
LEGAL TRADITION AND THE TRANSFORMATION OF ORTHODOX CONTRACT THEORY: THE MOVEMENT FROM FORMALISM TO REALISM

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1 Introduction

The first decennium of the new constitutional dispensation introduced transformation in most aspects of South African society, not least on the legal front. This comes as no surprise as political changes by necessity influence both the nature and emphasis of legal systems. Thus, it was expected that after the static period prior to the introduction of the Constitution, contract law would adapt to fall into line with developments which had taken place and are taking place in the legal systems of our major trading partners. This paper argues that the cause for the stasis of contract went further and deeper than the Apartheid-induced isolation. It finds this cause in the Westminster system and the ensuing legal tradition which provides a possible explanation for the reluctance to scupper the pre-1994 mode of adjudication. It is submitted that the drastic political and societal changes of the 1990s reflect a turning point in the moral and ethical beliefs of the nation which has been noticeable in many areas of the law. The core ethic of the law of contract may be identified as either the belief in individualism or an avowal to co-operativism. Adherence to either paradigm determines the acceptance or rejection of a doctrine of good faith. Thus, the fortunes of good faith during the last decennium are used to explain why the judiciary has in principle remained true to the legal tradition of the previous century, but by covert methods has also accommodated the new beliefs in social justice.

2 Historical background

The Constitution of the Republic of South Africa, 1996¹ distinguishes between legislation, the common law and customary law.² Furthermore, South African law is a mixed legal system,³ which means that as the result of historical events civilian jurisprudence has survived within a common-law environment.⁴ Lastly, the South African legal system is exceptional, since it is composed of both

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1 Act 108 of 1996.

2 S 39.

3 Included in this group are Scotland, Quebec, Louisiana, Sri Lanka, South Africa, Botswana, Lesotho, Swaziland, Namibia and Zimbabwe.

4 Zimmermann & Visser "Introduction" in Zimmermann & Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 3.

Western and indigenous law. The Western legal component comprises Roman law, Dutch law with French and Spanish influences as well as the English or common-law tradition.⁵

The Roman-Dutch and English jurisdictions have had the greatest influence on the development of the law of contract. The colonisation of South Africa commenced in 1652 with the establishment of a refreshment station by the Dutch East India Company, which considered this station to fall under the jurisdiction of the office in Batavia. The law applicable was the law of Holland.⁶ Holland had become an independent state after the Dutch revolt against the Spanish Habsburgs. The law applied in the Cape of Good Hope consisted of the general law of Holland, local statutes and customary law and, in the absence of these, Roman law.⁷

The British occupied the Cape in 1795 and 1806 and retained this territory in terms of the Convention of London of 1814.⁸ In terms of the English common law, the legal *status quo* in the conquered territory was maintained.⁹ However, in an attempt to establish an independent judiciary,¹⁰ the Charters of Justice of 1827 and 1832 introduced several changes to the judicial organisation of the Colony of the Cape of Good Hope: The *Raad van Justitie* was replaced by the Cape Supreme Court and courts of resident magistrates in accordance with the English system.¹¹ Judges of the Supreme Court were chosen only from the ranks of the English-trained judiciary. Mercantile law and the law of procedure and evidence were brought within the ambit of English law as applied in England.¹² Obviously the British-trained judges and advocates were not familiar with Latin or old Dutch and thus relied on translations.¹³ Where the Dutch translations did not provide an answer, the English-trained judges and advocates looked to English law for precedent.¹⁴

5 Fagan "Roman-Dutch law in its South African historical context" in Zimmermann & Visser (n 4) 43ff; Hahlo & Kahn *The South African Legal System and Its Background* (1973) 570ff 580ff esp 584ff.

6 De Wet *Die Ou Skrywers in Perspektief* (1988) 1ff.

7 It is interesting to note that this application of the law in the Cape of Good Hope agreed with what Joannes van der Linden (tr) *Juta Institutes of Holland* (1891), at 1 1 4, said about the law to be applied in a land.

8 Hahlo & Kahn *The Union of South Africa: The Development of Its Laws and Constitution* (1960) 4.

9 *Calvin's Case* (1608) 7 Coke Report 1a, 77 ER 377 at 18a 398; *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 at 209 1048.

10 The Colebrooke-Bigge Commission was appointed in 1822 to recommend ways in which the administration in the Cape could be improved. See Fagan (n 5) 50f.

11 Fagan (n 5) 51.

12 Hahlo & Kahn (n 8) 18f; Van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 451f.

13 Fagan (n 5) 55.

14 *Idem* 57; Hahlo & Kahn (n 8) 17ff.

