

**CONSTITUTIONALISING CONTRACT LAW: IDEOLOGY,
JUDICIAL METHOD AND CONTRACTUAL AUTONOMY**

Thesis submitted by

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I declare that this thesis is my own, unaided work. I further declare that this thesis has never before been submitted for any degree or examination in any university.

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Deeksha Bhana
20 May 2013

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CONSTITUTIONALISING CONTRACT LAW: IDEOLOGY, JUDICIAL METHOD AND CONTRACTUAL AUTONOMY

ABSTRACT:

This thesis develops a conceptual framework which represents a systematic, integrated approach to the constitutionalisation of the common law of contract. Although it is beyond doubt that the Bill of Rights must apply horizontally to contract law, there is still considerable debate about the *manner* in which the system of contract law should be constitutionalised. The thesis begins with an analysis of the respective roles of ss 8 and 39 of the Constitution and finds that they call for the constitutional development to take place within the common law framework, though with constitutional adjustments as required. Whilst the entire body of contract law must be constitutionalised incrementally over time (within the common law tradition), constitutional justice must be done simultaneously in every contract case too. The thesis interrogates the substance, form and attending legal mechanics of operation of contractual autonomy; the idea being that a constitutionalisation of contractual autonomy would in effect constitutionalise or, at the very least, set the stage for the constitutionalisation of contract law in its entirety. The thesis proceeds to unpack the classical liberal underpinnings of contractual autonomy and to tease out its internal (content) and external (reach) dimensions. It highlights contractual autonomy's preference for an atomistic, independent conception of the contracting self as bolstered by strongly individualist values, and explains that this is out of step with the constitutional vision of a more contextual, interdependent, conception of the self as grounded in collectivist values. Rather, a fluid triage comprising the foundational constitutional values of freedom, dignity and equality, which is cognisant also of the rights enumerated in the Bill of Rights, must now form the basis of contractual autonomy. Moving to the legal methodology employed in the common law of contract, the thesis shows how the extant contract law machine ensconces the classical liberal conception of freedom of contract and thereby mostly frustrates bona fide efforts to constitutionalise the contract law. It thus argues that the legal methodology must be adjusted so that it dovetails likewise with the foundational constitutional triage's basis of contractual autonomy. Finally, the thesis considers the practical implications of its argument by applying the triage in a number of concrete contexts. Focusing on the economic right to freedom of trade, occupation and profession, the civil-political right to freedom of religion, belief and opinion and the socio-economic right of access to health care services, it shows how a proper (substantive and methodological) invocation of the triage in relation to the internal and external dimensions of contractual autonomy can resolve much of the uncertainty surrounding the question of how precisely to approach the process of constitutionalising contract law.

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CHAPTER 1

INTRODUCTION

1.1 THE BROADER GOAL OF CONSTITUTIONALISING THE COMMON LAW OF CONTRACT

“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 [*my emphasis*].”¹

The Bill of Rights in Chapter Two of the Constitution of the Republic of South Africa² is horizontally applicable.³ What this means is that the domain of the Bill of Rights extends beyond the traditional constitutional supervision of public power; it seeks also to deal with private power as exercised between private individuals and sanctioned by the long-established common law.⁴

In broad terms, the Constitution envisions a democratic South African society based on the core values of “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms”;⁵ a society based on “social justice and [an] improved quality of life for all of its citizens”, where every person has a genuine opportunity in substance, (as opposed to a mere formal opportunity),⁶ to unlock his or her potential and so realise his or her vision of the good life.⁷ In other words, the Constitution strives for a

¹ *Pharmaceutical Manufacturers of South Africa: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 44 (per Chaskalson P). See also *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at paras 88-95; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras 17-24; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at para 6; *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at para 15.

² Act 108 of 1996. Hereinafter referred to as the ‘Constitution’ or the ‘final Constitution’.

³ As per ss 8 and 39(2) of the Constitution.

⁴ Halton Cheadle and Dennis Davis ‘Structure of the Bill of Rights’ in MH Cheadle; DM Davis and NRL Haysom *South African Constitutional Law The Bill of Rights* 2ed (2005 Issue 13 September 2012) chapter 1; Stuart Woolman ‘Part II – Bill of Rights: Application’ in Stuart Woolman, Michael Bishop; Jason Brickhill; et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4 2012) chapter 31 at 31.1; Hector L MacQueen ‘Delict, contract, and the Bill of Rights: A perspective from the United Kingdom’ (2004) 121 *SALJ* 359 at 361; Danwood Mzikenge Chirwa ‘The horizontal application of constitutional rights in a comparative perspective’ (2006) 10 *Law, Democracy & Development* 21 at 21-22. See also Dennis M Davis and Karl Klare ‘Transformative constitutionalism and common and customary Law’ (2010) 26 *SAJHR* 403 especially at 408-431.

⁵ As per s 1(a) of the Constitution.

⁶ i.e. the individual must be in a position where he or she is able to make an actual choice in reality as to whether to exploit the opportunity or not. This is a significantly different position from that of an individual being afforded such opportunity in the abstract.

⁷ Davis and Klare op cit note 4 at 410 quoting *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, amici curiae)* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 36. See also the preamble; s 1; s 7 of the Constitution.

substantively progressive society which recognises that, in moving forward, past wrongs have to be righted constructively in a manner that eliminates the socio-economic inequalities fostered by the apartheid regime,⁸ restores basic human dignity and espouses freedom in all spheres of an individual's life.⁹

Importantly, the constitutional aspiration of a substantively progressive and transformed society is for South Africa *as a whole* where the classical liberal divide between the public (State) and the private (market) can no longer hold, (at least not to the same degree).¹⁰ In the post-apartheid era, it must be appreciated that the wielding of socio-economic power is not limited to the public arena.¹¹ On the contrary, the private sector is a key player in the South African economy. The power wielded by private actors is often comparable to, if not greater than, that of the State itself.

⁸ These inequalities have been fostered also by patriarchy, colonialism, social hierarchies and status relationships. In this thesis, references to apartheid must be understood to encompass these power structures too.

⁹ At the broader level therefore, the Constitution articulates both the *South African society* that it envisions as well as the ideal of the *constitutional self* living in such society. See further Lucy Williams 'The legal construction of poverty: Gender, "work" and the "social contract"' (2011) 22 *Stell LR* 463 at 468-470; 476-481; Sandra Liebenberg *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) at chapter 7; Sandra Liebenberg 'Grootboom and the seduction of the negative/positive duties dichotomy' (2011) 26 *SA Public Law* 37 at 45-48; DM Davis 'Developing the common law of contract in the light of poverty and illiteracy: The challenge of the Constitution' (2011) 22 *Stell LR* 845.

¹⁰ Deeksha Bhana and Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *SALJ* 865 at 866-872; Cheadle and Davis op cit note 4; Halton Cheadle 'Application' in MH Cheadle; DM Davis and NRL Haysom *South African Constitutional Law The Bill of Rights* 2ed (2005 Issue 13 September 2012) chapter 3. See also Duncan Kennedy 'The stages of the decline of the public/private distinction' (1982) 130 *University of Pennsylvania Law Review* 1349. For a further discussion of the public-private divide, see 1.3.1 below.

¹¹ See PJ Sutherland 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 CC – Part 1' (2008) 19 *Stell LR* 390 at 396:

"...The Constitution makes a clear break with the preceding legal order. It is impossible to think that this break should not also have profound consequences for horizontal relationships. Many of the abuses of the apartheid system and much of the exploitation that marked apartheid society occurred on a horizontal level. Private law assisted in creating the values of apartheid South Africa against which the Constitution turns its face: equality must replace inequality, dignity repression and transparency suppression of information. A restrictive approach would rely on the public-private divide to an extent that simply does not accord with the basic tenets of our Constitution and society."

See also Halton Cheadle and Dennis Davis 'The application of the 1996 Constitution in the private sphere' (1997) 13 *SAJHR* 44 at 50; Sandra Liebenberg 'The application of socio-economic rights to private law' (2008) *TSAR* 464 at 464-465; 469; MacQueen op cit note 4 at 361-363; Johan Van der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *SAJHR* 341 at 352-355; Christopher J Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19 *SAJHR* 57 at 59-62; Woolman op cit note 4.

For the most part, the current distribution of wealth and the resulting power dynamics within the private market is a product of the socio-political as well as legal structures of the apartheid regime.¹² The classical (private) common law structures,¹³ although seemingly 'value-neutral' when considered in the abstract, implicitly endorsed the carefully engineered patterns of wealth and power of the apartheid society in which they applied.¹⁴ Accordingly if the substantively progressive and transformative vision of the Constitution is to become a reality in South Africa, it is not sufficient to transform our social and political institutions. The South African *legal* enterprise, including the *private legal enterprise*, likewise must conform to, and if necessary, be re-aligned with, our constitutional goals.¹⁵ The law cannot tolerate a perpetuation of the apartheid legacy by virtue of continuing pre-constitutional socio-economic power relations in the private arena.

Historically, the common law of contract has been hegemonic in relation to other spheres of private law.¹⁶ In this tradition, contract law ought therefore, to take a leading role in private law's working towards the Constitution's goals. Yet, there is considerable ambivalence about the precise interplay between the Bill of Rights and contract law; an ambivalence which reveals itself in the debate about the *extent to which*, and the *manner in which*, our system of contract law should be constitutionalised.

In *Brisley v Drotzky*¹⁷ the Supreme Court of Appeal, (hereinafter referred to as the SCA), situated the existing common law of contract within the constitutional context. Briefly stated, Cameron JA (as he then was) emphasised the point that the Bill of Rights applies to the common law of contract and that, from now on, the development of contract law by the courts must promote the Bill of Rights' spirit, purport and objects.¹⁸ Cameron JA

¹² Ibid.

¹³ Briefly stated, the classical common law structures are rooted in classical liberalism and *laissez faire* ideology. For a detailed discussion of these concepts, see chapter 2 at 2.2.1.

¹⁴ Deeksha Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *SAJHR* 300 at 302-303.

¹⁵ As per s1 of the Constitution; Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 156; Davis and Klare op cit note 4 at 408-413; MacQueen op cit note 4 at 361; Williams op cit note 9 at 468-470.

¹⁶ On the traditional hegemony of contract law, see generally, Alfred Cockrell 'The hegemony of contract' (1998) 115 *SALJ* 286.

¹⁷ *Brisley* supra note 1 at paras 88-95.

¹⁸ *Brisley* supra note 1 at para 88.

further identified the contractual doctrine of legality, with its concept of ‘public policy’,¹⁹ as the appropriate portal for the constitutionalisation of contract law:

“In its modern guise, ‘public policy is now rooted in our Constitution and the fundamental values it enshrines.”²⁰

In terms of the foundational values of freedom, dignity and equality then, Cameron JA explained that the value of freedom encapsulates the fundamental principle of freedom of contract and the attending maxim *pacta sunt servanda* (contracts must be honoured).²¹ Furthermore, the value of human dignity complements the value of freedom in the sense that individual contractants locate their dignity in their freedom to govern their own lives by deciding for themselves whether, and if so, on what terms to contract. At the same time, Cameron JA pointed out that any ‘obscene excesses’ of autonomy must be rejected as counter-intuitive to individual dignity and self-respect.²² The values of freedom and dignity thus require the courts to continue to exercise ‘perceptive restraint’ when deciding whether to strike down or refuse to enforce a contract on the basis that it is against public policy; an ‘obscene excess’ of autonomy being the exception, rather than the norm.²³

Shortly thereafter, in *Afrox Healthcare Bpk v Strydom*,²⁴ the SCA also recognised that the value of equality is relevant insofar as parties are presumed to contract on an equal footing and therefore, to exercise actual freedom of contract. Accordingly, where there is evidence of unequal bargaining power, it

¹⁹ In terms of our contract law, if a contract is held to be against public policy, it is illegal and therefore void and unenforceable. In brief, common law illegality is based on common law rules (eg. the *in duplum* rule or the general prohibition against champerty) and broader open-ended standards that have developed over time. The latter comprise the *boni mores* (eg. a slavery or prostitution agreement is said to be *contra bonos mores*), public policy (eg. a contract that undermines the administration of justice is said to be against public policy) and the broader public interest. Although there are subtle distinctions between each of these standards, these distinctions are not significant for the purposes at hand. Accordingly, unless otherwise stated, any reference to public policy should be understood to encompass all of these bases. For a detailed discussion of legality of contracts see SWJ (Schalk) Van der Merwe, LF Van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* 4ed (2012) at chapter 7.

²⁰ *Brisley* supra note 1 at para 91.

²¹ *Brisley* supra note 1 at para 94. See also *Afrox* supra note 1 at paras 17-24 where freedom of contract was itself held to be a constitutional value.

²² *Brisley* supra note 1 at paras 94-95.

²³ *Brisley* supra note 1 at paras 92-94. In *casu*, the Cameron JA held that the value of equality was not relevant as the clause in question protected both parties (at para 90).

²⁴ *Afrox* supra note 1 at para 12.

must be taken into account so as to ensure that contractual autonomy is not undermined.²⁵

To sum up, *Brisley* and *Afrox* set the stage for the broader constitutionalisation of our law of contract in an autonomy-based (empowerment) image of the values of freedom, dignity and equality. Indeed, this has become the foundation of further SCA judgments,²⁶ as well as the first Constitutional Court (hereinafter referred to as the CC) judgment, dealing with the constitutionalisation of contract law.²⁷

Even so, commentators are critical of the results yielded by these cases. The cases, despite ostensibly aligning the common law of contract with the Bill of Rights, seem to leave contract law largely intact and unaffected by the Bill of Rights, often with results that appear to be patently unfair to individual contractants and inimical to the transformative aspirations of the Constitution. Rather, they seem to valorise the unequal and unjust status quo.

Some commentators have ascribed such results to the manner in which the courts have aligned themselves unquestioningly with the underpinning classical liberal ideology and ensuing laissez faire conception of contractual autonomy.²⁸ To expound, the courts continue uncritically to apply the individualist paradigm of classical contract law, to regulate market transactions, where the continued preference for 'self-interest, self-reliance and self-determination' effectively maintains status quo distributions of wealth and power, as fostered by apartheid.²⁹ In adopting this approach, it is argued that the courts fail to take sufficient cognisance of the significantly altered legal

²⁵ *Afrox* supra note 1 at para 12; *Napier* supra note 1 at paras 8; 14.

²⁶ See for instance *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at para 12; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 12; *Napier* supra note 1 at paras 11-14.

²⁷ *Barkhuizen* supra note 1 at para 57. The discussion here elaborates on arguments advanced in Bhana op cit note 14 at 300-301.

²⁸ I, myself, have argued along these lines: Deeksha Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 *SALJ* 269; Bhana and Pieterse op cit note 10. See further Jonathan Lewis 'Fairness in South African contract law' (2003) 120 *SALJ* 330; Luanda Hawthorne 'The principle of equality in the law of contract' (1995) 58 *THRHR* 157; Gerhard Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *SALJ* 395; Dire Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Healthcare v Strydom*' (2002) 17 *SA Public Law* 473; Kevin Hopkins 'Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm' (2002) 119 *SALJ* 155.

²⁹ Bhana op cit note 28 at 273-278 and authorities cited there; Cheadle and Davis op cit note 11 at 50; 56; Van der Walt op cit note 11 at 360-363; Roederer op cit note 11 at 61-62.

context of post-apartheid South Africa, with the result that our established body of contract law is mostly non-responsive to the substantively progressive and transformative socio-economic goals of the Bill of Rights. So, whereas the courts ostensibly have constitutionalised the classical liberal conception of contractual autonomy, they have failed actually to transform it.

Other commentators have gone a different route to argue that the problem lays not so much with the substance of contractual autonomy employed by the courts, as it does with the very *concepts* of our common law of contract and their application.³⁰ Briefly stated, it is argued that, in the context of a constitutional question, the invocation of common law concepts within the established common law framework, (coupled with its accepted methodology in applying the common law concepts), is inclined to conflate “rights analysis, value analysis and public-policy analysis”.³¹ This approach, it is argued, undermines the general spirit, purport and objects of the Bill of Rights and the substantive rights³² that are enshrined therein. So, the basic charge against the courts here is that their adoption of a common-law-centred approach avoids substantive engagement with the fundamental rights enumerated in the Constitution, with the result that the values which underpin them, including the foundational constitutional values, fail significantly to impact on the law of contract.

This thesis reconciles and adds to these two explanations of a constitutionalised contract law, by locating the cause for the criticisms at once in ideology and methodology, and investigating the links between them.³³ Beginning with ideology, I will investigate contract law’s classical liberal underpinnings and explain why its laissez faire conception of contractual autonomy may fall short of what the Constitution envisions for contractual

³⁰ See generally Stuart Woolman ‘The amazing vanishing Bill of Rights’ (2007) 124 *SALJ* 762; Stuart Woolman ‘Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*’ (2008) 125 *SALJ* 10; IM Rautenbach ‘Constitution and contract – Exploring “the possibility that certain rights may apply directly to contract terms or the common law that underlies them”’ (2009) *TSAR* 613. See further IM Rautenbach ‘Constitution and contract: The application of the Bill of Rights to contractual clauses and their enforcement *Bredenkamp v Standard Bank of SA Ltd* 2010 9 *BCLR* 892 (SCA)’ (2011) 74 *THRHR* 510.

³¹ Woolman (2007) op cit note 30 at 772.

³² In this thesis I use the term ‘substantive rights’ loosely to denote the human rights enumerated in ss 9-35 of the Bill of Rights. From time to time, I also refer to these rights as ‘enumerated’ or ‘listed’ rights.

³³ Bhana op cit note 14 at 301.

autonomy. In doing so, I endeavour also to develop a conceptual framework for the effective constitutionalisation of contractual autonomy, both, in terms of the foundational values of freedom, dignity and equality, as well as the substantive rights enumerated in the Bill of Rights. Thereafter, I intend to shift focus to the methodology dimension of contract law. In terms of methodology, I will interrogate the contract law mechanism as currently employed by the courts. In particular, I plan to canvass the general configuration of contract law rules, standards and principles and the manner in which they are applied by our courts, individually and jointly, to produce the legal outcomes that they do. Here, I hope to show how the courts' application of our contract law concepts is also intertwined with classical liberal ideology and so requires constitutional interrogation too. Finally, I will venture to consolidate the ideology and methodology foundations of this thesis, and consider their practical implications for the actual constitutionalisation process of our common law of contract by the courts, firstly, in terms of the foundational values and then, the enumerated substantive rights. In relation to the latter, I will consider the application of three different rights in several concrete contexts that involve contracts and demonstrate how courts ought properly to approach and resolve such cases.

The arguments in the thesis are framed by the implications of the more immediate debate between 'direct' and 'indirect' horizontal application for the above-outlined accounts. Notably, a seeming parallel between the ideology-methodology critiques and the direct-indirect horizontality debates has emerged: whereas proponents of the ideology critique prefer an indirect horizontal application of the Bill of Rights (through invocation of the common law framework), proponents of the methodology critique argue for a more direct form of horizontality that would bypass the challenges presented by contract law in its present form.³⁴

³⁴ Compare for instance, Cheadle and Davis op cit note 11; Van der Walt op cit note 11 and Lubbe op cit note 28, with Roederer op cit note 11; Woolman (2007) op cit note 30. Note further, that when I use the phrase 'common law framework', I mean the more concrete legal structure within which the rules, standards, principles, etc. of the common law of contract operate, rather than intangible common law sensibilities or logic. Similarly, the notion of the 'Bill of Rights' framework' refers to the more concrete constitutional legal construct, within which the foundational values and enumerated rights operate, rather than the more abstract constitutional mindset.

Therefore, the next section of this chapter will explain the South African concept of horizontality as it underlies this thesis. In particular, it will show how the final Constitution largely transcends the direct-indirect horizontality debate and sets out the distinct roles that are to be played by the relevant sub-sections of ss 8 and 39 in the process of constitutionalising our common law of contract. Thereafter, section 1.3 will tease out the interplay between the values and rights within the Bill of Rights framework, and explain their horizontal impact upon the underpinning ideology and methodology that animates the traditional common law concept of contractual autonomy. Finally, section 1.4 will set out the basic aims, objectives and premises of the thesis, together with a breakdown of what will be done in each subsequent chapter.

1.2 THE APPLICATION DEBATE: DIRECT VERSUS INDIRECT HORIZONTALITY

In relation to the application of the Bill of Rights of the final Constitution, the horizontality debate has focused on whether direct or indirect horizontal application is to be preferred, the received premise being that the Bill of Rights must apply to contract law.³⁵ In this respect, ss 8 and 39(2) of the Bill of Rights have occupied centre stage where the former section generally is associated with direct horizontality and the latter with indirect horizontality.³⁶ Yet, confusion abounds; upon perusal of the cases and academic writings in this area, one uncovers a dissonance that extends to the very definition of 'direct versus indirect horizontality'.³⁷ Accordingly, I begin by canvassing the main conceptions of this distinction.

³⁵ See for instance Woolman (2007) op cit note 30; Iain Currie and Johan De Waal *The Bill of Rights of Handbook* 5ed (2005) at chapter 3; Cheadle and Davis op cit note 11; Chris Sprigman and Michael Osborne 'Du Plessis is *not* dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *SAJHR* 25; Roederer op cit note 11; Van der Walt op cit note 11.

³⁶ *Ibid.*

³⁷ Sutherland op cit note 11 at 396; Frank I Michelman 'On the uses of interpretive 'charity': Some notes on application, avoidance, equality and objective unconstitutionality from the 2007 term of the Constitutional Court of South Africa' (2008) 1 *Constitutional Court Review* 1 at 5, make the same point. See more generally, Alistair Price 'The influence of human rights on private common law' (2012) 129 *SALJ* 330.

1.2.1 Conceptions of ‘direct versus indirect horizontality’

(a) Law versus conduct

The South African distinction between direct and indirect horizontality, in its earliest and most rudimentary form, depends on whether or not the common law acts as the portal through which the Bill of Rights applies to a legal dispute between private individuals. Articulated further, indirect horizontality contemplates an indirect application of the Bill of Rights to private legal disputes, by way of an intermediate invocation of the common law framework, together with its legal process of interpreting, applying and (where required), developing new common law rules and standards, in accordance with the dictates of the Bill of Rights. In contrast, direct horizontality contemplates a direct application of the Bill of Rights to the conduct of private individuals, meaning that a plaintiff can rely directly on a particular substantive right, (insofar as it is applicable to private individuals), to found a cause of action and the defendant, likewise is able to do so for the purposes of raising a defence.³⁸

This basic distinction reflects the conventional distinction between law and conduct, derived from the interim Constitution.³⁹ Under the interim Constitution however, there was no clear indication of horizontal application, except for s 35(3), in terms of which, it was argued that the Bill of Rights should regulate law, rather than conduct. The debate related primarily to the initial question of *whether, (and if so, the extent to which)*, the Bill of Rights found horizontal application, rather than, the ensuing question regarding the *form (or manner)* of such application.⁴⁰ In the seminal case of *Du Plessis and Others v De Klerk and Another*⁴¹ the majority of the CC, guided by the text of the interim Constitution, articulated the contemplated function and reach of the Bill of Rights, in terms of a traditionally verticalist constitutional framework, so that, the Bill of Rights applied neither directly to private conduct, nor indirectly to the

³⁸ Cheadle op cit note 10 at 3-4.

³⁹ of the Republic of South Africa, Act 200 of 1993. Hereinafter referred to as the ‘interim Constitution’.

⁴⁰ On the distinction between law and conduct, see Cheadle op cit note 10 at 3-5, who argues that emphasis should be on the Bill of Rights’ regulation of law as opposed to conduct. See also Michelman op cit note 37 at 6-7, who submits that s 8(3) renders this distinction redundant under the final Constitution.

⁴¹ 1996 (3) SA 850 (CC).

common law, unless, the State was a party to the dispute.⁴² Additionally, s 7(1)'s non-inclusion of the 'judiciary', as one of the State organs bounded by the Bill of Rights, meant that a common law dispute between private parties that was brought before a court of law, was not open to an importation of the US doctrine of State action⁴³ potentially to permit a 'backdoor-horizontal application'⁴⁴ of the Bill of Rights. On the contrary, s 7(1)'s omission of the 'judiciary' was held to qualify the reach of s 7(2)'s directive (i.e. that the Bill of Rights "shall apply to all law"), so that, the common law, as applied between private parties, was not subject to any definitive Bill of Rights' review (i.e. the common law was at least not subject to review in terms of the Bill of Rights' substantive rights' provisions).⁴⁵

This general position was nonetheless subject to a caveat - in terms of s 35(3), the common law was subject to the Bill of Rights in the sense that it required a court to have "due regard" to the general "spirit, purport and objects" of the Bill of Rights when interpreting, applying and/or developing the common law.⁴⁶ It would appear therefore, that in *Du Plessis v De Klerk*, the CC ultimately did sanction some form of horizontality which, in terms of the 'law versus conduct' distinction, would comprise indirect horizontality. That this was so was particularly evident from Mahomed DP's concurrence with the majority judgment. Although concerned about the danger of a privatised apartheid within our constitutional dispensation,⁴⁷ Mahomed DP felt reasonably assured that s 35(3) was robust enough to curb such danger, by way of an aligning of the common law with the Bill of Rights.⁴⁸ So, the key would be to focus on the

⁴² *Du Plessis* supra note 41 at paras 44-49; 60-66 - As per ss 7; 33(4); 35(3) of the interim Constitution. See further the summary by Woolman op cit note 4 at chapter 31.2.

⁴³ As formulated in *Shelley v Kraemer* 334 US 1 (1948). In terms of the State action doctrine, the use of State machinery (including the judiciary) to enforce a private claim (as founded in the common law), constitutes State action, and thus subjects the claim to the application of the Constitution. See *Du Plessis* supra note 41 at para 47.

⁴⁴ I use this phrase to denote the formalistic manipulation of what, in substance, would comprise a species of horizontal application of the Bill of Rights, to fit the mould of vertical application of the Bill of Rights. For a critique of the State action doctrine, see Sprigman and Osborne op cit note 35 at 32-33; Chirwa op cit note 4 at 22-26 and the authorities cited there. See also 1.2.2(a)(i) loc cit note 79.

⁴⁵ *Du Plessis* supra note 41 at paras 44-46; Woolman op cit note 4 at chapter 31.2(b).

⁴⁶ Section 35(3) of the interim Constitution reads:

"In the interpretation of any law and the application and development of common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter."

⁴⁷ *Du Plessis* supra note 41 at para 75 ffg. See also the judgment of Madala J at para 163 (as quoted in Cheadle and Davis op cit note 11 at 56).

⁴⁸ *Du Plessis* supra note 41 at para 87.

constitutional muster of the applicable rules (and standards) of the common law and not on the conduct of the parties *per se*.

That being said, the majority court, having focused on the ‘vertical-horizontal’ application debate, was not very forthcoming about the precise implications of s 35(3) as a species of indirect horizontality, or even, horizontality generally. For instance, in what sense, and/or to what extent, was a court to have “due regard” to the Bill of Rights? Furthermore, what comprised the “spirit, purport and objects” of the Bill of Rights - ought courts to focus exclusively on the “spirit, purport and objects” of the founding values of freedom, dignity and equality or ought they to pay attention also to those of the specific substantive rights enshrined in the Bill of Rights? In the final event, how did s 35(3) envisage revision of the common law – did it contemplate incremental development, by way of a gradual infusion of constitutional values within the common law tradition, or was a more direct overhaul of the common law required?⁴⁹

To sum up, the court’s fluidity, in its employment of the language of horizontality, failed to provide concrete guidance - the language of ‘direct versus indirect horizontality’ was so enmeshed in that of the more pressing ‘vertical-horizontal’ distinction, that the particulars of the former distinction were obscured, rather than elucidated, by the court. Accordingly, the usefulness of the court’s distinction between direct and indirect horizontality does not extend much beyond the vertical-horizontal debate. It is nevertheless, instructive for the purposes of highlighting what ought to be two distinct, (albeit related), legs of the horizontality debate viz. the *scope* (content)⁵⁰ of horizontal application of the Bill of Rights and the *form* (method)⁵¹ of such application (i.e. direct or indirect application).⁵²

⁴⁹ Stuart Woolman ‘Application’ in Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz and Stuart Woolman (eds) *Constitutional Law of South Africa* (1996) (Revision Service 5 1999) chapter 10 at 10-40.

⁵⁰ By ‘*scope (content)*’ leg of horizontal application of the Bill of the Rights I mean *to what extent* does the Bill of Rights apply to the common law? Phrased differently, what is the *specific content* of the Bill of Rights that applies horizontally to the common law?

⁵¹ By ‘*form (method)*’ leg of horizontal application of the Bill of Rights I mean *how* does the Bill Rights apply horizontally to the common law? It is here, therefore, that the conceptions of direct and indirect horizontality are most relevant.

⁵² Michelman *op cit* note 37 at 3; 7.

The final Constitution appreciates this nuance: inasmuch as it accepts and delineates the scope of horizontal application of the Bill of Rights, it also adopts as the basic principle for the ensuing form of such application, that the *common law* must act as the medium through which private conduct is subjected to the Bill of Rights.⁵³ This stands to reason, given that the object of the common law has always been to regulate such private conduct, which it deems worthy of legal attention. In the final event, where the extant law fails (effectively) to distinguish such private conduct, which the Bill of Rights would now insist upon regulating, it would again be the *law* that would need to be reformed accordingly.⁵⁴ The secondary level of the ‘direct-indirect’ horizontality distinction is thus brought into play.

(b) Rights versus values based analysis

At the secondary level, the distinction between direct and indirect horizontality focuses on the nature of the legal analysis, the question being whether the Bill of Rights applies directly or indirectly to the common law. Articulated further, direct horizontality entails a *rights-based analysis*, in terms of which, the common law is tested directly against the substantive rights, as embodied in the relevant provisions of the Bill of Rights.⁵⁵ In other words, direct horizontality contemplates a testing of common law rules and standards *outside* of the traditional common law framework. Rather, the Bill of Rights’ legal framework, (coupled with *its* methodology), finds application.⁵⁶ Direct horizontality thus focuses on the particular substantive right invoked by a claimant, and considers firstly, whether the right is horizontally applicable, secondly, whether it has in fact been infringed by the relevant common law rule (or standard), and thirdly, whether such infringement of the right constitutes a reasonable and justifiable limitation, in terms of s 36(1) of the Constitution. Finally, to remedy the unconstitutionality of the common law rule (or standard), a Court has a variety

⁵³ Cheadle op cit note 10 at 3-5 to 3-6; 3-9 to 3-10. See also the discussion of ss 8(3) and 39(2) in 1.2.2 below.

⁵⁴ As per s 8(2) read with s 8(3) of the Constitution; Cheadle op cit note 10 at 3-6; Woolman op cit note 4 at chapter 31.1(c); Currie and De Waal op cit note 35 at 49-50. See further the Hohfeld ‘privilege-liberty/no right’ distinction, as discussed in Wesley N Hohfeld ‘Some fundamental legal conceptions as applied in judicial reasoning’ (1913-1914) 23 *Yale Law Journal* 16 especially at 30.

⁵⁵ As set out in ss 9 to 35 of the Constitution.

⁵⁶ Currie and De Waal op cit note 35 at 34 (especially footnote 9); 49.

of constitutional remedial options at its disposal, including the developing, striking down or replacing of the common law – ultimately, a constitutional body of contract law, as per the Bill of Rights’ framework, is envisaged.⁵⁷

In relation to contracts between private parties therefore, direct application of the Bill of Rights will entail abandoning the common law of contract’s methodology, in favour of the Bill of Rights’ methodology.⁵⁸ This, in turn, will impact on the nature of the constitutional development of our contract law and moreover will situate any such development outside the extant common law of contract. Presumably, the parallel *constitutional* law of contract, as developed by the direct horizontal application of the Bill of Rights, eventually will replace its common law counterpart.

Understandably, contract lawyers tend to be circumspect of this approach to the constitutionalisation process, because the contemplated replacement would occur, presumably, only to the extent that current contract law rules (and standards) are held to be unconstitutional. Further, the constitutional remedies are relatively new and untested in the private domain, with few guidelines on when to invoke which remedy from the wide range of options. The envisaged *constitutional* law of contract therefore poses a real risk of being piecemeal, incomplete and unpredictable.⁵⁹

Indirect horizontality on the other hand, entails a *values-based analysis*, in terms of which, the Bill of Rights constitutes the ‘objective normative value system’ that must inform the interpretation, application and development of the rules (standards, and remedies) of the common law.⁶⁰ Importantly, indirect horizontality contemplates a constitutionalisation of the common law of contract from *within* i.e. by invocation of the common law’s legal framework, coupled with *its* concepts and methodology.

⁵⁷ Woolman (2007) op cit note 30 at 763; 768-769; 775-776; Woolman (2008) op cit note 30 at 14; Currie and De Waal op cit note 35 at 34 (especially footnote 9); 32; 50-52. See further, Roederer op cit note 11 at 71, on the undesirability of a ‘bifurcated’ approach where constitutional rules (rather than common law rules) regarding standing, damages etc. would apply.

⁵⁸ Woolman (2007) op cit note 30 at 763; 772-781; Van der Walt op cit note 11 at 355.

⁵⁹ Bhana op cit note 14 at 308-309. See also Van der Walt op cit note 11 at 359.

⁶⁰ Bhana op cit note 14 at 308; Currie and De Waal op cit note 35 at 32; 34-35. See also *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at para 40.

In the common law of contract, a foremost portal for horizontal application would comprise the doctrine of legality and its public policy scale.⁶¹ Briefly stated, the doctrine of legality determines the lawful reach of contractual autonomy, and thus of contracts generally, in light of competing policy considerations and foundational contract law values.⁶² Further, the public policy scale guides the balancing process by which the legal (and socio-economic) desirability of contracts are determined. So, the general idea under indirect horizontality would be to continue to invoke the legality doctrine's public policy scale, but at the same time, to infuse its content and method of application with the values espoused by the Bill of Rights.⁶³

Additionally, the "common-law method of decision making"⁶⁴ envisages the gradual evolving of contract law into an integrated, *constitutionalised* body of modern contract law. This approach to the constitutionalisation process is what 'contemporary' contract lawyers prefer, because such engagement with contract law, within the common law tradition of incremental development of the law over time, is familiar. More importantly, they trust it for being systematic and maintaining a strong coherence of legal principle and certainty.⁶⁵

This secondary level of the distinction between direct and indirect horizontality clearly is more comprehensive than the original distinction. Furthermore, contract lawyers generally would align themselves with its conception of indirect horizontality. Indirect horizontality's deference to the common law experience, in terms of how best to develop a constitutionalised contract law, in an incremental, methodical and legally principled manner, is especially persuasive in relation to contract law's public policy framework.⁶⁶ However, insofar as it is accepted that there is no substantive difference in the legal outcome produced by the different routes of direct and indirect horizontality, it is crucial also, that all applicable common law concepts and

⁶¹ Bhana op cit note 14 at 303-308; 310; Bhana and Pieterse op cit note 10 at 867-872.

⁶² The foundational contract law values comprise 'freedom' and 'good faith'. See Bhana and Pieterse op cit note 10 at 867-872.

⁶³ Bhana op cit note 14 at 309-310. This issue will form the essence of the discussion in chapter 3 below.

⁶⁴ Phrase borrowed from Currie and De Waal op cit note 35 at 34 footnote 9.

⁶⁵ Bhana op cit note 14 at 309-310; Currie and De Waal op cit note 35 at 32; 50-52; cf Woolman (2007) op cit note 35 at 763; 768-769; 772; 776-779; Van der Walt op cit note 11 at 362-363.

⁶⁶ Bhana op cit note 14 at 309-310.

methodologies, (as they operate within the common law framework), are themselves adjusted appropriately so that, they likewise reflect the new constitutional ideology and what ought to be an altered legal culture.⁶⁷ In this respect, it would be logical for such framework adjustments to be informed by the Bill of Rights' legal framework and its methodology. The upshot is that there could well be interplay between direct and indirect horizontality at the secondary level.

The difficulty however, is that the CC again has been less than unequivocal in its understanding and support of the secondary definition of 'direct versus indirect horizontality' under the final Constitution. In particular, the CC has been vague about the precise implications of, and relationship between, the allegedly conflicting *application, interpretation and development* sections of the Bill of Rights.⁶⁸ For instance, there remains a lack of clarity as to the Bill of Rights' values exacted by the 'objective normative value system' contemplated by indirect horizontality – are they limited to the broader constitutional values of freedom, dignity and equality, or do they also comprise the distinct values, which underpin the relevant substantive rights enshrined in the Bill of Rights? Further, if the latter values are included, does the common law constitutionalisation process still fall exclusively within the parameters of s 39(2) (read with s 173),⁶⁹ or does it instead implicate s 8 (read with s 172(1))⁷⁰?

⁶⁷ On the links between autonomy, ideology and methodology, see 1.3.3 below. See also Bhana op cit note 14 at 302-308; chapter 3 at 3.2.

⁶⁸ That is s 8 read with s 172(1) versus s 39(2) read with s 173. In terms of CC cases, the most notable are *Barkhuizen* supra note 1; *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

⁶⁹ Section 39(2) of the Constitution reads:

"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."

Section 173 of the Constitution then reads:

"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

⁷⁰ Section 8 of the Constitution reads:

"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

Section 172(1) of the Constitution then reads:

"When deciding a constitutional matter within its power, a court –

Alternatively, could s 39(2) be read in combination with s 8 (either, as a whole or, with any of its subsections, individually)? More importantly, do the respective associations with s 39(2) and/or s 8 adjust the above-outlined secondary distinction between direct and indirect horizontality, and if so, how? It is with these questions in mind, that we turn to consider the implications of ss 8 and 39(2) respectively.

1.2.2 Sections 8 and 39(2) of the final Constitution

In contrast to the modest reference to the common law in s 35(3) of the Bill of Rights of the interim Constitution, the drafters of the final Constitution were alert to expressing the horizontal applicability of the Bill of Rights to the so-called 'private realm', as governed traditionally by the common law, and moreover, to addressing the form that such horizontal application should take. In addition to s 39(2) of the final Constitution retaining the interim Constitution's interpretation section (i.e. s 35(3)), s 8 overhauls the former application section (i.e. s 7) of the interim Constitution.

(a) Section 8 – The application section

(i) Section 8(1)

In terms of s 8(1), both according to its ordinary, grammatical meaning, and its broader constitutional meaning, the Bill of Rights applies, without qualification, to *all law*, regardless of whether the relevant law has its roots in the legislature, executive or judiciary.⁷¹ Likewise, the latter part of s 8(1) decidedly subjects *all State conduct*, including that of the judiciary, to the Bill of Rights under the final

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

⁷¹ In terms of the broader context, I mean the context of s 8, the Bill of Rights and the history of the judgment of *Du Plessis* supra note 41 at paras 44-47, where omission of the judiciary was held to qualify the reference to "all law" in s 7(2). But cf *Khumalo* supra note 68 at paras 29-33, which interpreted s 8(1)'s reference to "all law" to mean all law that finds application where the State is a party to the dispute. For a convincing critique of this interpretation see Woolman op cit note 4 at chapters 31.1(c); 31.4(a)(v); 31.4(b). See also *Pharmaceuticals* supra note 1 at para 44, in terms of which, *all law* is subject to the Constitution and *Barkhuizen* supra note 1 at para 15, which can be interpreted in line with my interpretation. Finally, see Cheadle and Davis op cit note 11 at 55.

Constitution. The quintessential function of s 8(1) therefore, is to delineate the general scope of application of the Bill of Rights to cover *all State conduct* which, as a matter of course, must include the *consequences* of such conduct.

It stands to reason then, that in relation to law-making powers, s 8(1)'s reference to the binding application of the Bill of Rights to all branches of the State, extends, not only, to the law-making conduct of the legislature, executive and judiciary, but also, to the resulting laws. So, why the express reference to 'all law' in s 8(1)? Arguably, such reference was meant to make it clear that the Bill of Rights also binds the *common law* - by definition, the common law forms an integral species of our law and as such must fall under the umbrella of "all [South African] law" subject to the Bill of Rights.⁷² However, the nature and source of the common law has long been a point of contention. On the one hand, conservative common lawyers define the common law as that law extrapolated (almost exclusively) from Roman Dutch sources.⁷³ In this respect, the judiciary is held out as that branch of the State, charged technically with discovering, interpreting and applying such laws, as founded in Roman Dutch law, but not with making laws.⁷⁴ This is particularly pertinent in relation to contract law, where courts generally are reluctant to disturb the long-established common law framework and attendant legal rules.⁷⁵ On the other hand, progressive common lawyers regard the common law as a body comprised essentially of 'judge-made law', which transcends its Roman Dutch Law roots and thereby purports to address the changing needs of an emerging constitutional South African society.⁷⁶ So whilst, in line with the broader constitutional project, s 8(1)'s reference to the 'judiciary' almost certainly would

⁷² *Pharmaceuticals* supra note 1 at para 44; Van der Walt op cit note 11 at 347.

⁷³ There are a few exceptions, for example doctrines like the doctrines of rectification and repudiation, as received from English law. However, these importations are regarded as derogations. See *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) at 606A-610B.

⁷⁴ Bhana op cit note 14 at 302-303. Such understanding is fairly formalistic – it is submitted that the distinctions between discovering, interpreting, applying and making law are technical and artificial.

⁷⁵ The common law's long-standing pedigree is the very thing that makes courts reluctant to interrogate its rules against the Bill of Rights. Accordingly, it seems that courts employ the technical distinctions in a manner that complements the maintenance of the status quo.

⁷⁶ MM Corbett 'Aspects of the role of policy in the evaluation of our common law' (1987) 104 SALJ 52 at 54; 67; Van der Walt op cit note 11 at 359-363. See also s 173 of the Constitution, which restates the inherent power of the courts to develop the common law.

encompass the extant body of common law,⁷⁷ the precursory reference to “all law” at once makes clear the applicability of the Bill of Rights to the common law, including the common law of contract, and furthermore, obviates the need for any engagement with Hartian-type (formalist) thinking⁷⁸ about the nature and pedigree of the common law.

Additionally, s 8(1)’s reference to ‘all law’, (which must include the common law), effectively precludes the need for any importation of the problematic US doctrine of State action.⁷⁹ Section 8(1) makes it clear that our Bill of Rights is applicable horizontally to the whole of the common law, including the common law of contract, even when operating within the traditionally private domain, and without needing to show that, the State is a party, (either directly, or indirectly), to the particular dispute.

To sum up, the common denominator in s 8(1) is the *State*, in its broader sense, meaning that *all State conduct, and the consequences thereof, including all law*, is subject to the Bill of Rights. By definition therefore, s 8(1) extends the Bill of Rights’ reach to the common law of contract in its entirety, notwithstanding the controversy as to whether it comprises ‘judge-made law’. More importantly, s 8(1) cuts across the original vertical-horizontal distinction of *Du Plessis v De Klerk*⁸⁰ and rejects any potential verticalist insulation of the (private) common law, from the Bill of Rights, in terms of the traditional public-private divide. Section 8(1) focuses rather, on delineating the general scope of

⁷⁷ I would lean toward a more Dworkinian model of law, where policies, principles and purposes of law are paramount. See generally Ronald Dworkin ‘Hard Cases’ (1975) 88 *Harvard Law Review* 1057; Ronald Dworkin ‘No Right Answer’ in PMS Hacker and Joseph Raz (eds) *Law, Morality and Society: Essays in Honour of HLA Hart* (1977); Ronald Dworkin *Law’s Empire* (1986).

⁷⁸ Woolman (2007) op cit note 30 at 789; Michelman op cit note 37 at 23.

⁷⁹ See 1.2.1(a) op cit note 44 for an explanation of the US doctrine of state action. In the absence of a reference to ‘all law’, many would have argued that the reasoning of *Du Plessis* supra note 41 becomes relevant: Whereas the majority relied primarily on the non-inclusion of the ‘judiciary’ to argue that a common law dispute between private parties, brought before a court of law, was not open to an importation of the US doctrine of State action, the converse should hold true in relation to s 8(1) of the final Constitution. This doctrine, however, is notoriously problematic - it relies on formalistic reasoning within a traditionally *verticalist* constitutional framework, essentially to permit an arbitrary ‘backdoor-horizontal application’ of constitutional rights to private persons and/or private law. In contrast, our Bill of Rights provides expressly for both vertical and horizontal application, inter alia in s 8(1), and so completely obviates the need for the doctrine. See Sprigman and Osborne op cit note 35 at 32-33 and authorities cited there; cf Van der Walt op cit note 11 at 347-348 who submits that horizontality comprises a secondary classification of verticalist constitutional review. See also Woolman op cit note 4 at chapters 31.1(c); 31.4(a) for a critique of the CC’s failure in *Khumalo* supra note 68 to engage with this doctrine.

⁸⁰ Supra note 41.

application of the Bill of Rights, to cover *all* aspects of State conduct, including *all law*, regardless of its classically ‘public’ or ‘private’ nature.⁸¹

(ii) *Section 8(2)*

Section 8(2) comprises the ‘natural or juristic person’ counterpart of s 8(1), in that it relates to the binding of *private persons*, (as opposed to the State), to the Bill of Rights. Articulated further, s 8(2) provides expressly for the possibility of binding private persons, (and thus private contracting parties), to the substantive provisions of the Bill of Rights. Like s 8(1) therefore, s 8(2) moves beyond the traditional verticalist constitutional framework, and attendant vertical-horizontal distinction, contemplated by *Du Plessis v De Klerk*⁸². Indeed, s 8(2) accepts the legitimacy of horizontality and focuses rather, on the *scope* of such horizontal application of the Bill of Rights to private persons.⁸³

This position was confirmed in *Khumalo and Others v Holomisa*⁸⁴ where the CC held that, in terms of s 8(2), the scope of horizontal applicability of any provision of the Bill of Rights, has to be determined principally in terms of the nature of the relevant substantive right and corresponding duty. So, whilst the fact that s 8(2) purports to bind *private* persons must continue to constitute an important factor in the determination of the Bill of Rights’ horizontal reach, this factor by itself can no longer be decisive. Rather, s 8(2) requires the judiciary to conduct a contextual determination of whether the relevant provision, (and the right/duty embodied therein), is ‘capable, fit and suitable’⁸⁵ for application to private persons. To begin with, courts will have to look at the wording of the relevant provision(s), in proper context of the case at hand, for any express or implicit indicators that the right(s) finds horizontal application.⁸⁶ Further, they will have to take cognisance of the underlying spirit, purport and objects of the substantive right (and corresponding duty) as enshrined in the relevant

⁸¹ See also Woolman op cit note 4 at chapters 31.1(c); 31.4(a)(v), who argues that on a ‘good faith reconstruction’ of *Khumalo* supra note 68, s 8(1) deals with the ‘range of application’ of the Bill of Rights:

“The ‘range of application’ speaks to FC s 8(1)’s commitment to ensuring that each and every genus of law is at least formally subject to the substantive provisions of the Bill of Rights.”

⁸² Cheadle and Davis op cit note 11 at 55.

⁸³ Cheadle and Davis op cit note 11 at 55; Michelman op cit note 37 at 3.

⁸⁴ Supra note 68 at para 33.

⁸⁵ *Khumalo* supra note 68 at paras 35-45; Cheadle and Davis op cit note 11 at 57-60; Liebenberg op cit note 11 at 467; Currie and De Waal op cit note 35 at 53-54.

⁸⁶ Cheadle and Davis *ibid*; Currie and De Waal *ibid*.

provision.⁸⁷ In the final event, the courts must always be mindful of the broader constitutional values of freedom, dignity and equality and the transformative type of post-apartheid society envisaged thereby.⁸⁸

(iii) *Sections 8(1) and 8(2): A mandate for direct horizontal application?*

Without a doubt, ss 8(1) and 8(2)s' mapping of the scope of application of the Bill of Rights, effectively addresses the *scope* leg of the horizontality debate and thereby, marks the end of the verticalist era of *Du Plessis v De Klerk*. Indeed, s 8(1) clearly indicates the scale of both vertical and horizontal application in its express binding to the Bill of Rights, of all law, (including 'private' common law), and other State conduct. Additionally, s 8(2) intimates the extent of horizontal application in its proposed binding of such private conduct, that ought legally to be subject to the Bill of Rights.

What is unclear however, is whether ss 8(1) and 8(2) also purport to address the *form* leg of the horizontal application debate according to the succeeding distinction between direct and indirect horizontality.⁸⁹

At the outset, it must be noted that neither s 8(1), nor s 8(2), makes explicit reference to any particular mode of horizontality. Even so, in *Khumalo v Holomisa*⁹⁰ the CC held that any invocation of, or reliance upon, either s 8(1) or s 8(2), would involve direct application of the Bill of Rights. In this respect, the CC seemed to draw on the original distinction between law and conduct, as well as the secondary distinction between values and rights based analysis. Articulated further, it would appear that s 8(2)'s contemplated application of the Bill of Rights to private persons, without an express reference to the corresponding common law portal, entails a direct assessment of the relevant substantive provisions of the Bill of Rights, to determine whether and to what extent they apply to the *conduct*⁹¹ of such persons.⁹² Likewise, s 8(1)'s

⁸⁷ *Khumalo* supra note 68 at para 33 refers to the 'intensity' of the relevant right – Currie and De Waal op cit note 35 at 52 interpret this to mean the *scope* of the right.

⁸⁸ Cheadle and Davis op cit note 11 at 55; 60; Liebenberg op cit note 11 at 467; 469; 470. See also discussion of 'power' in Hohfeld op cit note 54 at 44-54.

⁸⁹ Roederer op cit note 11 at 70. See also Michelman op cit note 37 at 7-8, who observes that the distinction between direct and indirect application can apply both vertically and horizontally. For the purposes of this discussion however, I focus only on the horizontal dimension.

⁹⁰ Supra note 68 at paras 29-34.

