Babes Bolyai Iurisprudentia</i>
<i>THRHR</i>	<i>Tydskrif vir die Hedendaagse Romeins-Hollandse Reg (Journal of Contemporary Roman-Dutch Law)</i>
<i>TR</i>	<i>Tijdschrift voor Rechtsgeschiedenis</i>
<i>TRW</i>	<i>Tydskrif vir Regswetenskap (Journal for Juridical Science)</i>
<i>TSAR</i>	<i>Tydskrif vir Suid-Afrikaanse Reg (Journal of South African Law)</i>