Nevertheless, although Roman-Dutch law was maintained, the changes in the judicial organisation had an influence on the substantive law. This influence continued after formation of the Union of South Africa in 1910 with the promulgation of the South Africa Act, 1909.¹⁵ Although a school of legal scholarship, in the form of the so-called purist movement, became intent on purifying the South African common law of English additions, an approach which was adopted by the Appellate Division under Chief Justice LC Steyn,¹⁶ the South African common law today is a mixture of the seventeenth and eighteenth century law of Holland, and parts of the English common law as received and developed in South Africa during the nineteenth and twentieth centuries.¹⁷ Thus, the identity of Roman-Dutch based private law was developed during the twentieth century: It was influenced by the rise to power of the Afrikaner and the notion that Roman-Dutch law symbolised the European cultural heritage.¹⁸ However, the determining factor for the legal tradition was that during most of the twentieth century law was conceived as positivistic. The cause for this legal positivism is to be found in the constitutional development of South Africa in 1910.

3 The Constitution of the Union of South Africa

The Constitution of the Union¹⁹ heralded modern South Africa and set its course until the Constitution of the Republic of South Africa, 1996. The South Africa Act, 1909, determined the route for legal development with its replication of a British Westminster system of government and constitution.²⁰ In *Rex v McChlery*,²¹ Innes JA discussed the question whether the courts could declare enactments *ultra vires* on the ground that they are inequitable, or opposed to the principles of natural justice, unfair and oppressive. In response to this question he stated:

Always assuming that the restrictive limits of the empowering documents are observed, the discretion to judge what measures are conducive to peace, order and good government lies with the lawgiver and not with the courts. Having regard to the fact that a subordinate legislature is in a similar position to the British Parliament, it is impossible that the Colonial Courts should have an overriding authority to say when measures are, and when they are not, in the general

15 9 Edw 7 c 9 (1909).

16 (1959-1971).

17 Fagan (n 5) 60 62.

18 Carey-Miller "South Africa: A world in one country on the long road to reality" in Harding & Orucu (eds) *Comparative Law in the 21st Century* (2002) 284.

19 Kennedy & Schlosberg *The Law and Custom of the South African Constitution* (1935) Part 1 ch 3 esp 89f.

20 Kennedy & Schlosberg (n 19) Part III esp ch 9 and 10.

21 *Rex v McChlery* 1912 AD 199 at 220.

interests of peace, order and good government. Such a task would be in the highest degree invidious and difficult, and it is fortunate that the spirit of our constitution does not impose it upon the judges.

In the same case Chief Justice Solomon stated the principle as follows:

It is the Legislature and not the Courts of Law ... who are the judges of whether any law is required for the peace, order or good government of the territory under their jurisdiction ... No Court of Law is entitled to examine the policy of an Ordinance passed by the Legislature ... That is a matter entirely within the discretion of the Legislature ... All that the Courts of Law can do is to inquire whether the Legislature has exceeded the power conferred upon it ...²²

These citations indicate clearly that the Appellate Division interpreted the new constitutional dispensation within Austinian theory.²³ Austin's doctrine formed the basis of the jurisprudence of legal positivism.²⁴ It is this paradigm that caused the limitation on judicial adjudication. The supremacy of an unfettered parliament and a judiciary functioning upon the premise of a narrowly-defined interpretative role constituted the foundation of the South African law prior to the inception of the Constitution in 1996. Thus, the most striking feature of the pre-1990s South African law was positivism.²⁵

4 Legal positivism

Although an attempt to summarise legal positivism in a paragraph is fraught with hazard, the following points deserve to be mentioned:

Positivism²⁶ describes the law as a set of discrete rules, which are identified, understood and applied through the technical expertise of legal officials whose work is detached from the moral and political disagreements of everyday life.²⁷

Legal positivism provides an accurate account of law as it actually is, rather

22 At 226, citing *Regina v Burah* [1878] 3 AC 889 and *Riel v Regina* [1885] 10 AC 675.

23 Smith & Weisstub *The Western Idea of Law* (1983) 510-518.

24 Hahlo & Kahn (n 5) 19 give an excellent explanation regarding the role positivism plays in the "anatomy" of law.

25 Carey-Miller (n 18) 286.

26 Jeremy Bentham *A Fragment on Government* (1988) provided the first philosophical alternative to social contractarianism. His ideas were developed further in 1832 by John Austin in *Province of Jurisprudence Determined*. Law was no longer the outcome of a social contract, but rather of a command. There was now a hierarchical relationship of power, extending up from the citizen to those in power. The source of this authority was customary obedience. Laws were commands from the sovereign to its subjects. Cf Atiyah *The Rise and Fall of Freedom of Contract* (1979) 341ff. Dworkin *Law's Empire* (1986) 47 offers "law as integrity" as an alternative to positivism. The premise of "law as integrity" is that the point behind the rule or series of rules may be stated independently of the rules. Further strict rules must be understood or applied with reference to or extended, modified, qualified or limited by that point; cf also 87-90 135-139.