⁹¹ In the case of a contract between private persons, conduct could well comprise the relevant contractual term. See *Barkhuizen* supra note 1 at paras 23-26.

contemplated application of the Bill of Rights to 'all law', (including the common law of contract),⁹³ calls for a direct assessment of the relevant substantive provisions, within the Bill of Rights' legal framework, in order to determine the extent to which, such provisions ought to apply horizontally to the common law.

By definition, the bounds of such 'direct application' cannot exceed the essential function of ss 8(1) and 8(2) i.e. the delineation of the scope of application of the Bill of Rights. Along these lines therefore, there can be no objection to the mandate of direct application advocated by *Khumalo v Holomisa*. Several commentators accept such approach as sound and commonsensical.⁹⁴

Nevertheless, the subsequent decision in *Barkhuizen v Napier*⁹⁵ has again caused confusion. In this case, the CC basically held that, as between private contractants, the Bill of Rights can only apply indirectly to a contract, by way of an invocation of the common law of contract's standard of public policy.⁹⁶ At face value, this case goes completely against the mode of application sanctioned by *Khumalo* and, more disconcertingly, does so without any attempt to distinguish itself from, or overrule *Khumalo*, either expressly, or impliedly. Consequently, it has been argued that the application debate is in a state of flux which, in turn, means that a court can manipulate the mode of horizontal application, according to the outcome that it wishes to achieve.⁹⁷

It is submitted that the apparently conflicting CC judgments can be explained and reconciled in terms of the earlier outlined nuance of the two distinct, (albeit related), legs of the horizontal application enquiry viz. the *scope* (content) leg of the enquiry and the *form* (method) leg of the enquiry. So, whereas the direct application contemplated by *Khumalo* is situated within the *scope* (content) leg of the horizontal application enquiry as presented by ss 8(1) and 8(2) respectively, the indirect application contemplated by *Barkhuizen* is

⁹² See above discussion of s 8(2) and the Hohfeld right-duty / liberty – non-right definition (as discussed in Hohfeld op cit note 54 at 30) which serves to distinguish s 8(1) from s 8(2).

⁹³ Op cit note 71: *Khumalo* supra note 68 at paras 29-33 adds the gloss that s 8(1) applies where the State is a party to the dispute. However, based on the critique of this aspect of the judgment, and the broader interpretation of s 8(1) above, I would argue that this should be interpreted rather as 'regardless of its nature and source'.

⁹⁴ Woolman op cit note 4 at chapters 31.1(c); 31.4(a); Van der Walt op cit note 11 at 350-355; Roederer op cit note 11 at 68-70.

⁹⁵ *Barkhuizen* supra note 1 at paras 28-30.

⁹⁶ *Barkhuizen* supra note 1 at paras 23; 28-30.

⁹⁷ Woolman (2007) op cit note 30 at 773-776.

situated within the ensuing *form* (method) leg of such horizontal application enquiry which, as will become apparent below, finds expression in s 8(3) (read with s 172(1)), as well as s 39(2) (read with s 173). Notably, the two cases read together, also indicate that the contemplated direct application, within the confines of the *scope* (content) leg of the enquiry, does not necessarily preempt, or mandate, the particular mode of application envisaged by the *form* (method) leg of the enquiry. The net result therefore, is that it is plausible, not only, to read the relevant pronouncements on application in *Khumalo* and *Barkhuizen* consistently with one another, but also, to explain the alleged application inconsistencies within each judgment.⁹⁸

To sum up, ss 8(1) and 8(2) serve to resolve the preliminary enquiry as to whether, and if so, the extent to which the relevant substantive rights enshrined in the Bill of Rights apply horizontally to the common law and private conduct⁹⁹ respectively.¹⁰⁰ In the final event, the conducting of the ss 8(1) and 8(2) enquiries necessarily employs a mode of (direct) application. However, such application is strictly a function of the delineation of the scope of application of the Bill of Rights and must be distinguished from the main enquiry relating to the manner of horizontal application, as envisaged by the *form* leg of the enquiry.

(iv) Section 8(3) read with s 172(1)

As previously alluded to, s 8(3) comprises the *form* leg that follows on from the s 8(2) *scope* leg, of the horizontal application enquiry i.e. s 8(3) explains *how*

⁹⁸ For example, in *Khumalo* supra note 68 at paras 29-34, the court interprets s 8 as mandating direct horizontal application. That said, the court's invocation of the common law, in terms of s 8(3), has elements of indirect horizontal application (see for instance paras 43-44; see also paras 18-19; 24-26). So too, in *Barkhuizen* (supra note 1 at paras 28-30; 35), the court mandates indirect horizontal application under s 39(2). Yet, in the course of determining the content of public policy (at paras 31-33), the court relies directly on s 34 of the Bill of Rights. It must be acknowledged, however, that neither case exhibits the logical sequence of the scope-form model of horizontal application. Additionally, there appears to be some confusion between the two legs of the model.

⁹⁹ Insofar as there is no applicable common law rule in the Hohfeldian right/duty sense of a law - Hohfeld op cit note 54 at 30. See also Van der Walt op cit note 11 at 354-355.

¹⁰⁰ As will be shown in chapters 2 and 4, there is constant interplay between the substantive rights and the 'objective normative value system'. So, whilst the focus here is on the applicability of substantive rights, the objective normative value system's foundational values of freedom, dignity and equality feed into the scope leg of the horizontality enquiry. At the same time, the specific values emanating from the horizontally applicable rights (as per ss 8(1) and 8(2)) reciprocate by feeding likewise into the content of the freedom, dignity and equality. For further discussion of the 'objective normative value system' see the discussion of s 39(2) below.

the law must give effect to the relevant constitutional right(s) which, in terms of s 8(2), binds a private person.¹⁰¹

In terms of s 8(3)(a), the process begins with a court's examination of legislation, that may find application to the case at hand. Here, the court must determine whether the legislation, if relevant, gives (adequate) effect to the horizontally applicable substantive right(s).¹⁰² If the court finds as much, it will consider the applicable right(s) vindicated, or at least, reasonably and justifiably limited, by way of the application of the particular legislative provision(s),¹⁰³ either way marking the end of the matter. Importantly, in so applying the relevant legislation to the parties' dispute, constitutional justice will be achieved between them.

So, s 8(3)(a) recognises the legislature as the foremost institution, which must give voice to the enumerated substantive rights and general dictates of the Bill of Rights. More significantly, the legislature is meant to make the hard choices between what may be competing constitutional rights, underpinning values and broader policy considerations.¹⁰⁴ Arguably, such deference to the legislature addresses the counter-majoritarian concerns surrounding s 8(2)'s latitude for judicial activism in the constitutionalisation process of the classically private domain.¹⁰⁵

At the same time, s 8(3)(a) appreciates the practical constraints of what the legislature can do:¹⁰⁶ in terms of s 8(3)(a), where legislation fails to give (adequate) effect to the applicable right(s), a court must look to the common law. Section 8(3)(a) accordingly, sanctions the court to enquire into, to apply and where required, duly to develop the common law rules, standards and remedies, with a view to give effect to the relevant substantive right(s) in relation to private persons. In other words, the *common law* must continue to act as the portal through which private conduct, as identified by s 8(2), is now regulated by the Bill of Rights.¹⁰⁷

¹⁰¹ Cheadle and Davis op cit note 11 at 61.

¹⁰² Section 8(3)(a); Cheadle and Davis op cit note 11 at 62.

¹⁰³ See Liebenberg op cit note 11 at 471-472; s 36(1) of the Constitution.

¹⁰⁴ On the legislation portal see Sprigman and Osborne op cit note 35 at 43; 50; Cheadle and Davis op cit note 11 at 62. The legislative route is beyond the scope of this thesis – the focus is on the common law route.

¹⁰⁵ Liebenberg op cit note 11 at 471-472.

¹⁰⁶ Ibid.

¹⁰⁷ Michelman op cit note 37 at 7; Cheadle op cit note 10 at 3-5 to 3-6; 3-9 to 3-10.

Section 8(3)(b) then, recognises the reality of the court having to make the difficult choices between potentially competing constitutional rights, underpinning values and broader policy considerations. As such, it provides expressly for the possibility of the court also developing common law rules, which *limit* the relevant substantive right(s), along the lines of s 36(1) of the Constitution.

As a final point, s 8(3), when read with s 172(1) of the Constitution, contemplates a striking down of unconstitutional common law rules, as well as possible adjustment of (common law) remedies, according to what would be 'just and equitable' in the circumstances.¹⁰⁸

(v) *Section 8(3) read with s 172(1): A mandate for direct or indirect horizontal application?*

In terms of the primary 'conduct versus law' level of the distinction between direct and indirect horizontality, s 8(3) clearly opts for indirect horizontality, in its adoption of the common law as the appropriate platform for the Bill of Rights' regulation of private disputes. At the secondary 'rights versus values' level of the distinction however, it is not entirely clear whether s 8(3) anticipates a direct or indirect application of the Bill of Rights to the common law.

Some contend that s 8(3)'s expressed linkages to s 8(2) and s 36(1) respectively, coupled with the attendant references to 'rights', mandates direct horizontal application of the Bill of Rights to the common law.¹⁰⁹ Moreover, s 8(3), when read with s 172(1), regards the matter as a 'constitutional matter' that affords the court a judicial review power. Such review power, it is argued, intends for the Bill of Rights to superimpose its legal framework (and its 'rights-based' methodology) onto the substantive content of the common law, in order to engage directly with the common law's rules (standards and remedies). This means that the court must test the relevant common law rule(s) directly against the applicable substantive right(s), and if the rule is found to be unconstitutional, it must rectify the common law by way of an appropriate

¹⁰⁸ Woolman (2007) op cit note 30 at 763; 768-769; 775-776; Woolman (2008) op cit note 30 at 14. See further Currie and De Waal op cit note 35 at 32; 34 especially at footnote 9; 50-52; Roederer op cit note 11 at 71.

¹⁰⁹ Sutherland op cit note 11 at 397-401; Woolman (2007) op cit note 30 at 768-769; 779; Currie and De Waal op cit note 35 at 49-52.

'constitutional development'.¹¹⁰ Notably, such 'constitutional development' could range from a simple adjustment of an extant common law rule, to the striking down and formulation of an entirely new replacement rule (standard and/or remedy).

In contrast, others focus on s 8(3)'s expressed reliance on the "common law" in relation to the vindication (or limitation) of a right, and interpret it to mean that the Bill of Rights must apply indirectly to the common law. In other words, s 8(3) does not intend for the substantive content of the common law to be tested and developed directly against the applicable rights. It intends rather, for such testing and development to be mediated through the common law's legal framework, (together with *its* concepts and methodology).¹¹¹ The constitutionalisation of the common law thus happens, by way of a continuing assessment, and an ensuing incremental development, of the common law's *content and methodology* (within the common law tradition), to reflect ultimately, the 'objective normative value system' that is the Bill of Rights.¹¹² Notably, such 'development' could comprise a mere purposive interpretation and application of an extant common law rule (standard and/or remedy), which better infuses it with the underlying Bill of Rights' values. It could also comprise an adjustment of an extant common law rule, concept and/or methodology, to reflect the general ethos and legal culture of the Bill of Rights.¹¹³ In this respect, the adjustment could range from a slight modification of an existing legal rule, to its re-formulation, or even the introduction of a new common law rule altogether, and an innovative, (or at least updated), common law concept or legal method.¹¹⁴

Upon a purely linguistic treatment of s 8(3) (read with s 172(1)), it is submitted that the interpretation advocating for direct horizontal application is

¹¹⁰ Michelman op cit note 37 at 2-3; 5-9; Currie and De Waal op cit note 35 at 32-34.

¹¹¹ Cheadle and Davis op cit note 11 at 63; Sprigman and Osborne op cit note 35 at 35-38; Van der Walt op cit note 11 at 350; 355.

¹¹² Proponents of indirect horizontality usually advocate for a broader conception of the 'objective normative value system' i.e. it comprises the foundational values of freedom, dignity and equality as well as those values underpinning the substantive rights.

¹¹³ On the links between autonomy, ideology and methodology see discussion in 1.3 below.

¹¹⁴ On development of the common law within the common law tradition, see for instance, Corbett op cit note 76. Also note the potentially limiting effect of the doctrine of stare decisis – see *Afrox* supra note 1 at paras 27-29.

more compelling. Even so, it must be acknowledged that s 8(3) also incorporates elements of indirect horizontality.¹¹⁵

To begin with, a closer inspection of s 8(3) reveals three basic stages of analysis in relation to the common law:

First, the court must *identify* the relevant common law rule (standard and/or remedy), that can be said to 'give effect' to the relevant constitutional right(s) which, in terms of s 8(2), binds a private person. If no such rule exists, the court must proceed directly to the third stage of the s 8(3) process, to develop the common law appropriately.

Second, upon identification of the relevant common law rule, the court must assess the rule.¹¹⁶ Here, the court needs to determine whether the rule in question gives adequate effect to the applicable right(s), or whether it infringes the right. Where the rule gives adequate effect to the applicable right, meaning that the right either, is vindicated, or reasonably and justifiably limited, by the common law, the enquiry comes to an end.¹¹⁷ Conversely, if it is found that the rule unreasonably or unjustifiably infringes the relevant right, the court may strike down the rule as unconstitutional, in terms of s 172(1), before it proceeds to the third stage of the s 8(3) process, to develop the common law appropriately.

Finally, where required, the court must *develop* the common law to give (adequate) effect to the relevant substantive right(s) so that, the common law either vindicates, or reasonably and justifiably, limits such right.¹¹⁸

Upon examination of s 8(3) against the direct-indirect horizontality classification then, it is submitted that the identification stage essentially embodies the primary level of indirect horizontality, whereby the common law must comprise the basic interface between the Bill of Rights and the conduct of

¹¹⁵ The very fact that s 8(3) is amenable both to direct and indirect horizontality interpretations, makes it reasonable to infer that s 8(3) has elements of both forms of horizontal application.

¹¹⁶ This interpretation is based primarily on the words "give effect to the right" in s 8(3), read with my earlier interpretation of ss 8(1) and 8(2) respectively.

¹¹⁷ This will be determined by the s 8(2) enquiry. Note, that in practice, the horizontal application of the Bill of Rights is likely to implicate competing constitutional rights of each of the parties. Consequently, the court almost certainly will have to proceed to the third stage of the s 8(3) process, in order to develop the common law in a manner that strikes the appropriate balance between the relevant rights. See Sprigman and Osborne op cit note 35 at 41-44, who highlight the challenge of competing constitutional rights in the private realm.

¹¹⁸ Both ss 8(3)(a) and (b) refer to the court having to 'develop' the common law as necessary.

private persons.¹¹⁹ At the same time however, the process of identifying relevant common law rules (standards and remedies), necessarily takes place against the backdrop of the substantive rights that were earlier identified and delineated under s 8(2). This is confirmed by s 8(3)'s linkage to s 8(2), as well as the reference to 'rights' - what is contemplated is that the results of the s 8(2) (rights-based) analysis be used to identify potentially corresponding common law rules that may find application. To this extent therefore, the secondary level of direct horizontality, contemplated by s 8(2), bleeds into the identification stage of s 8(3).

In the same vein, the s 8(2) analysis sets the stage for direct horizontality in the assessment stage of the s 8(3) process. The corresponding rights-based assessment of the relevant common law rule(s) complements the preliminary s 8(2) assessment of the applicable constitutional rights. Such testing of the common law, dovetails with s 8(1)'s binding of the Bill of Rights to the common law. In the final event, the invocation of the Bill of Rights legal framework, at this stage of the s 8(3) process, can facilitate a *comparative* assessment of the common law framework,¹²⁰ and may further inform the extent of any methodological adjustments to the latter framework, in the development stage of the s 8(3) process.

Moving finally to the development stage, the crucial question, in terms of the direct-indirect horizontality distinction, relates to whether s 8(3) intends for development to take place within the Bill of Rights' legal framework or the common law's legal framework. Once again, the key to resolution of this particular question is to be found in the seminal CC case of *Khumalo v Holomisa*. In this case, the CC appears mindful of the danger of a 'bifurcated' approach to the common law.¹²¹ If s 8(3) were to sanction the development of the common law, within the Bill of Rights' legal framework, the result would be a set of constitutional rules and remedies that would replace those common law rules and remedies that fail to pass constitutional muster. Presumably, such *constitutional* rules and remedies, operating within the Bill of Rights' framework,

¹¹⁹ See 1.2.1(a) op cit note 53.

¹²⁰ As shown in 1.3 below, the common law framework itself, also influences the substance of the common law, and accordingly, also needs to be assessed against the Bill of Rights. See also chapter 3 at 3.3.

¹²¹ *Khumalo* supra note 68 at paras 31-33, where s 8(3) is interpreted to mandate development of the common law. See further 1.2.1(b) op cit note 57.

will exist alongside those *common law* rules and remedies which happen to pass constitutional muster and thus, still operate within the common law framework. In contrast, if s 8(3) directs the development of the common law within the common law framework, it ensures the development of a single, integrated system of constitutionalised common law.

What I find therefore, is that the *Khumalo* court, although interpreting s 8(3) as requiring direct horizontal application of the Bill of Rights, at the same time, appreciates that the development stage of s 8(3) requires the common law to be developed within the common law framework.¹²² I would add the caveat however, that the Bill of Rights' framework and methodology must still inform necessary methodological adjustments to the common law framework. Indeed s 8(3)(b)'s reference to s 36(1) of the Constitution, can be interpreted to mean that the common law 'public policy scale', for instance, and the balancing process contemplated thereby, must now be informed by the Bill of Rights' limitations analysis set out in s 36(1).¹²³

To sum up, s 8(3) is able, through interplay between direct and indirect horizontality, to facilitate rigorous engagement of the common law with the Bill of Rights, (including relevant substantive rights), and at the same time, to ensure its systematic and integrated development within a constitutionally adjusted, common law framework.

(b) Section 39(2) (read with s 173) – The interpretation section

In essence, s 39(2) addresses the *form* leg of the horizontal application enquiry that follows on from s 8(1). So, whilst s 8(1) renders the Bill of Rights applicable to the common law, s 39(2) (read with s 173), provides for its constitutionalisation by way of its interpretation, application and incremental development in a manner that not only accords with, but promotes the 'spirit, purport and objects' of the Bill of Rights.¹²⁴ In other words, s 39(2) sanctions

¹²² *Khumalo* supra note 68 at paras 31-33; 18-19; 24-27; 35-44. This further explains why parts of O'Regan J's analysis looked like an analysis of the foundational constitutional values contemplated by s 39(2).

¹²³ The same can be said of s 172(1)(b).

¹²⁴ See 1.2.1(b) op cit note 60. Cf Anton Fagan 'The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development' (2010) 127 *SALJ* 611, who argues that the role of the 'spirit, purport and objects of the Bill of Rights' should be limited to that of "a tie-breaker when the rights in the Bill of Rights, justice and the rules of the common law are indeterminate." For a convincing critique of Fagan's position, see DM Davis 'How many

indirect horizontality at the secondary level by way of a values-based analysis, within the common law framework, where the ‘spirit, purport and objects’ of the Bill of Rights comprise the ‘objective normative value system’.

At the very least therefore, s 39(2) contemplates a general imbuing of common law rules and underlying principles, open-ended standards, doctrines and concepts, with the foundational values of freedom, dignity and equality.¹²⁵ That is to say, that s 39(2) has a role to play in every common law case, whether or not any enumerated right or value in the Bill of Rights is explicitly brought up. Accordingly, it could be argued that s 39(2) comprises the broader stage for the general operation of the common law within the constitutional era. Indeed, if understood in this way, s 39(2) functions distinctly, as the broader constitutional *backdrop*, that complements, (rather than eclipses), the analysis anticipated by s 8(2) read with s 8(3).¹²⁶

Increasingly however, the judiciary has come to rely on s 39(2) as the basic mechanism for constitutionalisation of the common law, even when one or more of the enumerated constitutional rights are implicated.¹²⁷ As a result, s 39(2) is interpreted increasingly, in favour of a more inclusive ‘objective normative value system’, that captures the specific values underpinning the implicated substantive rights too. The rationale seems to be that this ‘muscular’ version of s 39(2), will facilitate a rigorous ‘values-based’ equivalent of the s 8(3) common law engagement with the Bill of Rights. But such an approach to s 39(2) is counter-intuitive: it effectively usurps the function of s 8(2) read with s 8(3). This could not have been the intention of the legislature, especially in light of the fact that the latter provisions were enacted in the final Constitution specifically,¹²⁸ and not in the interim Constitution.¹²⁹

For the purposes of this thesis therefore I advocate for the interpretation of s 39(2), (read with s 8(1)), that contemplates the general constitutionalisation

positivist legal philosophers can be made to dance on the head of a pin? A reply to Professor Fagan’ (2012) 129 *SALJ* 59.

¹²⁵ Currie and De Waal op cit note 35 at 68-69.

¹²⁶ This would further avoid redundancy of any section in the Bill of Rights. See 1.2.1(b) op cit note 57; *Khumalo* supra note 68 at para 32.

¹²⁷ See for instance *Carmichele* supra note 60; *Barkhuizen* supra note 1; *Brisley* supra note 1; *Afrox* supra note 1; *Napier* supra note 1.

¹²⁸ Presumably, in reaction to *Du Plessis* supra note 41 (see discussion under 1.2.1(a) above), with a view to addressing the potential circumvention of substantive rights in the final Constitution.

¹²⁹ Op cit note 126.

of the common law, in terms of the foundational values of freedom, dignity and equality, in every common law case. Importantly, as with s 8(3), the s 39(2) development of the common law is designed to take place ultimately, within the common law framework which, as I will show later in this thesis, may itself require constitutional adjustment.¹³⁰

1.2.3 The way forward

If the above-outlined interpretations of ss 8 and 39 are accepted, the direct-indirect horizontality distinction loses much of its significance.¹³¹ On the contrary, it appreciates the value of fluid interplay between the two. In this thesis therefore, I will take care to distinguish the scope (content) leg of horizontal application of the Bill of Rights, as well as the form (method) leg of such horizontal application.

In particular, s 8(1), read with ss 39(1) and (2), delineates the broader scope of operation of the Bill of Rights, in the sense that *all law*, including the entire body of (private) common law (also contract law), must reverberate with, and give effect to, (or at the very least, be consistent with), the 'objective normative *value* system' of the Bill of Rights. Importantly, this broader constitutional assessment of the common law must happen in every case. In contrast, s 8(2) focuses on the scope of application of substantive constitutional rights, (and corresponding duties), to the conduct (including contracts) of private persons, and by logical extension, to the laws that govern such conduct themselves. Accordingly, the s 8(2) exercise must happen where specific rights are relied upon, or otherwise implicated, in the particular case before the court.

Sections 39(2) and 8(3) then take up the form leg of the horizontality enquiry, with s 39(2) focusing on how the common law ought to be developed, so that it accords with, and gives effect to, the 'objective normative *value*

¹³⁰ See discussion in chapter 3.

¹³¹ Currie and De Waal op cit note 35 at 73-74. Indeed, the only shortcoming of indirect horizontality relates to the potentially limiting effect of the doctrine of *stare decisis*. In *Afrox* supra note 1 at paras 27-29, the SCA purported to limit the ability of lower courts to deviate from precedent to those cases which implicate an open-ended standard or where the Bill of Rights finds direct horizontal application. However, this shortcoming is based on a flawed understanding of what comprises a 'constitutional matter', and as such, does not hold much weight. For a critique of the *Afrox* position see Currie and De Waal op cit note 35 at 70-72; Woolman op cit note 4 at chapter 31.1(c); Stuart Woolman and Danie Brand 'Is there a Constitution in this courtroom: Constitutional jurisdiction after *Afrox* and *Walters*' (2003) 18 *SA Public Law* 38 especially at 64 ffg.

system' (comprising the foundational values of freedom, dignity and equality), and s 8(3) focusing on how the common law ought to be developed, in order to give effect to the applicable substantive right(s), (and duties), as identified, and assessed, in s 8(2). Once again, the s 39(2) infusion must happen in every case, whilst the s 8(3) development ought to happen only in cases where specific rights are relied upon, or otherwise implicated.

In the final event, whereas the scope and form legs of horizontal application each have links with direct and indirect horizontality, both ss 8(3) and 39(2) dictate that the relevant constitutional *development* process of the common law, (as opposed to the preceding identification and assessment processes), ultimately must take place within the common law framework, as constitutionally adjusted.

1.3 THE HORIZONTAL APPLICATION OF THE BILL OF RIGHTS TO THE COMMON LAW OF CONTRACT: THE CONSTITUTIONAL TRANSFORMATION OF AUTONOMY, IDEOLOGY AND METHODOLOGY

1.3.1 The Bill of Rights horizontality framework: Values, rights and context

What emerges clearly from the horizontality discussion above, is that the constitutionalisation of our (private) common law must occur at two levels. First, in terms of s 8(1), read with ss 39(1) and(2), it must occur at the overarching level, where the foundational values of freedom, dignity and equality are meant jointly to align the common law, (and the results produced thereby), with the broader constitutional vision of a substantively progressive and transformative South African society. Second, s 8(2), read with s 8(3), require the constitutionalisation also to occur at the level of the more concrete substantive rights, where the common law may not, (unreasonably or unjustifiably), infringe those right(s) that may be implicated in a particular case.

A significant consequence of this understanding of the horizontal application of the Bill of Rights, is that the strict traditional divide between public law and private law can no longer hold – the impenetrable brick wall between

the public and the private must be torn down.¹³² However, this cannot mean that public entities and private individuals must now be treated in exactly the same manner. Nor can all private individuals be treated alike. In relation to contract law, for instance, there is a spectrum of private individuals participating in the market, (by way of contract), ranging from extremely powerful private businesses, to uneducated and vulnerable individuals living below the poverty line. So, whilst it may be appropriate for the law to impose onerous public-like duties on the former, this would clearly be inappropriate for the latter. How private parties are to be treated in terms of the Bill of Rights therefore, must differ necessarily according to the parties' respective natures (or stations in life), the attending nature of the interplay between freedom, dignity and equality, in the broader factual context and finally, the nature of the relevant constitutional rights (and corresponding duties), implicated in the particular case.¹³³

To sum up, the Bill of Rights mandates a tearing down of the impenetrable brick wall between the public and the private, in order to initiate the constitutionalisation process of our private law. Further, it contemplates the wall's replacement, simultaneously, with a more permeable wire-mesh fence, which has to 'translate' the application of the foundational public law values, and applicable substantive rights, to the private common law in a manner that befits the particular *factual* context.¹³⁴

1.3.2 The common law framework

In contrast to the Bill of Rights framework, with its foundational values and comprehensive set of substantive (human) rights for post-apartheid South Africa, the common law framework has dealt, traditionally, with (classical liberal) values alone. Moreover, the particular values at stake and the manner in which they are invoked within the common law framework, differ from area to area of the (private) common law.

¹³² Bhana and Pieterse op cit note 10 at 866-872; Cheadle and Davis op cit note 4; Haysom op cit note 10. See further Kennedy op cit note 10.

¹³³ Williams op cit note 9 at 468-473; 478-481.

¹³⁴ Hugh Collins 'Utility and rights in common law reasoning: Rebalancing private law through constitutionalization' (2007) 30 *The Dalhousie Law Journal* 1 at 23. See also chapter 3 at 3.2.

For instance, in the common law of delict, liability turns primarily on a collectivist policy-oriented concept of wrongfulness, where substantive fairness and justice are paramount. Accordingly, the re-alignment of the content of our delict law, with the substantively progressive and transformative rights, values and goals of the Constitution, does not create much conceptual difficulty.¹³⁵ Moreover, the methodology employed by our common law of delict, favours a balancing of the relevant values, in a manner similar to that contemplated by the Bill of Rights, with no particular value, automatically occupying primacy of place. The constitutionalisation of our delict law therefore, ought to be relatively straightforward.¹³⁶

Unlike the law of delict however, the common law of contract has one dominant value, that of contractual autonomy, which traditionally has been understood in a particular ideological sense viz. classical liberalism.¹³⁷ As previously alluded to, classical liberalism affords our contract law a *laissez faire*, individualist concept of autonomy where the values of self-interest, self-reliance and self-determination dominate. A more collectivist concept of autonomy is yet to be explored fully, in this realm. Rather, the policy considerations of legal certainty, commercial efficacy and international competitiveness of the South African economy, continue to bolster the classical liberal conception of autonomy. Moreover, this understanding of contractual autonomy operates in a manner that generally trumps competing values, not only within the conventional realm of contract law, but also, in relation to other branches of the common law.¹³⁸ In the end therefore, the South African common law of contract has as its central value, a fixed, classical liberal conception of contractual autonomy, which furthermore, adopts an 'autonomy

¹³⁵ See *Carmichele* supra note 60 at paras 33-40 and subsequent cases decided by the SCA, such as *Van Eeden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA); *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA); *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 (6) SA 349 (SCA); *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 (1) SA 515 (SCA); *Minister of Safety and Security v Hamilton* 2004 (2) SA 216 (SCA); *Minister of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA); *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA); *K v Minister of Safety and Security* 2005 (6) SA 419 (CC). See further *F v Minister of Safety and Security* 2012 (1) SA 536 (CC); JC Knobel (ed and trans), J Neethling and JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 6ed (2010) at 16-21; 39-40.

¹³⁶ See for instance the approach outlined by the CC in *Carmichele* supra note 60 especially at paras 33-40; 54-60.

¹³⁷ Bhana and Pieterse op cit note 10 at 866-868.

¹³⁸ By reason of the traditional hegemony of contract law. See generally, Cockrell op cit note 16.

trumping' methodology, that renders it fairly extensive in its reach i.e. autonomy is trumped in exceptional circumstances only.

In terms of the constitutionalisation of South African contract law then, the Bill of Rights envisages contract law's engagement with the Constitution's substantively progressive and transformative goals, as per its foundational values and enumerated rights.¹³⁹ In other words, the Constitution brings into play a set of values and rights, that are different from, (and/or additional to), those associated with classical liberty. Furthermore, the Constitution recognises that such values and rights are multi-faceted and further, that the interplay between the relevant values themselves, as well as between the relevant values and rights, is multi-dimensional. Much is dependant on the context within which the contract at hand operates. The constitutionalisation of contract law therefore, is likely to disrupt the fixed meaning of autonomy, (i.e. the *content* of autonomy), that is currently assumed by our common law of contract.

In the final event, the Bill of Rights is likely to affect, not only the content of contractual autonomy, but also, the largely unchallenged 'trumping method' upon which, it presently operates. In contradistinction to contract law, the Bill of Rights does not automatically assume the hegemony of any particular value or right, or even, a particular understanding of such value or right - the Bill of Rights implies a context-sensitive *balance* rather than a *trumping* mechanism.¹⁴⁰ As a result, it is likely that contract law's inherent trump for classical liberty will be transformed by the Bill of Rights.

1.3.3 The relationship between autonomy, ideology and methodology

An essential premise of this thesis is that judicial method is as imbedded in the traditional conception of autonomy, as is liberal ideology, so that it plays a significant role in shaping the outcome of a case. Indeed, Karl Klare has questioned the use, by South African judges, of conservative methodology, to realise substantively progressive constitutional aims.¹⁴¹

¹³⁹ Klare op cit note 15 at 156; MacQueen op cit note 4 at 361.

¹⁴⁰ Bhana op cit note 14 at 308-311; 315-317.

¹⁴¹ Klare op cit note 15 at 168-171; Bhana op cit note 14 at 302-303; Collins op cit note 134 at 6-11. See further the discussion in chapter 3 at 3.2.

South African contract law, with its central axis of autonomy, is entrenched in classical liberal ideology and legalist methodology.¹⁴² The danger of the resultant common law framework and method is that they could undermine the realisation, within contract law, of the foundational constitutional values, in substance, as well as the rights, as set out in the Bill of Rights.¹⁴³

In relation to the common law of contract, adjudication has been viewed traditionally, as a value-neutral exercise in legal reasoning that is distinct from, and impervious to, politics. Judges are constrained by the rule of law: their job is to interpret and apply the law, but *not*, (at least not overtly), to make the law.¹⁴⁴ Judges therefore, appear mindful not to permit personal and/or political ideologies, values and sensibilities, to feature in the adjudication process. In South Africa, these concerns are articulated in a cautious approach that prefers analysis that is 'highly structured, technician, literal and rule bound'.¹⁴⁵

Nevertheless, judges do adjudicate according to a particular system for the determination of meaning. The traditional understanding of adjudication, as outlined above, is termed 'liberal legalism'.¹⁴⁶ Karl Klare depicts this reality as the 'legal culture' that comprises 'the professional sensibilities, habits of mind and intellectual reflexes' of the legal fraternity.¹⁴⁷ Such legal culture, necessarily informs the judicial mindset and therefore, the decision making process (legal method) and ultimately the legal outcomes of cases.

Ideology then, exists as a sub-set of legal culture. Consequently, ideology and legal method are necessarily linked to one another. Nevertheless, in relation to ideology, judges still claim to be value neutral. Klare explains that the claim to neutrality stems from what he describes as the 'naturalisation' of the common law of contract's classical liberal underpinnings, as an intrinsic part of our common law legal culture. Be that as it may, liberalism does reflect a particular set of individualist values that is ultimately political in nature.¹⁴⁸ Classical liberalism however, is more amenable to formalist reasoning that, by

¹⁴² Bhana op cit note 14 at 303-308; Bhana op cit note 28 at 273-275; Bhana and Pieterse op cit note 10 at 866-868; Lubbe op cit note 28 at 406-408.

¹⁴³ Bhana op cit note 14 at 308. See further Woolman (2007; 2008) op cit note 18; Hawthorne op cit note 28; Tladi op cit note 28; Hopkins op cit note 28.

¹⁴⁴ Klare op cit note 15 at 149; 157.

¹⁴⁵ Klare op cit note 15 at 168; Bhana op cit note 14 at 302-303.

¹⁴⁶ Klare op cit note 15 at 157.

¹⁴⁷ Klare op cit note 15 at 166.

¹⁴⁸ Klare op cit note 15 at 152; 184.

and large, embraces rules-based analysis, with minimal judicial discretion.¹⁴⁹ The result is two-fold: the preferred liberal ideology underpinning contract law's conception of autonomy informs the applicable legal method, and the legal method, in turn, usually relieves judges from having expressly to articulate their policy preferences.

In summation, because legal method is imbedded in legal culture and ideology, it actually informs the substantive determination of the legal parameters of contractual autonomy itself and therewith, the substantive development of contract law, as a whole.¹⁵⁰ Consequently, in fulfilling the mandate of constitutionalising contractual autonomy, and thus, the common law of contract, it is important to be conscious, not only of the South African legal culture and its preferred ideology, but also, of the influence of the established legal methods on the attainment of the constitution's substantively progressive and transformative aims.¹⁵¹

1.3.4 Constitutional transformation of the ideology and methodology that underpin contractual autonomy

As discussed in the introductory portion of this chapter, the Constitution marks an ideological shift, away from liberalism, toward a more substantive recognition of 'human dignity, the achievement of equality and the advancement of human rights and freedoms.'¹⁵² Consequently, whilst freedom remains a foundational value, substantive equality¹⁵³ has also become a foundational value, whilst dignity must mean more than an empowering of an individual, to decide for him or herself, in a mere, formal sense. Freedom of contract now operates within a constitutional democracy that mandates substantive transformation of the 'very fabric of [the South African] society as a whole – in the behaviour and perceptions of all people in South Africa, as both public and private actors.'¹⁵⁴ The ideology underpinning contract law must therefore be assessed against this broader socio-economic constitutional

¹⁴⁹ Alfred Cockrell 'Substance and form in the South African law of contract' (1992) 109 *SALJ* 40 at 43-44.

¹⁵⁰ Klare op cit note 15 at 168; 170.

¹⁵¹ Bhana op cit note 14 at 308; 310-311.

¹⁵² Section 1(a) of the Constitution.

¹⁵³ See also s 9(2) of the Constitution.

¹⁵⁴ MacQueen op cit note 4 at 361.

context, as well as the factual context in which parties find themselves. Importantly, such ideology must be reconciled with the substance of the (multi-faceted and multi-dimensional) foundational values of the Bill of Rights, and the fluid (contextual) manner in which they are meant to work together. Furthermore, where any substantive right(s) is implicated, the content of our contract law must also engage contextually with such right(s) and be reconciled therewith.

At the same time, the legal culture too, must be revised in order to complement the new constitutional order. Indeed, Klare stresses that a progressive legal culture, i.e. a legal culture that is more 'policy-oriented and consequentialist',¹⁵⁵ is a pre-requisite for the ultimate success, of what he calls, 'transformative constitutionalism'.¹⁵⁶ The implication for legal method, (as informed by legal culture and ideology) therefore, is that effective engagement with the Bill of Rights calls for stronger emphasis on purposive adjudication, where freedom of contract (and *pacta sunt servanda*), in their classical liberal conceptions, can no longer automatically occupy primacy of place.

Accordingly, the horizontal application of the Bill of Rights to the common law of contract, contemplates the constitutional interrogation and development of the underpinning ideology and attending methodology, that basically animate the legal principle of contractual autonomy, and the ensuing rules, standards and doctrines, that together, comprise the common law of contract.

As a final point, it is imperative that the contemplated horizontality exercise, be situated within the earlier-outlined horizontality framework. Dealing first, with the scope of horizontal application of the Bill of Rights to South African contract law, s 8(1), read with ss 39(1) and (2), requires the content/substance of contractual autonomy to be assessed against the foundational values of freedom, dignity and equality, with a view ultimately to aligning our contract law, (and the results produced thereby), with the broader constitutional vision of a substantively progressive and transformative South African society. Additionally, s 8(2) mandates the interrogation of those substantive constitutional rights (and corresponding duties) that may be

¹⁵⁵ Klare op cit note 15 at 168.

¹⁵⁶ Klare op cit note 15 at 170; see also Van der Walt op cit note 11 at 344.

applicable in the particular case, in order to determine whether they are in fact, applicable.

Moving then to the form leg of horizontal application, s 39(2) focuses on how to develop our common law of contract, so that it articulates with the 'objective normative *value* system'. In turn, s 8(3) focuses on how to give effect to the applicable substantive right(s) (and duties), as identified and assessed, in terms of s 8(2).¹⁵⁷ Notably, both ss 39(2) and 8(3) sanction the invocation of the broader common law framework and methodology, for the actual process of constitutionalising contract law. However, as explained above, the framework and methodology employed by the common law of contract has generally favoured a particular, classical liberal conception of contractual autonomy, as against competing common law rights. A blanket invocation of the pre-constitutional contract law methodology could therefore, inadvertently subvert the substantively progressive and transformative goals of the Constitution (as per the objective normative value system), and furthermore, diminish the significance of substantive constitutional rights.

Accordingly, as will be shown in this thesis, the common law of contract methodology also must be reviewed against the substantively progressive aims of our constitutional order, and adjusted appropriately, to reflect the weight that ought to be attached to the foundational values, and any applicable constitutional rights. Here, s 8(3) provides some guidance, by way of its reference to the s 36(1) limitations analysis. Further, judges can draw from ss 172(1) and 173 of the Bill of Rights, to guide the general constitutional adjustment of the contract law framework and methodology.¹⁵⁸

¹⁵⁷ For purposes of legal certainty presumably, this will be done incrementally, over a period of time, as and when contract cases present themselves before the courts.

¹⁵⁸ See Bhana op cit note 14 at 311; 316. Whilst the details of my argument there have since changed, the underlying point remains the same i.e. the courts must guard against being too formalistic about the distinction between constitutional development under ss 8(3) and 39(2). This is because all constitutional developments of contract law are meant ultimately to occur within the same common law framework. Indeed, the courts must be vigilant and not inadvertently create parallel frameworks.

1.4 BASIC PREMISES AND OBJECTIVES OF THIS THESIS

1.4.1 The basic aim of this thesis

Having established the premise for horizontal application of the foundational values and substantive rights of the Constitution, and showing how this challenges our common law of contract, both at the level of content and method, it should be evident that, the constitutionalisation of South African contract law, is not clear-cut.

This thesis postulates that there is no single, 'one-size-fits-all' way, in which to constitutionalise contract law. Nor can there be a single conception of contractual autonomy. I propose, that the manner in which the value of contractual autonomy is invoked and given content, will vary, based on the fluid content of, and interplay between, freedom, dignity and equality, as well as that of any constitutional rights (and corresponding duties) that find application, in each particular case. In terms of the foundational values, I will show that their content, and the appropriate legal methodology to be employed, in integrating them into the relevant common law rules, (standards and principles), will depend on the particular factual context within which the contract operates. Additionally, the specific legal outcome must measure up to the broader, substantively progressive and transformative constitutional context. Further, where a substantive constitutional right is implicated, I suggest that the nature, content and operation of the particular right will also inform the content of, and interplay between, the foundational values. Here, the content of contractual autonomy, and the methodology to be employed, in aligning the particular rule (or standard/principle) of contract law, ought to be informed, likewise with the spirit, purport and object of the right in question.

The focal point of this thesis therefore, is the development of a *conceptual* framework for the actual constitutionalisation process of South African contract law, by the judiciary.

1.4.2 The basic premises of this thesis

In this thesis, I proceed from the essential premise that the principle of contractual autonomy comprises and must continue to comprise the keystone principle of our contract law. I assume further, that a constitutionalisation of

contractual autonomy effectively would constitutionalise, or, at the very least, set the stage for the constitutionalisation of our contract law, in its entirety. The scope of my thesis therefore, is one that will interrogate the substance, form and attending legal mechanics of operation of contractual autonomy, with a view ultimately to developing the conceptual framework for South African contract law, operating in a constitutional context.

Before outlining how I plan to approach this thesis however, I need to make three preliminary points. First, as a common lawyer, and based on my discussion of ss 8(3) and 39(2) above, my emphasis in this thesis will be on the constitutionalisation of the common law of contract from *within* i.e. the constitutional development of our contract law, (as opposed to its assessment), must proceed ultimately from the common law platform, which embraces the common law tradition of incremental, judicial development, over time, as cases present themselves before the courts. That said, allowance must be made for constitutional adjustment of the common law platform itself, as and when required.

This brings me to my second point: I have not engaged with the debate on the subject of legislative intervention, either as a preferred or secondary route, for constitutionalising our contract law.¹⁵⁹ My thesis proceeds rather, on the premise that legislative intervention may not be required, and that common law development is a more doctrinally sound way of constitutionalising contract law. Accordingly, I have not interrogated any of the recent interventions, such as the National Credit Act¹⁶⁰ and the Consumer Protection Act.¹⁶¹ Nevertheless, I would argue that the interpretation of these pieces of legislation ought to be informed by, and dovetail with, the constitutionalised judicial approach, that I will advocate for, in this thesis.

¹⁵⁹ See for instance, Lewis op cit note 28; Tjatie Naude 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' (2006) 17 *Stell LR* 361; Tjatie Naude 'The use of black and grey lists in unfair contract terms legislation in comparative perspective' (2007) 124 *SALJ* 128; Tjatie Naude 'The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective' (2009) 126 *SALJ* 505; RD Sharrock 'Judicial control of unfair contract terms: The implications of the Consumer Protection Act' (2010) 22 *SA Merc LJ* 295; Luanda Hawthorne 'Responsive governance: Consumer protection legislation and its effect on mandatory and default rules in the contract of sale' (2011) 26 *SA Public Law* 431.

¹⁶⁰ 34 of 2005.

¹⁶¹ 68 of 2008.

My final preliminary point then, is that a comparative analysis of the contract laws of other jurisdictions, falls largely beyond the scope of this thesis. This is necessarily so, given the somewhat unique South African context of transformative constitutionalism, with its mandate of doing public-law-type justice within the private law context.

1.4.3 Thesis outline

Starting with Chapter Two, I will launch my investigation by looking at the substance of contractual autonomy. I will begin my analysis by canvassing the conceptions of contract law, beginning with the 18th and 19th century, classical liberal model, followed by the 20th century, neo-classical, economic model and finally, the late 20th century, modern model of contract law. Significantly, elements of each of these models still underpin our contract law today and I do not purport in this thesis to reconcile them.¹⁶²

I intend to draw attention rather, to the continued tension between the classical liberal preference for an atomistic, independent (negative liberty) conception of the contracting self, as bolstered by strongly individualist values, on the one hand, and the more substantive, interdependent (positive freedom) conception, that pays greater attention to modern collectivist values, on the other hand.¹⁶³ My principal purpose for doing so is to tease out, what I will argue, are the two essential dimensions of contractual autonomy viz. the *internal (content)* and the *external (reach)* dimensions of contractual autonomy.¹⁶⁴

¹⁶² In this respect, see generally, Chris-James Pretorius 'The basis of contractual liability (1): Ideologies and approaches' (2005) 68 *THRHR* 253; Chris-James Pretorius 'The basis of contractual liability (2): Theories of contract (will and declaration)' (2005) 68 *THRHR* 441; Chris-James Pretorius 'The basis of contractual liability (3): Theories of contract (consideration, reliance and fairness)' (2005) 68 *THRHR* 575 at 581-590; Chris-James Pretorius 'The basis of contractual liability (4): Towards a composite theory of contract' (2006) 69 *THRHR* 97.

¹⁶³ See Bhana and Pieterse op cit note 10 at 883-889; Bhana op cit note 28 at 273-274; 276-278.

¹⁶⁴ In relation to this thesis, the internal (content) dimension will focus on the very concept of autonomy, in the sense of determining what exactly an exercise of autonomy entails (and ought to entail), for the purposes of contract law. In other words, the focus of the internal dimension is on how the law regards the contracting self. Most important, would be the legal delineation of the pre-conditions that are necessary for the contracting self validly to exercise his or her autonomy: So, whereas the pre-conditions for the exercise of autonomy by the atomistic, independent self would be minimal, the same cannot be said for the more substantive, interdependent self. In contrast, the external (reach) dimension focuses on the scope of operation of autonomy, in the sense of determining precisely how far an exercise of autonomy extends (and ought to extend), as compared to other values operating in contract law. So here,

On the basis of this paradigm, I plan then, to unpack the manner in which our common law of contract currently articulates the internal and external dimensions of contractual autonomy respectively and show, why it is likely that they will fall short of what the Bill of Rights envisages. Finally, to conclude Chapter Two, I will attempt actually to conceptualise the constitutionalisation of contractual autonomy, in terms of the foundational values of freedom, dignity and equality, which, at once, will need to be context sensitive and responsive to any applicable substantive rights, as well as to the broader constitutional vision of a substantively progressive and transformative post-apartheid South Africa.

Moving on to Chapter Three, I propose to shift focus to the conservative legal culture and the attending liberal legalist methodology employed in our common law of contract. Here, I want to look, particularly, at how the contract law machine¹⁶⁵ continues to entrench both, the internal and external dimensions of contractual autonomy, in classical liberal ideology. In particular, I aim to show how the methodology employed by the contract law machine, may frustrate bona fide efforts to constitutionalise our contract law. Accordingly, I will argue that the legal methodology employed in contract law, must dovetail, likewise with the constitutionalised conception of contractual autonomy, as outlined in Chapter Two. In concluding the chapter then, I endeavour to point out where, I anticipate, constitutional adjustments, generally, will need to be made.

Having, by this point, outlined how conceptually to constitutionalise the substance, form and attending methodology of contractual autonomy, Chapter Four will consider the practical implications of the conclusions reached in Chapters Two and Three, by contemplating their application in a number of concrete contexts.¹⁶⁶

Thereafter, I am going to pay special attention to the further dimension of one or more of the substantive constitutional rights finding application, both at a

the balancing of relevant individualist and collectivist considerations, as per the traditional legality exercise, would be brought into play.

¹⁶⁵ The contract law machine comprises a configuration of rules and standards that primarily use deductive legal reasoning to determine the legal outcomes of cases that come before the courts. For a detailed discussion of the contract law machine, see chapter 3 at 3.2; 3.3.

¹⁶⁶ As per s 39(2) of the Constitution – the ‘objective normative value system’. See discussion at 1.2.2(b) above.

general, and a case-specific, level.¹⁶⁷ In doing so, I will look at three different constitutional rights, that are broadly representative of the rights enumerated in the Bill of Rights viz. the freedom of trade, occupation and profession,¹⁶⁸ the freedom of religion, belief and opinion¹⁶⁹ and the right to have access to health care services.¹⁷⁰ For each of these rights, I will examine their basic content and nature, and consider how they could influence contractual autonomy. The main conclusion that I hope to draw, is that there cannot be a 'one-size-fits-all' approach. Much will depend on the nature of the particular constitutional right implicated, the ideology most germane to the particular context, and the attendant altered conception of contractual autonomy, both in terms of content and legal method.

In conclusion, Chapter Five will reiterate the need for the transformation of South African private law, and illustrate how the findings of this thesis, assist to facilitate this transformation, in the realm of contract law.

¹⁶⁷ As per s 8(2) read with s 8(3) of the Constitution.

¹⁶⁸ Section 22 of the Constitution.

¹⁶⁹ Section 15(1) of the Constitution.

¹⁷⁰ Section 27(1)(a) of the Constitution.

CHAPTER 2

AUTONOMY

2.1 INTRODUCTION

Autonomy comprises the central axis of South African contract law. Its manifestation as the principle of freedom of contract and the attendant maxim *pacta sunt servanda* can be traced back to foundational Roman Dutch legal sources.¹ Moreover, the elevated emphasis on freedom of contract, during the ensuing classical liberal era (of the 18th and 19th century), continues to dominate contract law jurisprudence.² This, notwithstanding much of 20th century discourse, which centred on what generally, was labeled ‘the rise and fall of freedom of contract’.³ As of the late 20th century, the principle of freedom of contract is back full-circle, in its rise once more, to primacy of place within the law of contract.⁴ Yet, the question of *what* contractual autonomy is, (and ought to be), and *how* it operates, (and ought to operate), remains contentious in post-apartheid South Africa.