27 Atiyah (n 26) 342.

than as it ought to be.²⁸ The point of legal positivism is to commend that legal systems be developed in such a way as to maximise the social and political benefits of having a system of readily identifiable mandatory rules of such clarity, precision and scope that they can be routinely understood and applied without reference to contentious moral and political judgements.²⁹ Legal positivism is thus a theory³⁰ which recommends the creation and sustenance of legal systems in which laws are identified, followed and applied without recourse to the moral opinions of those involved in these processes.³¹ Positivism negates the crucial role of judges and judicial culture in the ascription of meaning and significance, which in themselves are compatible with an infinite number of different interpretations.³²

5 Effect of legal positivism on development of the law

Legal decisions depend on a multitude of factors not all provided in the relevant rules. The systematic misdescription of law as a set of determinate rules has the ideological function of disguising the political power of judiciaries which are thereby better able to impose their own values by passing off their decisions as the morally neutral application of pre-existing rules and encouraging the belief that citizens and judges alike are duty-bound to obey the objectively determined "law".³³ It has been maintained that legal positivism's view on this point is to be found in a hidden ideological agenda, namely the legitimating of a system that disguises the political power of lawyers and the class interests they represent.³⁴

Therefore, many academics are of the opinion that legal positivism is a false and perhaps dangerous theory; that it is an historical curiosity which is unhelpful in relation to the development of law and legal systems.³⁵ It has been held that it no longer fills the role of an official theory which can be used to justify the reality and importance of legal knowledge,³⁶ and that it is not only false, but also pernicious as a theory which protects entrenched interests and renders courts less than responsive to changing needs and the well-being of oppressed groups in society.³⁷ Thus it may be argued that the lack of a doctrine

28 Dworkin (n 26) 114-150; Campbell "The point of legal positivism" 1998 *Kings College LJ* 63.

29 Raz *The Authority of Law: Essays on Law and Morality* (1979) 47; Campbell (n 28) 63.

30 Hahlo & Kahn (n 5) 18.

31 Campbell (n 28) 67.

32 Hahlo & Kahn (n 5) 17ff.

33 Campbell (n 28) 64.

34 *Ibid.*

35 Carey-Miller (n 18) 301 states as follows: "The time warp appearance of pre-1990s South African law reflected its static normative basis and positivist context – both kept firmly in place by a controlling state. The unrepresentative system bred lawyers of legalistic mentality."

36 Campbell (n 28) 64.

37 Gordon "New developments in legal theory" in Kairys (ed) *The Politics of Law* (1990) 413

of good faith in South African law of contract provides the perfect example of the effect that the Westminster system of government, positivism and the formalistic approach to contract law has had on this very important area of our law.

6 Formalism

A consequence of legal positivism is formalism,³⁸ which may characterise all areas of legal adjudication. Formalism constitutes an attitude of mind or ideology of adjudication; it represents a particular view about the judicial role.³⁹ Atiyah explains formalism as an attitude of the judge who believes that all law is based on legal doctrine and principles which can be deduced from precedents.⁴⁰ According to this view there is only one correct way of deciding a case. It is not the judge's function to refer to policy considerations or consider the relative justice of the parties' claims.⁴¹ The premise is that the courts are not concerned with the effect of a contract. All that is required is to determine what the contract means in order to give effect to the intention of the parties, and not to determine whether a just result was obtained.⁴² Concomitant with this approach is the tendency to literalism, that is, the courts' refusal to read into the contract anything which the parties had not expressly provided for and the insistence that implied terms can only be made in order to give business efficacy to the contract.⁴³

According to positivism the reason behind rules and principles is irrelevant. Adherence to positivism caused formalism to play a very specific role in contract law adjudication. Formalism infers an approach to contract law adjudication which is governed by a contract law regime characterised by individualism.⁴⁴ Thus courts are denied any power or right to interfere in order to achieve justice. The fairness of the contract and the reasonableness of the

-425, esp 420f.

38 Horwitz "The rise of legal formalism" 1975 *American J of Legal Hist* 251ff.

39 Adams & Brownsword *Understanding Contract Law* (2004) 41f are of the opinion that individualism used in the contractual sense can further be described by the adjective market. Market individualism is the point of departure when describing what is referred to as the "classical theory" of contract. In this regard cf Atiyah (n 26) at 341f and Collins *The Law of Contract* (2003) 5 35ff, who explain that these ideologies underlie the law of contract and play a major role in contract law adjudication.

40 Atiyah (n 26) 389.

41 *Ibid.*

42 *Ibid.*

43 In this regard see the excellent publication by Campbell, Collins & Wightman (eds) *Implicit Dimensions of Contract* (2003) in general, and especially the contributions by Collins "Introduction: The research agenda of implicit dimensions of contracts" 1ff, Campbell & Collins "Discovering the implicit dimensions of contracts" 25ff, Collins "Discretionary powers in contracts" 219ff, and Ireland "Recontractualising the corporation: Implicit contract as ideology" 255ff.

44 Atiyah (n 26) 226ff 388ff; Adams & Brownsword (n 39) 185-204; Collins (n 39) 3-10; Brownsword "After investors: Interpretation, expectation and the implicit dimension of the 'new contextualism'" in Campbell, Collins & Wightman (n 43) 24; Pretorius "Individualism, collectivism and the limits of good faith" 2003 *THRHR* 638 639-641; Grové "Die kontraktereg, altruïsme, keusevryheid en die Grondwet" 2003 *De Jure* 134.

bargain do not concern the court. The parties choose their own terms and if one choose skilfully and the other foolishly, this is the working of the free market.⁴⁵

Adams and Brownsword describe contract law textbooks, treatises and legislation to which the judiciary refers, collectively as the rule-book.⁴⁶ Formalist judges are governed by the proverbial rule-book.⁴⁷ Although the world may change, the traditional rules of contract remain the same. Not only do they remain unchanged, but formalists view the rule-book as a closed logical system⁴⁸ which leads to the notion that the purity and integrity of the rule-book must be maintained. These authors point out that formalists are distrustful of doctrines which deviate from the norm or allow a relaxation of the traditional rule.⁴⁹ The formalist approach is illustrated by, for example, the abrogation of the doctrine of *laesio enormis*,⁵⁰ the denial of the existence of the *exceptio doli*⁵¹ and the interpretation of the doctrine of good faith.⁵²

Formalism leans towards doctrinal conservatism. In consequence, formalists tend to avoid or limit innovations. The latter was the case with the interpretation of public interest in *Sasfin v Beukes*.⁵³ Although it was held in this case that agreements inimical to the interests of the community or to social or economic expedience will not be enforced on the grounds of public interest, the court added the *caveat* that the power to declare a contract contrary to public policy should be exercised sparingly.⁵⁴ In other words, if such open norms are to be used, they must be used with extreme caution. That this admonition was meant and taken very seriously becomes evident in *De Beer v Keyser*,⁵⁵ where the court held that the clause in a micro-lending contract requiring borrowers to hand over bank cards and personal identification numbers to the lender was not contrary to public policy. Innovation was limited in *Brisley v Drotsky* where the question whether the non-variation clause in the contract could be found unenforceable in terms the Bill of Rights in the Constitution, was answered with

45 Horwitz (n 38) 256-257 states: "What came to be certified as purely 'legal', of course were those rules of law that had been established ... to implement a market regime."

46 Adams & Brownsword (n 39) 25.

47 Adams & Brownsword (n 39) 185ff.

48 Adams & Brownsword (n 39) 185; Atiyah (n 26) 389.

49 Adams & Brownsword (n 39) 186.

50 *Tjollo Ateljees (Eins) Bpk v Small* 1949 1 SA 856 (A).

51 *Bank of Lisbon and South Africa v De Ornelas* 1988 3 SA 580 (A) 616C.

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

53 1989 1 SA 1 (A).

54 *Sasfin v Beukes* (n 53) 9.

55 *De Beer v Keyser* 2002 1 SA 827 (SCA); Hawthorne "Public policy and micro-lending – has the unruly horse died?" 2003 *THRHR* 116.

the statement that a court could not shelter in the shadow of the Constitution in order to attack and set aside principles.⁵⁶

Since formalism exhorts judges to base themselves on well-established rules in “the rule-book”, they are of necessity reluctant to employ open norms such as good faith, public policy and *boni mores*.⁵⁷ In *Brisley v Drotzky* the Supreme Court of Appeal by majority found that good faith is not an independent free-floating basis for setting aside or not enforcing contractual principles.⁵⁸ The court laid down that good faith does not constitute a legal rule.⁵⁹ Furthermore, it was held that courts have no discretion but to enforce contract clauses subject to crystallised rules of the law of contract⁶⁰ and that a court could not act on abstract ideas.⁶¹ For judges, working within the ambit of formalism, sympathy and politics cannot be material considerations unless the “rule-book” makes them essential. Positivism and formalism demand a nearly mechanical application of rules and doctrines. Phrases such as freedom of contract and sanctity of contract are used without critical reflection of their purpose or the social context within which they are to be applied.⁶² Consequently, formalism supports the application of clear general rules which require no judicial discretion. In *Mort NO v Henry Shields-Chiat*⁶³ the court upheld an agreement entered into by the father of a severely injured minor and an attorney specialising in road accident claims. The attorney had debited the financial award made to the injured minor with an exorbitant untaxed fee, thus failing to maximise the disabled minor’s financial ability to negotiate his economic future. It was held that the existence of the constitutional community had not given the

56 *Brisley v Drotzky* (n 52) 16D-E.

57 Hawthorne “Closing of the open norms” 2004 *THRHR* 294; cf also Hopkins “Standard-form contracts and the evolving idea of private law justice” 2003 *TSAR* 150; Naudé “Exemption clauses – A rethink occasioned by *Afrox Healthcare Bpk v Strydom*” 2004 *SALJ* 442; Lewis “Fairness in South African contract law” 2003 *SALJ* 330; Lubbe “Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law” 2004 *SALJ* 395.

58 (n 52) at 15E; the court relied on a statement made by Hutchison in “Non-variation clauses in contract: Any escape from the *Shifren* straightjacket” 2001 *SALJ* 720.

59 *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) 41A-B.