In the constitutional era, where the law must also transform power relations between individuals in the private law realm, it is uncertain how even to conceive of individual autonomy. This uncertainty extends to the concept of contractual autonomy too.

¹ Luanda Hawthorne ‘Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism’ (2006) 12-2 *Fundamina* 71 at 71-74; FDJ Brand ‘The role of good faith, equity and fairness in the South African law of contract: The influence of the common law and the Constitution’ (2009) 126 *SALJ* 71 at 71-73.

² Jack Beatson and Daniel Friedman ‘From classical to modern contract law’ in Jack Beatson and Daniel Friedman (eds) *Good Faith and Fault in Contract Law* (1995) at 7; Luanda Hawthorne ‘The principle of equality in the law of contract’ (1995) 58 *THRHR* 157 at 164; Deeksha Bhana and Marius Pieterse ‘Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited’ (2005) 122 *SALJ* 865 at 866-868. Note further, that unless otherwise stipulated, I use the terms ‘freedom of contract’, ‘contractual autonomy’, ‘liberty’, ‘freedom’, ‘free will’, ‘choice’ and ‘voluntary’ loosely and interchangeably.

³ See Ronald KL Collins (ed) *Grant Gilmore ‘The Death of Contract’* (1995) at 103-104; 106-107; 111-112; PS Atiyah *Essays on Contract* (1988) especially Essay 1 ‘The modern role of contract law’ 1; Essay 2 ‘Contracts, promises and the law of obligations’ 10; Essay 6 ‘The liberal theory of contract’ 121; Essay 7 ‘Executory contracts, expectation damages, and the economic analysis of contract’ 150; Essay 12 ‘Freedom of contract and the new right’ 355; cf Charles Fried *Contract as Promise A Theory of Contractual Obligation* (1981) especially at 1-21; FH Buckley ‘Introduction’ in FH Buckley (ed) *The Fall and Rise of Freedom of Contract* (1999) at 1-14.

⁴ Buckley op cit note 3; Atiyah op cit note 3 ‘Essay 2’ at 40; ‘Essay 12’ at 355-358. See also Stephen A Smith ‘Future freedom and freedom of contract’ (1996) 59 *MLR* 167 at 175-176, on the role of contracts and contract law in daily life.

I show in this chapter, that the concept of contractual autonomy comprises two essential dimensions viz. the *internal (content)* and the *external (reach)* dimensions. The former dimension focuses on the substantive concept of the (constitutionalised) contractual self and the latter, on the extent to which contract law gives, and ought to give, credence and effect to exercises of autonomy (as per the internal content dimension). In relation to contractual autonomy therefore, the question of how to conceive of contractual autonomy in the post-apartheid constitutional context, must extend both to its internal and external dimensions.

Recent debate has focused primarily on the *external 'reach' (scope of operation)* dimension of this question; the idea being, that the striking of a fitting constitutional balance between the classically individualist and the increasingly pervasive collectivist ideologies must re-define the contractual doctrine of legality. In so doing, the doctrine of legality can continue to comprise the external legal policy, (and now constitutional), corrective for our modern law of contract.⁵ At the same time, not much attention has been paid to the *internal 'content'* dimension of the above question. Nevertheless, a holistic approach to the constitutionalisation of contractual autonomy makes it imperative, that the very content of autonomy itself, as it operates within our common law of contract, likewise be interrogated constitutionally and adjusted, if required.⁶

In this chapter, I evaluate the general landscape of autonomy in contract law and constitutional law respectively, with a view to determining the relevant conceptions of contractual autonomy, both externally (in terms of its 'reach' dimension) and internally (in terms of its 'content' dimension), that animate, or at least, ought to animate, a constitutionalised contract law operating in a substantively progressive and transformative South Africa. I begin by canvassing the classical model of contract law and its laissez faire conception of autonomy. Here, I also look at the neo-classical economic analysis of

⁵ See for instance, Bhana and Pieterse op cit note 2 at 887-889; Hawthorne op cit note 2 at 171-176. See further, Jonathan Lewis 'Fairness in South African contract law' (2003) 120 *SALJ* 330; Gerhard Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *SALJ* 395; C-J Pretorius 'Individualism, collectivism and the limits of good faith' (2003) 66 *THRHR* 638.

⁶ Stuart Woolman and Dennis Davis 'The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions' (1996) 12 *SAJHR* 361 at 382-390.

contract law, which, at once, feeds into and augments the classical conception of contractual autonomy. This is followed by a discussion of the modern model of contract law, as it operates in South African law, and the manner in which it tempers the classical liberal foundations of contractual autonomy. In particular, I canvass the relevance of ‘apparent (reliance-based) autonomy’ and collectivist-type normative considerations, such as fairness, reasonableness and good faith. Thereafter, I complete my analysis of contractual autonomy, by teasing out and examining the implicit external (reach) and internal (content) dimensions of contractual autonomy in contemporary contract law.

I then move on, to assess critically, the conception(s) of autonomy contemplated by Chapter Two of the Constitution of the Republic of South Africa, and relevant constitutional (contract) law cases. In this chapter, I focus specifically on the foundational values of freedom, dignity and equality⁷ and carefully look at how they articulate with the pre-constitutional, common law concept of autonomy. Finally, I consider the interplay between the various conceptions of autonomy, potentially at work in post-apartheid contracts and propose the way forward for the constitutionalisation of contractual autonomy.

So, this chapter concentrates on the *substance* of contractual autonomy, both internally and externally, and how conceptually, to align this with the Bill of Rights’ objective normative value system.⁸ As such, this chapter constitutes the ideological axis of the overall thesis, that will frame the subsequent chapters’ interrogations of legal methodology and the implication of the enumerated constitutional rights respectively, as well as the development ultimately of a framework for the constitutionalisation of our common law of contract.

I argue here, that the fixed ((neo-) classical) understanding of the substance of contractual autonomy is liable to fall short of what the Constitution requires. I explain that the foundational values of freedom, dignity and equality are multi-faceted, and their interplay, multi-dimensional. Accordingly, a constitutionalised conception of the substance of contractual autonomy that is grounded in these values must be a shifting one that, at once, will need to be

⁷ As per s 8(1) read with ss 39(1) and (2) of the Constitution. See the discussion of horizontality in chapter 1 especially at 1.2.2.(a).

⁸ As outlined in chapter 1 at 1.2.2(a), I adopt the narrower concept of the ‘objective normative value system’ that is limited to the foundational values of freedom, dignity and equality.

sensitive to the factual context, any applicable substantive rights, as well as the broader constitutional vision of a substantively progressive and transformative South Africa.

2.2 THE GENERAL LANDSCAPE OF AUTONOMY IN THE COMMON LAW OF CONTRACT: FROM THE CLASSICAL TO THE NEO-CLASSICAL AND MODERN MODELS OF CONTRACT LAW

2.2.1 The classical model of contract law in outline

In the main, the classical period was epitomised by the industrial revolution and its rejection of the (generally exploitative) power dynamics of the then existing social hierarchies and status relationships.⁹ During this period, the focus shifted from such hierarchical and status structures to the liberty of the *individual*, as a free human being, respected as equal to all others and, in the same way, capable of forming and exercising free will (in the form of free choice) and control, over his or her person and immediate private sphere.¹⁰ Along these lines then, every person was said to be the master of his or her own destiny and to be responsible, above all, for the realisation of his or her particular vision of the 'good life'.¹¹ A strongly individualist concept of autonomy thus prevailed, with the values of self-interest, self-reliance and self-determination paramount, and collectivist concerns minimal.¹²

⁹ Beatson and Friedman op cit note 2 at 7; Hugh Collins 'Contract and Legal Theory' in W Twining (ed) *Legal Theory and Common Law* (1986) chapter 8 at 136-141; Hawthorne op cit note 2 at 164.

¹⁰ Note however that the society of the time was still rooted in patriarchy and racism. For a further discussion of 'choice' and 'choice theory', see 2.2.3(a) below.

¹¹ There are major philosophical texts that deal with individual liberty. See for instance, the texts relied upon by Ackermann J in *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* 1996 (1) SA 984 (CC) at paras 47-54. Most notably, these included Isaiah Berlin *Four Essays on Liberty* (1969); Karl R Popper *The Open Society and its Enemies. Volume 1: The Spell of Plato* 4ed (1962). I will not be engaging with the substance of these texts here. Rather, I focus more narrowly on how their view of autonomy has manifested in legal understandings of autonomy.

¹² Duncan Kennedy 'Form and substance in private law adjudication' in Dennis Patterson (ed) *Philosophy of Law and Legal Theory An Anthology* (2003) 193 at 207-209; 214-216, who submits that in order for self-interested individuals to co-exist with one another, there must be a limit on their respective pursuits of self-interest viz. respecting the rights of one another; Chris-James Pretorius 'The basis of contractual liability (1): Ideologies and approaches' (2005) 68 *THRHR* 253 at 258-264. See also Collins op cit note 9 at 137-144; Smith op cit note 4 at 175ffg, on the central role of autonomy in relation to an individual's 'well-being.'

It follows therefore, that the classical model of contract law identifies itself with this conception of autonomy.¹³ Indeed, the principle of freedom of contract exemplifies a non-interventionist, individualistic approach in the sense that parties are free, (at least in theory), to decide whether to enter into a contract,¹⁴ with whom and on what terms. Such autonomy, is given expression through the legal concept of consensus to a contract¹⁵ i.e. an (outwardly) expressed meeting of minds, a correspondence of wills, an articulation of a common intention, envisaged upon the basis of theoretical arm's length negotiations between parties of sound mind, mature age and (formally) equal standing.¹⁶ Importantly, the corollary of such exercise of autonomy is the principle of sanctity of contract (*pacta sunt servanda*). The interplay between the two principles is described best in the following well-known dictum:

“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 of contract.”¹⁷

The upshot is that the underlying assumptions of individual autonomy and the attendant liberty to consent to a contract, comprise the cornerstones of the principle of sanctity of contract which, under classical contract law, are presented as an ‘axiomatic truth’.¹⁸ Accordingly, the classical model of contract law embraces a *laissez faire* approach that generally respects the contracting parties’ freedom to arrange their affairs as they see fit, by way of the terms of their contract.

¹³ What follows in the remaining paragraphs of this section relies heavily on the discussion by my colleague and me, in an earlier article, Bhana and Pieterse op cit note 2 at 867-869.

¹⁴ Whilst parties are free to enter into contracts, and so create legally binding obligations, the converse applies likewise. Parties are free equally *not* to contract, meaning that, in the absence of (express or tacit) consent, they are free from contractual obligation.

¹⁵ See Reinhard Zimmerman ‘Good faith and equity’ in Reinhard Zimmerman and Daniel Visser (eds) *Southern Cross – Civil Law and Common Law in South Africa* (1996) 217 at 217-220; Gerhard Lubbe and Christina Murray *Farlam and Hathaway Contract: Cases, Materials, Commentary* 3ed (1988) at 18–22.

¹⁶ Pretorius op cit note 5 at 640; Hawthorne op cit note 2 at 164-165.

¹⁷ Sir George Jessel MR in *Printing and Numerical Registration Co v Sampson* (1875) LR 19 Eq 462 at 465 as quoted in *Wells v South African Alumenite Company* 1927 AD 69 at 73; *Roffey v Catterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 505; *Basson v Chilwan* 1993 (3) SA 742 (A) at 761. See also *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at para 169.

¹⁸ Alfred Cockrell ‘Substance and form in the South African law of contract’ (1992) 109 SALJ 40 at 46; Luanda Hawthorne ‘Materialisation and differentiation of contract law’ (2008) 71 *THRHR* 438 at 441.

This means that when courts are asked to resolve contractual disputes, they concern themselves primarily, with the formal validity of consensus (so-called procedural fairness) and/or the enforcement of the resulting contract, by way of an abstract (and somewhat mechanical) application of the monistic set of rules of contract law; rules which have crystallised over time.¹⁹ In other words, the *rules of contract law*, rather than the courts, are the authority for the substance of contractual autonomy. This is because, in terms of the classical model, it is the contract law rules that delineate the conditions for the exercise of free will (i.e. autonomy in the classical liberal sense), which the law will give credence and effect to. In contrast, the courts simply *apply* these rules, to the particular factual context. So, ultimately the rules determine whether the conditions of autonomy have been satisfied and whether autonomy is present. In terms of the classical model, the role of the courts is limited to being referees of the conditions for autonomy; they are mere arbiters of fact that have a procedural, rather than a substantive role.

Courts generally do not engage contextually, with the substantive fairness or otherwise, of contracts. The classical model mostly disregards a contractant's (potential or actual) change in circumstances subsequent to conclusion of a contract. The focus rather, is on discrete (as opposed to long-term continuing) transactions, where a party is presumed able, fully "to judge [and presentiate] his [or her] own future state of mind, as well as more obvious matters like the true nature and extent of the risk."²⁰ Moreover, it fosters a

¹⁹ Gilmore op cit note 3 at 7. The focus, in terms of procedural fairness, is on the rules that articulate contractual consensus, and whether, the requirements for the valid formation of a contract have been fulfilled. In relation to contractual autonomy, the relevant rules are housed in the requirements of contractual capacity and agreement, including the paradigm of offer and acceptance, the doctrine of mistake, and the established categories of misrepresentation, duress, undue influence and bribery. Importantly, such rules presuppose a single model of contract. For a critique of this position see Atiyah op cit note 3 'Essay 1' at 1; 5-8, who submits at 8 that "we must try to extricate ourselves from the tendency to see contract as a monolithic phenomenon."

²⁰ Atiyah op cit note 3 'Essay 6' at 126; 148. Arguably, the doctrine of supervening impossibility is the portal for a change of circumstance. Nevertheless, this doctrine is subject to fairly strict parameters. See also the *Shifren* principle, (as established in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A)), which is also fairly strict in its application, notwithstanding the (potential) hardship caused by a change in circumstances; cf the approach formulated by our courts in relation to restraint of trade contracts (*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)), and more recently, in *Barkhuizen* supra note 17 at paras 30; 56-58. See also 2.2.3(c); 2.3.2; 2.4.2 below. See further Andrew Hutchison 'The doctrine of frustration: A solution to the problem of changed circumstances in South African contract law?' (2010) 127 SALJ 84; Andrew Hutchison 'Gap filling to address

narrow doctrine of legality, in terms of which, a court will strike down a contract as illegal only in extreme cases, where the contract's content and/or basic tendency offends well-established boni mores of the community,²¹ or is against reasonably articulated public policy or the broader public interest.²²

The result is a certain, predictable and efficient legal framework of contract law, comprising a formal set of rules, (articulating freedom of contract in the form of consensus and the attendant *pacta sunt servanda*), coupled with a nominal set of balancing standards, (articulating underlying (classical liberal) policies, socio-economic mores and (predominantly individualist) values). It is within this framework therefore, that society recognises the legitimacy of contracting parties' exercises of contractual autonomy. The courts then, as representatives of society, effectively endorse and enforce such exercises of autonomy, when invoking the classical contract law framework and applying the relevant rules and standards.²³

Insofar as contractual justice is concerned, the classical liberal model avers, that a crucial dimension of consensus, as the basis of contract, is that it necessarily implies, that all contracts are entered into in good faith.²⁴ In fact, Roman Dutch law consistently maintained this to be the position. Moreover, the underlying value of good faith, in its classical liberal understanding, requires persons also to honour their agreements. Good faith is thereby reconciled with the individualist maxim of *pacta sunt servanda* and its classically extensive reach. Articulated further, the classical liberal advocates that the presence of

changed circumstances in contract law: When it comes to losses and gains, sharing is the fair solution' (2010) 21 *Stell LR* 414.

²¹ Arguably, the boni mores as articulated by the common law of contract, finds its roots in canon law. Examples of contracts that are contra bonos mores include slavery and prostitution.

²² The concepts of public policy and the broader public interest tend to bleed into each other. For a detailed discussion of these concepts, see SWJ (Schalk) Van der Merwe, LF Van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* 4ed (2012) at chapter 7. See also Brand op cit note 1 especially at 74-83; Beatson and Friedman op cit note 2 at 8-9; Matthew Kruger 'The role of public policy in the law of contract, revisited' (2011) 128 *SALJ* 712.

²³ For a detailed discussion on the role of rules and standards, and the manner in which they operate, see chapter 3. See Kennedy op cit note 12 at 220 ffg; Cockrell op cit note 18 at 43-44; Pretorius op cit note 12 at 258-265. Notably, during the classical liberal era, the rules and standards of contract law were permeated with individualist thinking, and as a result, freedom of contract was far-reaching, especially in light of the then underlying belief that the political was distinct from law.

²⁴ Zimmerman op cit note 15 at 218; 220; P Du Plessis 'Good faith and equity in the law of contract in the civilian tradition' (2002) 65 *THRHR* 397 at 407. It is important at this point to note that, whilst good faith is generally assumed in contract law, there is limited recognition of bad faith insofar as it underlies the categories of improperly obtained consensus, the doctrine of fictional fulfillment, various breaches and remedies, as well as the doctrine of legality.

consensus,²⁵ coupled with the value of good faith, renders our law of contract inherently equitable - the concept of good faith is said to infuse the law of contract with an equitable spirit and concomitantly, to diminish the significance of apparently competing collectivist norms of substantive fairness, justice and reasonableness, as against the individualist principle of freedom of contract.²⁶

To sum up, contract law as per the classical model constitutes a self-contained network of legal rules and limited standards that animate an individualist, laissez faire conception of (formal)²⁷ autonomy. The courts, although legally recognised as the representatives of the society in which people contract, are placed in an extraneous 'referee' position. They oversee contracts, permitting them to run their course, as long as the requisite formal preconditions (as delineated by the rules of contract law) have been fulfilled; they intervene only where the rules have clearly been broken.

2.2.2 The neo-classical economic analysis of contract law in brief

Briefly stated, neo-classical economists present an instrumentalist argument, in terms of which, the classical model of contract law is defended in the modern era, by way of its continued recognition, as the basic tool for the realisation of desired, socio-economic goals, within a free market system.²⁸ In terms of free market ideology, the marketplace represents the forum, where participants at arms' length and on a formally equal footing, come together to do business with each other, freely and fairly.²⁹ Notably, this market is said to foster a free and fair competitive environment, which, in turn, prefers 'self-regulation' and 'self-

²⁵ Contract law has acknowledged and sought to address the possibility of defective consensus by means of limited interventions such as the doctrines of mistake, misrepresentation, duress and undue influence. For further discussion of these, see 2.3.3(c); 2.3.3(d) below.

²⁶ Bhana and Pieterse op cit note 2 at 867-868; see further, at 889-893, and the authorities cited there. See also Hawthorne op cit note 18 at 441.

²⁷ I use the term 'formal' to denote autonomy that is grounded in the negative liberty conception of freedom, coupled with a limited conception of good faith and the abstract treatment of individuals as equals, irrespective of their particular contexts. See further discussion at 2.3.3(a) below.

²⁸ Peter Cane 'The anatomy of private law theory: A 25th anniversary essay' (2005) 25 *Oxford Journal of Legal Studies* 203 especially at 204-206; Hawthorne op cit note 18 at 441; 443-444; Michael J Trebilcock *The Limits of Freedom of Contract* (1993) at 15-17; Anthony T Kronman and Richard A Posner in Hugh G Beale, William D Bishop and Michael P Furmston *Contract Cases and Materials* 2ed (1990) chapter 5 at 71-78; Lubbe and Murray op cit note 15 at 22-26; Beatson and Friedman op cit note 2 at 7; Pretorius op cit note 12 at 273.

²⁹ Pretorius op cit note 12 at 258; Hawthorne op cit note 18 at 441.

correction',³⁰ as opposed to State intervention. This clearly dovetails with the above-outlined individualist, laissez faire nature of classical contract law.

In a free market economy,³¹ the basic idea is that every individual must be afforded an equal opportunity (albeit only in a formal sense), to participate in the market, with a view to achieving the socio-economic position in life, to which he or she aspires. This is premised on the individual of sound mind and mature age, being a rational actor and accordingly, being best suited in relation to market transactions, to decide for him or herself *whether* to conclude a particular type of transaction (*self-determination*), upon the basis of his or her *own assessment (self-reliance)* of what comprises his or her *best interests* and *how* best to achieve it within the parameters of the market (*self-interest* i.e. with whom to transact and on what terms to transact).³² In other words, neo-classical economic analysis contemplates a rational, individualist market, where participants, by the rational exercise of free choice, transact only when the transaction enhances their respective welfares, as defined subjectively. In this manner, market resources are said to migrate naturally, to those individuals who value them most. This, in turn, is said to promote economic efficiency in the market and overall welfare of society.³³

The fundamental function of classical contract law then, is to comprise the legal framework for the operation of the free market. Articulated further, the law of contract facilitates the voluntary conclusion of competitive market transactions, upon the basis of its cornerstone principles of freedom of contract and *pacta sunt servanda*.³⁴ As discussed in the previous section, the established set of simple, yet, robust rules, that is the law of contract, serves basically, to identify (clearly) and to enforce (strictly) the parties' exercise of

³⁰ Dikgang Moseneke 'Transformative constitutionalism: Its implications for the law of contract' (2009) 20 *Stell LR* 3 at 9.

³¹ As with most Western countries, the South African economy ascribes primarily to a free market economy, with limited pockets of State intervention.

³² Beale et al op cit note 28 at 73; Hawthorne op cit note 18 at 441; Luanda Hawthorne 'Contract law's choice architecture: The hidden role of default rules' (2009) 73 *THRHR* 599 at 599-601; Stephen A Smith *Contract Theory* (2007) at 126-127; Atiyah op cit note 3 'Essay 6' at 128; 'Essay 7' at 155-156; Pretorius op cit note 5 at 640; Hawthorne op cit note 2 at 163.

³³ Atiyah op cit note 3 'Essay 7' at 152-153, that discusses Posner's conception of economic efficiency. See further, Hawthorne op cit note 18 at 443; Trebilcock op cit note 28; Beale et al op cit note 28. For a critique of the premise of rationality in the market, see Hawthorne op cit note 32 at 600-601; Lubbe and Murray op cit note 15 at 24-26.

³⁴ Hawthorne op cit note 18 at 441; Hawthorne op cit note 32 at 599-601.

autonomy, as expressed in their consensus to resulting contracts.³⁵ Accordingly, the identification of market transactions with contracts, as governed by classical contract law, likewise affords legal security to market participants' voluntary exchanges³⁶ and more importantly, promotes certainty, predictability and efficiency in the marketplace.³⁷

At this juncture, it is important to note, that neo-classical analysis employs the language of economic efficiency, to substantiate the sub-set of contract law rules stipulating the (internal) pre-conditions for a valid exercise of contractual autonomy, as well as the corresponding (external) normative parameters of *pacta sunt servanda*. This means that, in economic terms, the internal and external parameters of contractual autonomy are meant to accommodate failures of the market and thereby, to curb inefficient transactions. Most notable, are those internal failures relating to imperfect competition in the marketplace, by reason of inequalities in information and/or bargaining power,³⁸ which, in turn, lead potentially to a deficient exercise of autonomy itself.³⁹ Market failures may also be caused by the externalities of market transactions - these translate generally, into the (potential) harm of market transactions to third parties and/or the community, as a whole.⁴⁰ Of particular concern, are the policy implications of the purported situating within the marketplace, of certain, social facets, of what comprises a valuable life and their resulting commodification.⁴¹

³⁵ Pretorius op cit note 12 at 258; Hugh Collins *The Law of Contract* 4ed (2003) at chapter 1. See also 2.2.1 above.

³⁶ Trebilcock op cit note 28 at 16.

³⁷ Bhana and Pieterse op cit note 2 at 868; cf discussion at 883-885.

³⁸ See discussion of improperly obtained consensus under 2.3.3(d) below. South African contract law, as it currently stands, needs to grapple with realities of unequal bargaining power, as well as the legal delineation of the concept of economic duress. In this respect, neo-classicists clamour for necessary alignment. See Hawthorne op cit note 18 at 451; Michael J Trebilcock 'External critiques of laissez-faire contract values' in FH Buckley (ed) *The Fall and Rise of Freedom of Contract* (1999) 78 at 82-86; *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 315 (SCA) at para 18.

³⁹ See further discussion of autonomy and the doctrine of mistake under 2.3.3(c) below; Smith op cit note 4 at 173; Andrew Robertson 'The limits of voluntariness in contract' (2005) 29 *Melbourne University Law Review* 179 at 180-181.

⁴⁰ In the extant contract law, such externalities are accommodated, presumably, by the doctrine of legality. Trebilcock op cit note 28 at 17; Trebilcock op cit note 38 at 88-90.

⁴¹ Smith op cit note 4 at 174, refers to the marker of 'efficiency' as 'a morally unattractive foundation'. See further, Smith op cit note 32 at 260-263; Trebilcock op cit note 38 at 88-90; cf Collins op cit note 9 at 147-151, who advocates for a social market theory; Hawthorne op cit note 18 at 443-444; 445-453, on the movement from 'solitary' to 'solidarity' in the sphere of contract; See further, Collins op cit note 35 at chapter 5.

Dealing finally, with the residual default rules of contract law, the neo-classicists contend, that these rules too, promote economic efficiency.⁴² For one thing, the contracting parties still maintain autonomy in relation to such default rules, insofar as they are free usually, to vary them or to contract out of them.⁴³ Additionally, such rules provide the backdrop that enables parties to conclude valid transactions, with minimal negotiation about their content; the idea being, that the rules, importing implied terms, for example, will fill in the relevant gaps and thereby, reduce transaction costs. In the final event, the default rules are said to be premised on rationality and accordingly, to be geared toward the maximisation of contracting parties' overall welfare.⁴⁴

The net result, according to neo-classical economic analysis therefore, is that classical contract law is defensible, because it facilitates the efficient conclusion and enforcement of those market transactions, that enhance overall welfare; the market maintaining its (somewhat paradoxical) premise of *rational* individualism which, at the same time, insists on a *subjective* delineation of an individual's welfare.

It must however, be remembered that this defense is ultimately an instrumental one. The neo-classicist accepts as much, conceding that where the classically delineated law of contract falls short of the free market mandate of an efficient economic order, such law must be re-aligned accordingly.⁴⁵ In other words, the neo-classicist's defense of the classical contract law stands, only for so long as, the market's (individualist) *foundations*, socio-economic *role* and (*laissez faire*) *relationship with the State*, resonate with classical liberalism. As these dimensions of the market evolve, the neo-classicist will have to heed the modern economist's critique of the classical liberal model and its conception of contractual autonomy.⁴⁶

⁴² Those terms that are implied by law (*naturalia*) are an example of this type of rule.

⁴³ Hawthorne op cit note 32 at 604; Todd D Rakoff 'Contracts of adhesion: An essay in reconstruction' (1983) 96 *Harvard LR* 1173 at 1182.

⁴⁴ Trebilcock op cit note 28 at 16-17. On the 'standardisation of implied terms', see Rakoff op cit note 43 at 1182.

⁴⁵ In fact neo-classicists make a compelling case inter alia for the recognition of economic duress and unequal bargaining power. See further, Michael G Martinek 'Contract law theory in the social welfare state of Germany – developments and dangers' (2007) *TSAR* 1 at 14-16; cf Smith op cit note 4 at 174.

⁴⁶ See for instance, Hawthorne op cit note 18 at 443; 452-453. See also Sandra Liebenberg and Beth Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative constitution' (2007) 23 *SAJHR* 335 at 360-361, who highlight the

In summation, the ‘hands-off-the-market’ mentality of neo-classicism, would limit the role of the State and therefore, the courts, along the same ‘referee-type’ line, espoused by the classical model of contract law.

2.2.3 The modern model of contract law in outline

As previously alluded to, the gradual 20th century movement away from classical individualism and toward a more welfarist State, brought with it, the alleged ‘decline of freedom of contract’.⁴⁷ Moving beyond the initial debate of contract being rooted in morally binding promise,⁴⁸ the then leading academics focused on three crucial issues within the modern law of contract, that purportedly detracts from the classical conception of freedom of contract – first, the increased awareness of the objective determination of contractants’ subjective states of mind, as manifested in the concretised classical rules of contract law; second, the growing incidents of reasonable reliance liability, based upon a so-called ‘apparent’ exercise of autonomy, as opposed to an actual exercise of autonomy in the form of ‘free will’ and lastly, the greater degree of substantive contractual justice in the form of substantive fairness, reasonableness and good faith.⁴⁹

In other words, the modern model of contract law continues to identify freedom of contract as its central axis, and for the most part, takes forward, the classical liberal understanding of contractual autonomy, into the present. At the same time, the modern model is designated by its legal grappling with the

reality of discrimination based on socio-economic status as endemic to a market economy. In the South African context, such discrimination is exacerbated in the aftermath of erstwhile apartheid (and patriarchal) policies. Indeed, racial (and gender) discrimination operates now in the guise of discrimination against the poor, (and especially women), and/or vulnerable sectors of South African society, where systemic, socio-economic barriers to meaningful participation in the market are not given sufficient credence. See also Marius Pieterse ‘Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa’ (2003) 14 *Stell LR* 3 at 18-19.

⁴⁷ Atiyah op cit note 3 ‘Essay 6’ at 146-149, refers to the ‘fall of freedom of contract’; Gilmore op cit note 3, goes so far as to declare the ‘death of contract’; cf Fried op cit note 3, who defends the notion of ‘contract as promise’.

⁴⁸ Here, I refer to promise in the broader context of agreement. See further, Fried op cit note 3 especially at 7-21; Atiyah op cit note 3 ‘Essay 2’; ‘Essay 6’ at 140-141.

⁴⁹ There seems to be support for a substantive concept of good faith, that embraces fairness and reasonableness – see the majority judgment of Ncgobo J (especially at para 80) in *Barkhuizen* supra note 17; see also the minority judgment of Sachs J especially at paras 151-157. Note further, the increased regulatory legislation that seeks to curb the reach of freedom of contract, for example, in relation to rent control and minimum wage. In the South African context, the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 are recent interventions of this nature. Such legislative measures are beyond scope of this project.

practical and normative implications of the three issues listed above. It is to each of these issues that I now turn.

(a) An objective determination of contractants' subjective states of mind
As outlined earlier, the classical model of contract law places emphasis on the 'free wills' of the parties and thus, contemplates (at least in theory), an 'actual (subjective) meeting of the minds', before a contract is validly formed.

Briefly stated, this comprises the subjective 'will-theory' foundation of legal liability, upon the basis of subjective consensus.⁵⁰ Explained further, the 'will theory' ascribes contractual obligation on the basis of a 'special choice' that the contracting parties make when they consent voluntarily, to a particular arrangement of affairs, with the requisite *animus contrahendi* (i.e. serious intention to contract).⁵¹ In the classical era, this notion of 'special choice' was derived from the morally paternalistic canon that all seriously intended promises must be kept (*pacta sunt servanda*). In modern times, this is retained and expressed as an intrinsically individualist value, rooted in the socio-economic policy of personal responsibility that must be assumed by the contracting self.⁵²

More significantly, in the modern era, there is an increased acknowledgement, that whilst, the theoretical emphasis must be on the *subjective* 'meeting of the minds', practically speaking, such determination of matching intentions is necessarily *objective*. An individual's subjective intention (*animus contrahendi*) is only ever really known to the individual him or herself. At best, another can make a logical inference of the individual's intention from whatever relevant, extrinsic evidence is available.⁵³ The classical model's rules, delineating the valid exercise of autonomy, have always placed emphasis on contractants' inner states of mind, as manifested *outwardly* through their *objectively* discernible actions. For instance, the 'offer and acceptance' set of contract law rules which, upon application by the courts, determine the

⁵⁰ See *Saambou-Nasionale Bouvereeniging v Friedman* 1979 (3) SA 978 (A) at 993C-1000E; 1002A-1002E; Atiyah op cit note 3 'Essay 2' especially at 12-15; 25; 40-41; 'Essay 6' at 121-122. For a detailed exposition of the will theory, see Chris-James Pretorius 'The basis of contractual liability (2): Theories of contract (will and declaration)' (2005) 68 *THRHR* 441 at 442-457.

⁵¹ Pretorius op cit note 50 at 442-457; Collins op cit note 9 at 139-144.

⁵² Collins op cit note 9 at 137 ffg.

⁵³ See for instance, *Maize Board v Jackson* 2005 (6) SA 592 (SCA); *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A).

presence of subjective consensus, is essentially objective, in nature.⁵⁴ Modern contract law therefore, recognises expressly, that elements of the objective 'declaration theory', which bases liability upon the objective, matching declarations of the parties, also form a part of contract law.⁵⁵ Indeed, this objective approach is crucial for a modern legal framework, that is sufficiently certain, predictable and efficient.

But herein lays the dilemma: whereas the classical liberal model of contract law is grounded fundamentally, in the individual exercise of free will, it must be accepted also, that its essentially objective determination, by way of concretised legal rules, as applied by the courts, runs the risk of falling short of the contracting parties' actual, subjective intentions.⁵⁶

In the modern era therefore, it is understood that the foundational ideal of subjective autonomy does not operate absolutely in contract law, but makes allowances necessary for associated, practical difficulties in determining the inner state of mind. In other words, it relies on the objective manifestations of the subjective state of mind.⁵⁷ Nevertheless, leading academics have also submitted, that such concession does not significantly undermine subjective freedom of contract, at least, not on an empirical level.⁵⁸

For one thing, whilst subjective consensus has to be determined objectively, it is only in a small percentage of cases that the question of actual, (subjective) consensus versus outwardly apparent, (objective) consensus⁵⁹ becomes relevant. In the numerous contracts concluded daily, the contracting parties are said usually to be in subjective agreement and as a result, their

⁵⁴ For detailed discussion of the rules on offer and acceptance, see Van der Merwe et al op cit note 22 at chapter 3. See also, the rules on caveat subscriptor and interpretation of contract terms, which all focus on the objective, rather than the subjective. See further, Rakoff op cit note 43 at 1186; Robertson op cit note 39 at 180; 203-207.

⁵⁵ In terms of the declaration theory, contractual liability arises on the objective basis of matching declarations of the parties. See Pretorius op cit note 50 at 457-460; Robertson op cit note 39 at 203-207; Smith op cit note 32 at 57-58; 158-161. The declaration theory features in South African contract law rules such as the parole evidence integration and interpretation rules.

⁵⁶ Pretorius op cit note 50 at 447-452; Rakoff op cit note 43 at 1188; Beatson and Friedman op cit note 2 at 10-11.

⁵⁷ Pretorius op cit note 50 at 446; Rakoff op cit note 43 at 1186. More generally, see Cane op cit note 28, on the interplay between legal analysis and legal theory.

⁵⁸ Pretorius op cit note 50 at 386-388 and the authorities cited there.

⁵⁹ On reasonable reliance, a more detailed discussion follows in 2.2.3(b); 2.2.3(c); 2.3.3(c).

contracts are executed fully, without further ado.⁶⁰ Additionally, the rules articulating an objectively determined consensus tend ordinarily, to reflect the parties' actual contractual intentions, as contemplated by the underlying classical liberal theory – the risk of divergence is argued to be negligible.⁶¹ At least at the empirical level therefore, the classical liberal ideal of subjective 'freedom of contract' and *pacta sunt servanda*, when invoked, remain materially intact and mostly undisturbed in the modern model of contract law, despite assertions to the contrary.

(b) Reasonable reliance liability based upon so-called 'apparent' autonomy
When looking at the normative underpinnings of the foundational 'freedom of contract', the classical model's emphasis on subjective consensus, (as per the 'will theory'),⁶² was not very forthcoming about alternate theoretical bases of contractual liability. In contrast, modern contract law acknowledges expressly, the legal possibility of contractual liability upon alternate bases, especially that of 'reliance theory'.⁶³ an honest, dissenting contractant, acting in good faith, can be held bound to an apparent contract, by reason of the other contracting party's reasonable reliance on the appearance of consensus.⁶⁴

The modern model admits further, that the interplay between the various theoretical bases, is crucial to a reasonably practicable, certain and balanced law of contract, that is able to deal effectively and fairly, with the risks attendant on subjective autonomy. For instance, 'reliance theory' enables the law also to

⁶⁰ Pretorius op cit note 50 at 446; Chris-James Pretorius 'The basis of contractual liability (4): Towards a composite theory of contract' (2006) 69 *THRHR* 97 at 113-114; Robertson op cit note 39 at 204-205. Although standard form contracts are alluded to in 2.3.3 below, the discussion of this type of contract will not extend any further in this thesis.

⁶¹ Pretorius op cit note 50 at 446. Note that whilst I can see how the objective is reconciled with the subjective in classical liberal terms, this must not be taken as an implicit acceptance of the classical liberal *internal* conception of autonomy. I tackle this issue in 2.3.3 below.

⁶² See 2.2.3(a) above.

⁶³ In terms of the reliance theory, contractual liability can be based also, on deemed consensus by reason of the reasonable reliance on the appearance of contract. See *Saambou* supra note 50 at 993-996 (of English translation); Chris-James Pretorius 'The basis of contractual liability (3): Theories of contract (consideration, reliance and fairness)' (2005) 68 *THRHR* 575 at 581-590; Alfred Cockrell 'Reliance and private law' (1993) 4 *Stell LR* 41 at 41-43, 46-48 and 56-62.

⁶⁴ If the party is dishonest, or acts in bad faith, the other party may have additional remedies. See authorities cited op cit note 24. The modern model of contract law also fosters elements of the 'declaration theory', the 'fairness theory', and other residual contract law theories. See Pretorius op cit note 50 at 457-460; Robertson op cit note 39 at 203-207; Smith op cit note 32 at 57-58; 158-161; Pretorius op cit note 63 at 590-593.

deal with the risk of a contractant, who invites (detrimental) reliance, carelessly, dishonestly or in bad faith.⁶⁵

In the end therefore, the modern law of contract accepts that it is underpinned by a combination of theoretical foundations and focuses rather, on the interplay between the respective contract legal theories, that comprise, (or at least, ought to comprise), the composite modern law of contract.⁶⁶ I do not purport here, to engage with the specifics of this debate. Instead, I adopt modern contract law's well-established point of departure viz. that freedom of contract is entrenched primarily, in the 'will theory' and supplemented secondarily, by the 'reliance theory'.⁶⁷

As already outlined above, the subjective 'will theory' ascribes contractual liability on the basis of a subjective 'meeting of the minds', (albeit objectively determined), which, in turn, is grounded in the personal responsibility theory of 'choice'. It is trite, that this represents the starting point of an enquiry into contractual autonomy: If, upon application by a court, the contract law rules establish consensus, as per the will theory, the parties will be bound to their agreement, upon the basis of their subjective consensus, thereto.

If, however, the presence of subjective consensus is brought into question before the court, the secondary basis of reasonable reliance liability will come into play. Here, the supplementary reliance theory acts as an objective corrective to the subjective will theory – in the absence of subjective consensus, the reliance theory purports to impose liability upon the basis of a contractant's reasonable reliance on the appearance of consensus. Significantly, the supplementary reliance theory is rooted in the distributive justice theory of 'harm to interests',⁶⁸ with the result, that reliance theory purports to infuse a greater degree of distributive justice into the law of contract.⁶⁹

⁶⁵ Pretorius op cit note 50 at 449; 453.

⁶⁶ Pretorius op cit 12 at 274-275; Robertson op cit note 39 at 217; Atiyah op cit note 3 'Essay 2' at 48-49; 54-55; 'Essay 6' at 142; Smith op cit note 32 at 158-159; Trebilcock op cit note 38 at 80.

⁶⁷ *Saambou supra* note 50 especially at 993-996 (of English translation); *South African Railways and Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715-716.

⁶⁸ Collins op cit note 9 at 141ffg; Cockrell op cit note 18 at 47-49. See further, Cane op cit note 28 at 205 ffg, on the interplay between law and economics, and justice and politics.

⁶⁹ Pretorius op cit note 50 at 453-457; Pretorius op cit note 63 at 581-590.

At the most basic level of ‘harm to interests’ theory, “the law attempts to establish “patterns of acceptable relationships”, informed by “a moral idea of the proper kinds of contractual relations in modern society, one based on trust [and solidarity]”.”⁷⁰ So, insofar as a party acts to his or her detriment, by concluding a contract in reliance on the other party’s appearance of consensus, such other party should be bound to his or her apparent consensus, in order to avert the (potential) harm that would otherwise result.⁷¹ This approach would embody a form of ‘liberalist harm to interests’ theory that was advocated for by John Stuart Mills,⁷² where the harm addressed, is limited largely, to the (potential) effects for the *individual (non-mistaken) contractant*, as opposed to that for the *broader community*.⁷³

It is important to note further, that the reliance theory also implicates a facet of personal responsibility, inasmuch as a party’s reasonable reliance on the appearance of consensus would, in most cases, denote *reasonable foreseeability*⁷⁴ on the part of the party responsible for such outward appearance. This has been interpreted as a ‘half-deliberate’ exercise of autonomy.⁷⁵

The result, is that the modern model of contract law recognises the reliance theory as an essential supplement to the primary ‘will theory’, that extends or curtails a party’s contractual autonomy, insofar as the relevant course of action would avert harm, or decrease the risk of (foreseeable) harm, at least, to his or her fellow contractants.

⁷⁰ Lubbe and Murray op cit note 15 at 242; Collins op cit note 35 at 112-113; 116; Collins op cit note 9 at 150; Hawthorne op cit note 18 at 443-444; 445-453. I submit further, that reliance theory, thus understood, resonates with Kantian moral philosophy’s essential principles of trust and respect, in terms of which, individuals must always be treated as being ends in themselves, as opposed to mere means.

⁷¹ The concept of detriment is discussed in 2.3.3(c)(iii) below.

⁷² Hereinafter referred to as ‘Millian’-type ‘liberalist harm to interests’ theory. See Bhana and Pieterse op cit note 2 at 868 and the authorities cited at footnote 15 - Beatson and Friedman op cit note 2 at 3-21; Collins op cit note 35 at chapters 1-2; Trebilcock op cit note 28 at chapter 1; Collins op cit note 9 at 141; Cockrell op cit note 18 at 48.

⁷³ Smith op cit note 32 at 256ffg. As will be shown in the discussion of the third and final issue of substantive contractual justice, the modern model has attempted to move away from the ‘Millian’-type approach, toward a more welfarist-type approach. Further, on the concept of a ‘non-mistaken’ contracting party, i.e. the party who relies on the appearance of consensus, see 2.3.3(c)(i) below.

⁷⁴ Cockrell op cit note 63 at 57-60.

⁷⁵ Cockrell op cit note 63 at 57, explaining that the contractant’s conduct would be “sufficiently intentional to generate duties even while falling short of a fully-fledged contractual assumption of obligation.” See also Cockrell op cit note 18 at 47-49 and the discussion of the doctrine of mistake in 2.3.3(c) below.

- (c) A greater degree of substantive contractual justice in the form of substantive fairness, reasonableness and good faith

It is well-established, that in striving for legal justice, all law endeavours to strike the right balance between competing normative values that are either individualist or collectivist in nature. The same is true for contract law, where the two sets of values can be represented along an underlying, normative continuum; a continuum, which extends from the one extreme of pure individualism ('selfishness'), to the other extreme of total collectivism ('selflessness').⁷⁶ The right balance between the two sets of values therefore, would be marked by contract law's proper situating of contractual autonomy, along the continuum. This, in turn, would be determined by the relevant policy considerations,⁷⁷ that are emphasised by the classical and modern models of contract law respectively.

As outlined earlier, the classical model emphasises a certain, predictable and efficient legal framework of contract law. Accordingly, it espouses a strongly individualist principle of freedom of contract, operating against more limited conceptions of the collectivist norms of substantive fairness, justice and reasonableness, so that, the latter values have minimal impact.⁷⁸ The classical model of contract law therefore, situates contractual autonomy fairly close to the individualism end of the normative continuum.

Moving to the modern model of contract law, its adoption of the secondary 'reliance theory' (and therewith 'harm to interests' theory), has meant that contract law is able now, to appreciate more overtly, that contracts do not operate in isolation, but form part of the greater fabric of society. In turn, this enables society, primarily by way of an established judiciary and legislature, to exercise greater *social control* over contractual autonomy, than its classical liberal, 'will-theory' counterpart.⁷⁹ More specifically, it enables modern contract law to pay greater attention to substantive contractual justice, (as opposed to legal certainty),⁸⁰ in its conception of contractual autonomy. In other words, reliance theory's greater emphasis on (socio-economic)

⁷⁶ Kennedy op cit 12 at 207-212; Pretorius op cit note 5 at 638-642; Cockrell op cit note 18 at 41-42; 63; Atiyah op cit note 3 'Essay 6' at 146-148.

⁷⁷ Such as the considerations of legal certainty and economic costs.

⁷⁸ See 2.2.1 above.

⁷⁹ Bhana and Pieterse op cit note 2 at 868.

⁸⁰ In the form of substantive fairness, reasonableness and good faith in contracts.

distributive justice, facilitates a more collectivist, (as opposed to individualist), positing of autonomy, within the modern law of contract.⁸¹

At present, the South African common law of contract expresses these collectivist-type adjustments to the classically individualist foundations, in the rules relating to procedural fairness, (i.e. those dealing with ‘mistake’, ‘misrepresentation’, ‘(economic) duress’ and ‘undue influence’),⁸² as well as the doctrine of legality’s open-ended standards of substantive fairness, (like good faith, the boni mores, and the public interest), which determine whether a contract is against public policy.⁸³ Notably, these open-ended normative standards have been identified, by academics and the judiciary alike, as a primary legal portal for the exercise of social control over contractual autonomy.⁸⁴ They operate unavoidably, at a high level of abstraction, are innately fluid and pluralist in nature, and are not easily reduced to specific rules.⁸⁵ Judges therefore, are required to do more than mechanically apply the rules of contract law here; they are required to invoke the relevant standard(s), to make value judgments, based upon all of the considerations, which they deem pertinent to the particular case. Increased substantive fairness in contract law therefore, comes at the price of a reduced, (although still acceptable), level of legal certainty.⁸⁶

⁸¹ This paragraph and the next draws heavily from the discussion by my colleague and me, in Bhana and Pieterse op cit note 2 at 868-869. See also Pretorius op cit note 50 at 456-457; Collins op cit note 9 at 145-146; Smith op cit note 32 at 89. See further, Kevin A Kordana and David H Tabachnick ‘Rawls and contract law’ (2005) 73 *The George Washington Law Review* 598 at 603 where they submit:

“For Rawls, fairness cannot be viewed locally – that is, as merely a matter of the relationship between individual persons conducting private transactions. Justice is to be viewed instead from what he calls the “social point of view.” Whether social justice obtains is a matter, for example, of whether or not there has been fairness of opportunity that extends “backward in time and well beyond any limited view” of individual transactions.”

See also their discussion at 627-629.

⁸² See further discussion in 2.3.3(c); 2.3.3(d) below.

⁸³ See discussion above in 2.2.1 especially at note 22; 23. See also, Cockrell op cit note 18 at 52-63, where he discusses the infusion of collectivism into contract law; Hawthorne op cit note 2 at 169-175; Smith op cit note 32 at 89.

⁸⁴ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) (Judgment of Cameron JA) at paras 88-95; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras 14-24; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at paras 6-14; Ngcobo J’s majority judgment in *Barkhuizen* supra note 17 especially at para 30; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 SCA at paras 50-51; cf *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at para 12. See further discussion of autonomy, in terms of the Bill of Rights, in 2.4 below.

⁸⁵ Cockrell op cit note 18 at 42-44; Pretorius op cit note 5 at 641-642.

⁸⁶ As per Olivier JA, in *Brisley* supra note 84 at paras 63-78 especially at para 78.

All the same, the earlier-outlined, ‘Millian’-type, ‘liberalist harm to interests’ understanding of reasonable reliance,⁸⁷ means that the resulting conception of contractual autonomy remains somewhat conservative. For instance, the categories of improperly obtained consensus, although allowing a greater measure of collectivism to infiltrate contractual autonomy, continue to be dominated by the classical liberal understanding of strongly, individualist values.⁸⁸ Likewise, the content and operation of the open-ended normative standards, within the doctrine of legality, although more receptive to considerations of substantive fairness, are, for the most part, still overruled by the classically individualist conception of freedom of contract.⁸⁹ Accordingly, the modern model of contract law, although moving contractual autonomy further along the individualism-collectivism continuum, still leans strongly towards the individualism end of the continuum.⁹⁰

It is questionable therefore, whether the modern model of contract law strikes the optimal balance between the relevant individualist and collectivist concerns, that inform the operation of autonomy, (*both actual and apparent*), within contracts. Indeed, the law of contract, the world over, remains notoriously vague as to such balance. As a result, the precise content and scope of operation of contractual autonomy in modern contract law is uncertain. For the most part, it is submitted, that this can be attributed to the lack of clarity, in terms of what comprises the intended socio-economic, legal and political vision for the relevant society and the extent to which, this is meant to influence the manner in which modern contract law operates.⁹¹

The modern economic analysis of contract law, for instance, confronts this very challenge in its delineation of the modern market. In relation to private law, the generic ‘State’ seemingly still operates on the premise of conventional free market ideology, notwithstanding, increasing legislative and regulatory market interventions that are clearly ‘welfarist’ in nature.⁹² The generic

⁸⁷ Smith op cit note 32 at 256ffg.

⁸⁸ See discussion in 2.3.3 below especially at 2.3.3(d).

⁸⁹ See discussion in 2.3.2 below. The operation of good faith in the constitutional era is a good example of how this works.

⁹⁰ Collins op cit note 9 at 140-141; 144-146; Smith op cit note 4 at 175-177.

⁹¹ Collins op cit note 9 at 137; Kennedy op cit 12 at 216-220; Pretorius op cit 12 at 264; 270-271; Atiyah op cit note 3 ‘Essay 6’ at 146-148.

⁹² On legislative interventions, op cit note 50.