60 Such as mistake, misrepresentation, duress, undue influence, the rules against contracts in restraint of trade, application of the *in pari delicto* rule, the judge’s discretion to reduce a contractual penalty in terms of s 3 of the *Conventional Penalties Act* 15 of 1962, and by providing for the relaxation of the principle of reciprocity and the award of a reduced contract price where equity demands it, when applying the *exceptio non adimpleti contractus*.

61 *Brisley v Drotzky* (n 52) 1A-B.

62 Cf Adams & Brownsword (n 39) 186 who hold that: “Formalism takes the idea that ‘justice is blind’ quite literally: the rule book is to be applied blind to any consideration of the merits of the case, the purpose or point of the rules, or the context of the dispute.”

63 2001 1 SA 464 (C); for a case discussion see Du Plessis “*Mort NO v Henry Shields-Chiat* 2001 1 SA 464 (C)” in 2002 *De Jure* 385ff.

concept of good faith enough content to trump sanctity of contract⁶⁴ and the agreement was enforced.

Moreover, formalists prefer a rule which either allows or disallows a clause over one which allows a clause subject to the condition that it satisfies the requirement of good faith. This becomes clear in *Afrox Healthcare Bpk v Strydom*,⁶⁵ where a patient had signed a standard hospital contract containing an exclusion of liability clause which prevented him from instituting a claim against the hospital if he suffered damage as a result of the hospital's negligence. There was no evidence to show that the respondent had occupied a weaker bargaining position than the hospital during the conclusion of the contract. The court held that good faith was not available to ameliorate the contract.⁶⁶

Formalist judges believe that it is not their function to make contracts,⁶⁷ but only to apply rules. The definitive question when a case comes up on appeal is not whether the trial judge obtained the correct result, but whether the correct rules were applied. This was clearly exemplified in the provincial division decision in *Strydom v Aprox*⁶⁸ where Mavundla AJ found that High Courts could depart from pre-constitutional decisions of the Appellate Division (as it then was) when exercising their powers in terms of section 39(2) of the Constitution. This section provides: "[W]hen 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." The honourable judge thus came to the conclusion that the common-law rule that a contractual term contrary to public interest is unenforceable must be interpreted in the light of the Bill of Rights.⁶⁹ On appeal, the Supreme Court of Appeal found that the

64 At 475G-J and 476F-J. This decision was taken regardless of the fact that the court made reference to the excellent article on the topic by Neels "Die aanvullende en beperkende werking van redelikheid en billikheid in die kontraktereg" in 1999 *TSAR* at 700 as well as to the criterion adhered to by Zimmermann in his chapter on "Good faith and equity" in Zimmermann & Visser (n 4) 259f, ie a minimum level of respect for each other's interest, where an unreasonable and one-sided promotion of one's interests at the expense of the other would outweigh the sanctity of contract and empower the court to refuse enforcement.

65 (n 59) 21.

66 *Idem* at 40G-J 41A-B.

67 Hawthorne "Distribution of wealth, the dependency theory and the law of contract" 2006 *THRHR* 48 at 49ff.

68 2001 4 All SA 618 (T). In this case it was found that an exclusion of liability clause in a private hospital's admission contract, which also constituted a contract of adhesion, was unenforceable. The honourable judge relied on ss 27(1) and 39(2) of the Constitution, holding that the common-law rule that a contractual term contrary to public interest is unenforceable must be interpreted in the light of the Bill of Rights and the plaintiff's constitutional right to access to health care services. The High Court argued that the right to health care services entitled the claimant to have access to health care services provided in a professional manner with reasonable care. The indemnity clause protected the respondent against claims for negligence and thus curtailed the plaintiff's right to professional health care. On the basis that the plaintiff was denied this constitutional right, the High Court found the indemnity clause unenforceable.

69 At 627.

High Courts, when developing the common law in terms of section 39(2), are bound by all pre-constitutional Appellate Division decisions. Mavundla AJ in the court *a quo* had failed to apply the right rule, but had obtained a cooperatively-orientated result in opposition to classical market individualism, where self-reliance is the ruling ethic. It was the doctrine of *stare decisis* which prompted the Supreme Court of Appeal to come to this decision.⁷⁰ The Supreme Court of Appeal relied on *Govender v Minister of Safety and Security*,⁷¹ in which decision the Constitutional Court also embraced the tenets of formalism in regard to the application of the doctrine of *stare decisis*. In this regard the court held:

High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or [the Constitutional] Court does so in respect of a constitutional issue.⁷²

7 Realism

Legal realism departed from the premise that the law is out of touch with reality.⁷³ Its battle cry was contained in a statement made by Justice Holmes that “[t]he life of the law has not been logic, it has been experience”.⁷⁴ Realism challenged the orthodox claim that legal thought was separate and autonomous from moral and political discourse. The realist critique was directed at the orthodox classical contract theory which justified the unequal results of the self-executing market economy as being just and equitable because they reflected the unequal abilities that the individuals brought to the market. The orthodox theory still holds that any attempt at interventionism in order to achieve social justice by results subverts the legitimacy of the market process which is considered to be a neutral, apolitical arbiter of the fair and reasonable distribution of wealth.⁷⁵ The realists argued that the notion that the market constituted a system of free and voluntary exchange which reflected the

70 Cf *Afrox Healthcare Bpk v Strydom* (n 59) 40C-E where reference is made to Hahlo & Kahn (n 5) 224.

71 2001 4 SA 273 (SCA), [2001] 11 BCLR 1197 (CC), 2001 2 SACR 197 (SCA).