'judiciary', likewise tends to pay no heed to the reality of vacillating individualist and collectivist policies, as based on the norms that are implicated, (or at least ought to be implicated), by applicable contracts, according to the socio-economic and political climate of the time. Instead, the judiciary insists generally, on the private law's veneer of certainty, by way of its steadfast invocation of the conventional 'public-private' divide, in terms of which, the private law (including the common law of contract), remains insulated largely, from the context within which it operates.⁹³

In South Africa however, the Constitution and, more especially, the Bill of Rights places our former dispensation's 'private' common law of contract in a somewhat unique position. As discussed in the previous chapter, the Constitution embodies the substantively progressive and transformative, socio-economic goals of post-apartheid South African society, and furthermore, expressly subjects all law, including the common law of contract, to this vision.⁹⁴ So, whilst our constitutional rights and values are open-ended, the South African constitution provides a clear, long-term vision of a substantively equal, free and dignified post-apartheid society, which the modern law of contract must also articulate. Accordingly, the South African model of modern contract law has a fairly definitive set of *constitutional* parameters, for the striking of the optimal balance between the relevant individualist and collectivist concerns that *must* inform the fair operation of autonomy within contracts. Yet, as will become evident below, the South African judiciary has not paid sufficient attention to the broader constitutional framework.⁹⁵

To sum up, in relation to the modern model of contract law, the judiciary continues largely, to see itself as a 'referee' that very much retains the classical hands-off approach, except when forced to deal with more substantive considerations, as delineated by the secondary reliance theory. But even then,

⁹³ On the public-private divide, see chapter 1 especially at 1.3.1; Pretorius op cit 12 at 270-271. See also Kordana and Tabachnick op cit note 81 at 598-600; 603-607; 627-629.; Hawthorne op cit note 18 at 452-453; Hawthorne op cit note 2 at 174-175; Martinek op cit note 45 at 16-17; Fried op cit note 3 at 106; 110. I would submit further, that the Dworkinian understanding of law, being made up of principles, policies and purposes, would best fit the post-apartheid mandate of transformative constitutionalism. See generally Ronald Dworkin 'Hard Cases' (1975) 88 *Harvard Law Review* 1057; Ronald Dworkin 'No Right Answer' in PMS Hacker and Joseph Raz (eds) *Law, Morality and Society: Essays in Honour of HLA Hart* (1977); Ronald Dworkin *Law's Empire* (1986).

⁹⁴ See the discussion of horizontality in chapter 1 at 1.2 and the authorities cited there.

⁹⁵ See discussion in 2.4.2 below.

the operational 'harm to interests' paradigm remains essentially liberalist in nature, with the result, that the outcomes produced by the modern model of contract law are relatively unchanged.

2.3 CONTRACTUAL AUTONOMY UNPACKED: THE INTERNAL 'CONTENT' AND EXTERNAL 'REACH' DIMENSIONS OF CONTRACTUAL AUTONOMY

2.3.1 Introduction

Upon closer analysis, of the above-outlined (neo-) classical and modern models of contract law, what becomes apparent is that the concept of contractual autonomy is an intricate one that is determinative of our common law of contract.

At the outset, the classical model articulated a strongly individualist, liberal concept of contractual autonomy, as the central cog of contract law. In doing so, the classical model identified contractual autonomy's basic legal function, with the facilitating of justice within the realm of contracts. Traditionally, this function has been expressed in the terminology of *procedural fairness* and *substantive fairness*, where the former, focuses on the fairness of the *process* by which contracting parties reach agreement, and the latter, on the fairness of the *substance* of what the parties contracted about.⁹⁶ So, whereas the classical model, grounded in the classical liberal conception of autonomy, expressed the two legs of procedural and substantive fairness in an essentially classical liberal manner, the neo-classical and modern models have purported to temper the operation of each of these legs.

My contention here is that the traditional terminology of procedural and substantive fairness, tends to obfuscate certain normative dimensions of contractual autonomy, that are implicitly at play, within the common law of contract. Indeed, the neo-classical and modern models of contract law, as outlined above, still mostly presuppose the conception of individual autonomy embedded in classical liberalism and thus, end up effecting mainly cosmetic

⁹⁶ See generally, Stephen A Smith 'In defence of substantive fairness' (1996) 112 *LQR* 138; Cockrell op cit note 18 especially at 41-46.

adjustments, to the rules and standards articulating procedural and substantive fairness.⁹⁷

I propose therefore, to rephrase the current articulation of contractual autonomy, in *autonomy terms*, expressly. At present, the procedural fairness leg of contractual autonomy comprises the rules and standards that express the doctrines of mistake, misrepresentation, undue influence and duress. Further, as a precursor for a procedurally fair exercise of contractual autonomy, it is arguable, that this leg extends also, to the rules delineating the requirements of contractual capacity and, offer and acceptance or, at the very least, the application of these rules.⁹⁸ Looking at these rules and standards together, I submit, that the question of procedural fairness translates into a direct enquiry of *what* comprises an exercise of contractual autonomy; when can it be said in law, that the contracting self has exercised his or her autonomy? Stated differently, the focus is on, what I term, the internal *content* dimension of contract autonomy.

Looking then, at the substantive fairness leg of contractual autonomy, it comprises the rules and standards that articulate the doctrine of legality. As previously alluded to, the doctrine of legality is a primary portal, through which, the judiciary is able to exercise social control over contracts. Accordingly, if the substance of a contract is found to be against public policy, it will be struck down as illegal.⁹⁹ So, the substantive fairness leg purports to regulate the reach of autonomy, once it is exercised - it purports to regulate the *extent to which*, the contracting parties can regulate their relationship by contract. For instance, an exercise of contractual autonomy will not be recognised by the courts, insofar as one party agrees to be the slave of the other – such exercise of autonomy will be regarded as an obscene excess, and the contract will be struck down, as against public policy.¹⁰⁰ The focus in terms of substantive fairness therefore, translates directly into what I term the external *reach* dimension of contractual autonomy.

⁹⁷ See discussion in 2.2.3 above.

⁹⁸ Admittedly, the categorisation of these requirements as issues of procedural fairness is not unequivocal. Nevertheless, insofar as they remain pre-requisites for the valid exercise of autonomy, their categorisation does not impact materially on my analysis.

⁹⁹ See authorities cited op cit note 83; 84.

¹⁰⁰ *Brisley* supra note 84 at paras 94-95; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at paras 9B-C.

Having thus outlined what I term the *internal (content)-external (reach)* paradigm of contractual autonomy, I proceed to interrogate each dimension in turn, with a view ultimately, of developing a constitutionalised conception of contractual autonomy.

2.3.2 The external reach dimension of contractual autonomy (the doctrine of legality)

As outlined earlier, the classical model adopts a laissez faire approach, in terms of which, courts can overrule contracting parties' freedom of contract, in exceptional circumstances only. In other words, it fosters a fairly narrow doctrine of legality, in terms of which, courts strike down or refuse to enforce contracts, in extremely limited cases. The contract's content and/or basic tendency must offend competing public policy considerations to such an extent, that the paramount values of freedom of contract and *pacta sunt servanda*, (as sanctioned by the limited conceptions of 'good faith' and inherent equity),¹⁰¹ are outweighed. In terms of the classical model of contract law therefore, the reach of contractual autonomy is fairly extensive, so much so, that contract autonomy and therefore, contract law has come to be hegemonic to other branches of private law.¹⁰² As will be discussed in the next chapter, parties can, for instance, regulate the consequences of a delict or a familial relationship by way of contract.

In contradistinction, the modern model of contract law recognises the need for a greater measure of *substantive contractual justice*.¹⁰³ As explained earlier, with the modern model's adoption of the secondary reliance theory, the courts have more room to reign in contracts that are substantively unfair or unreasonable. Indeed, in the pre-constitutional dispensation, the courts had already begun to recognise, that the normative value of good faith had a more substantial role to play in the modern era; the somewhat narrow, classical liberalist interpretation being, but one dimension, of this multi-faceted value.¹⁰⁴

An important turning point in the modern era was the demise of the

¹⁰¹ See discussion under 2.2.1 above.

¹⁰² On the traditional hegemony of contract law, see generally, Alfred Cockrell 'The hegemony of contract' (1998) 115 *SALJ* 286. See also chapter 3 at 3.3.3.

¹⁰³ This section draws heavily from the discussion by my colleague and me, in Bhana and Pieterse op cit note 2 at 889-893.

¹⁰⁴ *Ibid.*

exceptio doli.¹⁰⁵ Subsequent to its demise, the connection between the normative value of good faith and the doctrine of legality became poignant. In *Sasfin (Pty) Ltd v Beukes*, the AD, (as it then was), invoked the value of good faith¹⁰⁶ to introduce the doctrine of unconscionability, in terms of which, a contract that was so unfair as to be exploitative of a contracting party and thus, unconscionable, would be contrary to public policy, and invalid. On the basis of good faith therefore, this doctrine provided an avenue for substantive fairness:

“No court should therefore shrink from the duty of declaring a contract contrary to public policy when occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness.”¹⁰⁷

In the constitutional era then, this position was reiterated in the minority judgment of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk Saayman NO*.¹⁰⁸ Hutchison succinctly summarised the main points of Olivier JA’s discussion:

“There is a close link ... between the concepts of good faith, public policy and the public interest in contracting. This is because the function of good faith has always been to give expression in the law of contract to the community’s sense of what is fair, just and reasonable. The principle of good faith is thus an aspect of the wider notion of public policy, and the reason why the courts invoke and apply the principle is because the public interest so demands. Good faith accordingly has a dynamic role to play in ensuring that the law remains sensitive to and in tune with the views of the community.”¹⁰⁹

Subsequently, several other judgments also recognised the importance of good faith in the legality enquiry.¹¹⁰ Nevertheless, more recent SCA cases

¹⁰⁵ *Bank of Lisbon of South Africa Ltd v De Ornelas* 1998 (3) SA 580 (A). Briefly stated, the exceptio doli was an equitable Roman law defence against the substantive unfairness of a contract.

¹⁰⁶ As grounded in the notion of ‘simple justice between man and man’ – *Sasfin* supra note 100 at 9G.

¹⁰⁷ *Sasfin* supra note 100 at 9B-C. See also *Baart v Malan* 1990 (2) SA 862 (E), where a substantively equitable result was achieved by employing the device of public policy, as it features in the doctrine of legality.

¹⁰⁸ 1997 (4) SA 302 (SCA).

¹⁰⁹ Dale Hutchison ‘Non-variation clauses in contract: Any escape from the *Shifren* straitjacket?’ (2001) 118 SALJ 720 at 742. See also the minority judgment of Olivier J in *Brisley* supra note 84 at paras 63-78; cf the majority judgment at paras 11-22.

¹¹⁰ See for instance, *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) at paras 25-26; *Mort NO v Henry Shields-Chiat* 2001 (1) SA 464 (C) at 474B-476I; *Miller v Dannecker* 2001 (1) SA 928 (C) at para 19; *Silent Pond Investments CC v Woolworths (Pty) Ltd and Another* 2011 (6) SA 343 (D) at paras 44-52; 66-67; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at paras 22-24; 30-34; cf *South African*

have made it clear, that the mere presence of bad faith in a contract does not automatically render the contract against public policy, and illegal. Bad faith is simply a factor to be taken into account, in carrying out the legality exercise.¹¹¹ Even so, the CC has since, (albeit in an obiter statement), aligned the value of good faith with the values of reasonableness and fairness, so that, substantive reasonableness and fairness are now factors, that a court should take cognisance of, in conducting an enquiry into the legality of a contract or a contractual clause.¹¹²

Our contract law therefore, is shifting gradually in the direction of substantive contractual justice. Moreover, with the advent of the Constitution, the courts have even more impetus to move beyond the conservative, 'Millian'-type, 'liberalist harm to interests' understanding of the secondary reliance basis of contract law.¹¹³

Significantly, the judiciary has recognised, that in the constitutional era, the doctrine of legality must draw progressively on the objective normative value system, that is our Bill of Rights, as well as the underpinning, transformative socio-economic, policy goals for post-apartheid South Africa.¹¹⁴ So, where a sanctioning of individual autonomy (actual and/or apparent), unduly impedes the foundational constitutional values and socio-economic policy goals of an increasingly 'welfarist', post-apartheid South African society, it should not be legally recognised.¹¹⁵ Taken further, individual autonomy (actual and/or apparent), should also be limited when it fails unreasonably and unjustifiably, to respect another's competing fundamental rights or freedoms, as enumerated in the Bill of Rights. Finally, there may also be instances where the Constitution requires the reach of individual autonomy (actual and/or

Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA) at paras 27-32.

¹¹¹ *Brisley* supra note 84 at paras 11–34, *Afrox* supra note 84 at para 32; *Bredenkamp* supra note 84 at para 50; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) at paras 23-25; cf *Silent Pond Investments* supra note 111 at paras 51-52, where the court held that a duty of good faith will be enforceable if contracting parties expressly agree to it.

¹¹² *Barkhuizen* supra note 17 at para 48; 70; 73; 79-82; *Everfresh Market Virginia* supra note 111 (minority judgment of Yacoob J) at paras 22-24.

¹¹³ Pretorius op cit note 63 at 590-593. Residual contract law theories, like 'fairness theory', also have a role to play here.

¹¹⁴ As per Chapter Two of the Constitution. See also Brand op cit note 1 at 84-89.

¹¹⁵ Pretorius op cit note 63 at 583-584, where he submits that, "perhaps reliance might best be viewed as a manifestation of good faith, or rather principles of reasonableness and fairness..." See also Pretorius op cit note 60 at 99-100, and the two-step reasonableness test formulated in *Barkhuizen* supra note 17 at paras 30; 56-58 (see discussion under 2.4.2 below).

apparent), to be *extended*.¹¹⁶

That the judiciary has begun the process of constitutionalising the common law of contract, (at least, through the portal of legality), is a step in the right direction. Yet, in so doing, our judiciary continues to look at contracts mainly, through the individualist prism of the erstwhile classical liberal era, in terms of which, the laissez faire understanding of freedom of contract persists, as the foundational legal premise. In fact, the judiciary has situated the classical liberal conception of autonomy, (as grounded in the will theory), within the Bill of Rights framework,¹¹⁷ so much so, that freedom of contract itself appears to have been elevated to being a constitutional value.¹¹⁸ In effect therefore, the operation of the will theory within the modern model of contract law, although seemingly mindful of the significantly altered constitutional context, continues largely to take its lead from the classical model's strongly individualist leanings of self-interest, self-reliance and self-determination, in relation to contractual autonomy.¹¹⁹

The classical conception of contractual autonomy therefore, still features in, and moreover, *dominates* the (constitutionalised) legality enquiry, as conducted by the courts, without any normative interrogation of what its content is, (and ought to be), in the constitutional era. As a result, freedom of contract (and *pacta sunt servanda*) continues to prevail generally, against competing constitutional considerations, in the constitutional-legality cases that come before the courts.¹²⁰

2.3.3 The internal content dimension of contractual autonomy

(a) Introduction

At the outset of this chapter, I highlighted the importance of a holistic approach to contractual autonomy that takes cognisance, both of its external reach dimension, as well as its internal content dimension. Yet, whilst the earlier-

¹¹⁶ See for instance, *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA); 2005 (8) BCLR 786 (CC) at paras 23-46; 50-52.

¹¹⁷ See authorities cited op cit note 84.

¹¹⁸ *Afrox* supra note 84 at para 123.

¹¹⁹ Deeksha Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 SALJ 269 at 273-275.

¹²⁰ *Ibid*.

outlined neo-classical and modern models of contract law purport to deal rigorously with the external scope of operation of contractual autonomy, they still mostly presuppose an internal conception of individual autonomy embedded in classical liberalism. They accept as implicit, that autonomy continues to comprise the free will of an atomistic individual, to make the basic (formal) choice of whether, with whom and on what terms to contract.¹²¹ The upshot is that the concept of autonomy itself has not received a lot of attention in modern contract law discourse,¹²² save perhaps, for the case of standard form contracts, where courts seem superficially to assimilate the classical form of autonomy and again, strive mainly, to control its external reach dimension.¹²³ At the risk of being tedious therefore, I preface my analysis of the internal dimension of contractual autonomy, with a re-tracing of its classical liberal origins and ensuing content.

In the classical liberal era, *laissez faire* came to occupy primacy of place as the overarching organising principle of society. Briefly stated, this entailed the State maintaining a ‘hands-off approach’ in relation to individuals’ arrangements of their private affairs; the main idea being, that the exercise of State power should not threaten, what was then, the newly devised individualist liberal ideal. It was imperative, that all individuals be respected as the masters of their own destinies. To this end then, as the State evolved into a fully fledged classical liberal State, it embraced a strict division between public and private matters.

In terms of its public (constitutional) mandate, the State concerned itself, essentially with the governance of the country, in a manner that left individuals,

¹²¹ See earlier discussion under 2.2.3. See also Pretorius op cit note 5 at 640; Pretorius op cit note 12 at 259-260; Lubbe and Murray op cit note 15 at 20-21; 25-26; Luanda Hawthorne ‘Distribution of wealth, the dependency theory and the law of contract’ (2006) 69 *THRHR* 48 at 49-52; Atiyah op cit note 3 ‘Essay 6’ at 121.

¹²² As opposed to its function as the underlying rationale for contractual liability, or its externally delineated limits, as highlighted in 2.3.2 above. See Marius Pieterse ‘The interdependence of rights to health and autonomy in South Africa’ (2008) 125 *SALJ* 553 at 553, where he submits that “...the dominance of ‘classical’ conceptions of liberty in many legal systems tends to preclude meaningful engagement with the substantive and material dimensions of human autonomy [itself].” Cf the quotation of Professor HR Hahlo in *Barkhuizen* supra note 17 at para 169, which epitomises classical liberal thinking on the internal content dimension of autonomy.

¹²³ On standard form contracts generally, see Rakoff op cit note 43; see also Robertson op cit note 39 at 187-196; Sachs J in *Barkhuizen* supra note 17 at para 139; DL Pearmain ‘Contracting for socio-economic rights: A contradiction in terms? (2)’ (2006) 69 *THRHR* 466 at 475; PJ Sutherland ‘Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) – Part 2’ (2009) 20 *Stell LR* 50 at 62-63.

largely 'free' to realise their particular conceptions of the 'good life'.¹²⁴ Admittedly, many parties' vulnerable socio-economic position at the time, posed a risk to their attainment of such goals. However, this was said only to be temporary. It was argued, that for so long as all individuals were entitled to exercise their freedom, even if, on a substantively unequal footing at first, they could achieve their goals. Significantly, this would require time, effort, education and commitment, especially of more vulnerable individuals. In the end however, individuals would be able to work their way out of, what may be dire circumstances and, prevail.¹²⁵

So, the basic idea was that the liberal State would *facilitate*, (as opposed to compel), a substantive, socio-economic equality and freedom, by way of initial baseline recognition of a formal equality between private individuals and the ensuing freedom.¹²⁶ The implication was that, only a lack of will on the part of a rational individual would prevent him or her from succeeding in life. This meant that the classical self was responsible essentially, for him or herself and his or her life – he or she could *rely* only on him or herself, to *determine* and achieve, what was in his or her best *interests*.¹²⁷ It is upon this basis then, that a distinct, *laissez faire* system of private common law emerged, where a *negative* conception of freedom was privileged.

'Individual autonomy' in the classical liberal era was characterised by the negative touchstone of an 'absence of coercion',¹²⁸ and more broadly speaking, a 'freedom from obligation', except for where personal responsibility could be ascribed, on the basis of fault or consent.¹²⁹ As alluded to, earlier in this

¹²⁴ See discussion in 2.2.1 above regarding the underpinning 'philosophy' of self-determination, self-reliance and self-interest. See also Hawthorne op cit note 32 at 599; Lubbe and Murray op cit note 15 at 21; Hawthorne op cit note 121 at 53-55.

¹²⁵ Atiyah op cit note 3 'Essay 12' at 358; Hawthorne op cit note 18 at 441; cf Hawthorne op cit note 2 at 162-163.

¹²⁶ Ibid.

¹²⁷ Smith op cit note 32 at 107; 139-140. On the flawed nature of the premise of rationality, see Hawthorne op cit note 32 at 599-601; 618-619. Hawthorne submits (at 600) that,

"...rationality [is] under suspicion...individuals do not necessarily make the best choices for themselves. Moreover, the enormous disparity of resources in domestic and global markets, economic necessity and ignorance force patients, consumers of milk and bread, the insured and everyone else into decisions based on misleading or no information or driven by necessity; this situation has led to a worldwide recognition of the modern state's protective role...."

See also Smith op cit note 4 at 175; 179-180; 185-186, where he recognises that individuals can make non-valuable choices and furthermore, that self-interest is not always a sufficient safeguard; cf Smith op cit note 32 at 126-127.

¹²⁸ Smith op cit note 4 at 177; Smith op cit note 32 at 139-140.

¹²⁹ Beatson and Friedman op cit note 2 at 7-8.

chapter, this negative understanding of autonomy featured likewise in the classical model of contract law and later on, became naturalised in the neo-classical and modern models of contemporary contract law.

The essential difficulty however, is that unlike the law of delict, for instance, where the personal responsibility element of fault is subordinate to that of wrongfulness, *autonomy* comprises the central axis of contract law, even in relation to the limitations of its generally extensive reach, in terms of the doctrine of legality.¹³⁰ Moreover, autonomy entails an actual (or apparent) *voluntary undertaking* for the creation of contractual obligations. By definition therefore, the conclusion of a valid contract contemplates an actual (or apparent) exercise of autonomy, which ought ideally to be sourced in a positive conception of autonomy.¹³¹ Nevertheless, our law's conception of contractual autonomy continues to be identified with *laissez faire*, and as such, is housed essentially in a 'personal responsibility-consent exception' to the negative conception of autonomy. The net result, is a fairly thin conception of positive autonomy within our common law of contract.

In the remainder of this section, I attempt to illustrate how our modern contract law continues to operate on an overly thin internal conception of contractual autonomy, and consider the implications thereof, for the modern contracting self. I begin, by examining the rules delineating the legal requirement of contractual capacity for the valid exercise of autonomy. I show how these rules continue to endorse the deficient, classical conception of the self that fails in the end, even to realise the substantive, socio-economic equality and freedom, originally advocated for, by classical liberalism itself. I then move on, to assess the modern doctrine of mistake, where I ascribe the current jurisprudential difficulties to an impoverished internal conception of apparent autonomy, coupled with the lack of normative interrogation of its external reach dimension. Finally, I look at the misrepresentation category of improperly obtained consensus, and show how it falls short of the modern self, exercising (actual or apparent) contractual autonomy.

¹³⁰ See discussion in 2.2.1 above, especially at notes 21; 22, on the limited role of competing policy concerns. In addition, in the context of a delict, "no positive act is required for these rights to come into existence" - Smith op cit note 32 at 73.

¹³¹ Robertson op cit note 39 at 182-186; Smith op cit note 32 at 73; 77; 139-140; 157.

(b) Contractual capacity

In terms of our contract law rules, the legal pre-requisite for the parties' positive exercise of autonomy is contractual capacity. Articulated further, an individual must have the basic cognitive ability to appreciate the legal nature and significance of entering into a contract, and furthermore, must have the essential conative ability to act accordingly.¹³² Only then, can it be said that he or she has the requisite autonomy to negotiate, and voluntarily conclude, a legally binding contract.

But such requirement of contractual capacity has proved so rudimentary, that it is rarely an issue between the parties.¹³³ On the contrary, a contracting party who has reached majority age,¹³⁴ and has not been declared the subject of a legal impediment, such as mental illness or prodigality, is presumed rebuttably, to have the required cognitive capacity. In addition, an act is deemed voluntary, bar some force that *physically* overpowers the conative ability of a party, to the extent that, he or she cannot be said to have been acting at all (*vis absoluta*).¹³⁵

The point of departure therefore, is that all individuals are respected as (formally) equal before the law, and as such, are presumed basically, to be willing and able, both cognitively and conatively, to exercise their contractual autonomy positively, unless they can prove otherwise. Notably, the element of contractual capacity does not distinguish between capacities to exercise actual versus apparent autonomy i.e. the capacity of a party actually to enter into a contract versus the capacity to act in a manner, which creates the impression that he or she is entering into a contract.¹³⁶ Moreover, autonomy is framed in absolute terms as an 'either-or' question - an individual with presumed

¹³² I use the terms cognitive, and conative, strictly to denote a *legal* understanding of the respective abilities, as set out in the text. I do not purport to venture into the scientific/medical meanings of capacity. For an exposition of capacity from a psychological perspective, see DA Louw and DJA Edwards *Psychology: An Introduction for Students in Southern Africa* (1993).

¹³³ See the majority judgment in *Saayman* supra note 108; cf s 39 of the Consumer Protection Act 68 of 2008, which appears to shift emphasis away from the *ability* of the consumer, to the *risk* of the supplier not knowing the consumer's lack of full legal capacity.

¹³⁴ Section 17 of the Children's Act 38 of 2005.

¹³⁵ See Van der Merwe et al op cit note 22 at 99; Pretorius op cit note 5 at 640; Collins op cit note 9 at 142; cf Robertson op cit note 39 at 182-186; Trebilcock op cit note 38 at 91.

¹³⁶ See Jacqueline Heaton *The South African Law of Persons* 3ed (2008) at 38-39; JC Knobel (ed and trans), J Neethling and JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 6ed (2010) at 125; Rakoff op cit note 43 at 1186, where he submits that, "...contract law is grounded on the voluntary assumption of obligation, or on what may reasonably be interpreted as such..."

contractual capacity, either exercises his or her autonomy by the voluntary making of a choice,¹³⁷ or not at all; there are no gradations, either of voluntary actions, or of choices exercised. The net result, it is said, is an ease of adjudication by the courts which, as a matter of policy, promotes contractual certainty.

In the final event, even if the question of contractual capacity does become relevant, contractual certainty again dictates that the factual enquiry remain limited strictly, to an atomistic determination of the individual's cognitive capacity to exercise autonomy, and ensuing voluntary action in the abstract, without any reference, to the (potential) influence of the particular context in which such individual finds him or herself.¹³⁸ At most, neo-classical economic analysis has admitted to a premise of *rational* individuals who, relying essentially on themselves, and absent any internal market failure (in the neo-liberalist sense), can, and do act, always in their own best (subjective) interests.¹³⁹ The modern model purports to go a little further, with attempts to bring in greater collectivist-type justice, through extant legal avenues of procedural fairness, vis-a-vis the exercise of contractual autonomy.¹⁴⁰

Nevertheless, contractual capacity's delineation of autonomy remains essentially, classically liberal in nature. It does not take account of pertinent socio-economic factors that are now considered integral to any meaningful understanding of (substantive) individual autonomy, in relation to the making of rational, voluntary, choices. Most notably, it does not take account of his or her socio-economic status and privation, in terms of basic human needs and/or

¹³⁷ This includes the voluntary creating of an impression of making a choice. Rakoff op cit note 43 at 1180-1183, where the 'Dimensions of Choice' in relation to the terms of a contract are discussed. See also Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 at 267, for a discussion of the choices of women in terms of marriage.

¹³⁸ Hawthorne op cit note 2 at 166; Collins op cit note 9 at 147-148; Pieterse op cit note 122 at 565-567. 'Context' here, would refer to the broader socio-economic context as well as the more personal context of the contracting parties.

¹³⁹ Such interests are said to include future (long-term) interests. This presumes that individuals are able to presentiate future intentions and risks. But such, at least requires more-or-less perfect market conditions, where participants have access to all relevant information, and therefore, can compete fairly equally with one another. Smith op cit note 4 at 173.

¹⁴⁰ See 2.2.2; 2.2.3 above.

wants,¹⁴¹ level of education,¹⁴² 'naivety in business' and/or access to information, and overall vulnerability to exploitation.¹⁴³

To boot, our law of contract fails even, to recognise the value of the broader liberalist context of an 'autonomous life', in which the 'autonomous self' and autonomy per se, are necessarily situated. In identifying the 'choosing self', the law leans towards the 'instantaneous discrete self', present at the time of entering into the contract, as opposed to the more 'continuous self who extends in time', at least, for so long as the contract is in existence. So, the law fails further to accommodate the 'future self' adequately, particularly in relation to the ability of the 'contracting autonomous self', properly to presentiate the 'future self' and all attendant risks. The ultimate liberal quest, for autonomy across an individual's lifespan as a whole, (i.e. past, present and future), is thus, also undermined.¹⁴⁴

The upshot is that the element of contractual capacity, although meant to be the modern law's initial guarantor of *positive* contractual autonomy, continues to be dominated, somewhat counter-intuitively, by erstwhile, laissez faire philosophy. In effect, our law's element of contractual capacity perpetuates a formal, *negative* conception of laissez faire contractual autonomy, which although legally certain in nature, fails in the end, even after the passage of well over a century, to realise the substantive, (socio-economic)

¹⁴¹ Such, would at least include those needs, (like housing, water, education, etc.), as embodied by the socio-economic rights founded in our Bill of Rights.

¹⁴² See for instance, the case of *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 (4) SA 105 (E), where the contractant's inability to read English was not considered an acceptable excuse.

¹⁴³ Hawthorne op cit note 121 at 61-62:

"The "centre" contracting party is a disembodied, unsituated entity who has the power to strike bargains concerning his or her basic needs. In the developing world the resources of the centre are education, economic and political power and the concomitant riches. However, the median person in the developing world, the peripheral contracting party, is rarely skilled, knowledgeable, well-educated or wealthy. Nevertheless, in terms of the classical theory all contracting parties are treated like the average person without needs, and thus all parties are treated as equal. The invisible hand of the market is deemed to be neutral and thus to treat everyone equally...The developing periphery of the poor is thus denied equity-based defences...These inequalities which typify the developing world can be signified in the term "internal colonialism", which connotes the economic subordination of the indigent underclass in a system originating in or affiliated to the developed world."

See also Hawthorne op cit note 2 at 170; Hawthorne op cit note 32 at 618-619; Atiyah op cit note 3 'Essay 7' at 155; Smith op cit note 4 at 177, where he refers to such as the horizontal dimension of autonomy.

¹⁴⁴ Smith op cit note 4 at 177; Smith op cit note 32 at 258-260; Atiyah op cit note 3 'Essay 6' at 126. See 2.2.1 above especially at note 21.

equality and ensuing (positive) freedom, as envisaged originally, by classical liberalism itself.¹⁴⁵

Contractual capacity's thin conception of autonomy then, sets the stage for the legal rules that articulate procedural fairness in our law of contract.¹⁴⁶ To iterate, procedural fairness focuses firstly, on the legal nature and effect of apparent autonomy (by way of the doctrine of mistake), and secondly, on the legal propriety of certain processes through which consensus is obtained, (by way of the established categories of misrepresentation, duress, undue influence and bribery).¹⁴⁷ It is to each of these issues, that I now turn.

(c) The doctrine of mistake

(i) *The doctrine of quasi mutual assent and reasonable reliance in general*

The legal doctrine of mistake appears to function, as the main portal through which, the earlier-outlined, secondary theory of reasonable reliance, operates. As explained earlier, contractual autonomy in modern contract law can take the form of *actual* subjective autonomy or objectively *apparent* autonomy. To expound, modern contract law grounds contractual liability primarily, in the classical will theory's conception of contractual autonomy. However, in cases, where the exercise of subjective, contractual autonomy of a party¹⁴⁸ falls short, by reason that he or she has made a (legally relevant) mistake,¹⁴⁹ the secondary reliance theory may still impose contractual liability, on the basis of the party's *apparent* exercise of contractual autonomy.¹⁵⁰

At present, the doctrine of mistake is expressed in terms of two alternate sets of legal rules. First, there is the set of legal rules that the contracting party

¹⁴⁵ Bhana op cit note 119 at 273-278.

¹⁴⁶ In our law of contract, there is no overarching category of improperly obtained consensus - *Exel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* 1999 (2) SA 719 (SCA). So, a court must fit the case before it, into one of the established categories, or if appropriate, develop a new category.

¹⁴⁷ For a detailed discussion of the relevant categories, see Van der Merwe et al op cit note 22 at chapter 4.

¹⁴⁸ Note that one or both parties can be mistaken. Further, if both parties are mistaken, the parties can make the same mistake or different mistakes. For purposes of this discussion, I focus on unilateral mistakes. For a detailed discussion of the basic rules of mistake, see Van der Merwe et al op cit note 22 at chapter 2, 22-45.

¹⁴⁹ i.e. a causal mistake that leads to dissensus between the parties as to the terms, parties and/or animus contrahendi in relation to the contract. See also, the discussion of the reliance theory under 2.2.3(b) above.

¹⁵⁰ Ibid.

trying to enforce the contract, (i.e. the contract assertor/non-mistaken party), would invoke. This set of rules comprises the doctrine of quasi mutual assent, that establishes whether the contract assertor, reasonably relied on the appearance of consensus, created by the other contracting party i.e. is the reliance by the non-mistaken party, on the apparent exercise of autonomy by the other (mistaken) party, reasonable, and therefore, legally protectable? In essence therefore, the doctrine of quasi mutual assent implicates the element of reasonable reliance *directly*, in relation to the objective appearance of consensus.¹⁵¹

Second, there is the alternate set of legal rules, that the contracting party trying to escape the contract (i.e. the contract denier/mistaken party), would invoke. This set of rules comprises the justus error approach, which determines whether the mistake of the contract denier is reasonable, and therefore, legally excusable. More specifically, a court employing the justus error approach would determine whether the non-mistaken party *caused* the mistake, or was *aware*, or *ought to have been aware*, of the mistake, or whether the mistake was *otherwise excusable*.¹⁵² In essence therefore, the justus error approach focuses on the mistake. Still, in focusing on the mistake, a court assesses the reasonableness of the mistake, basically in terms of the *non-mistaken party's reasonable reliance* on the objective appearance of consensus.¹⁵³ Explained further, where the non-mistaken party *caused* the mistake, it cannot be said that he or she reasonably relied, on the apparent exercise of autonomy by the mistaken party. Likewise, if the non-mistaken party was aware, or ought to have been aware, of the mistake, it cannot be said that he or she relied, or reasonably relied, on the appearance of consensus created by the mistaken party. The only deviation from the reasonable reliance

¹⁵¹ See for instance, *Saambou* supra note 51; *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A); *National and Overseas Distributors v Potato Board* 1958 (2) SA 473 (A); *Steyn v LSA Motors Ltd* 1994 (1) SA 49 (A); *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A); *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA).

¹⁵² See for instance, *Diedericks v Minister of Lands* 1964 (1) SA 49 (N); *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 (4) SA 164 (D); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA); cf *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA).

¹⁵³ Dale Hutchison and Belinda Van Heerden 'Mistake in contract: A comedy of (justus) errors' (1987) 104 SALJ 523 at 524-527.

yardstick appears to be, where a court considers the mistake 'otherwise excusable'.¹⁵⁴

With the exception of 'otherwise excusable' mistakes therefore, the doctrine of quasi mutual assent, and the justus error approach, are conversely correlative of one another,¹⁵⁵ in their respective *direct* and *indirect* articulations of reliance theory's conception of apparent contractual autonomy. In other words, contractual liability, in terms of the narrower doctrine of mistake, appears to turn ultimately on *the reasonable reliance by the non-mistaken contracting party*, on the apparent exercise of autonomy by the mistaken contracting party.¹⁵⁶ The pertinent question is why?

As outlined earlier, the secondary reliance theory has been delineated basically, in terms of the (arguably conservative), 'Millian'-type, 'liberalist harm to interests' theory.¹⁵⁷ So, even though the courts have recognised that the concept of apparent autonomy must infuse a greater degree of distributive (collectivist) justice into the modern law of contract, they do so through the lens of classical liberalism: By the doctrine of mistake focusing attention on whether there was reasonable reliance on the part on the non-mistaken party, the basic premise is that the non-mistaken party acted for him or herself, in the same manner that the classical contracting self would have acted i.e. in entering into the contract he or she relied on him or herself to determine, and achieve, what he or she considered to be in his or her best interests.¹⁵⁸ As such, the non-mistaken party should not suffer the (potential) harm flowing from the mistake of the mistaken party. Conversely, the mistaken party cannot expect others to bear the consequences of his or her mistake – if he or she makes a (legally relevant) mistake when entering into a contract, the legal responsibility for such mistake is his or hers alone.

The upshot is that in the modern context of the doctrine of mistake, the contracting self, whether non-mistaken (and therefore, exercising actual contractual autonomy), or mistaken (and therefore, exercising mere apparent

¹⁵⁴ This category of mistake is dealt with separately in the next section.

¹⁵⁵ Hutchison and Van Heerden op cit note 153 at 524-529.

¹⁵⁶ *Sonap* supra note 151; *Slip Knot* supra note 151.

¹⁵⁷ See discussion under 2.2.3(b) above.

¹⁵⁸ i.e. the individualist underpinnings of self-interest, self-reliance and self-determination.

autonomy), continues largely to assume a classical liberal identity.¹⁵⁹ However, given that the non-mistaken party would be most aligned with the classical liberal self, the doctrine of mistake effectively elevates the interests of the non-mistaken party, above those of the mistaken party.

(ii) *The additional justus error ground of an 'otherwise excusable' mistake*

In South African contract law, the doctrine of mistake is complicated further, by the contentious added justus error ground, in terms of which, a mistaken party may be able to escape from a contract, on the basis that his or her mistake is 'otherwise excusable'.

To begin with, it is contentious in our law, whether the 'otherwise excusable' ground of justus error is even a valid ground of mistake. Whereas, the SCA has in at least two instances, held that the doctrine of quasi mutual assent is decisive,¹⁶⁰ the courts have continued generally, to use the justus error approach and in some instances, even the 'otherwise excusable' ground.¹⁶¹ Indeed, the SCA itself purported recently, to reconcile this added justus error ground, with the doctrine of quasi mutual assent.¹⁶²

Additionally, the precise content of the 'otherwise excusable' ground of justus error is unclear. Academics have identified two major considerations here.¹⁶³ The first major consideration is the absence of fault, on the part of the mistaken party, in making, (and operating under), a mistake, and thereby, creating the impression of exercising actual autonomy in relation to the contract. Presumably, the standard of fault, in this context, takes the form of

¹⁵⁹ As per the classical model discussed in 2.2.1 above.

¹⁶⁰ *Sonap* supra note 151; *Slip Knot* supra note 151.

¹⁶¹ See for instance, *Nasionale Behuisingskommissie v Greyling* 1986 (4) SA 917 (T); *Lake and Others NNO v Caithness* 1997 (1) SA 667 (E). See also Hutchison and Van Heerden op cit note 153, where the authors contrast the approach taken in *Greyling*, with that taken in *Horty Investments (Pty) Ltd v Interior Acoustics (Pty) Ltd* 1984 (3) SA 537 (W).

¹⁶² *Brink* supra note 152 at para 8, where the court purported to combine the doctrine of quasi mutual assent and the justus error approach. However, far from resolving the legal quandary, the court created further difficulties. See Minette Nortje "Unexpected terms' and caveat subscriptor' (2011) 128 SALJ 741 at 748.

¹⁶³ Note further, the debate regarding mistake and whether it has its roots in the doctrine of estoppel. Cockrell op cit note 18 at 46-50; Cockrell op cit note 63 at 47; Hutchison and Van Heerden op cit note 153 at 528-530. More generally, see Collins op cit note 35 at chapter 5. The issues surrounding estoppel aside, the considerations identified here remain important considerations, given that reliance theory ought to be more rooted in collectivist/distributive justice.

the *delictual* standard of non-negligence.¹⁶⁴ An often cited example, of where there would be such an absence of fault, is when a third party causes the mistake of the mistaken party.¹⁶⁵

The second consideration relates to the absence of concrete harm or prejudice to the non-mistaken party.¹⁶⁶ In terms of the doctrine of quasi mutual assent, the law does not require the non-mistaken party to prove harm or prejudice suffered; the non-mistaken party need only prove that he or she entered into the contract, whilst relying on the apparent exercise of autonomy by the mistaken party.¹⁶⁷ However, in terms of the ‘otherwise excusable’ mistake category, there is room to accommodate the fact that the non-mistaken party had not, before discovery of the mistake, acted to his or her detriment, in reliance on the contract. So, for instance, a (non-mistaken) building contractor, who is contracted by a (mistaken) landowner to build a house, would not have acted to his or her detriment if, at the time of discovering the landowner’s mistake, he or she had not yet taken any steps, or incurred any costs, in preparation of his or her performance in terms of the contract.¹⁶⁸ In such circumstances, the argument is that the mistaken party should be allowed to escape the contract, on the basis that the mistake was ‘otherwise excusable’, given that there was no concrete harm to the non-mistaken party.

What emerges from the above is that the ‘otherwise excusable’ ground of justus error, purports to shift the (somewhat exclusive) focus away from the reasonable reliance of the non-mistaken party, and to concentrate rather, on whether, and if so, why the mistaken party should be held legally responsible for his or her mistake. The justus error’s ‘otherwise excusable’ category thus purports to distinguish the mistaken contracting self, from the classical

¹⁶⁴ Note, that the capacity to act with fault is determined in terms of the delictual standard – see Neethling *et al* op cit note 136 at 125-126. The focus shifts to the mistaken party, where fault is used as the basis of ascribing personal responsibility.

¹⁶⁵ See also the scenario in *Lake* supra note 161, where the mistaken party was very ill and therefore vulnerable, at the time of contracting.

¹⁶⁶ The question of what comprises harm, for the purposes of the doctrine of mistake, is unclear – at present, it would seem that our law treats the mere entering into the contract as the prejudice/harm. In other words, there is no need for the non-mistaken party actually to act to his or her detriment by relying on the contract before the existence of a mistake is discovered. For example, in reliance on a building contract, a builder enters into employment contracts with labourers.

¹⁶⁷ For a discussion of the doctrine of mistake and estoppel/reasonable reliance relationship see Cockrell op cit note 18 at 46-50.

¹⁶⁸ See the scenario in *Potato Board* supra note 151; see also *Maritz v Pratley* 1894 (11) SC 435.

contracting self, and so, counter the doctrine of mistake's liberalist privileging of the non-mistaken party, over the mistaken party.

(iii) *The internal content and external reach dimensions of apparent autonomy*

Taken a step further, the contention about the 'otherwise excusable' category of mistake, highlights the failure of the doctrine of mistake, fully to address the normative tensions that are, (and ought to be), at play, when dealing with the implications of a legally relevant mistake for the contracting self. This is exacerbated by the current understanding of the doctrine of mistake, as an issue of procedural fairness. The courts still focus their attentions mostly on the technical application of the relevant sets of rules, rather than the continued legitimacy of the underlying normative values, that must animate the concept of apparent contractual autonomy, within the post-apartheid, constitutional context.

As our common law of contract currently stands, the above-outlined, (liberalist) reliance-based concept of *apparent autonomy* is recognised within the parameters of the doctrine of mistake. Furthermore, once a court is satisfied that there was a valid (and therefore, a procedurally fair), exercise of apparent autonomy, in terms of the doctrine of mistake, the mistaken party is bound by the contract, for all intents and purposes. The significance of the distinction between actual and apparent autonomy falls away.¹⁶⁹ So, for instance, if there is an additional (substantive fairness) issue about the legality of the contract, the court will conduct its enquiry on the premise that freedom of contract (and *pacta sunt servanda*), has full blown application in its classical liberal form. The potential normative role of reliance theory is thus, significantly undermined within the legality enquiry, and so too, within the rest of our contract law.

Nevertheless, given that reliance theory constitutes the secondary basis of our common law of contract, it is crucial that the concept of apparent contractual autonomy, like that of actual contractual autonomy, is holistic and

¹⁶⁹ As discussed in 2.2.3(b) and 2.2.3(c) above, elements of reliance theory, in the sense of distributive justice, feature elsewhere within our common law of contract. Nevertheless, in relation to apparent autonomy, the articulation is somewhat vague.

legally sound. For this purpose, it would be useful to re-cast our contract law's principal reliance-based liability, (i.e. the doctrine of mistake), in terms of the internal 'content' and external 'reach' dimensions of apparent autonomy.

(aa) *The internal content dimension of apparent autonomy*

In terms of the internal content dimension of apparent autonomy, it is notable, that our contract law does not have a distinct requirement of capacity, on the part of the mistaken party, firstly, to make a mistake and further, to create an impression of consensus, whether with fault or otherwise.¹⁷⁰ The presence of such capacity is simply assumed by the doctrine of mistake, presumably, because the element of contractual capacity ought to cover it.

As pointed out earlier, the element of contractual capacity does not distinguish the capacity of a party, actually to enter into a contract, versus the capacity to act in a manner, which creates the impression that he or she is entering into a contract. Nevertheless, the legal capacity to exercise apparent autonomy may be significantly different, especially if the delictual standard of fault is implicated, by the 'otherwise excusable' justus error category, of a non-negligent mistake.¹⁷¹ The upshot is that contractual capacity's earlier outlined, thin conception of autonomy, has set the stage similarly, for an impoverished internal conception of apparent autonomy too.

Indeed, the traditional doctrine of mistake simply requires the mistaken party to create an impression that he or she is exercising contractual autonomy. As outlined above, the only normative parameter for the creation of such impression and thus, for what constitutes a valid exercise of apparent autonomy is that the impression created, must be one that is *reasonably relied* upon. The emphasis therefore, is on the *reliance*, rather than the *exercise, of apparent autonomy* itself. In addition, the standard of reasonableness is delineated in our contract law, in terms of the atomistic, independent, contracting self, operating in the abstract - it does not accommodate factors pertaining specifically, to the mistaken party, not even those relating to his or her state of mind and/or general vulnerability, in the particular context. The

¹⁷⁰ Likewise, there is no express requirement of capacity on the part of the non-mistaken party, in terms of his or her ability to rely on the appearance of consensus.

¹⁷¹ Most notably, a person's capacity may fall short of the contractual standard, but not the delictual standard.

result, is that the doctrine of mistake invokes a conservative, liberalist form of reasonable reliance, that identifies the non-mistaken party and the mistaken party alike, with the classical contracting self.

In contradistinction, the *justus error*'s 'otherwise excusable' category of mistake purports to invoke the absence of fault, on the part of the mistaken party, in order to distinguish the mistaken contracting self, from the non-mistaken contracting self. Indeed, the 'otherwise excusable' mistake category, highlights the need for a more contextual and material understanding of the reliance-based contracting self, who is an interdependent member of post-apartheid, South African society and who may exercise *apparent* (as opposed to actual), autonomy.

To sum up, the internal content dimension of apparent, contractual autonomy, like its actual autonomy counterpart, is fairly thin. As such, it also needs to be normatively interrogated, in the constitutional context and developed, in a manner that moves beyond the mere recognition of an individual's basic cognitive and conative abilities.

At the very least, our contract law ought to adopt a fuller concept of capacity, that can anticipate fault, (or the absence thereof), on the part of a mistaken party. In those cases, where the mistaken party acted *without fault* (especially, in the delictual sense of fault), the *justus error*'s 'otherwise excusable' ground of escape could be developed, with a view to enhancing modern contract law's internal conception of *apparent* autonomy too, and so, find application.¹⁷²

Admittedly, such recognition of fault, (or non-fault as the case may be), in the contractual context may somewhat collapse the traditional distinction between consent and fault; fault being the common law's other basic ground for the ascription of personal responsibility and which, for the most part is not considered relevant to contracts. Nevertheless, a recognition (and development) of reliance theory's personal responsibility facet of fault, within the 'otherwise excusable' category of the *justus error* approach, could lead eventually, to a fuller internal conception of apparent contractual autonomy.

¹⁷² There is the argument that it is pragmatic to use the declaration theory as a starting point, and that a mistaken party can then escape a contract, if his or her error is *justus*. According to Martinek op cit note 45 at 18, this will go some way, within the law of contract, to striking "a moderate balance between the formal ethics of liberty and the material ethics of responsibility".

Moreover, as previously mentioned, reliance theory implicates personal responsibility inasmuch as a non-mistaken party's reasonable reliance on the appearance of consensus would, *in most cases* denote reasonable foreseeability and thus, a 'half-deliberate exercise of autonomy', on the part of the mistaken party who created such outward appearance.¹⁷³

So, in the end, it is submitted, that a fuller conception of the supplementary reliance theory and therewith, a fuller internal content dimension of apparent autonomy, could be the key to the balance in our contract law between the subjective (atomistic) extreme of actual autonomy, and the objective (solidarity) extreme of apparent autonomy.

(bb) The external reach dimension of apparent autonomy

Dealing finally with the external reach dimension of apparent autonomy, what should be evident is that the doctrine of mistake does not pay much attention to this dimension of apparent autonomy. Indeed, save for the potentially tenuous application of the 'otherwise excusable' category of justus error, on the basis of an absence of concrete harm or prejudice to the non-mistaken party, the reach of apparent autonomy, once established, is not limited by the doctrine.

Additionally, the doctrine of legality, as invoked by the courts, although accommodating reliance theory's distributive justice underpinnings more generally, does not currently distinguish an exercise of apparent, as opposed to actual, contractual autonomy. As a result, the normative interrogation of the external reach dimension of apparent autonomy is also deficient.

Here, I would submit, that the external reach dimension of apparent autonomy, ought to be dealt with by the doctrine of legality. Given that the reliance theory constitutes the secondary basis of our contract law, it ought, like the primary will theory, to permeate the entire body of contract law. Accordingly, the doctrine of mistake ought to focus exclusively, on the (normative) delineation of a fuller, internal content dimension of (reliance-based) apparent autonomy, whilst the doctrine of legality should be mindful,

¹⁷³ Cockrell op cit note 63 at 57-60. See discussion in 2.2.3(b) above, especially at notes 74; 75. The satisfaction of the reasonable preventable element of fault is likely to be inevitable, in the sense that the contract denier could have avoided the situation, quite simply, by not creating the impression, in the first place.

that it limits the scope of operation of actual and apparent autonomy, and that the respective forms of autonomy, may implicate different policy considerations.

(d) Improperly obtained consensus – misrepresentation, duress, undue influence and bribery

As regards the (procedural fairness)¹⁷⁴ categories of improperly obtained consensus, our law of contract recognises certain impediments to a party's ability, properly to exercise his or her autonomy. Briefly stated, the concretised categories of misrepresentation, duress, undue influence and bribery, represent those sets of circumstances, in which one party, (the 'guilty' party),¹⁷⁵ is considered in law to have elicited consensus from the other party, (the 'innocent' party), in a legally wrongful (improper) manner.¹⁷⁶

At the outset, each category of improperly obtained consensus appears to be linked by the *wrongfulness* of the guilty party's conduct. Broadly speaking, the courts have delineated the operation of wrongfulness, in terms of the (potential) undermining of the classical liberal, individualist concerns of self-interest, self-reliance and self-determination.¹⁷⁷ Our common law of contract has thus, articulated the guilty contractant's (procedurally) wrongful conduct with a deficient exercise of autonomy by the innocent contractant, where each contractant is held to the standard of the classical contracting self.

On the one side, the classical self will not employ those 'negotiation tactics', as employed by the guilty party, that classical liberalism would regard as legally wrongful or improper. On the other side, the classical self cannot be expected to deal with such wrongful 'negotiation tactics', as experienced by the innocent party, when exercising his or her contractual autonomy. In the end therefore, the concretised categories of improperly obtained consensus that are recognised in our law, represent those cases of wrongful conduct identified by

¹⁷⁴ Procedural fairness relates to the fairness of the process through which consensus is secured. See discussion in 2.2.1 above at note 20.

¹⁷⁵ I use the term 'guilty', loosely to denote the party who makes the misrepresentation etc. and the term 'innocent', loosely to denote the party who is subject to such misrepresentation etc.

¹⁷⁶ Note that whilst I am mindful that misrepresentation, duress, undue influence and bribery are discrete categories, and furthermore, that there is no overarching principle of 'improperly obtained consensus', my analysis of these categories' relationship with contractual autonomy focuses on their commonalities (so-called 'linking devices'). As such, they do not need to be distinguished to the extent of their detailed requirements, except, where otherwise indicated.

¹⁷⁷ Smith op cit note 4 at 173; 185.

classical liberalism, where the thin internal conception of contractual autonomy requires additional content, if the contract is to have full force and effect, against the innocent party. Accordingly, where the innocent party's exercise of autonomy falls short of the additional content threshold of contractual autonomy, as articulated by the relevant categories of improperly obtained consensus, the resulting contract ought to be rendered null and void.¹⁷⁸

Nevertheless, the basic consequence of such a deficient exercise of autonomy is that the resulting contract is *voidable*, rather than void. This means that the innocent party can choose, either to invoke the *restitutio in integrum* to withdraw from (and avoid) the contract, or simply to continue with (and uphold) the contract.¹⁷⁹ A withdrawing from the contract, leads to the contract being rendered void *ab initio*, (as if the contract never existed), whilst an upholding of the contract renders the contract fully valid and enforceable, (as if the wrongful conduct never occurred).¹⁸⁰ It would seem therefore, that the innocent party's initial exercise of autonomy is not completely nullified by the guilty party's conduct. On the contrary, whilst the remedy of *restitutio in integrum* provides for a fuller, internal conception of contractual autonomy in relation to the recognised categories of improperly obtained consensus, the innocent party can opt instead, for the lesser protection afforded by the initial, thin conception of autonomy, if he or she chooses to uphold the resulting contract.

In essence, the remedy of *restitutio in integrum* gives the innocent party a second chance, properly to exercise his or her autonomy, (this time without the procedural unfairness), in relation to the question of 'withdrawal' from the contract.¹⁸¹ The basic idea is that this second opportunity will 'cure' the initial, deficient exercise of autonomy by the innocent party. That said, and except for the category of duress, the availability of the *restitutio in integrum* is limited to cases where the other contractant is the guilty party - if the guilty party is a third party, the innocent party will be bound to the contract, notwithstanding, his or

¹⁷⁸ If an element for formation of a valid contract is absent, the contract is null and void. See generally, Van der Merwe et al op cit note 22 at chapters 2-8.

¹⁷⁹ The *restitutio in integrum* is the common law remedy that allows the innocent party to set aside the contract. For the requirements of the *restitutio*, see Van der Merwe et al op cit note 22 at 116-118.

¹⁸⁰ Van der Merwe et al op cit note 22 at 116-118.

¹⁸¹ *Novick v Comair Holdings Ltd* 1979 (2) SA 116 (W); *Feinstein v Niggli* 1981 (2) SA 684 (A).

her deficient exercise of autonomy.¹⁸² In this respect, the internal conception of autonomy remains wanting, even in terms of the strongly individualist values of classical liberalism.¹⁸³

More significant, is the generally liberalist manner in which the remedy of *restitutio in integrum* continues to operate in the modern law of contract. Once it is established that the guilty party's conduct was wrongful, in terms of one of the established categories of improperly obtained consensus, our law renders the *objectionable conduct itself*, null and void. So, when the focus shifts thereafter, to the legal implications for the contract, the (procedurally) wrongful conduct of the 'guilty' contractant is no longer in issue. Consequently, when the *restitutio in integrum* then affords the innocent party a second opportunity to exercise his or her autonomy, the objectionable conduct is implicitly and automatically regarded as having been 'removed' from the contracting situation.

Insofar as one is dealing with a misrepresentation or a bribe that subsequently comes to light, it may be arguable that the approach of simply nullifying the wrongful conduct is acceptable, as the innocent party would be privy to the relevant information, the second time around, and as such, would no longer be acting in terms of the misrepresentation or bribe. Still, in modern contract law the legal conception of the innocent party remains aligned with the classical contracting self who, once the misrepresentation or bribery is removed, reverts to the atomistic, independent contracting self, as entrenched in the individualist values of self-interest, self-reliance and self-determination.

This shortcoming is highlighted by the categories of duress and undue influence, where the relevant threat or influence is more likely to have a lingering effect on the innocent party's subjective state of mind. In such a case, would the law's removal of the objectionable conduct, in the classical liberal tradition, suffice for purposes of 'curing' the deficient exercise of autonomy?

At present, the courts are fairly formalistic in their application of the rules articulating the established categories of improperly obtained consensus. Yet, the rules remain so entrenched in classical liberalism, that there does not seem

¹⁸² Note however, that in the case of duress, the applicable rules go further to recognise that the wrongful conduct (duress) of a third party, also entitles the innocent party to invoke the contractual remedy of *restitutio in integrum*. See generally, Van der Merwe et al op cit note 22 at 99-105; 116-118.

¹⁸³ Collins op cit note 9 at 142.

to be much room to accommodate, even individualist concerns relating to the evolution of the contracting self, (in relation to the doctrines of duress and undue influence, for instance), let alone competing collectivist concerns. To be sure, the prevailing categories of improperly obtained consensus fail even to distinguish between actual and apparent autonomy, and the distinct considerations, that attach thereto. Hence, the difficulty in contemporary South African contract law, when it comes to the recognition and development of new categories of legally wrongful negotiation tactics, most notably, economic duress and more broadly, an abuse of unequal bargaining power, that significantly undermines the real-life contracting self's ability, properly to exercise his or her autonomy.¹⁸⁴

So, whilst the categories of improperly obtained consensus have purported to endorse a more substantive, internal concept of autonomy in our law, its normative delineation continues to be linked intrinsically to classical liberalism. As such, the element of contractual consensus, as it currently operates in our law, fails effectively to take account of pertinent socio-economic factors that are integral to any meaningful, present-day understanding of (substantive) individual autonomy.¹⁸⁵

To expound, the law's 'deemed removal' of the guilty party's objectionable conduct mechanically sweeps away with it, all systemic external factors and resulting inequalities of bargaining power, too.¹⁸⁶ In this manner therefore, the broader socio-economic context is sanitised, when it comes to the 'entering-into', of contracts. Likewise, both the innocent and guilty contracting parties are atomised, in the sense that the law presumes essentially, that the innocent (more vulnerable) party is able actually to rectify his or her deficient exercise of autonomy, once the particular product of the guilty (stronger) party's internal power is neutered. The role of systemic external factors, for all practical purposes, goes unnoticed.¹⁸⁷

¹⁸⁴ Cockrell op cit note 18 at 56-58.

¹⁸⁵ See discussion in 2.4 below.

¹⁸⁶ In other words, those factors which obstruct the making of materially autonomous choices i.e. rational, informed, valuable, and ultimately fair choices. See Hawthorne op cit note 18 at 618-619; Hawthorne op cit note 2 at 169-170; Hawthorne op cit note 121 at 57; Smith op cit note 4 at 175; 179-180; 186; Martinek op cit note 45 at 7.

¹⁸⁷ See Smith op cit note 4 at 175, on the importance of systemic external factors, and their counterpart, which, he terms 'background conditions necessary for the achievement of autonomy'. See also Martinek op cit note 45 at 4-5; 7; Hawthorne op cit note 121 at 61-62;

In similar fashion, our law of contract's internal conception of autonomy is deficient also, when it comes to the ideal of an 'autonomous life';¹⁸⁸ non-commercial contracts; (long-term) relational contracts; (potential) changes in the circumstances of contracts and the ability, realistically and properly, to presentiate these risks upon conclusions of contracts.¹⁸⁹

To sum up, the internal conception of individual autonomy, as embedded in our law of contract, continues to foster a classical liberal philosophy, so much so, that the 'real-life contracting self', by and large, is unable meaningfully to realise his or her vision of the 'good life'. Moreover, the above-outlined thin conception of contractual autonomy is likely to be obstructive of bona fide efforts to measure up to the ideal of the 'constitutional contracting self', operating in a substantively progressive and transformative post-apartheid, South African society, based on human dignity, equality and freedom.

2.4 AUTONOMY AS CONTEMPLATED BY THE BILL OF RIGHTS OF THE CONSTITUTION

2.4.1 The triage¹⁹⁰ of foundational constitutional values: Freedom, dignity and equality

The common law of contract, and in particular, contractual autonomy, must now find a legal home in the Bill of Rights. In the absence of an express right to freedom of contract, (or a comparable right to free economic activity),¹⁹¹ both the CC and the SCA have purported to situate freedom of contract, within the foundational triage of what are now, the fundamental *constitutional* values of freedom, dignity and equality. In this respect, the key is to appreciate the basic shift from the pre-constitutional, classical liberal articulation of freedom, dignity and equality (in their *formal*, atomistic conceptions of individual autonomy, good

Atiyah op cit note 3 'Essay 7' at 155; Trebilcock op cit note 38 at 82-88; 91-93; Pieterse op cit note 122 at 563-567; 570-572.

¹⁸⁸ Smith op cit note 4 at 178-180; 185-186 - future autonomy should not be limited unnecessarily, or disproportionately, in the pursuit of non-valuable goals (as defined by the State), where the contractants' 'self-interest' does not comprise an adequate safeguard.

¹⁸⁹ Atiyah op cit note 3 'Essay 6' at 142.

¹⁹⁰ I use the word 'trriage' to denote the tripartite relationship between the foundational constitutional values of freedom, dignity and equality.

¹⁹¹ Notably, the constitutional right to freedom of trade, profession and/or occupation was significantly broader under s 26 of the interim Constitution as compared with the corresponding right in s 22 of the final Constitution.

faith and inherent equity respectively), to the post-apartheid, substantively progressive and transformative, constitutional conceptions of these values.¹⁹²

At the outset, it is important to outline the manner in which this *foundational constitutional triage* is meant to articulate the ideal of the 'constitutional self', both fundamentally, as well as in relation to the specifically enumerated rights. To begin with, the values of freedom, dignity and equality, in and of themselves, are innately fluid and multi-faceted. Indeed, the respective internal facets of each value are associated with competing legal and political philosophies that extend beyond the pre-constitutional classical liberal ideology espoused by our common law and as such, can be diverse and not necessarily congruent with one another.¹⁹³ Moreover, the Constitution does not, at the outset, demand that a specific internal facet of a value, predominate. Much depends on context. Furthermore, in terms of s 8(2), the enquiry should be informed, inter alia, by the nature and scope of those enumerated right(s) that may be applicable. In this respect, it is also important to remember that the specifically enumerated rights, as set out in the Bill of Rights, are grounded likewise in the values of freedom, dignity and equality and accordingly, must comport finally, with the overarching progressive and transformative vision of the Constitution i.e. to realise a substantively equal, free and dignified, post-apartheid, South African society.¹⁹⁴

The further crucial dimension of this analysis, relates to the interplay between the values of freedom, dignity and equality, as a sort of open-form *triage*, where again, in contrast to the pre-constitutional common law's steadfast privileging of (classical liberal) freedom, there is no set formula as to the relative weight to be accorded to each value in a particular case, save for looking at the particular context, the nature and scope of any enumerated right(s) implicated, and the broader parameter of realising the Constitution's basic vision for South African society.

In other words, what the Constitution envisages for the construction of the autonomous self and autonomy generally, is a comprehensive delineation

¹⁹² As per s 1(a), s 7(1), s 39(1)(a) and s 39(2) of the Constitution. See discussion in chapter 1 at 1.1;1.3. There may be a possibility of invoking selected freedom and/or economic rights in relation to contract, but to date, such rights have been interpreted narrowly.

¹⁹³ Bhana and Pieterse op cit note 2 at 876.

¹⁹⁴ Iain Currie and Johan De Waal *The Bill of Rights of Handbook* 5ed (2005) at 234.

and appreciation of the foundational constitutional values of freedom, dignity and equality, both individually and jointly,¹⁹⁵ all the while, being informed by context and those enumerated rights that may be applicable. The basic idea is that the fluid legal *intra-action*, (*within* each value respectively), and *inter-action*, (*between* the values), must occur in such a manner that, in each case, the resulting concept of autonomy, although a necessarily shifting concept, plausibly articulates or works toward (or at the very least, is not inconsistent with), the Constitution's substantively progressive and transformative ambitions.¹⁹⁶

With this framework in mind, I proceed to discuss the values of freedom, dignity and equality, insofar as they animate the constitutional conception(s) of contractual autonomy.

2.4.2 The foundational constitutional value of freedom

To begin with, the earlier discussion of the common law of contract makes clear the classical liberal elevation of the value of freedom, (above equality and dignity), in its legal conception of contractual autonomy. Accordingly, freedom of contract appears naturally, to be most at home with the foundational constitutional value of freedom.¹⁹⁷ Nevertheless, as just discussed, the (pre-constitutional) private law's essentially negative conception of individual liberty can be, but one (formal) dimension of freedom and the foundational triages'

¹⁹⁵ This is in contradistinction to the traditional approaches in social science disciplines, such as, philosophy and politics, where the values of freedom, dignity and equality, generally have been studied as discrete phenomena.

¹⁹⁶ See Liebenberg and Goldblatt *op cit* note 46 at 337-341, who take as their point of departure, the interdependence/interconnectedness between substantive equality and socio-economic rights, for the attainment of transformation in South Africa. At 338-339, they quote Craig Scott 'The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights' (1989) *Osgoode Hall LJ* 769 at 786:

"The notion of the interdependence and interrelatedness of rights is a fundamental tenet of international human rights law. Its animating insight is that 'values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation'."

See also Sandra Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 1 at 4-5; Stuart Woolman 'Dignity' in Stuart Woolman, Michael Bishop; Jason Brickhill; et al (eds) *Constitutional Law of South Africa 2ed* (2008 Revision Service 4 2012) chapter 36 at 36-25; 36-29 footnote 1 for a brief discussion of Drucilla Cornell's conception of 'synchronisation'.

In my analysis, I focus on the broader interdependence/interconnectedness firstly, between the foundational values of freedom, dignity and equality, and secondly, with the substantive rights enumerated in the Bill of Rights.

¹⁹⁷ Bhana and Pieterse *op cit* note 2 at 877. This section is grounded in, and builds upon, the discussion of freedom generally, and *Ferreira supra* note 11 in particular, in Bhana and Pieterse *op cit* note 2 at 877-879.

conception of autonomy. Most importantly, autonomy must operate now, within a *constitutionalised* law of contract that is meant likewise to work towards the realisation of a substantively equal, free and dignified, post-apartheid, South African society.¹⁹⁸

That said, the value of freedom itself has been the subject of interrogation by the CC and the SCA, in relatively few instances. To date, the leading CC case to speak expressly to the foundational value of freedom, (albeit in the context of the interim Constitution and with reference to the right to freedom and security of the person), remains that of *Ferreira v Levin*. Here, the differing understandings of the constitutional value of freedom, by the respective members of the *Ferreira* Court, served essentially to highlight the multi-faceted nature of freedom and therefore, autonomy too. So, whereas Ackermann J reaffirmed the broader, pre-constitutional, classical liberal conception of freedom and individual autonomy, Sachs J emphasised the need for a more substantive conception of freedom which, in its articulation of autonomy, must incorporate the reality of human interdependence, as well as those pre-conditions integral to its actual enjoyment.¹⁹⁹ Chaskalson P and Mokgoro J, in turn, focused more narrowly on the physical integrity dimension of the right to freedom and security of the person, with Chaskalson P, although accepting that there was scope for a broader meaning of freedom in relation to this enumerated right,²⁰⁰ was largely agnostic about it.²⁰¹ On the other hand, Chaskalson P was explicit in rejecting Ackermann J's articulation of freedom, on the basis that it may well impede 'regulation and redistribution' (read transformative) policies of the post-apartheid, 'social welfare' State.²⁰²

Looking more closely at the judgment of Ackermann J, it reiterated that individual freedom continues to be a 'core right' in the constitutional era, by

¹⁹⁸ See discussion in 2.2; 2.3 above. See also DL Pearmain 'Contracting for socio-economic rights: A contradiction in terms? (1)' (2006) 69 *THRHR* 287 at 289; 293; Pearmain op cit note 123 at 476.

¹⁹⁹ On Ackermann J, see *Ferreira* supra note 11 at 1012-1019; on Sachs J, see *Ferreira* supra note 11 at 1109-1115 especially at para 251.

²⁰⁰ Chaskalson P in *Ferreira* supra note 11 at paras 170 (1085G); 184-185. Mokgoro J outright rejects any such possibility in *Ferreira* supra note 11 at paras 209-213.

²⁰¹ O'Regan J and Kriegler J do not discuss freedom in *Ferreira* supra note 11 as they deal with the case on other grounds.

²⁰² *Ferreira* supra note 11 at para 180. The discussion here, draws from Bhana and Pieterse op cit note 2 at 878. See also Pieterse op cit note 46 at 6, where Pieterse expounds a model of the "welfare/social state", that purports to advance socio-economic justice for vulnerable groups, who have to navigate, what are still, predominantly capitalist market economies.

reason of its essential interaction with human dignity; the latter value being identified as the central axis of our constitutional democracy.²⁰³ To this end, Ackermann J submitted:

“Human dignity has little value without freedom; for without freedom personal development and fulfillment 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...[So] an individual’s right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others.”²⁰⁴

Ackermann J, then drove the point home by way of a contrast, with the systematic denial under the apartheid regime, of the basic “freedom to choose or develop one’s own identity...to be fully human”.²⁰⁵ Nevertheless, in the generous delineation of the right to freedom of the person, Ackermann J relied mainly on the work of leading (classical) libertarian, Isaiah Berlin, to privilege the negative ‘liberty’ dimension of constitutional freedom, and furthermore, to abstract and distinguish the legal concept of autonomy, from the material conditions required for its exercise.²⁰⁶ Hence, the right to freedom of the person was defined as “the right of individuals not to have ‘obstacles to possible choices and activities’ placed in their way by the...State.”²⁰⁷ At the same time, Ackermann J conceded that the State would need to curb the dangers of unlimited freedom, by way of a justifiably limiting, law of general application, as contemplated by the limitation clause of the interim Bill of Rights.²⁰⁸

²⁰³ *Ferreira* supra note 11 at para 48.

²⁰⁴ *Ferreira* supra note 11 at para 49.

²⁰⁵ *Ferreira* supra note 11 at para 51. See further, Francois Du Bois ‘Freedom and the dignity of citizens’ in AJ Barnard-Naude, Drucilla Cornell and Francois Du Bois (eds); Jan Glazewski (gen ed) *Dignity, Freedom and the Post-Apartheid Legal Order The Critical Jurisprudence of Laurie Ackermann* (2008) 112-148, where Du Bois defends Ackermann J’s emphasis on freedom and the central constitutional relationship between freedom and dignity.

²⁰⁶ *Ferreira* supra note 11 at paras 49; 52.

²⁰⁷ Drawn from Bhana and Pieterse op cit note 2 at 878; *Ferreira* supra note 11 at para 54. Ackermann J also refers to the US conception of liberty (at para 77 especially at footnote 92) and the ICCPR and ECHR (at para 88).

²⁰⁸ *Ferreira* supra note 11 at paras 52; 66; which presume that any (statutory) limitation of contractual freedom will need to be justified in terms of s 33 i.e. the interim Constitution’s limitations clause. Ackermann J *assumes* therefore, that freedom of contract enjoys constitutional protection, and presumably, that when freedom of contract conflicts with/is limited by other rights, such conflict will be resolved by the limitation analysis (paras 53; 57; 69). Note however, the distinction between the interim Constitution’s s 33, and the final Constitution’s s 36. Under the interim Constitution, s 33 stipulated that the limitation of certain enumerated rights (as listed in ss 33(1)(aa) and (bb)), by a law of general application, had to be reasonable, justifiable and *necessary*. The latter requirement does not feature in the s 36 limitations clause.

In effect therefore, Ackermann J, although starting out with an ostensibly new appreciation of dignity, as the key to our post-apartheid, constitutional dispensation, ended up collapsing dignity wholly into its pre-constitutional conception of liberty, so that, ultimately the classical liberal dimension of freedom (and autonomy), with a corresponding affinity for individualism, prevailed.²⁰⁹ Freedom's potential interplay with the foundational value of equality did not even feature. On the contrary, Ackermann J went so far as to rely on Kant to aver that freedom comprises the "only one innate right" of all human beings.²¹⁰ Nevertheless, this was somewhat counter-intuitive in light of the judgment's simultaneous espousal of the atomistic, Berlinian understanding of autonomy, as opposed to the contemporary, more full-bodied, 'human agency' understanding of Kantian philosophy, as derived from its central tenet of "treating persons always as ends in themselves as opposed to mere means".²¹¹

The upshot is that Ackermann J's conception of the right to freedom of the person, as enumerated in the Bill of Rights, presumably is broad enough to accommodate the extant, common law right to freedom of contract, as a residual (economic) freedom right, that resonates with our classical liberal, common law of contract. So, according to Ackermann J's hypothesis of freedom, the constitutionalised conception of contractual autonomy should not deviate significantly, from its pre-constitutional conception. At most, there could be minor constitutionally prompted adjustments, on the fringes of contractual autonomy's external reach dimension.²¹²

Dealing then, with the judgment of Sachs J, he was more mindful of the dangers of too expansive, an interpretation, of the s 11(1) right to freedom of the person.²¹³ To begin with, Sachs J made it clear that the negative, laissez faire conception of individual liberty is far from consonant with the modern

²⁰⁹ Save for minimal collectivist corrections in terms of the limitations clause.

²¹⁰ *Ferreira* supra note 11 at para 52.

²¹¹ See further discussion of dignity in 2.4.4 below. See also Liebenberg op cit note 196 at 6-7; Currie and De Waal op cit note 194 at 273; Catherine Albertyn and Beth Goldblatt 'Equality' in Stuart Woolman, Michael Bishop; Jason Brickhill; et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4 2012) chapter 35 at 35-1 to 35-2; 35-9; Woolman op cit note 196 at 36-1 to 36-4; 36-6 to 36-19.

²¹² This generous delineation of freedom seems to resonate with recent SCA cases, as well as the first CC case, dealing with the law of contract – see discussion of cases below at 56 ffg.

²¹³ *Ferreira* supra note 11 at para 249.

reality of people's lives. On the contrary, positive action on the part of the State is necessary, both for the protection against (the potential abuse of) private power, as well as for the realisation of autonomy in substance. Sachs J submitted:

“[G]overnment is required to establish a lawfully regulated regime outside of itself in which people can go about their business, develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security...The reality is that meaningful personal interventions and abstinences in modern society depend not only on the State refraining from interfering with individual choice, but on the State helping [positively] to create conditions within which individuals can effectively make such choices.”²¹⁴

So, Sachs J took as the point of departure, differing conceptions of autonomy, which operate, presumably, on a continuum. This continuum extends from the negative, atomistic extreme of *laissez faire*, in relation to an individual's personal arrangement of his or her affairs, to the positive, contextual extreme of full blown, active State involvement in the individual's exercise of autonomy in substance. In this respect, Sachs J placed particular emphasis on the increasing reality of human interdependence and its corresponding affinity with the collective, as integral to a constitutional conception of autonomy.²¹⁵

Sachs J then proceeded to situate this fluid understanding of autonomy, within the broader constitutional framework, as grounded in the values of freedom and equality.²¹⁶ Here, Sachs J was able to appreciate firstly, the internal fluidity of each of the values of freedom and equality, so that, they can “at one and the same time [be] in tension with each other, and mutually supportive.” Moreover, the interplay between the values of freedom and equality is also fluid, with neither value necessarily being dominant, and much depending on context and the fundamental right(s) implicated. Even so, an important constraint in striking the balance between freedom and equality is that neither value should ever be sacrificed wholly, in the name of the other.²¹⁷

²¹⁴ *Ferreira* supra note 11 at paras 250-251.

²¹⁵ *Ferreira* supra note 11 at para 251. This reflects the principle of ubuntu, as espoused by our Constitution.

²¹⁶ *Ferreira* supra note 11 at para 252. This would now include the foundational value of dignity too. In relation to *Ferreira*, the interim Constitution was applicable, where sections 33(1) and 35(1) referred to an “open and democratic society based on freedom and equality.” In contrast, the corresponding provisions of the final Constitution refer to an “open and democratic society based on *human dignity*, equality and freedom...[*my emphasis*]”.

²¹⁷ *Ferreira* supra note 11 at para 253.

The upshot is that autonomy can no longer defend the general hegemony of its pre-constitutional, classical liberal conception, upon the basis merely, of the residual right to freedom of the person, or even the broader, foundational value of freedom, without something more.²¹⁸

For purposes of the case before the court then, Sachs J delineated the right to freedom and security of the person as a right, which protects an individual from undue (State) interference and most notably, encompasses freedom from physical restraint and other freedoms that are analogous to physical freedom.²¹⁹ More importantly, the recognition within s 11(1), of the right not to incriminate oneself, was held ultimately to depend on time, place and context, as well as on the general (countervailing) interest of the community in the fight against crime.²²⁰

In the end therefore, Sachs J's approach to freedom is most aligned with my earlier outlined framework comprising the multi-dimensional constitutional values of freedom, dignity and equality, both individually and jointly. Indeed, if carried forward into the law of contract, it would articulate a fluid internal conception of (contractual) autonomy, as exercised by the 'constitutional self', who is now situated squarely, within the broader South African community, as ensconced in ubuntu ('umuntu ngumuntu ngabantu').²²¹

Nevertheless, subsequent cases have not followed through with Sachs J's approach. The Supreme Court of Appeal has adopted an approach to freedom of contract that resonates rather, with Ackermann J's understanding of freedom. In *Brisley v Drotsky*,²²² Cameron JA (as he then was) purported to situate our common law of contract within the Bill of Rights. Cameron JA explained that our common law of contract is now subject to the Constitution,²²³ which means that 'public policy', as applied to contracts, is now grounded in the Constitution and its foundational values of freedom, human dignity, and

²¹⁸ *Ferreira* supra note 11 at para 254.

²¹⁹ *Ferreira* supra note 11 at para 254-257.

²²⁰ *Ferreira* supra note 11 at para 258.

²²¹ Hawthorne op cit note 18 at 446 – translated as “a person is only a person through his relationship to others” and explains the movements from, individualism to collectivism; solitary to solidarity, independence to interdependence; see also Woolman and Davis op cit note 6 at 386-387; 392; and 395-399; Pieterse op cit note 122 at 553-557; 568; 570-572. See also Liebenberg op cit note 196 at 11-12 especially at footnote 44; *Barkhuizen* supra note 17 at para 51.

²²² *Brisley* supra note 84 at paras 88-95. See also the discussion in chapter 1 at 1.1.

²²³ *Brisley* supra note 84 at para 88.

equality.²²⁴ In terms of the broader constitutional framework, the values of freedom and human dignity embrace the fundamental principle of freedom of contract, save for any ‘obscene excesses’.²²⁵ In other words, the SCA held that the constitutional values of freedom and dignity re-legitimate the classical liberal notion of autonomy of individuals, to govern their own lives by contract, for so long as their ‘self-respect and dignity’ are not undermined.²²⁶ Presumably, like Ackermann J therefore, the SCA anticipates that the Constitution will prompt mostly minor adjustments, on the fringes of contractual autonomy’s external reach dimension. Indeed, this is borne out by *Afrox Healthcare Bpk v Strydom* where, as mentioned earlier, the SCA further elevated the status of the common law principle of freedom of contract, to a constitutional value *itself*.²²⁷

So, the pre-constitutional, internal conception of autonomy appears not to have been disturbed by the Constitution. On the one hand, the SCA has since recognised the impact of the constitutional value of equality (and dignity), on contractual validity, at least, insofar as it acknowledges that a court must take cognisance of inequalities in bargaining power, in order to ensure, that parties are not “forced to contract...on terms that infringe...dignity and equality”.²²⁸ On the other hand, the SCA continues to conceive of dignity and equality, essentially in the classical liberal tradition, with not much being said about the competing, (more positive/substantive) conceptions of these values.²²⁹ Likewise, the enumerated rights that have been implicated in the various cases, whether civil, political, economic, socio-economic or cultural in nature, seem not to have had any significant bearing on the ideal of a ‘full and integrated...[constitutional] self’, in any particular case.²³⁰ Indeed, the SCA, in ascertaining the constitutional compliance of individual exercises of contractual autonomy, simply assumes that the implicated enumerated right(s), as

²²⁴ *Brisley* supra note 84 at para 91.

²²⁵ *Brisley* supra note 84 at para 94; in casu it was held that equality was not relevant as the non-variation clause favoured both parties.

²²⁶ *Brisley* supra note 84 at paras 94-95. On self-respect and dignity see 2.4.4 below.

²²⁷ *Afrox* supra note 84 at paras 17-24 especially at para 23 where freedom of contract was referred to as “[d]ie grontwetlike waarde van kontrakteursvryheid...”. Drawn from Bhana and Pieterse op cit note 2 at 883.

²²⁸ *Afrox* supra note 84 at para 12; *Napier* supra note 84 at paras 14; 16.

²²⁹ See discussion of equality in 2.4.3 and dignity in 2.4.4 below.

²³⁰ Scott op cit note 196 at 804.

grounded in the foundational constitutional triage of values, works essentially with the classical liberal conception of autonomy.²³¹

In any event, the SCA has yet to take account of alleged inequalities in bargaining powers. Apparently, this has been due to the failure, thus far, of the relevant contracting party to bring evidence that would satisfy the court that he or she was in a weaker bargaining position. The basic classical premise that parties contract on an equal footing thus prevails.²³² Additionally, the SCA contemplates that (potential) deficiencies in the internal conception of autonomy, can be cured solely, by contract law's external legal policy, (now constitutional), corrective. In terms of this corrective, the relevant terms may be invalidated for being contrary to public policy.²³³ But such approach would be flawed. As previously alluded to, the external reach dimension of autonomy remains grounded in the thin, (classical liberal), internal conception of autonomy. The earlier-outlined difficulties pertaining to the strongly individualist leaning of the public policy enquiry, as well as the deficient, formalistic categories of improperly obtained consensus, therefore, continue to manifest within the constitutional context, too.²³⁴

The result, is that the common law of contract is 'constitutionalised', almost exclusively, in the negative liberty image of the values of freedom, dignity and equality and accordingly, appears to survive constitutional scrutiny, largely intact and undisturbed. Moreover, such approach seems to have taken root in further SCA judgments, as well as the first CC judgment, dealing with the constitutionalisation of contract law.²³⁵

²³¹ *Stott* supra note 84 at para 12, has come the closest to acknowledging that the enumerated 'Right to Life' may have some bearing on the constitutional concept of autonomy. Significantly, the courts are yet to deal with the impact of the various socio-economic rights, as set out in the Bill of Rights, on the internal content dimension of contractual autonomy. Even so, these rights are linked intrinsically to a constitutional/transformational conception of capacity (so-called capabilities-based approach), for instance, which, at one and the same time, draws on, and facilitates, substantive freedom, dignity and equality. See further discussion in chapter 4 at 4.3.3. See also Pearmain op cit note 198 at 292-294; 296-297; Pearmain op cit note 123 at 474-477; Marius Pieterse 'Indirect horizontal application to the right to have access to health care services' (2007) 23 *SAJHR* 157 at 177; Pieterse op cit note 46 at 19; Scott op cit note 230 at 804; 806-808.

²³² *Napier* supra note 84 at para 15. See also Bhana op cit note 119 at 275-278, for a critical analysis of the SCA's treatment of equality and bargaining power in *Napier*. For a discussion of the use of the so-called 'evidence-technique' in relation to the issue of unequal bargaining power, see chapter 3 at 3.3.5; 3.5.1(b)(i).

²³³ *Napier* supra note 84 at para 16.

²³⁴ See earlier discussion in 2.3 above.

²³⁵ See cases cited op cit note 84.

In *Barkhuizen v Napier*, the CC was presented with an opportunity to pronounce on the constitutionalisation of our common law of contract. In particular, it was asked to decide on the constitutionality of a contractual time limitation clause. So, the primary focus of the enquiry was on public policy, as the external constitutional corrective, for our common law of contract.²³⁶ Still, in examining the external reach dimension of contractual autonomy, the CC needed first, to re-position the common law of contract, as a *whole*, within the framework of the Bill of Rights.²³⁷ It stands to reason therefore, that Ngcobo J (as he then was), writing the majority judgment for the CC, took as his point of departure, the quintessential doctrine of *pacta sunt servanda*, it being, the embodiment of freedom of contract and contractual autonomy. At the same time however, the CC endorsed the approach to freedom of contract, as adopted by the SCA.²³⁸ So, whilst the CC expressly recognised that *pacta sunt servanda* is not a ‘sacred cow’, but is subject to constitutional control, it applied its mind only to the external reach dimension of autonomy. Moreover, like the SCA, it did so, only in the classical liberal image of the values of freedom, dignity and equality.²³⁹

Yet, *pacta sunt servanda* is premised on a holistic conception of autonomy that has both an internal and an external dimension. An acceptable ‘constitutionalisation’ of this doctrine therefore, would require a more rigorous interrogation of its classical liberal, negative autonomy grounding, both internally and externally, especially in light of the largely unsatisfactory results yielded thus far, by the SCA’s essential maintenance of the pre-constitutional position, in relation to contracts.

Be that as it may, the CC assumed, as the SCA had done, that the parties validly consented to the term in question. Admittedly, the CC did allude to the internal content dimension of autonomy, by way of a reference to “the extent to which the contract was freely and voluntarily concluded” as a ‘vital

²³⁶ *Barkhuizen* supra note 17 at paras 28-30.

²³⁷ *Barkhuizen* supra note 17 at paras 23; 28-30. See also the discussion in chapter 1 at 1.2.2.

²³⁸ The CC did, however, disagree with the SCA, insofar as the SCA has refused to give weight to the mere fact that “a term is unfair or may operate harshly... [at para 12 *Napier* supra note 64]”. *Barkhuizen* supra note 17 at para 72.

²³⁹ *Barkhuizen* supra note 17 at paras 15; 30; 55; 57. This ‘formal’ conception of dignity further explains why the court did not explicitly make the link between dignity and the common law’s more substantive conception of good faith comprising justice, reasonableness and fairness. See also *Barkhuizen* supra note 17 at paras 80-82, and the discussion of dignity in 2.4.3 below.

factor', that must inform the operation of the foundational constitutional triage. The prospect of a more fluid internal conception of autonomy, thus finds some measure of support. In addition, the CC acknowledged the relevance of inequalities in bargaining power, "in a society as unequal as ours."²⁴⁰ Nevertheless, the CC again, took its lead from the SCA, in dealing with these factors firstly, on the basis of a lack of evidence and secondly, as factors pertinent purely to the external (public policy) reach dimension of contractual autonomy, without a concrete grasp of its innate connection with its internal content counterpart.²⁴¹

On a final note, the CC did go further than the SCA, in relation to the autonomy-limiting considerations of contractual fairness and justice – it introduced a second, subjective stage to the public policy enquiry, in terms of which, a court must determine whether enforcement of the time-limitation clause would be reasonable, in the particular circumstances of the case. Presumably, the CC subjectivised the public policy enquiry in this manner, in order to deal with the shortcomings yielded by its failure sufficiently, to distinguish the internal content dimension of autonomy.²⁴²

The minority judgment of Moseneke DCJ then, picked up on the difficulty with the majority judgment's subjectivisation of the public policy enquiry. According to Moseneke DCJ, the subjective yardstick incorporating the particular circumstances of the contractants perverts the long-established practice of determining whether a clause is contrary to public policy, on the basis of its tendency, rather than its actual proved result.²⁴³ This is because, it effectively collapses the more steadfast (objective) notion of fairness, as measured by general public norms, into a more variable (subjective) notion of individual fairness, that is dependant on the contracting parties' particular circumstances, their experience thereof and, in the end, their ability to prove this.²⁴⁴ This does not make for good contract law, as it "renders whimsical the

²⁴⁰ *Barkhuizen* supra note 17 at paras 57, 59; 64-65.

²⁴¹ *Barkhuizen* supra note 17 at paras 66; 70; cf paras 87-88 where the majority held that the facts simply did not require consideration of the internal content dimension of autonomy.

²⁴² *Barkhuizen* supra note 17 at paras 58; 72-78. See however, the subsequent (narrow) interpretation of this test, by the SCA, in *Bredenkamp* supra note 84 at paras 41-51.

²⁴³ *Barkhuizen* supra note 17 at paras 94-103.

²⁴⁴ *Barkhuizen* supra note 17 at paras 98; 104.

[fairness /] reasonableness standard of public policy.”²⁴⁵ Moseneke DCJ then proceeded to apply the objective public policy test, and held, in concurrence with Sachs J, that the time limitation clause in *casu*, was unreasonable and unjust, in its failure to provide “a((n) objectively) reasonable and adequate opportunity to access the courts”. Accordingly, he concluded that the clause was contrary to public policy and of no force or effect.²⁴⁶

Whether one agrees with Moseneke DCJ’s analysis or not, it is at the very least, symptomatic of the failure of the majority court, to recognise the particular circumstances of the contracting parties as more appropriate, (at least initially), to the *internal*, rather than the external dimension of contractual autonomy and the legal rules appertaining thereto; legal rules that must foster a fuller, internal conception of freedom of contract, along the lines of Sachs J’s approach, in *Ferreira*.²⁴⁷

This then brings us finally, to Sachs J’s minority judgment in *Barkhuizen*. To begin with, Sachs J recognised the reality of the standard form contract and that the time limitation clause in *casu*, did not form part of the terms of the contract that were actually negotiated by the parties.²⁴⁸ Indeed, Sachs J carefully expounded the evolution of contracts, from the 19th century, *laissez faire* tradition, modeled on arms’ length negotiation between parties of roughly equal standing, to the modern proliferation of the standard form, presented on a ‘take-it-or-leave-it’ basis, where in effect, one party’s will is imposed on the other. To this extent therefore, Sachs J purported to tackle the internal content dimension of autonomy.²⁴⁹

Nevertheless, as previously alluded to, the law’s treatment of the standard form contract has been mainly to assimilate artificially, the classical

²⁴⁵ *Barkhuizen* supra note 17 at para 98. This also resonates with the SCA’s assertion in *Napier* supra note 84 at para 12, that “the fact that a term is unfair or may operate harshly [cannot] by itself lead to the conclusion that it offends against constitutional principle.” This appears to be based on the concern that judges may impose “their individual conceptions of fairness and justice on parties’ individual arrangements” (*Napier* supra note 84 at para 13). Cf the majority judgment in *Barkhuizen* supra note 17 at para 72.

²⁴⁶ *Barkhuizen* supra note 17 at paras 105-119.

²⁴⁷ *Ferreira* supra note 11. See also the discussion of capacity and improperly obtained consensus in 2.3.3(b) and 2.3.3(d) above.

²⁴⁸ *Barkhuizen* supra note 17 at paras 122; 123; 129; 134-138. For a general analysis of Sachs J’s judgment, see Luanda Hawthorne ‘Justice Albie Sachs’ contribution to the law of contract: Recognition of relational contract theory’ (2010) 25 *SA Public Law* 80.

²⁴⁹ *Barkhuizen* supra note 17 at paras 135-138; 151-157. In *casu*, the court did not look at the implications of the s 34 right of access to court for the delineation of the concept of autonomy.

internal dimension of autonomy and to focus instead, on the external reach dimension, for potentially onerous, one-sided and/or unreasonable clauses.²⁵⁰ Accordingly, Sachs J also situated the analysis of the time-limitation clause within the parameters of the common law public policy enquiry, as espoused by Moseneke DCJ. Within our constitutional context, this meant that such clause had to be assessed in terms of the foundational constitutional triage of freedom, dignity and equality.²⁵¹ In this respect, Sachs J was particularly mindful, on the one hand, of the reality of private power, parties' compromised freedom and the potential injustice, in relation to imposed standard form terms.²⁵² On the other hand, *pacta sunt servanda* in the classical liberal sense, contractual certainty and the economic need for such contracts were also held to be relevant.²⁵³ In the end, Sachs J held that the time-limitation clause should not be enforced against the insured.²⁵⁴

The upshot is that the judgment of Sachs J goes further than the judgments of Ncgobo J and Moseneke DCJ respectively, in its initial examination of the internal content dimension of autonomy. Unfortunately, Sachs J does not follow through with such examination because, whilst he acknowledges the deficiency in the actual (subjective) exercise of autonomy, he too, fails in the end, to maintain the distinction between the internal content dimension and the external reach dimension of autonomy. Like the SCA therefore, Sachs J relies ultimately on public policy (being the *external* legal policy corrective), coupled with its salient classical liberal understanding of internal autonomy, to address the deficiencies of this very conception, as manifested in the context of the standard form contract! This is somewhat perplexing, given Sachs J's earlier judgment in *Ferreira*, where he rejected expressly, the classical liberal understanding of autonomy, in favour of a more fluid conception, that would be exercised by the 'constitutional self', as situated within South African society and rooted in the foundational constitutional triage of human dignity, equality and freedom.

²⁵⁰ *Barkhuizen* supra note 17 at para 139.

²⁵¹ *Barkhuizen* supra note 17 at para 140: note the emphasis on the fluidity of equality and dignity, which can, in contradistinction to classical autonomy, denote an infringement of good faith in a manner that outweighs *pacta sunt servanda*. See also paras 142 ffg; 167.

²⁵² *Barkhuizen* supra note 17 at paras 150-157.

²⁵³ *Barkhuizen* supra note 17 at paras 158-161.

²⁵⁴ *Barkhuizen* supra note 17 at paras 184-185.

Significantly, the SCA has since interpreted the *Barkhuizen* judgment, fairly narrowly. Indeed, in *Bredenkamp* the SCA interprets the majority judgment's two-staged public policy enquiry, in a manner which resonates rather, with the judgment of Moseneke DCJ; the argument being, that fairness (or reasonableness) per se cannot suffice to refuse to enforce a contract. In other words, fairness must be delineated in terms of public policy and implicated constitutional values, if any.²⁵⁵ The subjective fairness stage of the *Barkhuizen* public policy enquiry therefore, appears to be limited to time-bar clauses that implicate s 34 of the Bill of Rights. The scope for the external reach dimension of autonomy, potentially to remedy the deficiencies of its internal classical liberal counterpart is thus, significantly reined in. At the same time, however, the SCA failed to appreciate sufficiently, the actual import of the internal content dimension of autonomy. The reality of the standard form contract, and unequal bargaining powers between the bank and the customer, in casu, were not even mentioned. Even so, the SCA reconfirmed *Bredenkamp* in the later case of *Maphango v Aengus Lifestyle Properties (Pty) Ltd*.²⁵⁶

2.4.3 The foundational constitutional value of equality

(a) Equality as a substantive, transformative value

The equality jurisprudence of our constitutional era is wide ranging and much has been written about it.²⁵⁷ In this section, I do not purport to conduct an in-depth analysis, but engage the equality jurisprudence, only in so far as it

²⁵⁵ *Bredenkamp* supra note 84 at paras 47-51.

²⁵⁶ *Maphango* supra note 111 at paras 23-25. Note that *Maphango* was subsequently taken on appeal to the CC. See *Maphango v Aengus Lifestyle Properties (Pty) Ltd* CCT 57/11 [2012] ZACC 2. However, the CC decided the case on the basis of the Rental Housing Act 50 of 1999, and not the common law of contract. Cf *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) where the High Court applied *Barkhuizen* to an exclusion clause. Here, the court refused to enforce an exclusion clause in the particular circumstances of the case before it, on the basis that it would be unjust or unfair to do so.

²⁵⁷ On equality, see generally, Albertyn and Goldblatt op cit note 211; Albertyn op cit note 137; Liebenberg and Goldblatt op cit note 46; Sandra Liebenberg *Socio-Economic Rights Adjudication Under a Transformative Constitution* (2010) at chapter 2; Hawthorne op cit note 2; Cathi Albertyn and Beth Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; Johan De Waal 'Equality and the Constitutional Court' (2002) 14 *SA Merc LJ* 141; Catherine Albertyn, Sandra Fredman and Judy Fudge 'Introduction: Substantive equality, social rights and women: A comparative perspective' (2007) 23 *SAJHR* 209.

impacts on the judicial understanding of the notion of constitutional autonomy, in relation to contract law.

In contradistinction to the classical model of contract law, the constitutional value of equality extends beyond the recognition of mere formal equality, in the sense of “sameness of treatment”.²⁵⁸ Indeed, the Constitution emphasises a more substantive conception of equality, which must focus instead, on ‘context’ and ‘equality of outcome’, and take proper cognisance of unfair discrimination, including ‘systemic group-based inequalities’ and ‘entrenched patterns of structural disadvantage’, that continue to be experienced both, at an individual, and a collective, level.²⁵⁹ This broader understanding of equality is underscored by the Constitution’s substantively progressive and transformative mandate for South African society. In other words, the value of *substantive equality* interacts inevitably with freedom and dignity, as part of the foundational constitutional triage’s broader legal project, of transforming the socio-economic landscape of South Africa.

Furthermore, the value of equality recognises that the responsibility for the constitutional conception of autonomy can no longer be that of the individual alone. Nor can it be shouldered by the State, exclusively. Indeed, the Constitution envisages a post-apartheid South African society, which strives for social justice and equality, where an individual member primarily finds meaning, not in an atomistic conception of the self, but rather, in the collective, as a situated, social being. Indeed, the constitutional self, even if most private in outlook, would accept the context of an aspirant egalitarian community, ensconced in ubuntu, at least, insofar as he or she will do to, or expect of and

²⁵⁸ Note however, that this does not mean that formal equality no longer plays any role. Indeed, an inclusive approach to equality relies heavily on the concept of ‘sameness of treatment’ in order to extend legal benefits to parties that were previously excluded on the basis of unfair discrimination. For example, extending the legal benefits of marriage to same-sex couples. See Catherine Albertyn ‘Defending and securing rights through law: Feminism, law and the courts in South Africa’ (2005) 32 *Politikon* 217 at 218. Still, the inclusive approach is criticised insofar as status quo norms become entrenched, and inclusion depends on parties’ assimilation thereto, and where the relevant difference is delineated in terms of whether there is a choice, in being gay, for example. See Albertyn further at 227 ffg. See also Marius Pieterse ‘Finding for the applicant? Individual equality plaintiffs and group-based disadvantage’ (2008) 24 *SAJHR* 397 at 413-418; Elsje Bonthuys ‘Institutional openness and resistance to feminist arguments: The example of the South African Constitutional Court’ 2008 (20) *Canadian Journal of Women and Law* 1 at 17-29.

²⁵⁹ Currie and De Waal op cit note 194 at 232-233; Albertyn op cit note 137 at 276; Liebenberg and Goldblatt op cit note 46 at 342-343; Bhana and Pieterse op cit note 2 at 879-880; Albertyn op cit note 258 at 225.

for others, only that which he or she would have done to, or would expect of and for himself or herself.²⁶⁰

That said, there have been instances in which the CC, somewhat curiously, has employed (neo-) classical choice analysis in the course of its equality judgments. The CC has done this, notwithstanding, its express rejection in *Ferreira v Levin* of Ackermann J's classical liberal conception of freedom. In relation to long-term domestic partnerships and sex work, for instance, the CC, by and large, has ascribed the lack of legal protection afforded to women, on the basis of their (formally) autonomous choices not to marry or to partake in sex work respectively. So, in this manner, individual autonomy was atomised, responsibility privatised and systemic socio-economic, religious and cultural factors, which are pertinent to South African society and, to poor women especially, have been rendered extraneous to the enquiry.²⁶¹

Critics have therefore, bemoaned the failure of the CC, generally to recognise a more substantive conception of freedom (and thus, also of individual autonomy), as crucial to the transformative value of substantive equality (as complemented by socio-economic rights), that would enable every South African to live his or her vision of a dignified 'good life'.²⁶²

²⁶⁰ See also the preamble of the Constitution; Pearmain op cit note 124 at 474; Liebenberg op cit note 196 at 3 especially at footnote 7; 11 especially at footnote 44.