72 At 646F-I.

73 Horwitz *The Transformation of American Law, 1870-1960: The Crises of Legal Orthodoxy* (1992) ch 6 187. According to the author (at 169) “legal realism” refers to a school of thought represented mostly by law professors at Columbia and Yale Law Schools during the 1920s and 1930s. The great names are Karl Llewellyn and Robert Lee Hale at Columbia and Walter Wheeler Cook and Arthur Corbin at Yale.

74 *The Common Law* (1881) 1: “The life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories; intentions of public policy avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”

75 Horwitz (n 73) 194; Atiyah (n 26) 321ff.

results of a neutral market was fallacious.⁷⁶ Thus Cardozo stated “that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience”.⁷⁷ He attacked positivism and warned against its logical outcome: “The constant insistence that morality and justice are not law, has tended to breed distrust and contempt of law as something to which morality and justice are not merely alien, but hostile.”⁷⁸ The realist legacy is to be found in their emphasis of contextualising contractual adjudication in order to ground the law and to bring it into touch with reality. The realists have added a new dimension to the discourse by insisting that law should reflect and express a more complex social reality: law needs to mirror social relations.⁷⁹

The above explains that a formalist judicial approach stands in sharp contrast to that of realist judges who are today identified as being of consumer welfarist persuasion.⁸⁰ The fact that the market does not produce fair results was first noticed and remedied by the legislature. Thus, the notion of welfarism⁸¹ is particularly reflected in legislative interventionism.⁸² However, Brownsword describes how, in England and elsewhere, welfarist protection has gone beyond legislation.⁸³ He cites the conceptualisation of equitable estoppel, the doctrine of economic duress, the right to withdraw for breach of contract, and the recognition of consumer disappointment as a loss fit to be compensated by awards of damages as examples of this judicial activism.⁸⁴ This interventionism promotes fairness and reasonableness. A realist approach to adjudication emphasises the facts and the decision of a case rather than the rules.⁸⁵ Being

76 Horwitz (n 73) 195f.

77 Cardozo *The Nature of the Judicial Process* (1921) 133f.

78 Cardozo (n 77) 134: “The new development of ‘Naturanrecht’ may be pardoned infelicities of phrase, if it introduces us to new felicities of methods and ideals. Not for us the barren logomachy that dwells upon the contrasts between law and justice, and forgets their deeper harmonies.”

79 Horwitz (n 73) 209 provides an example of the practical influence of sociological jurisprudence on legal understanding.

80 Welfarist philosophy stands for a policy of consumer protection and for principles of fairness and reasonableness in contract. Cf the following contributions in Brownsword, Howells & Wilhelmsson (eds) *Welfarism in Contract Law* (1994): Brownsword “The philosophy of welfarism and its emergence in the modern English law of contract” 21ff, Wilhelmsson “The philosophy of welfarism and its emergence in the modern Scandinavian contract law” 63ff and Collins “Disclosure of information and welfarism” 97ff. See also Adams & Brownsword’s (n 39) detailed explanation of the tension which runs between the formalist, market-individualist-realist and consumer-welfarist-realist judicial approach to adjudication at 36-44, esp 42f as well as 187ff; Vittori “The socialisation of the law of contract” 2005 *De Jure* 81ff.

81 Brownsword “The philosophy of welfarism” (n 80) 21ff.

82 In England, eg, the *Consumer Credit Act* 1974 Eliz 2 c 39; the *Unfair Contract Terms Act* 1977 Eliz 2 c 50; the *Law Reform (Frustrated Contracts) Act* 1943 Geo 6 c 40 and the *Misrepresentation Act* 1967 Eliz 2 c 7. In South Africa this is to be found extensively in consumer legislation, eg *The Rental Housing Act* 50 of 2000, *Credit Agreements Act* 75 of 1980, *Usury Act* 63 of 1968, *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998, *Basic Conditions of Employment Act* 75 of 1997, *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000, *Employment Equity Act* 55 of 1998 and the *Consumer Credit Act* 34 of 2005.