²⁶¹ See for instance, *Volks NO v Robinson* 2005 (5) BCLR 446 (CC); *Jordan v S* 2002 (6) SA 642 (CC); cf the minority judgments of Sachs J in *Volks* and *Jordan*. See also *Bhe and Others v Magistrate Khayelitsha and Others (Commission for Gender Equality as amicus curiae)*; *Shibi v Sithole and Others*; *SA Human Rights Commission v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC); *Daniels v Campbell NO* 2004 (5) SA 331 (CC), which are more in line with a substantive, transformative conception of equality.

²⁶² See Bonthuys op cit note 258 at 23-26; Albertyn op cit note 137 at 265; 267-270; 272; Albertyn and Goldblatt op cit note 211 at 35-83; Pearmain op cit note 198 at 292-293; Pieterse op cit note 46 at 19. In relation to reproductive autonomy, see Joanna Birenbaum 'Contextualising choice: Abortion, equality and the right to make decisions concerning reproduction' (1996) 12 *SAJHR* 485 at 485-490; 500-503. See also Liebenberg and Goldblatt op cit note 46 at 340-341, where they argue that poverty is more a product of systemic 'group-based discrimination', rather than 'individual blameworthiness/responsibility', or 'some pre-ordained natural economic order'.

(b) Equality and the constitutional self (internal content of autonomy)

As a function of constitutional autonomy therefore, (substantive) equality must engage with, and inform, autonomy's internal content and external reach dimensions.

Dealing first, with the internal content of autonomy, equality contemplates a more positive exercise of a real *choice* by the individual; a choice that is sensitive to the material (social and economic) conditions, which advance, or hinder, the individual's ability to develop his or her potential fully, and so, realise his or her vision of the good life.²⁶³

At a broader level therefore, substantive equality envisages a 'dismantling' of those '(unequal) power relations and (institutional) hierarchies', which unduly constrain the extant legal conception of individual choice (or human agency). At the very least, this must entail an unmasking and addressing of those systemic and structural inequalities that impede the true capability for meaningful exercise of choice, by many South Africans in their everyday lives. However, I submit that the value of equality would go further, to inspire and establish 'new norms and conditions' that, like freedom, will foster a '*transformative meaning*' of autonomy.²⁶⁴ Presumably, the goal is to *enable* genuine participation, by all South Africans, on a substantively equal footing, in the 'political, economic, social and cultural spheres of our democracy'.²⁶⁵ In this manner, all South Africans will be able materially to shape their own identities and ultimately their own lives.

So, looking through the lens of substantive equality, the constitutional contracting self necessarily differs from the liberal contracting self. In contrast to the acontextual, atomistic classical self, the constitutional self necessarily is a more contextual self, situated within an interwoven network of social and economic power structures. Accordingly, a constitutionalised law of contract can no longer abstract the contracting self, from the context in which

²⁶³ Pieterse op cit note 258 at 409-413; Bonthuys op cit note 258 at 23-26; Albertyn op cit note 258 at 219-220; 223.

²⁶⁴ Albertyn op cit note 137 at 274-276; Liebenberg and Goldblatt op cit note 46 at 338; 342. On the impact of status quo norms, see Pieterse op cit note 258 at 413-418; Bonthuys op cit note 258 at 17-23.

²⁶⁵ Liebenberg and Goldblatt op cit note 46 at 337.

contracting parties actually operate. The law must be more alert to the impact on autonomy, of the lived social and economic realities of contracting parties.²⁶⁶

Importantly, in accepting a more contextual, (and therefore, more positive) conception of the self, it must be appreciated that the self is necessarily more complex. In the words of Marius Pieterse,

“Human identities are multidimensional, fluid, unpredictable, often contradictory and always evolving. Moreover, social constructs such as gender, race, sexual orientation and class, as well as the power structures that accompany them, shape individuals differently in different contexts. Individual experiences of power, disadvantage, oppression or harm are therefore varied, contingent and particular, both within and across social groups...Furthermore, individuals...often experience compounded disadvantage, flowing from discrimination or marginalisation that relates to more than one aspect of their complex identities. This phenomenon is often referred to as intersectional discrimination and requires us to appreciate the multiplicity of particular contexts within which the impact of discrimination is felt.”²⁶⁷

Accordingly, a constitutionalised law of contract, as grounded in substantive equality, must accommodate a more complex, multi-dimensional self, where different aspects and/or configurations of the self, may come to the fore in different situations. Indeed, the social and economic vulnerability, (and disadvantage), or conversely, privilege, of the self, manifests in different ways in different contexts. So, whereas an individual contractant may be considered privileged in one context, he or she could be less privileged, or more vulnerable, in a different context.

In addition, it must be borne in mind, that the law of contract regulates the legal relationship between two or more contracting parties. As such, the law must be concerned, not only with the broader social and economic context (i.e. the systemic and structural inequalities affecting the contracting parties), but also, with the power dynamic *between* the contracting parties. Most notably, courts need to be mindful of the *relative* nature of this power dynamic in their assessment of how it impacts on contractual autonomy. To illustrate, in *Barkhuizen v Napier*, Mr Barkhuizen was profiled by the CC essentially, as a white middle-class man who drove a BMW motor vehicle.²⁶⁸ As such, he was considered implicitly to be a socially and economically, privileged individual who, like the classical contracting self, was able to look after his own interests.

²⁶⁶ Albertyn op cit note 258 at 225 and the authorities cited there.

²⁶⁷ Pieterse op cit note 258 at 405-406.

²⁶⁸ Pieterse op cit note 258 at 403 especially at footnote 27; *Barkhuizen* supra note 17 at para 14.

That Mr Barkhuizen was, in the context of the contract, also a typically vulnerable consumer of insurance, from an insurance company, which was far more resourced than he was, and moreover, had the weight of the insurance industry behind it, was not taken into account. The argument was that there was a lack of evidence of this. Nevertheless, in ignoring this reality, a significant aspect of Mr Barkhuizen's identity effectively was ignored by the court. By presuming rather, that there was an equality of bargaining power between the parties, the power dynamic between Mr Barkhuizen and the insurance company, in terms of the contract – i.e. Mr Barkhuizen's relatively weaker position - was rendered invisible.²⁶⁹

Accordingly, the value of substantive equality provides impetus for a constitutionalised contract law's development of a fuller internal content of autonomy, particularly, in terms of the relative bargaining powers of contracting parties. Obviously, not every instance of unequal bargaining power can mean that the exercise of autonomy by the weaker party is deficient. Conversely, a powerful, private contractant cannot be saddled with absolute responsibility for his or her more vulnerable, co-contractant.²⁷⁰ Still, the implications of unequal bargaining power for the constitutional self must be investigated further, and autonomy developed as a more positive conception, having a content, that is normatively in line with and advances, the broader constitutional goal of a substantively equal society.²⁷¹

(c) Equality and the external reach of constitutional autonomy

Moving on, to the external reach of autonomy, equality contemplates a society in which unfair discrimination is not privatised. As submitted in an earlier article by Marius Pieterse and myself,

“The value of equality...aides the transformation of South African society into an ultimately more egalitarian one through measures which may, to varying extents, limit a variety of individual liberty interests. In the contractual realm..., such liberty-limiting measures include provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which declares the imposition of contractual 'terms, conditions or practices' that have the effect of

²⁶⁹ Cf the minority judgment of Sachs J at para 149; see also paras 122-124; 135-139; of the minority judgment of Moseneke DCJ at paras 95-103. See further Bhana op cit note 119 at 275-278.

²⁷⁰ On the public-private divide, see chapter 1 especially at 1.3.1.

²⁷¹ This question is left for further research.

perpetuating the consequences of past unfair discrimination, as well as the unfair limiting or denial of contractual opportunities, as practices which may amount to (prohibited) unfair discrimination. (Item 9b of the Schedule to the Act read with s29 thereof. See also ss 7-8.)”

In other words, absent compelling individualist considerations, a (private) contract, which promotes unfair discrimination within our more ‘welfarist’, post-apartheid society, ought to be struck down for being unconstitutional and against public policy. Likewise, there may now be a duty also, to *enter* into a contract, where the basic reason for refusing to contract with the other party, constitutes unfair discrimination.²⁷²

At the very least, this means that the common law of contract’s automatic liberalist privileging of freedom, above equality, can no longer apply. Rather, in light of the substantively progressive and transformative mandate of our Constitution, it is more likely that the value of substantive equality will carry more weight, especially within the doctrine of legality’s public policy exercise.²⁷³ Accordingly, the external reach of a constitutionalised contractual autonomy can be curbed, (or extended), significantly more than its classical liberal counterpart.²⁷⁴

(d) The SCA and CC’s approach to equality in contract law cases of the constitutional era

As outlined earlier, the CC and the SCA have both accepted that our common law of contract is subject to the Constitution. Nevertheless, in so doing, they have continued to emphasise the classical liberalist conceptions of freedom and dignity. At the same time, they have significantly downplayed the (potential) role of substantive equality within a constitutionalised contract law.²⁷⁵

To begin with, in *Brisley v Drotzky* Cameron JA (as he then was) held that the value of equality was not relevant to the case at hand, because the

²⁷² As per *Hoffmann v South African Airways* 2000 (1) SA 1 (CC). Note however, that in this case, the employer was a State-owned enterprise. Where both contracting parties are private individuals, the implications may be different. On the significance of the distinction between public and private individuals, see chapter 1 especially at 1.3.1.

²⁷³ Bhana and Pieterse op cit note 2 at 882.

²⁷⁴ It is important to note that the collectivist dimension of equality is also relevant i.e. the impact of a contract on group(s) must also inform the legality enquiry. This issue is left for further research.

²⁷⁵ As per Cameron JA, in *Brisley* supra note 84 at paras 90; 94-95; confirmed in *Afrox* supra note 84 at paras 17-24; *Napier* supra note 84 at paras 12-16. The CC also accepted this position in *Barkhuizen* supra note 17 at para 15.

contractual principle in issue, (i.e. the *Shifren* principle),²⁷⁶ protects both the ‘stronger’ and the ‘weaker’ contracting parties in the same manner.²⁷⁷ Nevertheless, in so holding, Cameron JA did not take sufficient cognisance of the relative contexts of the parties in casu, and how the *Shifren* principle would, in reality, affect each party differently.²⁷⁸

This aside, what is more significant, is that Cameron JA failed even to appreciate, that the value of substantive equality must, at least, have an “indirect impact on the matter”, lest the classical liberal conception of contractual autonomy continue to operate undisturbed.²⁷⁹ As should be evident from the above discussion of equality, a conception of autonomy that is moderated by the value of equality, (both internally and externally), is crucial to aligning our common law of contract with the substantively progressive and transformative goals of our Constitution. The continued operation of the classical liberal conception of contractual autonomy, unmoderated by the value of equality, is untenable, insofar as it entrenches the status quo in the private sphere and thereby, privatises the systemic inequalities and patterns of disadvantage, as fostered by apartheid and patriarchy.

Admittedly, the SCA and the CC have indicated subsequently, that equality has a role to play in a constitutionalised contract law, insofar as contracting parties can prove the presence of unequal bargaining power. All the same, the courts are yet to interrogate the implications of such power dynamic between contracting parties, ostensibly due to a lack of evidence of an inequality of bargaining power in the first place, even in the context of standard form contracts.²⁸⁰ The classical liberal premise, of parties contracting at arms length, on a (formally) equal footing, thus remains intact.

²⁷⁶ In terms of the *Shifren* principle (as established in *Shifren* supra note 20), where a contract contains a ‘non-variation clause’, which imposes formalities for variation of the contract, the contracting parties cannot vary the contract informally.

²⁷⁷ *Brisley* supra note 84 at para 90. See also the discussion in chapter 1 at 1.1.

²⁷⁸ See Bhana and Pieterse op cit note 2 at 885, for a discussion of how non-variation clauses in lease agreements generally tend to favour the ‘stronger’ lessor above the ‘weaker’ lessee.

²⁷⁹ Bhana and Pieterse op cit note 2 at 882.

²⁸⁰ Bhana op cit note 119 at 275-278. See *Afrox* supra note 84 at para 12; *Napier* supra note 84 at para 8-9; *Barkhuizen* supra note 17 at para 59.

2.4.4 The foundational constitutional value of dignity

As previously alluded to, the value of human dignity appears to be linked fundamentally, to Kantian philosophy's moral ideal of treating a human being "never simply as a means but always at the same time as an end".²⁸¹ Indeed, the common point of departure is that every individual has intrinsic worth, by reason of their basic human dignity, and as such, are worthy of equal concern and respect.²⁸² As a function of autonomy, this conception of human dignity translates into two essential components viz. dignity as *empowerment* and dignity as *constraint*.²⁸³ In an earlier article, Marius Pieterse and I conceptualised each of these components. Briefly stated, we defined 'dignity as empowerment' as that conception of dignity, as espoused by Ackermann J in *Ferreira*, which "enhances individual liberty by locating dignity in 'capacity for autonomous action' and accordingly holding that dignity is enhanced by the protection of autonomous choices."²⁸⁴ In turn, 'dignity as constraint' was defined as that conception of dignity, which constrains liberty, "by implying that society should not tolerate exercises of autonomy that affront human dignity."²⁸⁵ We submitted further, that whereas, the classical liberal (internal) conception of contractual autonomy appeared to dovetail with dignity as empowerment, it seemed inimical to dignity as constraint.²⁸⁶

Upon further reflection however, I submit, that dignity as empowerment and dignity as constraint are not inconsistent conceptions. On the contrary, they must, and in fact, do, work together within our contract law. Indeed, whereas, dignity as empowerment necessarily relates to the internal content dimension of autonomy, dignity as constraint must inform its external reach dimension. That said, the connection between dignity and classical liberalism needs to be revised, with a view ultimately, to align the value of dignity with the

²⁸¹ Liebenberg op cit note 196 at 6.

²⁸² *S v Makwanyane* 1995 (3) SA 391 (CC) at para 328 (per O' Regan J); Liebenberg op cit note 196 at 13; Currie and De Waal op cit note 194 at 273.

²⁸³ Bhana and Pieterse op cit note 2 at 881.

²⁸⁴ Bhana and Pieterse op cit note 2 at 880-881. See also discussion in 2.4.2 above.

²⁸⁵ Bhana and Pieterse op cit note 2 at 881.

²⁸⁶ Bhana and Pieterse op cit note 2 at 881; Lubbe op cit note 5 at 421-422; Robert Brownsword 'Freedom of contract, human rights and human dignity' in Daniel Friedman and Daphne Barak-Erez (eds) *Human Rights in Private Law* (2001) 181 at 183-184; 191-195.

foundational constitutional triage's broader, legal project of (substantively) transforming the socio-economic landscape of South Africa.²⁸⁷

Looking more closely at the classical conception of autonomy, dignity as empowerment, as discussed and adopted by Ackermann J in *Ferreira*, captures the notion of the individual as an autonomous, moral agent, capable of self-actualisation and governance, the upshot being that respect for one's autonomous choices means respect for one's dignity. In the same tradition then, dignity as constraint, limits the exercise of autonomy, only in those rare cases where the contract is said to offend the conception of dignity, as articulated by the classically limited doctrine of legality.²⁸⁸

This understanding of dignity goes some way to explaining the approach of the SCA to the constitutionalisation of contractual autonomy. In *Brisley*, Cameron JA (as he then was) interpreted dignity in the classical liberal tradition, so that, a contractant's dignity remains grounded in his or her freedom to govern his or her own life, by deciding for him or herself whether, and if so, with whom and on what terms to contract.²⁸⁹ In addition, as outlined earlier, the value of (substantive) equality was said to have no relevance. The effect of Cameron JA's interpretation therefore, is that the constitutional value of dignity simply re-affirms the classical understanding of the atomistic, independent, (negative-liberty based) contracting self. In relation to the external reach dimension of autonomy then, Cameron JA made it clear that 'obscene excesses' of autonomy must be rejected as counter-intuitive to individual dignity and self-respect.²⁹⁰ Even so, in light of the contracting self's classically liberal point of departure, it would appear that the notion of 'obscene excess' implicitly would privilege a classically liberal delineation of individualist and collectivist considerations.

In subsequent cases, the SCA, and even the CC, have confirmed Cameron JA's classical articulation of dignity operating in the constitutional era.²⁹¹ Nevertheless, such a thin conception of dignity would undermine the

²⁸⁷ See generally, Susie Cowen 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34.

²⁸⁸ *Ferreira* supra note 11 at para 49.

²⁸⁹ *Brisley* supra note 84 at paras 94-95.

²⁹⁰ *Brisley* supra note 84 at para 93.

²⁹¹ See *Afrox* supra note 84 at para 22; *Napier* supra note 84 at paras 12-13; *Barkhuizen* supra note 17 at para 57.

(potential) role of the value of human dignity, which, together with freedom *and equality*, must foster a constitutional ‘*transformative meaning*’ of autonomy (both externally and internally).

In fact, contemporary Kantian thinking on human dignity (as empowerment), contemplates a more positive, *capabilities-based* approach that must be alert to those material conditions,²⁹² necessary for the effective development and exercise of human potential and agency.²⁹³ Moreover, dignity as empowerment ought to extend beyond the individualist notion of self-worth and self-respect, to recognise the collective, insofar as individuals, engaged in the process of shaping their own lives, value their essential interconnectedness (social and otherwise) with fellow human beings, so much so, that it is considered constitutive of their very own identities.²⁹⁴

This fuller conception of dignity as empowerment would then set the stage, for a more substantive conception of the ‘dignity as constraint’ component. Indeed, the emphasis ought to be on dignity as a collective good, grounded in ubuntu and espousing a basic threshold for the living of a dignified life, in a socially democratic South Africa.²⁹⁵ As such, dignity as constraint must inform the external reach dimension of a ‘transformative’ conception of autonomy. In other words, those exercises of autonomy that are offensive to the dignity of the collective and therefore, the dignity also, of the particular individuals concerned, cannot be countenanced. In the context of contract law, this means that agreements, which undermine or transgress such dignity, would constitute an ‘obscene excess’ of autonomy that must be struck down as contrary to public policy. Presumably, the content of dignity would be informed

²⁹² For instance, those conditions that support a basic dignified living standard, and/or counter circumstances of poverty, group-based disadvantage and systemic inequality. On basic conditions, see the works of Martha C Nussbaum as cited in Liebenberg op cit note 196 at 1-13 especially at 2 (footnote 4); 7-8 (footnotes 26, 28); 9-10 (footnotes 38-39); cf the approach of Amartya Sen also cited in Liebenberg op cit note 198 at 1-13 especially at 2 (footnote 4); 8 (footnote 29). See also Woolman op cit note 196 at 36-2 to 36-4; 36-7 to 36-18; 36-66 to 36-70; including the discussion of A Sen’s approach at 36-67; 36-68. See generally, Martha C Nussbaum *Women and Human Development The Capabilities Approach* (2000); Amartya Sen *Development as Freedom* (1999).

²⁹³ Ibid. See also Liebenberg and Goldblatt op cit note 46 at 336-337; Pieterse op cit note 46 at 21.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

primarily, by the value of substantive equality, as well as the enumerated socio-economic rights.²⁹⁶

2.5 CONCLUSION

In this chapter, I interrogated the concept of autonomy, both as it actually operates within our common law of contract, and as it ought to operate within the post-apartheid, constitutional era.

At the outset, I traced the development of the common law's conception of contractual autonomy, from the classical, to the neo-classical and modern models of contract law. From this analysis, it emerged that the classical liberal understanding of the solitary, atomistic, contracting self, as grounded in the strongly individualist values of self-reliance, self-interest and self-determination, continues to dominate our contract law. To be sure, neo-classical economic analysis uses the free-market-economy rationale (albeit in an instrumentalist manner), essentially to bolster the classical conception of contractual autonomy within the modern era. Further, the modern model, although highlighting the increasing tension between individualist and collectivist considerations, in terms of the secondary reasonable reliance basis of contract law, remains rooted primarily, in the classical liberal foundations of contractual autonomy. At best, the modern model tempers the classical liberal foundations, somewhat conservatively, by way of a restrained shift in emphasis to 'apparent (reliance-based) autonomy' and collectivist-type normative considerations, such as fairness, reasonableness and good faith.

From this analysis then, I highlighted contract autonomy's delineation of contractual justice, in terms of procedural and substantive fairness, and translated this into, what I term, the internal and external dimensions of contractual autonomy. In essence, the internal dimension is identified with the *content* of contractual autonomy, as exercised by the *contracting self*, and the external dimension, with the *reach* of such exercise of autonomy.

On this basis, I completed my analysis of contractual autonomy by examining contemporary contract law's articulation of the external (reach) and

²⁹⁶ Bhana and Pieterse op cit note 2 at 881; ss 26-29 of the Constitution. See further, Jeremy Waldron 'The dignity of groups' in AJ Barnard-Naude, Drucilla Cornell and Francois Du Bois (eds); Jan Glazewski (gen ed) *Dignity, Freedom and the Post-Apartheid Legal Order The Critical Jurisprudence of Laurie Ackermann* (2008) 66-90.

internal (content) dimensions of autonomy respectively. In relation to the external reach dimension, I argued, that whilst the modern model of contract law had the potential to facilitate a greater degree of collectivist-type justice, in the form of substantive fairness and/or reasonableness, the courts have continued to invoke a Millian-type, liberalist 'harm to interests' understanding of reasonable reliance. Indeed, even with the advent of the Bill of Rights and its foundational values, the courts continue to look through the individualist prism of the erstwhile classical liberal era, so that, the laissez faire understanding of freedom of contract persists as the foundational legal premise.

I then unpacked the internal content dimension of contractual autonomy and illustrated how its laissez faire (negative-liberty based), atomistic conception, still permeates the modern law of contract. In particular, I examined the pre-requisite of contractual capacity and showed how it continues to articulate a fairly impoverished conception of contractual autonomy and the contracting self. It fails to take account of any socio-economic and other (more personal) factors that affect people's decisions, in reality, as to whether, with whom and on what terms to contract.

Beginning with the element of contractual capacity, it fails even to capture the distinction between an actual and an apparent exercise of contractual autonomy, let alone the notion of an 'autonomous life', in which the contracting self, who continues on beyond the conclusion of the contract, is necessarily situated. Moreover, this thin, classical liberal conception of autonomy is mirrored in the context of an apparent exercise of autonomy, as per the doctrine of mistake. Finally, the categories of improperly obtained consensus, even though purporting to endorse a more substantive, internal concept of autonomy in our law, fails to do so effectively, for it remains linked intrinsically to classical liberalism.

The pertinent question in the post-apartheid constitutional era then, is whether the classical liberal conception of contractual autonomy is in line with conception(s) of autonomy, contemplated by Chapter Two of the Constitution of the Republic of South Africa. To this end, I focused specifically on the foundational constitutional values of freedom, dignity and equality and considered how they articulate with the common law of contract's concept of autonomy.

In essence, I argued here that the fixed (neo-) classical understanding of contractual autonomy is liable to fall short of what the Constitution requires. The foundational values of freedom, dignity and equality are multi-faceted, and their interplay, multi-dimensional. Accordingly, a constitutionalised conception of the substance of contractual autonomy, which is grounded in these values, is necessarily a shifting one that, at once, needs to be sensitive to the factual context, any applicable substantive rights, as well as the broader, constitutional vision of a substantively progressive and transformative South Africa.

Focusing then, on each foundational value, I began with freedom. Here, I argued that the substantive notion of freedom, held forth by Sachs J, in the leading CC case of *Ferreira v Levin*,²⁹⁷ is best suited to a constitutional conception of the contracting self. Importantly, this fuller, constitutional conception of autonomy reflects a more concrete interaction between individualist and collectivist considerations and envisages more movement, toward the collectivist end of contract law's normative continuum. Indeed, this is likely to facilitate the realisation of the broader, constitutional vision within our common law of contract. To this end, I argued, that a more substantive conception of the values of equality and dignity must work with the value of freedom, where their impact in cases must depend also, on the particular context of the parties before the court and any substantive right(s) that may be implicated.

To sum up, freedom, dignity and equality both in their *intra-action*, and *inter-action*, lean toward a more full-bodied, substantive conception of legal autonomy, with the constitutional self, being grounded essentially, in the broader transformative project of South African society. Accordingly, if such an understanding of autonomy is carried forward into the law of contract, it would be able effectively, to address the earlier outlined constitutional deficiencies (both external and internal) of the extant conception of contractual autonomy. Indeed, not only is it sufficiently fluid to facilitate real contractual justice in every case, it is also definitive enough, for the transformation of the law of contract itself into an essential *constitutional* tool for the enabling of individuals to realise their respective visions of the good life.

²⁹⁷ *Ferreira* supra note 11 at paras 249-258.

CHAPTER 3

LEGAL METHODOLOGY (JUDICIAL METHOD)*

3.1 INTRODUCTION

The politics of judging is underscored by the constitutional mandate of doing public law justice in private law matters, including those matters traditionally governed by the common law of contract.¹ A most crucial aspect of this, relates to a systematic realisation within contract law of the substantively progressive and transformative aims of the constitution. Indeed, in the two previous chapters I canvassed the broader goal of constitutionalising the common law of contract and considered the *substantive* content and reach of contractual autonomy (actual and apparent), that operates, (or at least, ought to operate), in post-apartheid South Africa. In doing so, I argued that the substance of contract law must transcend its classical liberal underpinnings and be re-legitimated within the foundational constitutional triage's conception of legal autonomy, as exercised by the constitutional self.²

In this chapter, I suggest that the accepted *legal method*, in terms of which, the legal concepts of contract law are applied by judges within the established common law framework, likewise needs to be assessed constitutionally and, if necessary, adjusted.³ Articulated further, I argue that judicial method is as imbedded in legal culture as is ideology, so that it plays a significant role in shaping the outcome of a case. In fact, academic commentators have questioned the use by South African judges of conservative methodology, even to realise substantively progressive and transformative constitutional aims,⁴ and this is what is interrogated here: the

* This chapter is a significantly expanded version of Deeksha Bhana 'The role of judicial method in the relinquishing of constitutional rights through contract' (2008) 24 *SAJHR* 300-317.

¹ As per s 8 and s 39(2) of the Constitution.

² As outlined in chapter 2, the constitutional conception of autonomy should be delineated in terms of the foundational constitutional triage of freedom, dignity and equality. In turn, the triage contemplates the fluid *intra*-action, and *inter*-action, between the foundational values of freedom, dignity and equality. Further, the triage is informed by any substantive constitutional rights, and other considerations, that may be relevant in the particular context of the case.

³ See generally Stuart Woolman 'The amazing vanishing Bill of Rights' (2007) 124 *SALJ* 762; Stuart Woolman 'Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*' (2008) 125 *SALJ* 10.

⁴ Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 156; 168-171; Theunis Roux 'Pro-poor court, anti-poor outcomes: Explaining the performance of the

implication of traditional method for the determination of both the internal and external dimensions of contractual autonomy, as contemplated by the foundational constitutional triage.

I begin by outlining briefly the politics of adjudication. Here, I discuss the manner in which legal culture and the imbedded (liberal) ideology, generally permeates method. On this basis then, I proceed to examine the methodology employed by judges enforcing the common law of contract and to show how this has influenced the determination of the content and traditional reach of contractual autonomy. This is followed by a discussion of the methodology that should be employed in the application of the Bill of Rights to contracts. To this end, I refer back to the horizontality debate traversed in Chapter One, with a view to determining the appropriate *constitutionalised* approach to contractual autonomy. Finally, I consider the methodology employed in key constitutional-contract law judgments of the Supreme Court of Appeal, (hereinafter referred to as the SCA), and the Constitutional Court, (hereinafter referred to as the CC), to exemplify the basic theme of this chapter.

3.2 LEGAL CULTURE, POLITICAL IDEOLOGY AND ADJUDICATION

3.2.1 Introduction

Broadly speaking, legal culture comprises the umbrella under which a legal system operates. To quote Karl Klare, it is the “cultural or social-psychological dimension” of law,⁵ that encompasses the various attitudes and understandings of law, as it actually operates, and ought to operate, within a particular society. These range from the highly theoretical legal conceptions put forward by jurisprudential scholars, to “the professional sensibilities, habits of mind[,]...intellectual reflexes”⁶ and ensuing standard practices of judges and lawyers, and even the more pragmatic perceptions of bureaucrats and lay

South African Land Claims Court’ (2004) 20 *SAJHR* 511 at 533-536. See also Luanda Hawthorne ‘Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism’ (2006) 12-2 *Fundamina* 71; Alfred Cockrell ‘Substance and form in the South African law of contract’ (1992) 109 *SALJ* 40; Dennis M Davis and Karl Klare ‘Transformative constitutionalism and common and customary law’ (2010) 26 *SAJHR* 403.

⁵ Klare op cit note 4 at 166.

⁶ Ibid.

persons.⁷ All of these attitudes and understandings are interconnected in fluid and complex ways. For instance, the legal scholar's conception, if it is to have credence, would be one that necessarily pays attention (albeit in differing degrees) to the general outlook of the legal profession and judiciary, as well as that of the State and society in general. Likewise, the legal professional's experience of the law, simultaneously draws upon, and feeds into, (even if only subconsciously), familiar legal traditions in which judges and lawyers generally have been schooled. The same can be said of the layperson's understanding of law which, again, must find some resonance with the practice and/or theory of law. A case in point would be the populist image of the blind-folded 'Lady Justice'; an image which pegs the traditionalist (classical) notion of the law and judges as (politically) neutral arbiters.⁸ I do not purport here to examine the nature of these various connections in any detail. Suffice to say, that legal culture is all-pervasive and multifaceted.

At the same time, it is important to appreciate that a unifying element of any legal culture comprises its basic (substantive) constitutionalist ideology, especially as it pertains to the *separation of powers* of the legislature, executive and judiciary, and the *rule of law's* delicate balance between 'legal constraint' and the 'need for [constitutional] justice'.⁹ This is most pertinent for a legal system's '*judicial*' legal culture, in the narrower form of its fundamental *judicial ideology* (i.e. how the culture understands the *roles* of judges, the judiciary and judicial mindset within our legal system), and attendant *judicial method* (i.e. the decision making process of *how* judges adjudicate).¹⁰ This is what I focus on here, specifically in relation to our private common law of contract.

In the discussion that follows, I assess our 'judicial' legal culture's ideology and method, (both as 'perceived' and 'actual'), under the respective pre-1994 apartheid and post-1994 constitutional dispensations, at least insofar as they relate to South African contract law. In the course of doing so, I also

⁷ Roux *op cit* note 4 at 531; Klare *op cit* note 4 at 166-167.

⁸ Roux *op cit* note 4 at 531-534; Klare *op cit* note 4 at 157; Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20 *SAJHR* 383 at 398-399.

⁹ Klare *op cit* note 4 at 149-150; 160.

¹⁰ To the extent that extra-judicial aspects of legal culture influence the judicial aspect of legal culture, see Roux *op cit* note 4 512-516; 531 *ffg*.

highlight the essential links between judicial ideology and method, and their impacts on the substance of legal outcomes.¹¹

3.2.2 The pre-1994 dispensation

Briefly stated, South African law, before the advent of the interim Constitution, rested upon the constitutional system of parliamentary sovereignty, as inherited from the colonial British regime. Intrinsic to the legal culture inculcated in terms of this regime, was the attendant classical liberal *laissez faire* ideology, grounded in the Industrial Revolution of the 18th and 19th century.¹²

So, under the apartheid era, South African law (as a whole) operated within the received classical liberal framework, where the *legislature* had the final say. It was to this end, that the law demanded a strict separation of powers of the legislature, executive and judiciary, with the judiciary essentially deferent to the (policy) decisions of its counterparts, especially within the realm of public law. Note however, that in reality, the distinction between the legislature and the executive was blurred, so much so, that judicial deference to the legislature was tantamount to deference to the executive.¹³

Moreover, the rule of law proceeded from the fundamental premise that the law, together with its classical liberal underpinnings, is 'neutral', and further, that the legal enterprise must be respected as being objective and distinct from politics. In the realm of private law, this premise of neutrality and judicial deference translated to a *laissez faire* ideology, where the judiciary deferred to the *individuals'* arrangements of their private affairs; the main idea being, that the exercise of State power should not threaten the seemingly neutral (read 'naturalised') individualist liberal ideal.¹⁴

In terms of the public-private divide, classical liberalism manifested in a minimal body of public common law consisting of largely procedural principles of administrative and constitutional law; there having been no substantive human rights discourse in public law. This stands to reason, given that classical liberalism was rooted in the strongly individualist values of self-reliance, self-determination and self-interest, which focused principally, on the

¹¹ Roux op cit note 4 at 531.

¹² Pieterse op cit note 8 at 396-399.

¹³ In other words, executive obedience was dressed up as parliamentary sovereignty.

¹⁴ See discussion of the naturalisation of classical liberal underpinnings at 6-8 below.

liberty of the individual. The State's *public law* role was limited, in large part, to respecting such individual liberty, basically by not interfering unduly, in the (private) individual's realisation of his or her particular conception of the 'good life'. So too, in relation to private law, the State mirrored its minimalist, *laissez faire*, public law role. Indeed, the classical liberal public law discourse foregrounded South African law's extensive body of private common law principles, which was, (and still is), delineated similarly, in terms of a non-interventionist, *legal* ('non-political') standard of formal justice.¹⁵

Significantly, the 'hands-off' outlook of the State and following thereon, the law, including the private law, at the same time facilitated a strict dichotomy between the public and private spheres. As discussed in Chapter One, the public-private divide came to be regarded as a solid wall, where public law norms (even if evolving), could not infiltrate (and/or do justice within) the private law.¹⁶ In this manner therefore, the judiciary was able to maintain the veil of judicial neutrality within the private sphere and continue to insist on the cautious, conservative, private law adjudication method.

South Africa's 'judicial' legal culture, at that time, was embedded in classical liberalism. Indeed, the general Hartian-type (legal positivist/formalist) attitude towards law culminated in a judicial ideology termed 'liberal legalism'.¹⁷ In terms of 'liberal legalism', the adjudicative role ascribed to judges envisaged an exercise, purely in deductive legal reasoning, as constrained by a conservative, (classical liberal) conception of the rule of law. In other words, the work of the judge strictly was to interpret and apply the law, but *not*, (at least not overtly), to make the law.¹⁸ More importantly, judges had to be vigilant at all times, not to permit personal and/or political ideologies, values and sensibilities, to feature in the adjudication process.

In relation to the common law of contract then, these concerns were said to translate into a cautious judicial method, in terms of which, analysis that was "highly structured, technician, literal and rule bound" was to be preferred.¹⁹ That is to say, that the strict notion of legal constraint was meant to be authoritative

¹⁵ Pieterse op cit note 8 at 396-399.

¹⁶ On the public-private divide, see chapter 1 especially at 1.3.1.

¹⁷ Klare op cit note 4 at 157.

¹⁸ Klare op cit note 4 at 149; 157.

¹⁹ Klare op cit note 4 at 168.

in the performance of adjudicative work. What was contemplated therefore, was a more formal application of the law by way of an abstract rules-based analysis, with minimal judicial discretion; the idea being that judges simply would feed the 'hard facts'²⁰ of problems into the 'common law of contract machine'²¹ and the machine, in turn, would spit out the 'logically correct', (and therefore *formally just*), legal solutions.

The emphasis was on a certain and coherent body of legal principle, where hard-and-fast rules as applied to hard facts were preferred to the more pliable, open-ended standards invoked in relation to broader (competing) normative/policy concerns.²² Articulated further, the contract law machine was made up mostly of rules, that judges could apply mechanically, and relatively few standards which, in contrast to rules, required judges to conduct more contextual enquiries and exercise discretion to make value judgments. So whilst rules promoted certainty and efficiency, standards were better able to facilitate contractual justice and fairness. Hence, the contract law machine's emphasis on rules. Indeed, the imperative of a *substantively just* legal outcome, by way of a more flexible, purposive style of adjudication, on the basis of open-ended normative standards or values, remained subordinate.²³ In this manner therefore, judges could emerge as neutral in the carrying out of their adjudicative function.

Nevertheless, judges (including those of the apartheid era) did not adjudicate in a vacuum, nor were they automatons. This remains the case. In fact, 'liberal legalism' itself reflected, and continues to reflect, preference for a particular value-system for the determination of meaning, viz. legal positivism.²⁴ Further, the underlying classical liberal ideology, (although 'naturalised' within our common law legal culture), necessarily reflects a particular, pro-individualist set of values that is ultimately political in nature.²⁵ To be sure, *laissez faire's*

²⁰ By 'hard facts' I mean those facts that are specific to the particular contracting parties and therefore need to be established by evidence. See further discussion of the so-called 'evidence technique' in 3.3.5 below.

²¹ The 'contract law machine' is the machine comprising the legal formulas, doctrines, rules, standards and principles that is the common law of contract.

²² Hugh Collins 'Utility and rights in common law reasoning: Rebalancing private law through constitutionalization' (2007) 30 *The Dalhousie Law Journal* 1 at 4-6.

²³ Hawthorne op cit note 4 at 76-80.

²⁴ Klare op cit note 4 at 157.

²⁵ Klare op cit note 4 at 152; 184.

espousal of a *negative* conception of autonomy reveals a partiality for the independent (atomistic) individual, rather than his interdependent (collectively situated) counterpart.²⁶

Such proclivity has rendered classical liberalism more amenable to the above-outlined formalist reasoning, rather than to purposive adjudication.²⁷ In other words, the preference for formalist (rules-based) reasoning has led to a somewhat automatic ‘legalising’ of individualist policy considerations,²⁸ largely at the expense of competing, collectivist-type policy concerns; the latter being viewed as largely ‘non-legal’ in nature and thus, articulated as a relatively limited set of sub-ordinate standards.²⁹ In the end, therefore, even the ‘contract law machine’, with its delineation mostly in terms of rules rather than standards of contract law, although seemingly neutral, is likewise loaded ideologically in classical (legal) liberalism.

The result is two-fold: the preferred classical liberal ideology has informed the applicable judicial ideology and (conservative) method. In turn, these have been made to appear neutral and thereby, have relieved judges basically, from having expressly to articulate their policy preferences. In fact, over time this (traditional) ‘judicial’ culture of our legal system has become so instinctive, that participants doing legal work in present-day South Africa, arguably, take it for granted. They may even be oblivious to its very existence, or at least, to how it impacts on their approach to, participation in, and/or outcomes of the adjudicative process. Legal participants may thus be oblivious to the fact that their way of ‘doing’ law entrenches and promotes classical liberalism.

That said, the reality of adjudication, within the pre-1994 context, is quite revealing of the consciousness of this paradox at the time, especially by progressive (‘enlightened’) judges. Judges seemed to have appreciated acutely, the veneer of neutrality, for the purposes of negotiating the (unjust)

²⁶ See discussion in chapter 2 at 2.3.2; 2.3.3.

²⁷ Cockrell op cit note 4 at 43-44.

²⁸ This is because these considerations are more amenable to articulation via concrete legal rules. Cockrell op cit note 4 at 41-45.

²⁹ This is because these considerations are more suited to purposive adjudication by use of open-ended standards and values. Cockrell op cit note 4 at 41-45; Duncan Kennedy ‘Form and substance in private law adjudication’ in Dennis Patterson (ed) *Philosophy of Law and Legal Theory An Anthology* (2003) 193 at 220 ffg.

'extra-legal' effects of apartheid policies, principles and practices.³⁰ This is understandable, given that all judges would have needed, at the very least, to reconcile themselves with their function as adjudicators of laws, operating within an essentially, unjust legal framework. Indeed, this calls to mind the famous debates on the moral and ethical dimensions of 'judging during apartheid'.³¹

So, on the one hand, the strict formal operation of legal constraint within a classical liberal legal system seemed largely to release the judiciary, (and particularly pro-apartheid judges), from complicity with regard to the political and socio-economic injustices facilitated by the apartheid State.³² On the other hand, more progressive judges, whilst still observing the formal strictures of legal constraint, tended to operate more along its margins, exploiting opportunities to effect justice wherever there were gaps, ambiguities or room, otherwise, for substantive development of the law and, at times, even in the method of application of established legal rules to the facts.³³ The legal developments within administrative law, towards the end of the apartheid era, provide a good example of such judicial activism.³⁴

At the same time however, the judiciary was fastidious in the classical liberal divide between public law and private law; the argument being that the common law of obligations, in particular, should operate within an essentially sterilised, laissez faire context, that was distinct from, and impervious to, apartheid South Africa. Accordingly, in the context of the (private) common law, even progressive judges, working from within the 'liberal legalist'

³⁰ Klare op cit note 4 at 168-169; Roux op cit note 4 at 532-533.

³¹ See for instance Edwin Cameron 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law' (1982) 99 *SALJ* 38; Cora Hoexter 'Judicial policy in South Africa' (1986) 103 *SALJ* 436; David Dyzenhaus *Hard Cases in Wicked Legal Systems. South African Law in the Perspective of Legal Philosophy* (1991); Etienne Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31. See further Edwin Cameron 'Academic criticism and the democratic order' (1998) 14 *SAJHR* 106; John Dugard 'The South African judiciary and international law in the apartheid era' (1998) 14 *SAJHR* 110; David Dyzenhaus 'Law as justification: Etienne Mureinik's conception of legal culture' (1998) 14 *SAJHR* 11.

³² Roux op cit note 4 at 532-533.

³³ Klare op cit note 4 at 148-149; 157.

³⁴ See generally, Hoexter op cit note 31; Cora Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *SAJHR* 281; Hugh Corder 'Administrative justice: A cornerstone of South Africa's democracy' (1998) 14 *SAJHR* 11. See more generally, Richard L Abel 'Law under stress: the struggle against apartheid in South Africa, 1980-94, and the defence of legality in the United States after 9/11' (2010) 26 *SAJHR* 217 at 217-222.

framework, were largely at ease with the hard-line distinction between law and politics, and the ensuing formalist approach, for one of two reasons: Either, because they failed to appreciate the links between public and private injustice or, because of how their political neutrality in public law blinded them to private injustice.

Still, if these judges were faced with sanctioning an unjust, albeit 'rational' legal outcome in terms of the 'legal machine', they would sometimes manipulate the formal framework, by discriminating covertly amongst the relevant 'interpretive' tools and 'decision-making' strategies, in a manner that would best ameliorate the extra-legal consequences of a seemingly sterile common law of contract, operating in an apartheid State.³⁵ Arguably, the approach of the court in *Du Toit v Atkinson's Motors Bpk*,³⁶ in purporting to get around a harsh exclusion clause, as incorporated by the long-established principle of caveat subscriptor, is an example of such manipulation.³⁷

In this creative (albeit woolly) manner, therefore, those navigating treacherous legal terrain were able to effect a level of substantive justice and, all the while, observe the formal, non-interventionist integrity of Parliamentary Sovereignty's authoritarian separation of powers and basic rule of law. In the final event however, the scope for judicial activism by progressive judges too, was limited.

3.2.3 The post-1994 era

With the abolition of apartheid and the concomitant replacement of parliamentary sovereignty with a system of constitutional supremacy, one would anticipate a significantly altered judicial legal culture. Indeed, we now have a justiciable Bill of Rights, which contemplates a movement from 'a culture

³⁵ Roux op cit note 4 at 532-533.

³⁶ 1985 (2) SA 893 (A).

³⁷ In this case, the Appellate Division (as it then was) invoked a fairly tenuous logic to get around an exclusion clause. See also the cases relating to unread signed documents, such as *Shepherd v Farrel's Estate Agency* 1921 TPD 62, that have ended up subverting the caveat subscriptor's point of departure – from the courts maintaining that it is never reasonable not to read your contract, they then accepted that it may be reasonable not to read your contract. In the post apartheid era, the majority judgment in the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) provides a further example of such manipulation. See discussion in 3.3.2 below. Outside of contract law, see the pinnacle case of *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530.

of authoritarianism to a culture of justification'.³⁸ Moreover, it seeks to bind, not only the State, but also, the judiciary and private individuals.³⁹ The upshot is that our substantively progressive Constitution now comprises the basic legal constraint for post-apartheid adjudication. As such, it updates the approach to separation of powers, the public-private divide⁴⁰ and the rule of law. For one thing, the legislature and the executive are more distinct in democratic South Africa, so that, an executive-minded judiciary is no longer appropriate. On the contrary, the judicial function has been elevated to that of ultimate guardian and promoter of the supreme Constitution and its values.

In terms of s 8(3), (read with s 172(1)), and s 39(2), (read with s 173), of the Constitution, judges now bear an express responsibility to test, strike down, (re-) interpret and/or develop all South African law, including the common law of contract, so that it does not contravene, but accords with, and gives effect to, the Bill of Rights. Further, judicial activism is advocated for expressly insofar as the judiciary must work likewise towards the realisation in law of the spirit, purport and objects of the Bill of Rights, these being the foundational legal constraints of post-apartheid South Africa.⁴¹

So, whilst still subject to legal constraint, judges must adjudicate now, in a more realist medium, which *explicitly* mandates transformation of the civil, political, social and economic order, by way of a constitutionalised system of law. In other words, South African law operates now, in terms of a 'transformative constitutionalism' ideology, where a more full-bodied constitutional self, as grounded in the basic values of freedom, dignity and equality, is able to realise his or her vision of the 'good life'. Accordingly, judges can no longer camouflage the essentially political nature of the underlying judicial ideology. They are necessarily subject now, to a 'more plastic' legal constraint in the performance of their adjudicative function and

³⁸ Klare op cit note 4 at 147 citing Mureinik op cit note 31 at 32.

³⁹ See discussion in chapter 1 at 1.2.2(a)(i).

⁴⁰ The public-private divide no longer represents a solid wall between so-called 'public law' and 'private law'. Rather, it is more like wire mesh fence, where constitutional rights and values apply also in the realm of private law, but not necessarily in the exact manner as they would apply in the public law arena. See discussion in chapter 1 at 1.3.1; Collins op cit note 22 at 21-23.

⁴¹ See discussion in chapter 1 at 1.1; 1.2.

accordingly, ought palpably, to be more amenable to a 'policy-oriented and consequentialist' approach, rather than the predominantly formalist approach.⁴²

Liberal legalism therefore, as received from the apartheid era, presents an uneasy fit with our substantively progressive and transformative constitutional framework. Nevertheless, the South African legal fraternity has continued in this conservative approach to adjudication. Those doing legal work continue to invoke technical 'interpretive' tools and 'decision-making' strategies, so that legal outcomes appear, or at least, are made to appear, as logical deductions (or more-or-less self-evident truths) from the relevant legal materials.⁴³ This stands to reason, given that those doing legal work, for the most part, were schooled within this legalist tradition. Further, judges, (even those with a progressive bent), also conform to the traditional legal culture, in a quest for professional respect amongst their peers and within the broader legal order.⁴⁴ Just as under apartheid however, the legal fraternity tend to perceive and acknowledge this in relation to the public sphere only, but not when it comes to private injustice. Those doing legal work remain resistant therefore, to the role of the Constitution in relation to the private realm.

Yet, South Africa is still grappling with the aftermath of the 'legal' policies, principles and practices of the apartheid regime. As outlined earlier, the classical liberal ideology largely represented the normative foundations of what are now regarded as established legal principles, with ensuing rules and standards. At the same time however, it must be remembered that the classical liberal ideology was complicit in masking the substantive injustices that it facilitated, by way of the attendant judicial ideology and method. As part of the post-apartheid transformative legal project therefore, it is crucial that the *entire* legal fraternity (i.e. judges, practitioners and academics), critically reflect on the underlying judicial legal culture derived from the apartheid era.⁴⁵

At the very least, those undertaking legal work must be alert to the prevailing conservative legal culture as it features in their 'professional beliefs and practices' and ensure that it does not undermine, (not even incidentally),

⁴² Klare op cit note 4 at 168; cf *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) at para 39.

⁴³ Klare op cit note 4 at 168-169; Pieterse op cit note 8 at 397.

⁴⁴ Roux op cit note 4 at 541.

⁴⁵ Klare op cit note 4 at 166-172. See further Dennis Davis 'Transformation: The constitutional promise and reality' (2010) 26 *SAJHR* 85 especially at 88-94.

the process of the substantive constitutionalisation of our common law.⁴⁶ For contract law, this would mean that the judicial commitment to legal principle (especially *pacta sunt servanda*) and the resulting ‘contract law machine’, *also* must be justifiable in terms of our substantively progressive and transformative constitution and in particular, in terms of the foundational constitutional triage of freedom, dignity and equality.⁴⁷

Accordingly, the common law of contract necessarily faces a transitional process, in terms of which, the contract law machine itself must be constitutionally assessed and, if necessary, re-configured. At minimum, this entails a prefacing of the ‘business as usual’ application of rules (and/or standards) to facts, with an assessment of the content of the pertinent rules (and/or standards), against the foundational constitutional triage’s conception of contractual autonomy.⁴⁸ But in addition to this, we need to assess whether, the legal articulation of a particular constitutionalised contract law principle better lends itself to a rule (that can be applied by judges in a fairly deductive manner, with relative certainty), a standard (that would require judges to conduct a more contextual enquiry and make a value judgment), or some combination thereof (as in the case of the doctrine of mistake, for instance, which comprises a set of rules that at the same time incorporates a standard of reasonableness).⁴⁹

Presumably, the flexible, purposive style of adjudication, as embraced by the open-ended contract law standards, will have an elevated role, especially in light of the more fluid, constitutional concept of contractual autonomy, as grounded in the foundational constitutional triage. But this is not to say, that rules no longer have a place in the constitutionalised law of contract. Indeed, the historically celebrated organic nature of our extant common law of contract means that, over time, it will evolve into a constitutionalised contract law, with

⁴⁶ Klare op cit note 4 at 168.

⁴⁷ Collins op cit note 22 at 11-14. Collins submits at 14 that:

“Private law becomes rather a kind of hybrid legal reasoning, one which both retains its fidelity to the tradition of rights and principles whilst at the same time seeking to replicate the reasoning processes of social regulation. Decisions have to be justifiable by reference to both criteria – legal principle and social policy.”

For the constitutional conception of autonomy see discussion in chapter 2 at 2.4.

⁴⁸ See discussion in chapter 2 at 2.4.

⁴⁹ See discussion in 3.3.2 below. Note also, the established categories of improperly obtained consensus, comprising a set of rules coupled with a standard of wrongfulness. For a detailed discussion of these categories see SWJ (Schalk) Van der Merwe, LF Van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* 4ed (2012) at chapter 4.

an apposite constitutionalised set of standards *and rules*, operating within the contract law machine. The upshot is that, the shift to a constitutional culture of justification contemplates a (potential) *re-balancing* of the configuration of rules and standards. In addition, there may be adjustments to the manner in which such rules and standards operate in the ‘contract law machine’, so that, their underlying judicial ideology and attendant method, are likewise aligned with the Constitution. For instance, the standard of reasonableness, as it currently operates within the doctrine of mistake, may assume a more open-ended role, at least during the transitional constitutionalisation period, with a view to adjusting the now-concretised rules of mistake, (or apparent autonomy), in a manner that better reflects our revised constitutional ethos.⁵⁰

To sum up, because legal method is imbedded in legal culture and ideology, it actually informs the substantive development of the law itself.⁵¹ Consequently, in fulfilling the mandate of constitutionalising the common law of contract, it is important to be conscious, not only of the South African legal culture and its preferred ideology, but also, of the influence of the established legal methods of our common law, on the attainment of the Constitution’s substantively progressive aims.

It is with this in mind, that I turn to assess how the legal methods, currently employed by the common law of contract, influence the internal content and external reach dimensions of contractual autonomy.

3.3 TRADITIONAL LEGAL METHOD FOR THE DETERMINATION OF THE INTERNAL (CONTENT) AND EXTERNAL (REACH) DIMENSIONS OF CONTRACTUAL AUTONOMY

3.3.1 Introduction

Contract law has generally been understood as the *means* by which to regulate socio-economic relationships in the private sphere. More specifically, contract law is the mechanism meant to regulate market relations.⁵² In doing so, its

⁵⁰ See discussion in 3.3.2 below.

⁵¹ Klare op cit note 4 at 168; 170.

⁵² Emmanuel Putman ‘The horizontal application theory and its influence on the freedom of contract – A French point of view’ (1998) 2 *Law, Democracy and Development* 219 at 222; Alfred Cockrell ‘The hegemony of contract’ (1998) 115 *SALJ* 286 at 308; Hugh Collins *The Law*

foundations in 18th and 19th century classical liberal theory buttress contemporary neo-liberal policies for macroeconomic growth, where there is continued emphasis on, and respect for, the (negative) autonomy of individuals participating in the market. In fact, contract law has been referred to as the ‘present day private law...of the “busy entrepreneur”’, where it is more ‘economically correct’ to link freedom of contract to freedom of enterprise.⁵³

What seems to be most attractive about our system of contract law is that, by virtue of the attending judicial ideology of liberal legalism, it provides a certain, predictable and efficient conceptual framework, within which, judges can adjudicate contracts.⁵⁴ This has been ascribed to the alleged intrinsic logic of the underlying ‘doctrinal system of thought’,⁵⁵ where individual autonomy and good faith comprise the cornerstone legal principles. As discussed in the previous chapter, these principles are expressed very basically in the legal concepts of consensus, *pacta sunt servanda* and (formal) equity which, in turn, articulate a fairly thin internal conception of contractual autonomy (*both actual and apparent*),⁵⁶ in simple, robust and seemingly ‘value-neutral’ rules. These rules are then accompanied by a restricted set of open-ended standards (or values), that are meant primarily to reign in the ‘external reach’s’ (obscene) excesses of freedom of contract, within a relatively contained doctrine of legality. The contract law machine thus constitutes a neat formal network of coherent legal principles, comprised predominantly of concise, yet, fairly robust legal rules, which, by virtue of their self-styled common sense, apply somewhat automatically to voluntarily assumed, private relationships.⁵⁷ In contrast, normative engagement, in terms of open-ended standards, is kept to a minimum, so that, freedom of contract is still dominant. In this manner, the potential range of answers that can be produced by the contract law machine is

of Contract 4ed (2003) at 1-3; Michael J Trebilcock *The Limits of Freedom of Contract* (1993) at chapter 1. See also discussion of neo-classical economic analysis in chapter 2 at 2.2.2.

⁵³ Putman op cit note 52 at 222. See also discussion in chapter 2 at 2.2.2.

⁵⁴ Deeksha Bhana and Marius Pieterse ‘Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited’ (2005) 122 *SALJ* 865 at 867 and the authorities cited there.

⁵⁵ Collins op cit note 52 at 3.

⁵⁶ See discussion in chapter 2 at 2.2; 2.3.3.

⁵⁷ Collins op cit note 52 at 3-7; Bhana and Pieterse op cit note 54 at 867. See also discussion in chapter 2 at 2.2.1.

carefully controlled. The contract law machine is thus able, to maintain a high level of legal coherence, predictability and certainty.

The downside, however, is that contract law's foundations in classical liberal theory have been 'formalised' into the legal culture, to the extent that, they feature as 'natural' or 'value neutral' in the contract law machine. Yet, as outlined in the previous chapter, contract law's central axis of autonomy, in itself reflects a particular conception of the 'good life' and resultant market order.⁵⁸ It advocates for a far-reaching *individualist* order, that promotes self-interest, self-determination and self-reliance, with minimal State interference. To articulate this further, it is assumed essentially, that the market is able to commodify the elements of the 'good life', so that, the role of contract law simply is to ensure that individuals are free, (at least, in terms of its formal legal rules),⁵⁹ to participate in the market, to achieve the quality of life to which they aspire. As a result, freedom of contract has inveigled its way into vital aspects of an individual's life, ranging from basic rights to housing⁶⁰ and other essential goods,⁶¹ to freedom of association, labour relations and even, religion.⁶²

In light of the above, I examine two main aspects of the contract law machine, in relation to the internal content and external reach dimensions of contractual autonomy. First, I consider how the contract law machine continues to bolster the thin, (classical liberal) internal content dimension of contractual autonomy. Here, I show how the machine continues formalistically, to apply the relevant established rules, within the sterilized, laissez faire context of (business) parties, negotiating at arm's length, on a more-or-less equal footing. Nevertheless, in reality, such rules are being applied increasingly outside of this naturalised individualist paradigm, with the result that, classical contract law's individualist underpinnings themselves, are increasingly (at risk of) being undermined.

Second, I interrogate the role of the contract law machine in the law of contract's purported accommodation of the more modern, (post-apartheid)

⁵⁸ Halton Cheadle and Dennis Davis 'The application of the 1996 Constitution in the private sphere' (1997) 13 *SAJHR* 44 at 50.

⁵⁹ See discussion in chapter 2 at 2.2.2.

⁶⁰ This right would be realised through a contract of lease or a purchase of immovable property.

⁶¹ For example water, education and healthcare.

⁶² *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 15. See also Trebilcock op cit note 52 at 18-19 and the discussion in chapter 2 at 2.2.1.

collectivist leanings that embrace a fair measure of altruism. As argued in the previous chapter, the latter is necessary to augment what must now be a constitutional conception of the 'self', and the succeeding ideal of the 'good life'.⁶³ Yet, the contract law machine's circumspect attitude toward normative reasoning (purposive adjudication), and concomitant preference for deductive reasoning, may be leading courts, to continue to apply the relevant rules abstractly, to socio-economic relationships. This may further explain why the courts fail to deal adequately, with the (traditionally deemed) extra-contractual policy concerns, that ought to feature in a constitutionalised contract law.

In the final event, I consider the impact of residual default rules and decision-making strategies that also form part of the contract law machine.

3.3.2 The implication of traditional legal method for the determination of the (internal) content of contractual autonomy

As set out above, the contract law machine and therefore, the legal methodology employed in the determination of the internal content dimension of contractual autonomy, remains entrenched in classical liberalism and the resulting legalist judicial ideology.

To illustrate, the starting point would be the element of contractual capacity. As discussed in the previous chapter, this element operates essentially, in terms of a rebuttable presumption, in favour of a contractant having the requisite capacity - the onus is on the party wishing to *escape* the contract, successfully to dispute this element. This enquiry therefore, is tipped to the side of freedom of contract and *pacta sunt servanda*. Moreover, such approach would be defended by the contract law machine as a purely factual and accordingly, 'value-neutral' enquiry. Indeed, the adjudication of a contractual capacity issue would appear to entail a straight-forward, objective determination of whether, the cognitive and conative abilities of the contractant concerned, were negated, as per the formal contract law rules, that articulate the legally recognised instances of 'no capacity'.⁶⁴

⁶³ Collins op cit note 52 at 8-10; Bhana and Pieterse op cit note 54 at 868-869. See also the preamble; s 1 of the Constitution; chapter 2 at 2.2; 2.3; 2.4.

⁶⁴ For an exposition of the capacity rules of contract law, see Birgit Kuschke 'Contractual capacity' in Dale Hutchison (ed), Chris-James Pretorius (ed), Jacques Du Plessis, Sieg Eiselen,

Nevertheless, the factual enquiry still takes place within the established classical liberal framework. Accordingly, the judicial methodology of focusing on a limited set of objectively ascertainable facts, as processed by the capacity element of the 'contract law machine', continues to draw on, and feed into, the erstwhile laissez faire ideology, with its principally *negative* conception of freedom. In effect therefore, judges are able, by invocation of the established 'contract law machine', to sidestep, what is perceived as the legal quagmire of a more substantive, contextually driven, *positive* conception of contractual autonomy. In other words, the veneer of an apparently value-neutral judicial methodology enables our judges essentially, to avoid pertinent normative concerns, which would now contest or, at the very least, temper the classical liberal conception of autonomy, operating within a post-apartheid constitutional context.⁶⁵

That said, on at least one occasion, the SCA did sense a deficiency in the capacity rules' conception of autonomy. In the case of *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*, the court was presented with an eighty-five-year-old mother, who was hard of hearing and almost blind, at the time when she signed as surety for her son's debt to the bank. At first glance, these facts do not appear to fit with any of the established instances of 'no capacity'. Yet, the majority court did not propose a normative interrogation of the capacity rules. Instead, it invoked the 'contract law machine' and in effect forced a fit of the relevant facts with the formal 'no capacity' rule relating to mental illness, and thereby, yielded a substantively just legal outcome.⁶⁶ The classical liberal underpinnings therefore, remained intact.

Interestingly enough, the minority judgment yielded a similar result, but called upon the competing collectivist normative dimension, to do so. In particular, it relied on the principle of good faith, as it features in the doctrine of legality, to hold that the contract was unenforceable, on the grounds of public policy.⁶⁷ Notably, the minority judgment rejected the classical liberal 'mental

Tomas Floyd, Luanda Hawthorne, Birgit Kuschke, Catherine Maxwell, Tjatie Naude and Elizabeth De Stadler *The Law of Contract in South Africa 2ed* (2012) chapter 5.

⁶⁵ See discussion in chapter 2 at 2.2.3; 2.4.

⁶⁶ *Saayman* supra note 37 at 315A-C. For a critique of the use of the doctrine of legality to cure a deficiency in the internal content dimension of autonomy, see discussion in 3.3.4 below.

⁶⁷ *Saayman* supra note 37 at 318G-I; 319B-B; 320D-E; 330I-331J. See also the discussion in chapter 2 at 2.3.2; 2.3.3(b).

illness-no capacity' route, on the basis that there was insufficient evidence pointing to this.⁶⁸ Be that as it may, the SCA subsequently criticised the minority judgment's use of good faith as methodologically unsound; it being an underlying value, as opposed to an established rule, of contract law.⁶⁹ Admittedly, the approach of the minority judgment is open to such critique, especially if what the majority judgment meant to say, was that any matter pertaining to the internal dimension of autonomy, ought not to be situated within the doctrine of legality.⁷⁰ Even so, this should not detract from the more important point that needs to be made here i.e. that the majority judgment effectively circumvented, all and any, *normative* interrogation of the internal content of contractual autonomy, as articulated by the extant contract law rules. The upshot is that the non-interventionist, formal (albeit sometimes creative) tendencies of judges, operating within the apartheid era, still commands the delineation of the internal content dimension of contractual autonomy, in post-apartheid adjudication. In this manner, the classical liberal conception of autonomy is able to continue to dominate, largely untested, against the constitutional conception(s) of contractual autonomy.⁷¹

Taken further, the extant approach to the determination of contractual capacity, sets the stage for a comparable methodology employed, in terms of the rules of offer and acceptance, the doctrine of mistake, as well as the legally recognised instances of improperly obtained consensus i.e. misrepresentation, duress, undue influence and bribery. Once again, the rules articulating each of these areas of contract law, dress up the relevant enquiries as formally objective, 'value-neutral' factual enquiries. Yet, the individualist policy concerns inherent to classical liberalism are weaved likewise into the very fabric of the rules that are meant to discern the relevant facts from the irrelevant facts, as well as their method of application.

Looking at the doctrine of mistake, for instance, it remains the exclusive portal through which, the supplementary reliance theory's conception of

⁶⁸ *Saayman* supra note 37 at 318H.

⁶⁹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at paras 11-34; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at para 32; cf *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at paras 79-83. For a detailed discussion of good faith, see Bhana and Pieterse op cit note 54 at 889-893.

⁷⁰ See discussion in 3.3.4 below.

⁷¹ See discussion in 3.3.3 below.

apparent autonomy, finds application.⁷² As such, the doctrine comprises the articulated rules that purport to give effect to the factual, as well as normative, dimensions of apparent autonomy. So when a 'mistake case' comes before a court, the court would first invoke the rule, which determines whether there is in *fact* an appearance of consensus and conversely, whether the mistake excludes actual consensus. Thereafter, the court would invoke those rules, which determine whether there is a *legally protectable* (i.e. reasonable) reliance on the appearance of consensus and conversely, whether the mistake is legally *excusable* (i.e. justus or reasonable).⁷³ Notably, the capacity to create the appearance of consensus, and conversely, the capacity to rely thereon, is presumed; arguably, irrebuttably so, there being no express rules relating thereto.⁷⁴

The upshot is that the *standard* of reasonableness is an integral part of the doctrine of mistake. As such, the doctrine of mistake ought to accommodate a normative style of adjudication. To be sure, the supplementary reliance theory, as well as the foundational constitutional triage, calls for a more fluid, contextual assessment, that can take better cognisance of important, collectivist-type policy considerations.⁷⁵ Furthermore, such type of adjudication would better facilitate a proper balancing of collectivist considerations, against both traditional *and modern* individualist considerations.⁷⁶ This would yield a more full-bodied, internal concept of apparent autonomy. Yet, an essentially rules-based framework, as founded in classical liberalism, is employed. On the one hand, the rules articulating reasonable reliance and justus error purport to resolve the relevant normative tensions, in terms of whether, the will of the non-mistaken party or the mistaken party, ought to triumph. On the other hand, they

⁷² On the problematic nature of mistake, as a somewhat exclusive portal for reliance theory, see the discussion in chapter 2 at 2.3.3(c).

⁷³ See discussion in chapter 2 at 2.3.3(c).

⁷⁴ The capacity to make a mistake, and further, to create an impression of consensus, ought to be a necessary preliminary step. As the law presently stands however, such capacity is presumed simply to be present. Arguably, such presumption is irrebuttable, given that the rules of contract law, including those articulating the doctrine of mistake, fail specifically to address the question of the capacity to exercise *apparent* autonomy, as opposed to actual autonomy. See further discussion in chapter 2 at 2.3.3(c).

⁷⁵ Such as the (potential) prejudice/harm to the non-mistaken party, and perhaps, even to non-contracting parties, who would rely, (whether directly or indirectly), on the conclusion of the contract.

⁷⁶ Such as the presence or absence of fault on the part of the mistaken party, in creating the impression of consensus and/or being mistaken about the contract.

fall short, at least, to the extent that the reasonable reliance and justus error approaches do not always yield the same result.⁷⁷ In the end therefore, an (over-)emphasis on the rules of mistake (and classical liberalism), undermines the collectivist-based, normative facet of the internal content dimension of apparent autonomy. To boot, it undermines the individualist facet itself, in light of pertinent socio-economic realities, that face the modern contractant, but that, as of yet, have not been taken into account, for the purposes of determining whether a mistake is justus.

Even so, the mistake enquiry continues to be presented basically, as an objective enquiry of *hard fact*, to which, the established rules must be applied in order to deduce the legally 'correct' answer. The normative dimension of reasonableness is subordinated. As such, a thin, (classical liberal) internal conception of apparent autonomy is preserved, notwithstanding the lack of scrutiny of the potential implications of the constitutional concept of apparent autonomy.⁷⁸

Finally, in relation to the concretised categories of improperly obtained consensus, the extant rules likewise tend to underplay the need firstly, for a fuller internal conception of autonomy in our law and secondly, for normative engagement with pertinent policy considerations, both individualist and collectivist in nature, for the purposes of determining a basic legal (albeit fluid) threshold of actionable (positive) contractual autonomy. To be sure, the conservative categorisation approach, coupled with the elevation of the traditional rules (as entrenched in classical liberalism), go some way to masking the general reticence of judges, to engage with present-day socio-economic realities. These realities include those that undermine post-apartheid

⁷⁷ See for instance *Lake and Others NNO v Caithness* 1997 (1) SA 667 (E); *Nasionale Behuisingkommissie v Greyling* 1986 (4) SA 917 (T). Note also, the confusion regarding mistake in *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA). See further, the discussion in chapter 2 at 2.3.3(c).

⁷⁸ It is submitted that the constitutional concept of autonomy, (which necessarily includes apparent autonomy), would insist on a more contextual standard of constitutional reasonableness and/or good faith, for the purposes of determining whether the will of the non-mistaken party or the mistaken party should prevail. This would require a re-balancing of the configuration of the extant rules and standards, with a concomitant shift in emphasis to normative adjudication. See Collins op cit note 22 at 14-16.

individualist considerations, such as those inherent in abuses of unequal bargaining power.⁷⁹

To sum up, contract law adjudication remains steeped in the erstwhile, liberal legalist judicial ideology, coupled with the formalist judicial method, appertaining thereto. However, as illustrated above, such approach plays a significant role in covertly naturalising the classical liberal conception of autonomy, which then, mostly avoids rigorous normative interrogation of the internal (content) dimension of contractual autonomy, in terms of the foundational constitutional triage of freedom, dignity and equality.⁸⁰

3.3.3 The implication of traditional legal method for the determination of the (external) reach of contractual autonomy – the public policy (legality) exercise

(a) The (objective) tendency of the clause (the broader policy context)

In contrast to the internal dimension of contractual autonomy, the external reach dimension engages expressly with the normative facet of contract law. Indeed, in delineating the external reach dimension of contractual autonomy, the point of departure is that contract law, although disinclined to collectivist ideology and purposive adjudication, does recognise it, at least, within the parameters of the contractual doctrine of legality.

As discussed in the previous chapter, it is a rule of contract law that a contract that is against public policy will be illegal and therefore, null and void.⁸¹ In other words, even if a court is satisfied, that the parties did in fact exercise their autonomy in relation to the relevant contract, (as per the internal content dimension of contractual autonomy), it may refuse to recognise such autonomy, on the basis that the contract is against public policy and therefore, illegal.

⁷⁹ Cockrell op cit note 4 at 56-58. See further, the discussion in 3.3.4; 3.5.1(b) below.

⁸⁰ Save for legitimating the classical liberal conception itself in *Brisley* supra note 69 at paras 91-95.

⁸¹ Contracts can be void for illegality either on the basis of the so-called 'established' common law rules (eg. the in duplum rule), or in cases where the contract is found to offend the boni mores (eg. a contract of slavery or prostitution), or is otherwise against public policy or the public interest. For the purposes of the thesis, I refer to public policy and this should be taken as encapsulating all of these bases. For a detailed discussion of legality of contracts, see Van der Merwe et al op cit note 49 at chapter 7.

At the outset therefore, it is important to appreciate that when invoking the doctrine of legality, a court implicitly takes as its point of departure, that the requirements pertaining to the internal content dimension of contractual autonomy, properly have been fulfilled. As such, the doctrine of legality necessarily has a built-in gatekeeper valve, which preliminarily limits the normative considerations that can be taken into account – only those considerations, which presume (and/or are informed by) a proper exercise of (internal) contractual autonomy, are relevant. So, for instance, those considerations relating to a deficient exercise of autonomy, by reason of an abuse of unequal bargaining power or economic duress, simply cannot feature.

That said, judges articulate public policy as a set of open-ended, (albeit preliminarily, (and essentially limited)) normative standards, (such as reasonableness and good faith), that contemplate purposive adjudication, on their part.⁸² In the post-apartheid context, the CC and the SCA have both recognised that public policy is grounded now, in the Constitution and the fundamental values that it enshrines.⁸³ The content of the open-ended normative standards therefore, must be informed now, by the substantive rights and underlying values of the Bill of Rights.⁸⁴

Without a doubt, this recognition of the Constitution and its role in the public policy exercise, marks a significant step in the process of constitutionalising the common law of contract. Nevertheless, judges also continue, at the same time, to employ a particular *method*, as rooted in classical liberalism, of applying the competing (collectivist) values to the concept of public policy. This is reflected in the ‘all or nothing’ approach to public policy.

In terms of the ‘all or nothing approach’, the tendency of a contract (and its clauses) is tested against public policy (expressed, in terms of the broader, classical liberal legal context) and is declared either valid or void, for all intents and purposes.⁸⁵ There is no middle ground. Importantly, the starting point of

⁸² Bhana and Pieterse op cit note 54 at 868; Cockrell op cit note 4 at 43.

⁸³ *Barkhuizen* supra note 69 at para 91.

⁸⁴ See discussion in chapter 1 at 1.1; chapter 2 at 2.2.3(c); 2.3.2.

⁸⁵ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 71-9G; *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 (5) SA 248 (SCA) at para 12; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at para 14. See also Graham Glover ‘Lazarus in the Constitutional Court: An exhumation of the *exceptio doli generalis*?’ (2007) 124 *SALJ* 449 at 450.

this enquiry is that the relevant contractual clause is valid and enforceable, with the responsibility on the party wishing to escape the clause, to show why it should be otherwise.⁸⁶

What emerges is that although the public policy enquiry is executed by way of a balancing exercise, it is not a straightforward balance. It is a balance according to a method, which impacts on the substantive outcome of the case. What this highlights, is that the *kind of scale* that is used in conducting the balancing exercise, is just as important as what one actually balances on the scale. Here, the kind of scale contemplated by the public policy enquiry is not a balanced one, but one that, at the outset, is tipped to the (individualist) side of freedom of contract. As a result, the application of contract law, and thus, the external reach of contractual autonomy, is fettered only in the clearest and most extreme cases.⁸⁷

The public policy scale itself thus, vociferously guards the borders of contract law. Accordingly, public policy's power to curb the contract law machine's approach to the application of the autonomy-based rules of contract law is diminished. The net result, is an *extension* of contract law's reach into socio-economic relationships, that may not be suited to laissez faire, market-based regulation.⁸⁸ This phenomenon has been described as the hegemony or privileging of contract law, in relation to other branches of the common law.⁸⁹

For instance, in family law, parties are free to regulate their matrimonial property regime, by way of an antenuptial contract. In such a case, the normal rules of contract law apply, where emphasis is placed on the individualist conception of autonomy, applicable to commercial contracts. The result, is that freedom of contract prevails over the particular concerns meant to be addressed by family law. This is because, contract law's tipped public policy scale, takes inadequate account of the non-commercial 'context and reality' of the intimate and vulnerable nature of the family relationship, as well as the

⁸⁶ Ibid.

⁸⁷ See generally *Bank of Lisbon and South Africa Ltd v De Ormelas* 1988 (3) SA 580 (A); cf *Sasfin* supra note 85 at 9B-C (where the doctrine of unconscionability was formulated); *Baart v Malan* 1990 (2) SA 862 (E) (where *Sasfin's* doctrine of unconscionability was applied); *Saayman* supra note 37 (minority judgment of Olivier JA).

⁸⁸ Collins op cit note 52 at 6-7; Cockrell op cit note 52 at 312-314. See further, Collins op cit note 52 at chapter 6.

⁸⁹ Ibid.

societal pressures and expectations, which attach to the institution of marriage.⁹⁰ Moreover, the traditional ‘all or nothing’ methodology is *unable* to accommodate the particular (changed) circumstances, that the parties find themselves in, when the antenuptial contract is actually enforced. The legislature has recognised as much, by making provision for a ‘forfeiture of benefits’,⁹¹ as well as ‘a limited judicial discretion to redistribute assets upon divorce’.⁹² Nevertheless, these legislative measures operate in very limited circumstances, and are generally insufficient, to address the socio-economic concerns that are normally raised in this context.⁹³

A further instance of contract law’s seeping into family law relates to the invocation of classical contract law, as the mechanism for extending the common law rights and duties attendant on traditional marital status, to those in relationships that have been excluded from such status.⁹⁴ Once again, however, contract law methodology has not been adapted in these contexts, to take proper cognisance of the concerns specific to family relationships. The outcome is that the freedom to contract, or not to contract, as the case may be, will generally outweigh the competing values underpinning family law.⁹⁵

Likewise, in relation to the law of delict, contract law has occupied a privileged position. With the contract-delict law interface, a primary concern is that the contract should not be circumvented by a delictual claim. The basic argument is that the parties have, by an exercise of their autonomy, isolated and allocated the general risks of their bargain and accordingly, planned their affairs within the contract law paradigm. They therefore have a reasonable expectation that their contractual arrangement will be respected, and the law of delict should not be allowed to frustrate this.⁹⁶

The law’s treatment of exclusion clauses comprises an archetype of such preferencing of contract, over delict. Although the courts are circumspect of contractual exclusions of delictual liability, they nevertheless, proceed from

⁹⁰ Jacqueline Heaton ‘Striving for substantive gender equality in family law: Selected issues’ (2005) 21 *SAJHR* 547 at 552 and 554-555. See also Elsje Bonthuys ‘Family contracts’ (2004) 121 *SALJ* 879 at 894-897.

⁹¹ Section 9 of the Divorce Act 70 of 1979 – Heaton op cit note 90 at 557-558.

⁹² Sections 7(3) and 7(4) of the Divorce Act 70 of 1979 – Heaton op cit note 90 at 558-562.

⁹³ Heaton op cit note 90 at 557-558.

⁹⁴ Bonthuys op cit note 90 at 900.

⁹⁵ Bonthuys op cit note 90 at 894-897; 900-901.

⁹⁶ Cockrell op cit note 52 at 287-288; 291-292.

the premise, that such practice is valid, in principle. Once again, the tipped public policy scale, articulated in the 'all or nothing' approach, means that the common law rights stemming from the law of delict, are generally outweighed by freedom of contract.⁹⁷

The same pattern can be identified in relation to the common law of unjustified enrichment, estoppel and in certain cases, even administrative law.⁹⁸ Ultimately, the primacy of open market relations, as articulated by the pre-constitutional, common law framework of contract, means that once the element of autonomy features, the court does not have to deal with competing substantive rights, on an equal footing.⁹⁹ This is notwithstanding, the fairly thin (internal) conception of positive autonomy, within our common law of contract.¹⁰⁰

To compound matters, within contract law itself, if a party is to be bound to a contract, on the basis of apparent autonomy (as per the supplementary reliance theory articulated by the doctrine of mistake), the public policy scale is not in any way adjusted, so as to accommodate those concerns inherent to reliance-based liability. The tipped public policy scale, is still used, notwithstanding, the reality of a 'half-deliberate' exercise of autonomy. As a result, the significance of those 'collectivist-type', (distributive justice) policy concerns, that are specific to the external reach dimension of apparent autonomy (and therefore, reliance theory), are underplayed, or even overlooked, whilst freedom of contract, in its classical liberal sense, continues to dominate.¹⁰¹

The significance of the 'all or nothing' approach to public policy then, is that it complements the deep-level, commercial commitment to the classical liberal conception of contractual autonomy; notwithstanding, the advent of

⁹⁷ See for instance, *Afrox supra* note 69 at paras 9-10; 23-24; *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 (1) SA 982 (SCA); *First National Bank of Southern Africa Ltd v Rosenblum* 2001 (4) SA 189 (SCA). On exclusion clauses generally, see Van der Merwe et al op cit note 49 at 258-260; Philip N Stoop 'The current status of the enforceability of contractual exemption clauses for the exclusion of liability in the South African law' (2008) 20 *SA Merc LJ* 496.

⁹⁸ See Cockrell op cit note 52 at 292-302.

⁹⁹ See Cockrell op cit note 52 at 308-314.

¹⁰⁰ See discussion in chapter 2 at 2.3. For the interplay of the internal and external dimensions of autonomy, see also 3.3.4 below.

¹⁰¹ See discussion in chapter 2 at 2.3.3(c); 2.3.2.

transformative constitutionalism, in terms of the Bill of Rights.¹⁰² At the same time, it inadvertently conflates actual and apparent autonomy, and so, endorses the conservative legal culture, which respects the intricate nature of our contract law rules, that have developed, over time, basically in terms of the *will theory* (but with a thin, essentially negative conception of autonomy), in order to achieve a balance between legal certainty and the pre-constitutional (individualist) conception of fairness.¹⁰³

To iterate, the traditional public policy scale, operating in terms of the doctrine of legality, at the very outset, carves down the external normative factors, that can even be put onto the scale - logically speaking, only those factors that are congruent with the essential premise of the parties having actually exercised contractual autonomy, (though presently, only in the classical liberal sense), can effectively be taken into account. To boot, in relation to those factors/competing considerations, that manage actually to pass through this initial gatekeeper (entry) valve, the very nature of the public policy scale itself becomes relevant. The scale's liberal bias (to the side of freedom of contract), as articulated in the above-outlined 'all or nothing' approach to contracts, significantly minimises the (potential) role that can be played, by what are, (and ought to be), relevant competing considerations, within the post-apartheid constitutional era. In other words, the scale itself, (as opposed simply, to what can be put on it), may further undermine the extent to which competing factors/considerations can disrupt the *laissez faire* outcomes, that our contract law machine still prefers to produce.

(b) The (subjective) enforceability of the clause in the particular circumstances (at the time of enforcement)

The notable departure from the 'all or nothing' approach relates to contracts in restraint of trade, where the common law has recognised, that the issue is primarily one of the enforceability of the restraint, as opposed to its validity. Briefly stated, restraint contracts are *prima facie* valid and enforceable, but

¹⁰² *Brisley* supra note 69 at paras 91-95.

¹⁰³ See discussion in chapter 2 at 2.2.3.

may be unenforceable, if contrary to the public interest.¹⁰⁴ So, whilst still premised on classical liberalism, a court determines whether the covenant in restraint of trade is contrary to the public interest, by taking cognisance firstly, of the factual circumstances prevailing between the parties, *at the time of enforcement* of the contract, and secondly, the broader policy interests. What is important to note, is that the courts have carefully developed the legal doctrine relating to restraint of trade agreements in a systematic manner, so that, over time, a concrete set of guidelines have emerged, as to when it would be unreasonable to enforce a restraint of trade agreement.¹⁰⁵ In the case of *Reddy v Siemens Telecommunications (Pty) Ltd*¹⁰⁶, the SCA confirmed the step-by-step approach, as outlined originally in *Basson v Chilwan*:¹⁰⁷

“In *Basson v Chilwan* Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.”

So, the courts generally regard the standard of reasonableness of the restraint, *inter partes* (as it relates to the enforceability of the clause), as decisive.¹⁰⁸ Further, it would seem that the reasonableness of the restraint, as per the broader public interests (the so-called tendency of the clause), is invoked in the last instance. In practical terms, this means that the latter ‘tendency’ enquiry would be invoked, only in those instances, where the former ‘enforceability’ enquiry does not render the restraint of trade unenforceable.

¹⁰⁴ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Basson v Chilwan* 1993 (3) SA 742 (A); *Reddy* supra note 62 at paras 10-12. See also the recent adoption by the CC in *Barkhuizen* supra note 69 at paras 30; 56-58.

¹⁰⁵ *Reddy* supra note 62 at para 16.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid* referring to *Basson* supra note 104 at 767C-H.

¹⁰⁸ See generally, *Sunshine Records (Pty) Ltd v Frohling* 1990 (4) SA 782 (A); *Rawlins v Caravanatruck (Pty) Ltd* 1993 (1) SA 537 (A); *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE); *MacPhail (Pty) Ltd v Janse van Rensburg* 1996 (1) SA 594 (T).

The methodology applied to restraint of trade agreements therefore, represents a relaxation of the 'all or nothing' approach because, in addition to the tendency of the clause, it focuses on the *outcome of enforcement*, in the particular circumstances. Here too, a scale that at the outset is tipped in favour of freedom of contract applies - the onus is on the party wanting to escape the restraint to prove his case. However, because the focus is principally on the enforceability as opposed to the validity of the restraint, the scale is not as heavily tipped, as in the case of the 'all or nothing' approach. Also, the methodology bolsters the level of purposive adjudication, in that each case, ultimately must be decided on the basis of the particular circumstances, in which the parties find themselves, at the time of enforcement. In other words, the sterilised, laissez faire approach gives way to a more realist-type, contextual approach, so that, the potential range of answers that can be produced by the 'contract law machine', although still contained, is somewhat broader.

The basic reason for the traditionally differentiated approach to restraint contracts is that such contracts, impinge on a legally recognised *competing economic right*, that, depending on the circumstances, courts accept can be more important than the right to freedom of contract. Just as freedom of contract is an integral part of an individual's right to engage in economic life, so too, is freedom of trade.¹⁰⁹ It is in the interests of society, that its members are productive and this would usually require that they are able to engage in the economy, by way of their chosen trade, occupation or profession. Consequently, where freedom of contract and freedom of trade conflict, a judge has to balance the competing considerations and exercise a value judgment. In effect therefore, the reach of contractual autonomy is somewhat re-defined, by the employment of a differing methodology.

As mentioned above, the approach developed by the courts, in relation to restraint of trade agreements, exhibits analytical rigour.¹¹⁰ As a result, an acceptable measure of certainty is preserved. Moreover, whilst the approach to restraint contracts was formulated by the pre-constitutional common law of contract, it resonates strongly with the limitations analysis of s 36(1) of the Bill

¹⁰⁹ Ibid.

¹¹⁰ Basson supra note 104 at 767C-H.

of Rights.¹¹¹ In terms of s 36(1), a court must assess whether the implicated substantive right, (which, in the case of a contract in restraint of trade, would be the s 22 freedom of trade, occupation and profession), is reasonably and justifiably limited by the law (i.e. the common law of contract), in the particular circumstances of the case. Most significantly, s 36(1) contemplates a balancing exercise, that is grounded in the foundational constitutional triage, with no particular value automatically privileged, and where the right(s) must be balanced against competing societal objectives, including those pertaining to “(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”¹¹²

To sum up, in terms of the common law of contract, the particular methodology employed by a court, in solving a particular contractual dispute, plays a pivotal role in defining the external reach of contractual autonomy. In this respect, the public policy scale endorses contractual autonomy, as the predominant consideration, that will be trumped in exceptional circumstances only. In relation to contracts in restraint of trade, however, the scale has been adjusted to accord greater weight to the competing economic right. It is thus possible, that justice may be served best by adjusting the scale, rather than simply what we put on it,¹¹³ or throwing out the scale.¹¹⁴

Taken a step further, I submit that, in principle, a constitutionalised doctrine of legality, which is meant to determine the external reach of the more fluid, constitutionalised conception of autonomy, would at least require, that the enforceability dimension of legality’s restraint of trade scale, be extended to all contracts.¹¹⁵ Accordingly, the constitutionalised public policy scale should comprise two levels. First, there should be the original ‘tendency level’ of the scale, which must continue to assess the tendency of the clause/contract, in terms of broader normative/policy considerations, as they pertain to the external reach of contractual autonomy. Second, there should now be an added, ‘enforceability level’, which must assess whether the clause/contract

¹¹¹ *Reddy* supra note 62 at para 17.

¹¹² As per s 36(1)(a)-(e) of the Constitution.

¹¹³ As argued for, in *Bhana and Pieterse* op cit note 54.

¹¹⁴ As argued for, in *Woolman* op cit note 3.

¹¹⁵ *Barkhuizen* supra note 69 at paras 30; 56-58. See also the discussion in 3.5.2 below.

should be enforced in the particular circumstances, that the contracting parties find themselves in, at the *time* of enforcement.

In the final event, I submit that, in line with the recent case of *Barkhuizen v Napier*,¹¹⁶ and in contrast to the extant approach to restraints of trade, a court ought instead, to invoke the more objective, 'tendency level' of the public policy scale, first. Further, a court ought to proceed to the more subjective, 'enforceability level' of the scale, only if, the contract/clause passes legal muster on the initial tendency level of the scale. The basic reason for proposing this staged approach is that the initial tendency level of the enquiry, necessarily, operates at a more abstract (and objective) level, and as such, is more amenable to the gradual development of clear guidelines, for this level of the legality enquiry. At the same time, the tendency level of the scale can serve as an additional valve, that will, at once, frame the enforceability level of the enquiry, and control, which of the (subjective) circumstances of the parties, may legitimately be placed on the enforceability level of the scale. In this manner therefore, a fair degree of legal certainty can still be maintained within the doctrine of legality.

3.3.4 The public policy scale and the internal dimension of contractual autonomy

Upon perusal of the post-apartheid contract law cases, one gets the impression that the normative dimension of contract law (as a whole), is limited strictly to the doctrine of legality; the classical liberal underpinnings being naturalised and therefore, all other spheres¹¹⁷ of our contract law, seemingly value-neutral.¹¹⁸ In other words, if there is a normative conflict, the doctrine of legality would appear to be the appropriate, and indeed only, portal to address the issue. Drawn to its logical conclusion, it is assumed, that if the *substance* of the doctrine of legality and the attendant adjudicative *method* are constitutionalised, the common law of contract (as a whole), will be constitutionalised.

¹¹⁶ *Ibid.*

¹¹⁷ Being, in the main, the internal autonomy and residual requirements for the 'valid formation of a contract' dimension, the 'parties to a contract' dimension, the 'contents of a contract' dimension, the 'breach of contract' dimension and finally, the 'contractual remedies' dimension. See generally Van der Merwe et al op cit note 49 at chapters 5-11.

¹¹⁸ *Brisley* supra note 69 at paras 91-95; *Afrox* supra note 69 at paras 23-24; 32; *Barkhuizen* supra note 69 at paras 15; 23; 28-30; *Bredenkamp* supra note 42 at paras 36-40.

But such an assumption is erroneous. As just discussed, the doctrine of legality traditionally has operated, only in relation to the determination of the *external* reach dimension of contractual autonomy and furthermore, assumes that the internal content dimension of autonomy has been satisfied. Accordingly, the law still needs first, to engage normatively with the internal content dimension of autonomy. Without a doubt, a failing by the law, even to recognise the need for such engagement, will mean that normative considerations are allowed to permeate, only certain parts, of the overall contract law machine i.e. those parts relating to the external reach component of contractual autonomy. This is not tenable.

All the same, as discussed earlier, the lack of normative interrogation of the rules (and standards) articulating the internal (content) dimension of contractual autonomy, has led to a constitutionally deficient concept of contractual autonomy. So, the pertinent question is whether, it is appropriate now, to house the normative interrogation of autonomy's internal content dimension, also within the doctrine of legality. Indeed, the SCA has alluded to this question in its submission, that the presence of unequal bargaining power, if proved, would be a relevant factor in conducting the legality enquiry.¹¹⁹

The point of departure must be that a remedying of the thin internal dimension of contractual autonomy does not fit easily within the doctrine of legality. For one thing, the doctrine of legality proceeds from the premise, that the contractants act with full-blown contractual autonomy, insofar as they do not fall short of the extant rules (and standards), which determine the presence of autonomy. This is principally sound, if the doctrine of legality is to deal purely with the external reach dimension of contractual autonomy, whether in terms of broader policy considerations (i.e. on the tendency level of the scale), or the circumstances of the parties at the time of enforcement (i.e. on the enforceability level of the scale).¹²⁰ In contrast, the nature of what would be put on the scale, if the normative facet of internal contractual autonomy were to be dealt with under the doctrine of legality, would not only be fundamentally

¹¹⁹ *Afrox* supra note 69 at para 12; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at paras 8; 14.

¹²⁰ As will become evident in 3.5.2 and 3.5.3 below, it is arguable that the latter 'enforceability' level is now recognised, at least where a constitutional right or value is implicated. See *Barkhuizen* supra note 69 at paras 30; 56-58; *Bredenkamp* supra note 42 at para 47; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 at para 25.

inconsistent with what is currently put on the scale, but it would also contradict, the very premise upon which, the public policy scale operates, and ought to operate.

Arguably, this hurdle could be overcome by introducing an added preliminary level to the scale that can address the normative aspect of the internal content dimension of autonomy. The idea would be that this preliminary level of the scale would preface the tendency and enforceability levels of the scale, and their attendant premise, of parties having acted with contractual autonomy. As such, once a court is satisfied, regarding the normative delineation and exercise of the internal content component of autonomy, the tendency and enforceability levels of the scale could come into play. The latter levels then, would deal still, only with autonomy's external reach dimension and as a result, the doctrine of legality would remain significantly intact. At the same time, the internal content dimension of autonomy would be normatively interrogated, without any major disturbance, to the extant operation of the contract law machine.

But such approach, would lead to a somewhat, illogical separation of the classical legal principles, as they pertain to the doctrines, rules and standards, that currently articulate the internal content dimension of contractual autonomy,¹²¹ from the more modern policy concerns, both collectivist and individualist, in nature, which necessarily affect these principles. Indeed, rather than reviewing and updating the relevant classical doctrines as required by the Constitution, an analysis, in terms of the extant classical legal principles, may well have to be supplemented artificially, by an application of the added preliminary level of the legality scale. Such approach would be completely out of step within a common law that is renowned for the organic nature of its incremental development, over time, responding as it must, to the changing needs and mores of the society, in which it operates.

Furthermore, judges would have to be alert, at all times, to the real danger of inadvertent conflation, and/or misallocation, of the respective considerations, as they relate, to the internal content and the external reach dimensions of autonomy respectively.

¹²¹ See discussion of the relevant principles, doctrines, rules and standards in chapter 2 at 2.3.3.

In the final event, the envisaged preliminary scale's emulation of a more, open-ended public policy exercise may not be suited sufficiently, to identify, distinguish and/or take appropriate cognisance, of all normative considerations relevant to the particular internal autonomy enquiry. Indeed, as alluded to earlier, a hybrid form of legal reasoning would be more appropriate, for a holistic development of a more full-bodied, internal conception of constitutionalised contractual autonomy, within the relevant doctrines, rules and standards, that currently articulate the internal content dimension of contractual autonomy.¹²² The upshot is that a housing of the normative aspect of internal autonomy, under the doctrine of legality, would be cumbersome, tedious and possibly, still ineffective.

At best, the thin internal conception of autonomy, coupled with the reality of this for a particular contractant (upon conclusion of a contract), may be a *factor* that reinforces his/her apparent vulnerability or substantive hardship, at the time of enforcement of a contract.¹²³ Anything further than this, must be situated within the relevant internal autonomy doctrine.¹²⁴ In other words, a deficiency in the legal conception of internal autonomy cannot be cured by the doctrine of legality.

3.3.5 Further changes required to the contract law machine

In this section, I have shown that the legal methodology employed by our common law of contract is also ideologically loaded. In particular, I have shown how the specific methodologies, as attached to the internal content and the external reach dimensions of contractual autonomy respectively, influence their relevant normative delineations.

The lesson is that the post-apartheid determination of the internal content and external reach dimensions of contractual autonomy (both actual and apparent), must take appropriate cognisance of the implications of the applicable methodologies, themselves. In other words, it is insufficient, simply to advocate for a blanket, indirect horizontal application of the Bill of Rights,¹²⁵ where the focus is on constitutionalising the substance of contract law alone,

¹²² See discussion in 3.3.2 above.

¹²³ This assumes that the 'enforceability' level of the scale would have general application.

¹²⁴ As outlined in 3.3.2 above.

¹²⁵ See discussion in chapter 1 at 1.2.

and the common law framework finds indiscriminate application, absent any critical reflection. It is just as crucial, that the internal and external paradigms of contract law are developed, simultaneously. They too, need to reflect a constitutionalised contract law methodology and culture that is most suited to the articulation of the applicable constitutional right(s), and/or underlying values, together with the foundational triage's conception(s) of contractual autonomy.

At this juncture, it is important to take note, also of the operation of general default rules and decision-making strategies, which transcend the internal content and external reach dimensions of contractual autonomy, within our common law of contract.

In relation to default contract rules and decision-making strategies, the theme appears to be that, which can be imputed reasonably, to 'the intentions of the parties'; this notwithstanding, the absence of any actual intention, in terms of the relevant matter.¹²⁶ So, default rules, for example, are justified on the basis that consensus can be inferred from the lack of any indication of a contrary intention. At the same time, these rules have no bearing to what was actually contemplated by the parties, at the time of contracting. Rather, they have been based traditionally, in equity and good faith. Further, the default rules have been said to have the effect of "nudge[ing] people to ultimately make improved decisions and reach beneficial results."¹²⁷ As Hawthorne explains,

"...[the] identification of contract law's choice architecture found in the [default] rules which have the effect of nudging a contracting party towards making a better decision...are ubiquitous and extremely powerful...the main reason [being]...that most people tend to accept the status quo. Furthermore, ignorance, transaction costs, strategic bargaining and economic power also favour the status quo, with the result that usually only the well-informed, wealthy and powerful will contract out of the default option in a case where the default option would be to their detriment."¹²⁸

In light of this reality therefore, it is imperative that default rules, as formulated in the pre-1994 era, are re-assessed in terms of the Constitution, so that, they do not accord simply with the rights enumerated in the Bill of Rights,

¹²⁶ PS Atiyah *Essays on Contract* (1988) Essay 9 'Judicial techniques and the law of contract' 244 at 272.

¹²⁷ Luanda Hawthorne 'Contract law's choice architecture: The hidden role of default rules' (2009) 73 *THRHR* 599 at 601.

¹²⁸ Hawthorne op cit note 127 at 601-602.

but also, nudge contract law in the direction of promoting actively, the spirit, purport and objects of the Bill of Rights.

The same would apply in relation to the rules of interpretation,¹²⁹ as well as the permeating ‘construction’ techniques which, being tied to the artificially imputed ‘intention of the parties’, has proved capable of manipulation, according to the preferred legal outcome of the judge. However, the scope for such manipulation can be reduced significantly, if the ‘construction technique’ is tied instead, to the spirit, purport and objects of the Bill of Rights. This would facilitate a more holistic, normative interrogation and would dovetail, with the post-apartheid nudging efforts of the constitutionalised default rules of contract law.

I would submit further, that the strategy of nudging should be integrated consciously, also in the broader constitutionalisation of the internal and external dimensions of contractual autonomy.

In the final event, the courts have on occasion employed an ‘evidence technique’, in terms of which, they are said to avoid dealing with a particular issue, because of a lack of evidence, in relation thereto.¹³⁰ Yet, this technique would be legitimate, if done in a principled and consistent manner. To this end, I would suggest that judges distinguish clearly between, what I term, ‘hard facts’ and ‘soft facts’. ‘Hard facts’ would be those facts that are specific to the particular contracting parties. In contrast, ‘soft facts’ would be those broader normative/policy concerns, that apply more generally to contracts, operating in the South African constitutional context. So, it stands to reason, that the former must be proved concretely with evidence, whereas the latter, ought to be brought into play, regardless.¹³¹ Further, if this distinction is appreciated and observed uniformly, both by judges and litigants, the scope for seemingly fortuitous invocations of the evidence technique, will be reduced significantly.

¹²⁹ See generally, Carole Lewis ‘The demise of the exceptio doli: Is there another route to contractual equality?’ (1990) 107 *SALJ* 26 at 34. See also Bhana and Pieterse op cit note 54 at 888.

¹³⁰ Most notably, see *Afrox* supra note 69 at paras 12; *Napier* supra note 119 at paras 8; 14; *Barkhuizen* supra note 69 at para 59.

¹³¹ For instance, the court could take judicial notice of such considerations - Deeksha Bhana ‘The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)’ (2007) 124 *SALJ* 269 at 278.

3.4 BILL OF RIGHTS' LEGAL METHOD FOR THE DETERMINATION OF THE INTERNAL (CONTENT) AND EXTERNAL (REACH) DIMENSIONS OF CONTRACTUAL AUTONOMY

As outlined in Chapter One, the horizontality debate has focused largely on whether a direct or indirect horizontal application of the Bill of Rights is to be preferred.¹³² However, upon closer examination of sections 8 and 39(1) and (2) of the Bill of Rights, it becomes apparent that horizontal application transcends the direct-indirect horizontality paradigm. The focus rather, is on the *scope*¹³³ and *form*¹³⁴ of application, of the relevant constitutional rights and underlying values, including the foundational values of freedom, dignity and equality, to the common law of contract.

In this respect, I re-iterate the importance of assessing, and if necessary updating, not only the substance of contract law, but also, the contract law machine (with its methodology), so as to reflect, the new constitutional ideology and what ought to be, an altered legal culture.

To illustrate, if the existing contract law machine were to be adopted, without question, the classical liberal internal conception of autonomy would be naturalised and the tipped public policy scale too, would be adopted. But as shown above, the classical liberal philosophy may no longer be appropriate. Further, to adopt the tipped public policy scale blindly could, on the basis of its classical liberal bias and resulting common law hegemony of freedom of contract, diminish the significance of the implicated constitutional rights and values. So, the constitutionalisation of the public policy scale, for instance, would require that it be adjusted in such a way, that it facilitates a more balanced, systematic engagement with the relevant constitutional rights and values, as flowing from a fuller internal conception of contractual autonomy.