83 Adams & Brownsword (n 39) 178.

84 Brownsword (n 80) 22f.

85 Adams & Brownsword (n 39) 187.

result orientated, realism supports innovation of doctrines and concepts. On occasion, the South African judiciary has also displayed strong realist tendencies. An important example in this regard is the decision in *Tuckers Land and Development Corporation (Pty) Ltd v Hovis*.⁸⁶ In this case, Jansen JA held that there should be a duty on a promisor not to commit an anticipatory breach of contract, and that it is accepted that an anticipatory breach constituted by the violation of an obligation *ex lege* flows from the requirement of good faith which underlies the law of contract.⁸⁷ A further example of realist adjudication is the honourable Justice Van Zyl's extension of the aedilician remedies to the seller in a trade-in agreement,⁸⁸ in circumstances where the trade-in vehicle had a latent defect, or an innocent but incorrect *dictum et promissum* had been made in respect of that vehicle. The learned judge based this extension on the basis that the principles of justice, equity, reasonableness and good faith are all norms inherent in the law of contract.⁸⁹ The court found justification for this bold step in the constitutional imperative that courts are to apply or to develop the common law where it does not give effect to the rights contained in the Bill of Rights.⁹⁰ Equality being one of these rights, Van Zyl recognised equity as a principle in the law of contract. Another decision in line with realist precepts was delivered in the Cape Provincial Division in *Miller and Another NNO v Dannecker*⁹¹ when the honourable Justice Ntzebeza found that a court may refuse to enforce an entrenchment clause should this result in a breach of the principle of good faith. In the earlier mentioned provincial decision of *Strydom v Afrox*,⁹² Mavundla AJ found that High Courts could depart from pre-constitutional decisions of the Appellate Division (as it was then) when exercising their powers in terms of section 39(2) of the Constitution. The learned judge found that the common-law rule in terms of which a contractual term contrary to public interest is unenforceable should be interpreted in the light of the Bill of Rights.⁹³ These decisions exemplify realist adjudication and are buds of realism grafted on the rootstock of the Constitution in opposition to the colonial legacy of formalism.

86 1980 1 SA 645 (A).

87 At 625D-G.

88 *Janse van Rensburg v Grieve Trust CC* 2000 1 SA 315 (C); Hawthorne "A new millennium a new approach" 2001 *THRHR* 511.

89 (n 88) 325C.

90 (n 88) 326E-F.

91 2001 1 SA 928 (C).

92 (n 68) 618ff.

93 *Idem* 627.

8 Constitutionalisation of the law

Formalism departs from the premise that law reform is the responsibility of Parliament and not the courtroom. On the one hand, the adoption of the Constitution of the Republic of South Africa, 1994⁹⁴ should have constituted a fundamental break with a formalistic approach to contract law.⁹⁵ On the other hand, positivism ought to compel adjudication in accordance with the rule-book, the rule-book in this instance being the Constitution. The advent of the Constitution should have signalled, as Mureinik advocated, a shift from a culture of authority to a culture of justification.⁹⁶ Formalism should have given way to realism where the emphasis is to be found in the result rather than the mechanical application of the rule.⁹⁷ Thus henceforth, the exercise of all public power ought to be justified in terms of democratic norms and values.⁹⁸ The mere invocation of authority for the proposition that something has been established by previous case law should no longer be decisive since all law and conduct are subject to the demand for public justification.⁹⁹ In *Baloro v University of Bophuthatswana*,¹⁰⁰ Judge President Friedman identified the difficulties associated with applying *stare decisis* to constitutional litigation:

The Courts in South Africa are now confronted by a rapid oscillation from the positivist jurisprudence founded on the sovereignty of Parliament to a jurisprudence based on the sovereignty of the law contained in the Constitution with a justiciable bill of rights.

Consequently, all law is now subject to the supremacy of the Constitution. We are in the unique situation that although our legal system is not codified, our Constitution instructs as to how the law should be developed and interpreted.¹⁰¹ All law, including common law, must be interpreted and developed to give effect to constitutional rights and values. South African law has taken a giant step forward with the achievement of constitutional supremacy and a justiciable Bill of Rights. In 1996, section 8(2) of the Constitution gave the Bill of Rights horizontal application. Furthermore, section 39(2) instructs the courts to interpret legislation and to develop the common

94 Act 200 of 1993.

95 Cf Woolman & Brand "Is there a Constitution in this courtroom? Constitutional jurisdiction after *Afrox* and *Walters*" 2003 *SAPR/PL* 37ff; Botha "Freedom and constraint in constitutional adjudication" 2004 *SAJHR* 276.

96 Mureinik "A bridge to where? Introducing the interim bill of rights" 1994 *SAJHR* 3; Botha (n 95) 275.

97 Adams & Brownsword (n 39) 187ff.

98 Botha (n 95) 275.

99 Botha (n 95) 276.

100 1995 4 SA 197 (B) 243; cf Woolman & Brand (n 95) 59ff.

101 The shift from parliamentary sovereignty to constitutional supremacy signals a shift from a culture of authority to a culture of justification: cf Mureinik (n 96) 3.

law and customary law in accordance with the spirit, purport and objects of the same Bill. Thus, the foundations are laid for an equitable development of the law of contract.

In essence the Constitution calls for a reappraisal of traditional ideas of the judicial function and of legal interpretation. It requires judges to engage in substantive legal reasoning, to articulate the values upon which their decisions are based and to engage with the social, historical and legislative context.¹⁰² Judges themselves are thus made subject to the demand for justification: rather than simply relying on a pre-existing rule or precedent, they are required to engage in value-based, contextual reasoning.¹⁰³

Consequently, the new constitutional dispensation promises to initiate new developments in the law of contract. 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. Judge Cameron of the Supreme Court of Appeal, in *Brisley v Drotzky*,¹⁰⁴ provides the following explanation for this situation: On the one hand the common law of contract is subject to the supreme law of the Constitution,¹⁰⁵ while on the other hand the Constitution enshrines the fundamental values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.¹⁰⁶ This requires a balance between contractual freedom and “securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity”.¹⁰⁷ Cameron AJA found further that the Supreme Court of Appeal has shown perceptive restraint in respect of freedom of contract despite the constitutional requirement that the courts, when developing the common law, promote the spirit, purport and objects of the Bill of Rights.¹⁰⁸ This has been possible as a result of the fact that the Constitution contains a variety of values which may in certain instances conflict. The chasm between equality and freedom is very evident in the law of contract, while human dignity is open for many interpretations. Although Cameron AJA held that it is not difficult to envisage situations in which contracts, which offend the fundamentals of our new social compact, will be struck down as being offensive to public policy,¹⁰⁹

102 Botha (n 95) 275f.

103 *Ibid.*

104 (n 52) 35ff.

105 *Idem* 35G-H.

106 *Idem* 37A.

107 *Idem* 36A; Hawthorne “The end of *bona fides*” 2003 *Merc LJ* 271.

108 *Brisley v Drotzky* (n 52) 35E-F.

109 in the *Brisley* case (n 52) 35B.

such situations have failed to materialise. The Supreme Court of Appeal has reservations regarding over-hasty or unreflective importation of *boni mores* into the field of contract law. It is also of the opinion that neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness, or to determine their enforceability on the basis of imprecise notions of good faith.¹¹⁰

9 Resistance to constitutionalisation based on the doctrine of *stare decisis*

In *Ex parte Minister of Safety and Security: In re S v Walters*¹¹¹ the Constitutional Court held that the High Courts must follow the interpretations of the Supreme Court of Appeal with regard to the interpretation of all forms of law. The High Courts are so obliged unless and until the Supreme Court of Appeal decides otherwise, or the Constitutional Court does so in respect of a Constitutional question.¹¹² In *Afrox Healthcare Bpk v Strydom* it was found that High Courts, when attempting to develop the common law or interpret legislation in accordance with the dictates of section 39(2) of the Constitution, are also bound by the decisions of higher tribunals given before the new constitutional era.¹¹³ In effect, these two cases hold that the High Courts have very little constitutional jurisdiction.

Section 39 (2) of the Constitution clearly exhorts development of the common law in accordance with the spirit and purport of the Bill of Rights. The Constitution itself is meant to be a measuring stick for settled areas of law. It is difficult to believe that the Constitution, which was meant to herald a new social order, precludes all courts, with the exception of the Supreme Court of Appeal and the Constitutional Court, from redressing past and present wrongs. Such an interpretation would imply that the drafters of the Constitution had enshrined pre-democratic, apartheid era values in our law. This would perpetuate the old tradition of authority when there should have been a change to a culture of justification.¹¹⁴

Woolman and Brand¹¹⁵ have provided solutions to this conundrum in their excellent, thought-provoking and enlightened essay. These authors plead for a

110 *Idem* 35C-E; cf Schauer "The jurisprudence of reasons" 1987 *Mich LR* 851 where he refers to Dworkin's opinion in *Law's Empire* (n 26) at 11-15 that the nature of appellate adjudication may influence the entire legal system.

111 2002 4 SA 613 (CC), [2002] 7 BCLR 663 (CC).

112 *Idem* 646F-I.

113 (n 59) 40B. See also Lubbe (n 57) 401ff.

114 Mureinik (n 96) 1.

115 (n 95) 37.

softened doctrine of *stare decisis* since constitutional adjudication is heavily laden with prevailing values which change rapidly, especially in a heterogeneous society which has moved to a democracy within a very short space of time.¹¹⁶ After *Afrox* and *Walters*, the High Courts at present appear to have little opportunity to develop the common law as required by section 39(2) of the Constitution.

10 Conclusion

The Eurocentric nature of the South African common law has cast some doubt over its prospects of survival under the new constitutional dispensation. The view of Justice Albie Sachs that our Eurocentric rules have become Africanised has prevailed:

Shorn of their associations with domination, there is no reason why these institutions should not be taken over and infused with a new spirit so as to serve the people as a whole rather than just a minority.¹¹⁷

Whether contract law adjudication has upheld these sentiments is debatable. When the dictum of Cameron AJA in *Brisley v Drotsky* – where the learned judge chooses clearly in favour of freedom in the eternal tension between freedom and equality – is viewed in the context of Schauers' observation that the nature of appellate adjudication influences the entire legal system, the answer may be negative. However, in view of the force of our legal tradition, the fact that small steps in a realist direction have been made should not be underrated but rather commended.

116 (n 95) 71ff.

117 Sachs *The Future of Roman-Dutch Law in a Non-Racial Democratic South Africa: Some Preliminary Observations* (1989) 3f.