¹³² See for instance, Woolman (2007 *SALJ*) op cit note 3; Iain Currie and Johan De Waal *The Bill of Rights of Handbook* 5ed (2005) at chapter 3; Cheadle and Davis op cit note 58; Chris Sprigman and Michael Osborne 'Du Plessis is *not* dead: South Africa's 1996 Constitution and the application of the Bill of Rights to private disputes' (1999) 15 *SAJHR* 25; Christopher J Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19 *SAJHR* 57; Johan Van der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *SAJHR* 341.

¹³³ In terms of ss 8(1) and 8(2) of the Constitution – see discussion in chapter 1 at 1.2.2.

¹³⁴ In terms of ss 8(3) and 39(2) of the Constitution - see discussion in chapter 1 at 1.2.2.

For the reasons outlined earlier, I contend that this would, at least, require the addition of an 'enforceability level' to the scale.¹³⁵

In addition, judges will have to question whether, there is a need further, to differentiate and adapt the common law framework and attending methodologies, depending on the nature of the substantive constitutional right, that is implicated. There may be a need also, to develop supplementary frameworks, in order to ensure a systematic approach to the determination of *which rights* ought to be horizontally applicable, and more importantly, *how to determine* the relative impact/weightings of the different rights and values of the Bill of Rights, in relation to the relevant internal and external conceptions, and operations, of a constitutionalised contractual autonomy.

At the very least, when so constitutionalising the contract law machine, judges will draw principally, on the intricate s 8 and s 36(1) methodologies, as set out in the Bill of Rights, given that these methodologies have been designed specifically, for normative engagement with the Bill of Rights.¹³⁶

Having thus outlined what needs to happen in order to constitutionalise the methodology employed by our contract law machine, I will now evaluate the ways in which our courts have, thus far, attempted to do this.

3.5 SELECTED POST-CONSTITUTIONAL CASES

3.5.1 Cases of the SCA (Pre *Barkhuizen v Napier* (CC))

As discussed in the previous chapters, in *Brisley v Drotzky*, Cameron JA situated contract law within our constitutional dispensation, where he relied on s 39(2), essentially to infuse contract law with the founding values of our Bill of Rights.¹³⁷ Subsequent cases have thus, supported the horizontal application of the Bill of Rights, essentially via the portal of public policy.¹³⁸

Nevertheless, the conservative legal culture of the SCA continues to dominate their approach to the constitutionalisation of contract law. The basic premise appears to be, that the pre-constitutional common law public policy

¹³⁵ See discussion in 3.3.3(b) above.

¹³⁶ For a detailed discussion of the legal method espoused by s 8(3), see chapter 1 at 1.2.2(a)(iv); 1.2.2(a)(v).

¹³⁷ *Brisley* supra note 69 at paras 91-94.

¹³⁸ See generally *Afrox* supra note 69; *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA); *Napier* supra note 119; *Bredenkamp* supra note 42; *Maphango* supra note 120.

framework is the appropriate platform for engaging with the foundational constitutional triage, as well as with substantive constitutional rights and their underpinning values, because it fits neatly with the neo-liberal economic policies that permeate the South African market.¹³⁹

(a) The SCA's approach to the external reach dimension of contractual autonomy

In terms of the external reach dimension of autonomy, the SCA has been especially cautious in its conception of the 'unacceptable excesses' of contractual autonomy, where a fairly high threshold of unfairness is prescribed. The court has maintained consistently, that the mere fact 'that a term is unfair [or unreasonable] or may operate harshly' cannot outweigh freedom of contract, to render the term unconstitutional and thus, against public policy.¹⁴⁰ In *Brisley*, Cameron JA stressed, that judges must exercise 'perceptive restraint', lest contract law becomes unacceptably uncertain.¹⁴¹ Clearly, this is an articulation of the traditional common law position, where the tipped public policy scale effectively gives primacy to the thin, (classical liberal) conception of contractual autonomy.¹⁴² According to the SCA therefore, the public policy scale and attendant methodology are to remain unaffected, even where a substantive constitutional right is implicated.¹⁴³

To illustrate the point, in *Napier v Barkhuizen*, the SCA effectively preserved the pre-constitutional common law rule on time-bar clauses, by way of a legalistic approach to the issue. It held that the clause did not implicate s 34 of the Bill of Rights, because the right to insurance in that case stemmed from the contract alone and, as such, freedom, dignity and equality endorsed the common law rule.¹⁴⁴ The court thus avoided any critical engagement with s 34, in relation to contractual time-bar clauses and did not even have to invoke

¹³⁹ Glover op cit note 85 at 453; Cockrell op cit note 52 at 308-312.

¹⁴⁰ *Napier* supra note 119 at para 12. See also *Brisley* supra note 69 at paras 15; 21; 22; 24; *Afrox* supra note 69 at paras 9-10; 23-24; cf the CC's express disagreement with this position in *Barkhuizen* supra note 69 at para 72.

¹⁴¹ *Brisley* supra note 69 at paras 93-94.

¹⁴² See 3.3.3(a) op cit note 87.

¹⁴³ Bhana op cit note 131 at 279. *Brisley* supra note 69 at paras 91-93; *Afrox* supra note 69 at paras 9-10; 23-24; *Napier* supra note 119 at paras 6-16.

¹⁴⁴ *Napier* supra note 119 at para 28, cf *Bafana Finance Mabopane v Makwakwa* 2006 (4) SA 581 (SCA) at paras 9-11; 15-17; 21; 24.

the public policy scale. Yet, its necessary premise was, that contract law's classical liberal articulation of freedom of contract trumped the substantive, constitutional right of access to court.¹⁴⁵

This is not to say, that s 34 has not found application in the realm of contract law. In *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd*,¹⁴⁶ s 34 was invoked to extend the external reach of freedom of contract, by recognising that champertous agreements are no longer, contrary to public policy. Likewise, in *SA Bank of Athens Ltd v Van Zyl*,¹⁴⁷ s 34 influenced the re-definition of parate eksekutie, so that, such clauses per se, are no longer against public policy. Finally, in *Bafana Finance Mabopane v Makwakwa*, the SCA clearly held that a contractual clause, which restricts a debtor's statutory right to seek judicial redress, (in the form of an administration order), is against public policy, as informed by the values underpinning the Bill of Rights, including s 34.¹⁴⁸ Nevertheless, in all of these cases, the traditional public policy scale, accompanied by the 'all or nothing' approach, found application and, for the most part, simply bolstered its classical liberal underpinnings and so, *extended* the reach of contractual autonomy.

In dealing with a socio-economic constitutional right, the SCA in *Afrox Healthcare Bpk v Strydom*, accepted that, the values underpinning the s 27(1)(a) constitutional right of access to health care services had to be taken into account, when determining the legality of an exclusion clause, that excluded a hospital's liability for the negligence of its nursing staff.¹⁴⁹ Nonetheless, when the public policy scale, together with the 'all or nothing' methodology was applied, it was found that the public interest in freedom of contract and *pacta sunt servanda* remained paramount.¹⁵⁰ Accordingly, the clause was held to be valid and enforceable.

¹⁴⁵ See also *De Beer v Keyser* 2002 (1) SA 827 (SCA) at paras 26-27.

¹⁴⁶ *Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA); 2004 (9) SA BCLR 930 (SCA) at paras 23-46; 50-52.

¹⁴⁷ *SA Bank of Athens supra* note 85 at paras 11; 15. See generally, *Juglal supra* note 85; *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA).

¹⁴⁸ *Bafana Finance supra* note 144 at para 11. See Minette Nortje and Deeksha Bhana 'General Principles of Contract' (2006) *Annual Survey of SA Law* 178 at 204-206. Although s 34 was not referred to expressly by the court, it is submitted that the provision did play a role (albeit an indirect role) in the court's reasoning.

¹⁴⁹ *Afrox supra* note 69 at para 17.

¹⁵⁰ *Afrox supra* note 69 at paras 23-24.

In the final event, the SCA, in *Johannesburg Country Club v Stott*, dealt with the implication for contracts, of the constitutional right to life, embodied in s 11 of the Bill of Rights. In this respect, the SCA was more forthcoming, where it alluded to the possibility of an exclusion clause, that purports to exclude liability for negligently causing another's death, as being against public policy, because this would be contrary, not only to the common law's high regard for the sanctity of life, but also, to the spirit of s 11.¹⁵¹ Yet, here too, there is no suggestion of a more progressive transformative legal culture, with an altered public policy scale. At the very least, the traditional public policy scale would need to be adjusted so that it is *able*, effectively to address the outcome of enforcement, in the particular circumstances of the contracting parties.¹⁵² Indeed, as explained earlier, to put those considerations, pertaining to enforceability on the original 'tendency' scale, would be largely ineffective, and would inadvertently, convolute the public policy enquiry itself.¹⁵³

To sum up, the methodology that emerges from these cases, embodies the pre-constitutional, common law public policy framework, with the caveat that the values underpinning the applicable substantive constitutional rights (including the foundational values), must be taken into account. Nevertheless, the SCA still employs the tipped public policy (tendency) scale, with the traditional '*all or nothing*' common law approach, which also limits when, where and to what extent these constitutional values may infiltrate. As a result, contractual autonomy remains the predominant consideration, which generally trumps competing public interest and constitutional values, including those, which underpin substantive constitutional rights.¹⁵⁴ Thus far, contractual autonomy has only been bolstered by constitutional values; it has not been trumped, save in the exceptional circumstances, as identified by the pre-constitutional common law. This is why commentators have mostly lambasted

¹⁵¹ *Stott* supra note 138 at para 12 (per Harms J, for the majority), cf paras 14-16 (per Marais J, for the minority).

¹⁵² The methodology employed in relation to restraint of trade contracts may be useful here. See discussion above in 3.3.3(b).

¹⁵³ See discussion above in 3.3.4.

¹⁵⁴ Glover op cit note 85 at 450.

the judiciary's approach to the constitutionalisation of our common law of contract.¹⁵⁵

Notwithstanding, the advent of the Constitution, the SCA continued, somewhat exclusively, to promote the classical liberal notion of freedom of contract, and the attending commercial certainty, as intrinsic goods. Yet, what should be apparent from the earlier discussion of the public policy scale, is that the confidence in the common law public policy framework, and its understanding of the generally 'hegemonic'¹⁵⁶ (external) parameters of classical contractual autonomy, ultimately undermines the relevant constitutional rights (and underlying values), as it prevents a more evenhanded, and thus, sufficiently rigorous balancing exercise from taking place.

(b) The SCA's approach to the internal content dimension of contractual autonomy

As outlined earlier, the SCA's approach to contract law's pre-constitutional articulation of the internal content dimension of autonomy, for the most part, remains unchanged. To be sure, the legal methodology employed by our contract law machine, to the established internal dimension of autonomy,¹⁵⁷ still fosters the thin (classical liberal) conception of autonomy; devoid of any constitutional interrogation.¹⁵⁸ At the same time, however, there has been a movement that began in *Afrox*, which purports to situate the relevant constitutional, normative interrogation of internal autonomy, within the doctrine of legality.

¹⁵⁵ See for instance, Bhana and Pieterse op cit note 54; Woolman (2007) op cit note 3; Luanda Hawthorne 'The principle of equality in the law of contract' (1995) 58 *THRHR* 157; Gerhard Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *SALJ* 395; Dire Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Healthcare v Strydom*' (2002) 17 *SA Public Law* 473; Kevin Hopkins 'Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm' (2002) 119 *SALJ* 155; PJ Sutherland 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 CC – Part 1' (2008) 19 *Stell LR* 390.

¹⁵⁶ See discussion above in 3.3.3(a).

¹⁵⁷ i.e. contractual capacity, the rules of offer and acceptance, the doctrine of mistake, as well as the legally recognised instances of improperly obtained consensus.

¹⁵⁸ See discussion above in 3.3.2.

(i) *Case of the SCA: Afrox Healthcare Bpk v Strydom*

In *Afrox Healthcare* and *Napier*, the SCA contemplated taking cognisance of an inequality in bargaining power, in relation to an exclusion clause, that appeared in a standard form contract. However, the court contemplated placing it on the traditional public policy scale, with a view to ensuring that parties are not “forced to contract...on terms that infringe...dignity and equality”.¹⁵⁹ In other words, the court contemplated an invocation of the original, public policy *tendency* scale, to remedy a deficient, internal conception of contractual autonomy.

That aside, the SCA held that in any event, there was no evidence of unequal bargaining power between the parties, in casu. As a result, the potential deficiency, in the internal content of a constitutionalised contractual autonomy, was a non-issue.

This approach of the SCA is problematic on a number of levels. To begin with, the envisaged normative interrogation of the internal content dimension of contractual autonomy upon the traditional public policy scale, would, as explained earlier, be unsound in terms of legal principle. It would also needlessly convolute the basic function of the doctrine of legality.¹⁶⁰

Moving on, to the ostensible lack of evidence of unequal bargaining power, here, the SCA clearly invoked the earlier outlined evidence technique, apparently to avoid the question of unequal bargaining power. Nevertheless, this has led to considerable confusion, in terms of the nature of the contemplated ‘public policy’ enquiry. For instance, does the SCA contemplate looking at unequal bargaining power, as a broader normative consideration, or rather, with a view to curing a factual deficiency in the internal content of autonomy, as exercised by a particular contracting party? Alternatively, does the SCA contemplate looking at unequal bargaining power, only insofar as it may impact on the question of substantive contractual unfairness, at the time of enforcement of the contract?

Clearly, these are distinct questions which implicate different scales (or, at the very least, different levels of a particular scale), and therewith, different rules regarding evidence. So, as a broader normative consideration, the issue

¹⁵⁹ *Afrox* supra note 69 at para 12; *Napier* supra note 119 at paras 14; 16.

¹⁶⁰ See discussion in 3.3.4 above.

of unequal bargaining power ought to be recognised as a 'soft fact', that does not require evidence. Moreover, such 'soft fact' would relate necessarily, and primarily, to the normative dimension of the *internal* conception of autonomy. In other words, the doctrine of legality, with its 'tendency level' of the public policy scale, relating as it does to the *external* reach dimension of autonomy, would not be the appropriate portal for the normative enquiry. Rather, the relevant doctrine pertaining to *internal* autonomy ought to come into play. But given that the internal autonomy framework, as it currently stands, does not accommodate inequalities in bargaining power, it would have to be developed accordingly, both in terms of where, specifically in the contract law framework, to situate the issue of unequal bargaining power, as well as, how, best to articulate it, in terms of legal principle (and ensuing rules and standards), and the attendant judicial methodology.

In contrast, if unequal bargaining power becomes an issue, that is specific to particular contracting parties too, then it ought to be recognised, also as a 'hard fact', that must be proved by evidence. More importantly, a judge needs to be clear, as to the function of unequal bargaining power, in the particular context. If it is meant to cure a factual deficiency in the internal content of autonomy, then the doctrine of legality would obviously not be the appropriate portal. Rather, it would again need to be situated, within the internal autonomy dimension of the contract law framework, as developed, to accommodate the question of unequal bargaining power.

At best, if the fact of unequal bargaining power is meant to be a mere factor in determining whether, it would be reasonable in the circumstances, to enforce a particular contract, then the 'enforceability level' of the public policy scale, would be appropriate. Still, it is highly unlikely, even in this context, that unequal bargaining power can ever comprise a relevant factor, and/or have a material impact. This is because, the gatekeeper entry valve, for the external reach enquiry, is that the parties did, in fact, exercise their autonomy fully, in relation to the relevant contract.

Arguably, the failure to appreciate these methodological nuances, has contributed materially to the general voice of dissatisfaction with the SCA's application of the evidence technique, to the issue of unequal bargaining

power.¹⁶¹ Even so, the SCA still falls short, insofar as it purports to situate the question of unequal bargaining power, within the doctrine of legality, as opposed to the relevant doctrine(s) articulating the internal dimension of autonomy.

3.5.2 Case of the CC: *Barkhuizen v Napier*

The *Barkhuizen* judgment is significant because it constitutes the CC's first, direct engagement with the common law of contract. For this reason, I will begin, by outlining the reasoning of the majority judgment and thereafter, provide a critique.

(a) *Barkhuizen v Napier*: Majority judgment by Ngcobo J; Minority judgments by Moseneke DCJ and Sachs J

Briefly stated, *Barkhuizen* was an appeal against the SCA judgment, referred to above. The appellant argued, that the 90 day time bar clause in a short-term insurance contract amounted to an unreasonable and unjustified limitation of the constitutional right of access to court, enshrined in s 34, and was therefore, contrary to public policy and unenforceable.¹⁶²

At the outset, Ngcobo J, delivering judgment for the majority of the Court, endorsed Cameron JA's broader conception of the law of contract, in the autonomy-based (empowerment) image of the values of freedom, dignity and equality.¹⁶³ The court therefore, accepted as its starting point, that the Constitution likewise requires contractants to honour contractual obligations that were freely and voluntarily undertaken. Freedom of contract thus, remains a predominant consideration. In accepting this position however, the court was also alert to the limits of the external reach of contractual autonomy: it stressed that the 'obscene' or 'unacceptable excesses'¹⁶⁴ of freedom of contract must be curbed. As a result, the contractual principle of *pacta sunt servanda*, although primarily supported by the Constitution, is ultimately subject to constitutional control.¹⁶⁵ In other words, the efficacy of the constitutionalised conception of

¹⁶¹ I, myself, failed to appreciate this in my critique in Bhana op cit note 131 at 276-277.

¹⁶² *Barkhuizen* supra note 69 at para 11.

¹⁶³ *Barkhuizen* supra note 69 at para 57.

¹⁶⁴ *Barkhuizen* supra note 69 at para 12.

¹⁶⁵ *Barkhuizen* supra note 69 at para 15.

contract law must depend on, what constitutes an ‘unacceptable excess’ and, more importantly, how to determine such.

In this respect, the court provided important indicators when it dealt with the question of the specific implications of s 34 for contract. Notably, the court opted for an indirect horizontal application of the Bill of Rights. It held that, as between private contractants, the proper approach to a constitutional challenge of a contractual term, on the basis of a substantive fundamental right, is to determine whether the term is contrary to the common law standard of public policy, which must now, be informed by the constitutional values that underlie the provisions of the Bill of Rights.¹⁶⁶ According to the court, this approach ‘leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.’¹⁶⁷

The court thus, rightly invoked the portal of legality, to assess the external reach dimension of contractual autonomy. In doing so, it opted also for the traditional public policy scale, where the values underpinning freedom of contract were balanced against the values underpinning the s 34 constitutional right of access to court.¹⁶⁸ Articulated further, the court held that, in relation to s 34, the question was whether the time bar clause afforded the contractant a reasonable, just and fair opportunity to access the courts.¹⁶⁹ The fringe of the external reach of contractual autonomy was thus located at the point, where the time bar clause crossed the threshold of fairness, justice and reasonableness.

In terms of how to locate this fringe, in relation to s 34, the CC developed a two-stage public policy approach. Firstly, the court must determine whether objectively speaking, the time bar clause is contrary to public policy i.e. is the clause itself unreasonable? In other words, the court must first assess the ‘tendency’ of the clause. Secondly, if the clause is found to be objectively reasonable, the court must then decide whether the clause should be enforced

¹⁶⁶ *Barkhuizen* supra note 69 at paras 28-30.

¹⁶⁷ *Barkhuizen* supra note 69 at para 30.

¹⁶⁸ *Barkhuizen* supra note 69 at paras 35-36.

¹⁶⁹ *Barkhuizen* supra note 69 at paras 55; 72-73.

in light of the circumstances, which prevented compliance with the clause i.e. is it subjectively reasonable, in the circumstances, to enforce the clause?¹⁷⁰

On the facts, the court held that the clause itself was not unreasonable because the appellant had all the information required to issue summons, at the commencement of the ninety day period.¹⁷¹ Furthermore, there was no evidence, that the applicant was in a weaker bargaining position, or that he had not freely and voluntarily entered into the contract, or that he was unaware of the time bar clause.¹⁷² In essence therefore, in the court's application of the first stage of its approach, it defined the reasonableness of the time bar clause, in terms of the presumed, internal autonomy of the applicant. In other words, the lack of evidence of a deficiency, in the internal (content) dimension of autonomy, meant that the classical liberal articulation of the traditional public policy scale, tipped to the side of freedom of contract, played a definitive role in the outcome of the case.

In relation to the second stage of the court's approach, it could not be said, according to the court, that it was unfair or unreasonable to enforce the time bar clause, in the circumstances, primarily, because the appellant had failed to explain his non-compliance with the clause.¹⁷³ The court therefore, held that the time-bar clause was valid and enforceable.

In contrast to the majority judgment, the minority judgments of Moseneke DCJ and more especially, Sachs J, conducted a rigorous interrogation of the internal content dimension of contractual autonomy, given that the contract in question was a standard form contract. Nevertheless, both judgments purported to situate such interrogation, within the doctrine of legality. Furthermore, they did so upon the traditional 'tendency' public policy scale; the 'enforceability' dimension being rejected.¹⁷⁴

(b) Critique of *Barkhuizen v Napier*

From the above exposition of *Barkhuizen*, it is clear that within our constitutional dispensation, freedom of contract and the attendant *pacta sunt*

¹⁷⁰ *Barkhuizen* supra note 69 at paras 56-58.

¹⁷¹ *Barkhuizen* supra note 69 at para 63.

¹⁷² *Barkhuizen* supra note 69 at para 66.

¹⁷³ *Barkhuizen* supra note 69 at paras 84-85.

¹⁷⁴ *Barkhuizen* supra note 69 at paras 97-105; 146; 158-161.

servanda, remain the twin dowels that hold the principles, doctrines and rules of contract law together. Furthermore, in terms of s 39(2) of the Bill of Rights, a constitutionalised doctrine of legality is the platform for determining the limits of the external reach of contractual autonomy, in relation to the substantive right in s 34 of the Bill of Rights. The essential premise therefore, is that freedom of contract *can, and must be balanced*, against the values of fairness, justice and reasonableness, as they underpin the s 34 constitutional right of access to court i.e. fairness, justice and reasonableness, in terms of access to court, must curb the unacceptable excesses of the reach of contractual autonomy.¹⁷⁵

Moreover, the CC adjusted the framework within which the 'access to court-public policy' enquiry takes place. Whereas, the 'all or nothing' common law approach focuses only on the clause in question,¹⁷⁶ the CC also drew attention to the particular circumstances of the contractants and therefore, the *particular outcome* of the case. In doing so, it is submitted, that the CC infused elements of s 8(2) and s 36(1), to guide the constitutional adjustment of the common law methodology, contemplated by s 39(2).¹⁷⁷ Further, this resonates with the methodology applied by the common law, to contracts in restraints of trade.¹⁷⁸ The net result, therefore, is a shift along the continuum, from a completely abstract, tendency-based analysis of a contractual term, to a more concrete, outcomes-based analysis. Arguably, this was an attempt to create a more evenhanded approach to contractual autonomy, so as to afford greater recognition to the substantive constitutional right implicated by the time-bar clause¹⁷⁹.

Broadly speaking, this development is to be welcomed. Nevertheless, the Court was not sufficiently rigorous in its identification and interrogation of considerations specific to the *external reach dimension* of contractual autonomy; it being a *legality* issue. Nor was it careful, in its allocation of the relevant considerations, to the respective levels of the scale. Indeed, the Court held, that 90 days was not a 'manifestly unreasonable period', without much interrogation. Objectively speaking, a mere comparison of 90 days to a '24

¹⁷⁵ *Barkhuizen* supra note 69 at paras 70-73.

¹⁷⁶ *Barkhuizen* supra note 69 minority judgment of Moseneke DCJ at paras 97-98; *SA Bank of Athens* supra note 85 at paras 14-15; *Sasfin* supra note 85 at 71-9G.

¹⁷⁷ *Barkhuizen* supra note 69 at paras 35; 48. See discussion in 3.4 above; chapter 1 at 1.2.

¹⁷⁸ See 3.3.3(b) above.

¹⁷⁹ But see Woolman (2007 *SALJ*) op cit note 3 at 763, 775-781.

hour period' cannot suffice.¹⁸⁰ Yet, the Court did not explain why it used a '24 hour period' as its objective benchmark. Furthermore, the Court did not draw effectively from its s 34 jurisprudence, on this issue. The enquiry simply collapsed into an assessment of the circumstances of the particular parties before the court, in the sense of their exercise of autonomy, on conclusion of the contract, and in light thereof, the reasons for non-compliance with the time-bar clause.¹⁸¹ In the end therefore, the classical liberal conception autonomy, as entrenched by the established doctrines and rules articulating internal autonomy, remained decisive in determining whether the clause was unreasonable, both objectively and subjectively.¹⁸²

To sum up, the majority court failed fully to appreciate and/or express the nature and effect of the various considerations i.e. whether they implicate the external or internal dimension of contractual autonomy or both, and furthermore, how, and to what extent, do they do so? For instance, does a particular consideration operate as a broader normative/policy concern, or is it more in the nature of a 'hard fact', that is specific to particular contracting parties and needs proof, by way of evidence? Alternatively, does the consideration implicate some *combination* of policy ('soft facts') and legal principle (as applied to 'hard facts')? Yet, these questions are crucial, especially in the context of the transitional process of constitutionalising the common law of contract.

Looking briefly, at the approach of the minority judgments then, although far more rigorous than the majority judgment, they failed sufficiently, to distinguish between the internal and external dimensions of contractual autonomy. Indeed, they purported to resolve deficiencies of internal autonomy upon the traditional public policy scale; a scale which is designed essentially to deal with the external reach dimension of autonomy. The basic function of the doctrine of legality was thus, ultimately confused. Moreover, the façade that the doctrines and rules articulating internal autonomy are 'value neutral' was perpetuated.

¹⁸⁰ *Barkhuizen* supra note 69 at para 63.

¹⁸¹ *Barkhuizen* supra note 69 at paras 64, 65; 66.

¹⁸² *Barkhuizen* supra note 69 at paras 63; 66.

3.5.3 Cases of the SCA (Post *Barkhuizen v Napier* (CC))

The most significant case after *Barkhuizen*, is that of *Bredenkamp v Standard Bank of South Africa Ltd*. In this case, the SCA purported to clarify the impact of *Barkhuizen* on our common law of contract. In particular, it appears to have accepted the two-level public policy scale, at least, where the s 34 right of access to courts is implicated.¹⁸³ Nevertheless, whether the SCA will apply the subjective enforceability level of the scale, in relation to other constitutional rights and values, is unclear.

To begin with, the court emphasised that values such as fairness and reasonableness are not constitutional values in the abstract, and furthermore, cannot be determined on the basis of individual perceptions of what is fair. Rather, it must be tied concretely to relevant “public policy consideration(s) found in the Constitution or elsewhere...”¹⁸⁴

To this extent, I would agree with the SCA. It is imperative that the reasonableness of a contract, and/or its enforcement, always be determined in terms of a methodical, (constitutionalised) public policy exercise, in accordance with concrete guidelines, that are established, over time. To illustrate, neither the tendency, nor the enforceability, of contracts in restraint of trade, has been the subject of judges’ individual whims or fancies, as to what is fair or reasonable,¹⁸⁵ when they have made value judgments. Nor has this area of law been rendered unacceptably uncertain, by the nature of the purposive adjudication that it fosters.¹⁸⁶

Nevertheless, in highlighting the point that concepts of fairness/reasonableness are not free-floating, the SCA did so, upon the basis of the long-established, liberal legalist approach to adjudication. In the words of the SCA,

“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”¹⁸⁷.

¹⁸³ *Bredenkamp* supra note 42 at paras 26; 44-46.

¹⁸⁴ *Bredenkamp* supra note 42 at paras 27-28; 47-48; 50. This has since been confirmed in *Maphango* supra note 120 at para 25.

¹⁸⁵ I use the terms fairness, reasonableness and justice loosely and interchangeably.

¹⁸⁶ See discussion at 3.3.3(b) above.

¹⁸⁷ *Bredenkamp* supra note 42 at para 39.

Indeed, it would seem that this concern led the court to conclude that the enforceability level of the public policy scale, as set out in *Barkhuizen*, did not apply in relation to the parties before it.¹⁸⁸ Here, the court iterated the fact that no substantive right had been implicated in casu, and further, that there was no overarching requirement of fairness in contract law.¹⁸⁹

Yet, as outlined earlier, the constitutionalisation of our common law of contract is grounded now, in the foundational constitutional triage. Accordingly, our common law doctrine of legality is grounded equally in the triage. This point of departure has two important consequences: First, our courts need to adopt a more ‘policy oriented and consequentialist’ approach, which will ensure, that not only the tendency of the contract/clause is (constitutionally) reasonable and therefore, in line with public policy, but also, that the outcome in every contract law case is constitutionally just or reasonable.¹⁹⁰ Second, the concept of reasonableness is not free floating, but necessarily grounded in the foundational constitutional triage (both at the tendency, and enforceability, levels of the public policy scale) which, in terms of s 39(2), must find application in every contract law case. In other words, in every case, both the tendency of a contract/clause, as well as its enforcement, in the particular circumstances of the parties, ought to be (constitutionally) reasonable. Importantly, the application of reasonableness per se does not *depend* on whether a substantive right is implicated or not. Rather, where s 34 or any other enumerated constitutional right is applicable, such right(s) would serve to *inform* the triage’s conception of reasonableness, in relation to the doctrine of legality.

In the end therefore, the SCA appears to be immersed still, in the conservative legal culture, as steeped in liberal legalism. As a result, the SCA purports to revert largely, to the pre-*Barkhuizen* public policy scale and moreover, does not address any of the concerns, as outlined here, in relation to *Barkhuizen* itself.

¹⁸⁸ See discussion in chapter 2 at 2.4.2.

¹⁸⁹ *Bredenkamp* supra note 42 at paras 47-52.

¹⁹⁰ See discussion above at 3.2.3.

3.6 CONCLUSION

In this chapter, I have shown how the legal method, as employed in our common law of contract, is informed by pre-constitutional legal culture and classical liberal ideology. Accordingly, just as the legal culture and underlying ideology must be constitutionalised, so too, must the legal method finding application be re-aligned with the substantively progressive and transformative goals of the Constitution. At the very least, legal method, operating in the constitutional context, must reflect the weight that ought to be attached to the foundational constitutional triage, as well as constitutional right(s) that may be applicable.

In carrying out their adjudicative function therefore, judges must be fully conscious of this task. Nevertheless, whereas the judiciary accepts that the common law of contract is subject now to the Constitution, its constitutional interrogation, to date, has been fairly limited. Thus far, the courts have only invoked contract law's public policy scale, as situated within the doctrine of legality. At the same time, the courts have failed to appreciate, that the legality doctrine houses only the external reach dimension of contractual autonomy. On the contrary, the courts appear to envisage, that the normative considerations pertaining to the internal content dimension of autonomy will likewise be placed on legality's public policy scale. As a result, the operation of the public policy scale, even in terms of the erstwhile classical liberal ideology, seems to be confused, so that, the outcomes yielded by contract cases in the constitutional era, even those that implicate substantive constitutional rights, have been less than satisfactory.

What the courts need to do, firstly, is to appreciate the distinction between the internal content and external reach dimensions of contractual autonomy. Second, they must be clear as to the legal function of each dimension, and how the methodologies pertaining to each, influence the legal outcomes of cases. Third, they need to adjust the relevant methodologies, as required by the foundational triage and any substantive right(s) that may be implicated. Finally, the courts need to ensure that the specific considerations pertaining to each case, are situated correctly within the correct (internal autonomy) framework, and/or the right level of the (external autonomy) public policy scale.

CHAPTER 4

DEVELOPMENT OF A CONSTITUTIONALISED APPROACH TO CONTRACTUAL AUTONOMY AND METHODOLOGY

4.1 INTRODUCTION

Having laid down the theoretical foundations of my broader research question, I propose, in this chapter, to set out a 'basic constitutionalised approach' to contractual autonomy and the attending common law methodology, firstly, in terms of the foundational constitutional values of freedom, dignity and equality and secondly, in terms of the substantive constitutional rights that may be implicated.

In doing so, I begin by highlighting briefly the main points of each of the previous chapters and teasing out the pertinent connections between them. Indeed, in the first chapter, I argued for a particular kind of constitutionalisation of contract law, predominantly through the common law portal, but which has both a general and a case-specific dimension. Notably, the general and case-specific dimensions of the constitutionalisation process are mandated by ss 39(2) and 8(3) of the Constitution respectively. These sections highlight the need simultaneously to constitutionalise the entire body of contract law incrementally, and gradually, over time, (essentially within the common law tradition), and moreover, to ensure that justice is done in every individual contract law case, in a way that is consistent with and promotes the general spirit, purport and objects of the Bill of Rights (including its foundational values), as well as those substantive right(s), (if any), implicated by a particular case.

In Chapter Two then, I interrogated the concept of contractual autonomy (both actual and apparent), and argued that in post-apartheid South Africa, autonomy comprises two essential components viz. an internal *content* component and an external *reach* component. In this respect, I explained that the substance of both of these components and therefore, the substance of contract law needs to transcend its classical liberal underpinnings and be re-legitimated within the foundational constitutional triage's more fluid conception of autonomy, as embodied by the constitutional self. Notably, where an

enumerated constitutional right(s) is also implicated in a particular case, the specific operation of the triage has to be further informed by this fact.

Finally, in Chapter Three, I looked at the role of the extant common law methodology in entrenching the classical liberal ideology and ensuing legalist judicial culture. I emphasised the need to adjust the contract law machine itself, in a manner that would better suit a constitutional determination of both the internal and external dimensions of contractual autonomy. To this end, I further stressed the importance of looking for guidance in the methodology engaged, most especially by ss 8, 36 and 39(2) of the Constitution.

So, in this chapter, I draw from the arguments advanced and conclusions reached in Chapters One, Two and Three, in order to construct an approach to the general constitutionalisation of contract law, in terms of the foundational constitutional triage of freedom, dignity and equality. I then consider the application of this approach in relation to the more specific situation, where one or more distinct substantive rights also find application in a particular case. For one thing, it must be appreciated that substantive rights are more concrete, (at least, in their impact), than the values which underpin them. More importantly, the purposes served by the rights themselves may be different - they may, for instance, be civil, social and/or economic.¹ For this reason, it is to be expected that these differences will influence the legal outcome of a case - they may implicate different dimensions of autonomy which, in turn, may require different 'degrees' of constitutionalisation and different methodological adjustments.

The pertinent question to be addressed in relation to substantive rights therefore, is where and how, these differences can, and will, make a difference, both generally, as well as in the context of a particular case, to legal outcomes produced by a constitutionalised law of contract.

¹ For a basic discussion of the enumerated rights, see Iain Currie and Johan De Waal *The Bill of Rights of Handbook* 5ed (2005) at chapter 3; chapter 6; see further at chapters 9-31. Note that this categorisation of rights is far from absolute; there are, arguably, other categories too. In fact, many aspects of the categorisation of rights into generations and groups of similar rights are criticised in the literature. See generally, Craig Scott 'Reaching beyond (without abandoning) the category of "economic, social and cultural rights"' (1999) *Human Rights Quarterly* 633. For purposes of this chapter however, the loose classification of the rights as economic, civil and socio-economic is useful.

It is with this question in mind, that I consider finally, the application of three distinct rights in this chapter; one that in a contractual setting may loosely be classified as economic (i.e. the freedom of trade, occupation and profession (s 22)), one that may loosely be classified as civil (i.e. the freedom of religion, belief and opinion (s 15(1))) and one that may loosely be classified as socio-economic (i.e. the right to have access to health care services (s 27(1)(a))). In all three instances, I show that constitutional infusion of the relevant substance, form and attending mechanics of operation of our contract law is possible, without sacrificing the law's doctrinal coherence or certainty and in the end therefore, without sacrificing the integrity of the common law of contract.

4.2 A JUDGE'S MANUAL FOR THE CONSTITUTIONALISATION OF OUR COMMON LAW OF CONTRACT

4.2.1 Horizontal application of the Bill of Rights and the public-private divide

As explained in Chapter One, the point of departure is that the common law of contract, like all other branches of South African law, is subject to the Bill of Rights. In other words, judges must appreciate that the pre-constitutional (classical liberal) delineation of public (constitutional) law, versus private (contract) law, can no longer hold true. But that is not to say, that there no longer is any value in the distinction between the public and the private. Rather, what judges must understand is that the Bill of Rights has replaced the impenetrable brick wall between the public and the private, with a more permeable wire-mesh fence.

So, on the one hand, the removal of the brick wall enables judges to begin the constitutionalisation process of our private law of contract firstly, (and more generally), in terms of the Bill of Rights' overarching 'spirit, purport and objects' and attending foundational values in all contract cases, and secondly, (and more specifically), in terms of any substantive constitutional rights (and/or duties) that may find application in the context of a particular contract case. On the other hand, the wall's replacement with a public-private wire-mesh fence recognises the need for judges, simultaneously to 'translate' the application of relevant constitutional concepts, in a manner, that befits the broader private

context, as well as the more particular context that the contracting parties find themselves in.² At a minimum, the nature, extent and manner of application of both the broader constitutional values in every contract law matter, as well as the specific rights (and/or duties) pertinent to the particular contract case before the court, are linked inextricably to whether a judge is dealing with a public or private entity. If a private entity, their basic nature also becomes relevant. For instance, is the private entity a natural or a juristic person? How vulnerable or powerful is the person? etc.

In 'horizontal application' speak, this constitutionally altered public-private divide means that judges basically need to conduct two distinct, (albeit related) enquiries, in order to constitutionalise our common law of contract. To begin with, judges must consider the *scope* (content) of horizontal application of the Bill of Rights to contract law. Thereafter, judges must determine the *form* (method) of such application.³

Beginning with the scope enquiry, a judge would be concerned with *whether*, and if so, the *extent* to which, the Bill of Rights ought to apply to the private common law of contract, both generally, to all contract law cases, as well as more specifically, in the context of a particular contract, where the legal outcome of the case now, must also be constitutionally sound/just.

An essential premise here is that the *law*, as opposed to conduct per se, must pass constitutional muster.⁴ Articulated further, the question of the actual *content* of horizontal application of the Bill of Rights relates, at least, to the broader application of the foundational values of freedom, dignity and equality to contract *law*.⁵ In terms of s 8(1), read with ss 39(1) and 39(2), the Bill of Rights is applicable to the whole of the common law of contract, in the sense that *all* of its rules, standards, doctrines, principles and policies must reverberate with, and give effect to, (or at least, not be inconsistent with), the

² Hugh Collins 'Utility and rights in common law reasoning: Rebalancing private law through constitutionalization' (2007) 30 *The Dalhousie Law Journal* 1 at 23.

³ See discussion in chapter 1 at 1.2. See also *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras 39-40. As a final point, take note that the respective headings of ss 8 and 39 are misleading, as elements of application and interpretation are found in both provisions.

⁴ On the law versus conduct distinction, see the discussion in chapter 1 at 1.2.1(a).

⁵ Section 8(1) read with s 39(2) of the Constitution. Where I use the term *content* in the context of horizontal application of the Bill of Rights, I mean the particular *substance* of the rights and values of the Bill of Rights, which judges must delineate.

broader 'spirit, purport and objects' of the Bill of Rights, together with its foundational values of freedom, dignity and equality. Importantly, this comprises the 'objective normative *value* system' that is the bedrock of the Bill of Rights and accordingly, the broader constitutionalisation process of the common law of contract.⁶

At the same time, there is also the narrower context of a particular matter, where a substantive constitutional right(s) (and corresponding duties), may or may not be implicated. In terms of s 8(2) of the Constitution, a judge must focus on the (potential) scope of application of substantive constitutional rights (and corresponding duties), to the contracts of private persons, that are the subject of individual instances of litigation and by logical extension, to contract law itself. In other words, the focus of the judge here, must be on the extent of application of the Bill of Rights to a particular matter and the contract law, that ought to govern it in the specific context. The judge must decide how much, or to what extent, it is necessary for contract law to be constitutionally resonant.

So, in essence, s 8(2) is a crucial precursor, to the development that a judge may deem necessary, in terms of s 8(3) of the Constitution. Accordingly, factors that impact on the 'how much of contract law to change' question, are relevant here i.e. the question relating to the current state of the relevant part of contract law and the extent to which it already reflects the applicable constitutional right(s) (and corresponding duties), and its underlying values, in the context of the particular contract matter before the court. Significantly, s 39(1) requires that this narrower enquiry always be conducted against the backdrop of the broader constitutional project, with its underlying 'objective normative value system'.⁷

In the final event therefore, the scope enquiry contemplates a *direct constitutional assessment* of the extant body of contract law, both generally and more specifically, against the 'objective normative value system', as well as the (potentially) applicable substantive constitutional rights (and corresponding duties). Additionally, where the common law of contract appears to fall short, the relevant contract or contractual clause must be assessed in the same way,

⁶ See discussion in chapter 1 at 1.2 especially 1.2.2(a)(i).

⁷ See discussion in chapter 1 at 1.2 especially 1.2.2(a)(ii).

in terms of s 39(2) and/or s 8(2) of the Constitution, all the while, with a view to developing an appropriately constitutionalised body of contract law.⁸

Moving on to ss 39(2) and 8(3), these sections take up the *form of horizontal application* enquiry. Notably, both sections take as their respective points of departure, the comparative identification and assessment of the relevant contract law rule(s), (or lack of rules as the case may be), with s 39(2), focusing on the 'objective normative *value* system' as the benchmark, and s 8(3), on those substantive *rights* (and corresponding duties) that may be implicated. So, whereas s 39(2) requires judges to consider how the common law ought to be developed generally, in all contract cases, so that, contract law accords with and gives effect to the 'objective normative value system', s 8(3) requires judges to determine how the common law ought to be developed, in order to give effect to applicable right(s) (and duties), in the narrower context of a particular contract case, as identified and assessed in terms of s 8(2).⁹

In terms of s 39(2), judges must now infuse the 'objective normative value system' into the common law of contract. They must do so organically, in the traditional common law fashion, incrementally, over time, as and when contract law issues present themselves before the courts. In other words, judges must work the 'objective normative value system' naturally and gradually into the common law framework (with its legal concepts and methodology),¹⁰ and in this manner, inform the interpretation, application and overall constitutional development of our common law of contract and contractual autonomy. In similar vein, the common law framework itself will start to look different, over time, as it is constitutionalised concurrently, on a case by case basis.¹¹

Section 8(3) then, shifts the attention of judges to the manner in which to give effect to applicable substantive *rights*, in the context of particular contract cases, as identified and assessed within the s 8(2) scope of horizontal application enquiry. Notably, s 8(3) likewise contemplates that judges will constitutionally develop the common law of contract, within the *common law*

⁸ See discussion in chapter 1 at 1.2.2(a)(iii).

⁹ See discussion in chapter 1 at 1.2 especially 1.2.2(a)(iv); 1.2.2(a)(v); 1.2.2(b). See also the discussion in chapter 3 at 3.4.

¹⁰ i.e. by using the contract law machine, as outlined in chapter 3 especially at 3.3.

¹¹ See discussion in chapter 1 at 1.2 especially 1.2.2(b); 1.2.3.

framework, so that, a single integrated system of constitutionalised contract law will emerge over time.¹² Once again, it must be noted that the common law framework itself likewise may require concurrent constitutional adjustment and to this end, ss 8, 36 and 39(2) of the Constitution will serve as a useful guide.¹³

To sum up, the direct-indirect horizontality debate is largely transcended in the final Constitution. The emphasis rather, is on the *scope* and *form* of horizontal application where the relevant sub-sections of s 39 and s 8, have distinct roles to play in the process of constitutionalising our common law of contract. Whilst each section has links with both direct and indirect horizontality, the final Constitution clearly dictates that the constitutional *development* of the common law of contract, ultimately must take place within the common law framework, as constitutionally adjusted.

4.2.2 The constitutionalisation of the substance of contractual autonomy

In Chapter Two, I identified contractual autonomy as the central axis of South African contract law and so, proceeded from the premise that a constitutionalisation of the substance of contractual autonomy would, in essence, constitutionalise the substance of our common law of contract.

Here, it is crucial for judges to appreciate that contractual autonomy comprises two essential components, viz. the internal *content* component and the external *reach* component. Briefly stated, the internal component delineates what actually constitutes an exercise of autonomy by the contracting self, whilst the external component sets the legal limits of such (internal) exercise of autonomy. So, whereas the internal dimension of contractual autonomy comprises the legal requirements of contractual capacity, offer and acceptance, the doctrine of mistake and the established categories of improperly obtained consensus, the external dimension essentially constitutes the doctrine of legality. Accordingly, what judges adjudicating in the constitutional era must appreciate is that, at least the substance of *all* of the rules, standards, doctrines and principles that make up the internal and external components of contractual autonomy respectively, need to transcend contract

¹² See discussion in chapter 1 at 1.2 especially 1.2.2(a)(iv); 1.2.2(a)(v); 1.2.3.

¹³ See discussion in chapter 3 at 3.4.

law's classical liberal underpinnings and be re-legitimated, in terms of the Bill of Rights.

Even so, it seems that judges in the constitutional era still foster the pre-constitutional (neo-) classical liberal philosophy, with the result that their conception of the 'common law contracting self' is likely to fall short of the constitutional ideal of the contracting self, operating in a substantively progressive and transformative South African society, grounded in the foundational values of freedom, dignity and equality.¹⁴

Indeed, judges have not really interrogated the continued operation of the fixed and essentially negative (*laissez faire*), thin internal conception of contractual autonomy, in the post-apartheid era. The elements of contractual capacity and offer and acceptance, as well as the doctrine of mistake and the established categories of improperly obtained consensus, have continued to operate as is, undisturbed by the Bill of Rights.¹⁵

Instead, for purposes of constitutionalising the common law of contract, the courts have focused, somewhat exclusively, on the external reach dimension of contractual autonomy. In particular, the doctrine of legality is recognised now, as *the* appropriate portal for constitutional considerations to enter the domain of contract law. Nevertheless, in the conducting of legality's public policy balancing exercise, between competing individualist and collectivist ideologies, judges still presume an exercise of autonomy as per the (neo-) classical liberal, thin internal conception of autonomy.¹⁶ Not even the distinction between actual and apparent autonomy, in terms of contract law's (secondary) roots in distributive justice, is acknowledged in this enquiry.¹⁷ As a result, the strongly individualist values of self-interest, self-reliance and self-determination still tend mostly to outweigh the more modern collectivist-type (read constitutional) concerns, such as, substantive fairness and reasonableness, in particular contracts, as well as in contract law generally. To

¹⁴ See in particular, the judgment of Cameron JA in *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at paras 88-95, where the classical liberal conception of contractual autonomy appears to have been constitutionalised. See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras 22-24; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at paras 12-16. See further *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at paras 15; 30; 57, where the CC confirmed this approach.

¹⁵ See discussion in chapter 2 at 2.2.1; 2.3.3.

¹⁶ See discussion in chapter 2 at 2.3.2.

¹⁷ See discussion in chapter 2 at 2.2.3(b); 2.2.3(c).

be sure, the courts thus far, have yielded largely unsatisfactory results, in relation to the transformation of contract law.¹⁸

In order effectively to constitutionalise our contract law, what judges need to do rather, is to situate and construct a constitutionalised conception of contractual autonomy within the Bill of Rights' 'objective normative value system', and to relate this conception, to any substantive rights that may be implicated in a particular matter. Significantly, this entails a fundamental shift from the classical liberal, negative, atomistic conception of contractual autonomy, to a more positive, interdependent (collectivist), substantive conception, that is grounded principally in the foundational constitutional triage.¹⁹

Articulated further, judges must recognise the foundational values of freedom, dignity and equality as intrinsically fluid and multi-faceted, where, unlike the classical liberal conception of autonomy, no particular facet of any of these values necessarily occupies primacy of place. Moreover, judges must understand that the interplay between the values is also fluid, so that, once again, no single value is naturally or definitively hegemonic, in a particular case. Rather, in determining both the *intra-action* within each value itself, as well as the *inter-action* between the values, for the purposes of the case before the court, much is dependent on three factors: One, the social and economic contracting context of contracts, more generally, as well as that of the particular contracting parties before the court; Two, the nature and scope of potentially applicable substantive rights (and corresponding duties), in relation to certain types of contracts (more generally), and moreover, in relation to the particular contracting parties in the case before the court (more specifically), and; Three, the broader constitutional project of a substantively progressive and transformative post-apartheid South Africa.²⁰

The result will be a more fluid, (as opposed to a fixed), concept of contractual autonomy, that is meant at a minimum, to be consistent with, but more importantly, to resonate with, and give effect to, the broader constitutional

¹⁸ See discussion in chapter 2 at 2.2.3(c); 2.3.2. See in particular, the judgment of Cameron JA in *Brisley* supra note 14 at paras 88-95, where the classical liberal conception of contractual autonomy appears to have been constitutionalised.

¹⁹ See discussion in chapter 2 at 2.4.

²⁰ See discussion in chapter 2 at 2.4.1.

vision of a substantively equal, free and dignified South Africa, in which the constitutional self is able *in substance* to realise his or her vision of the good life. Notably, with this more fluid concept of autonomy, judges will be able to develop a constitutionalised contract law that can accommodate the more full-bodied, multi-faceted internal conception of contractual autonomy. Indeed, it will enable judges to pay greater attention to the crucial, modern contextual realities of solidarity, interdependence and the material conditions necessary for the exercise of choice by the constitutionalised contracting self, in substance, as opposed to mere form.

In practical terms, this means that judges will constitutionally assess²¹ and where necessary develop,²² gradually, on a case-by-case basis, the substance of the contract law machine's general rules (and standards) articulating contractual capacity, offer and acceptance and the doctrines of mistake, misrepresentation, duress, undue influence and bribery. At the same time, greater cognisance must be taken of the particular context of the contracting parties, with a view to ensuring that their respective exercises of contractual autonomy are constitutionally sound. Also, where a substantive constitutional right(s) tempers the internal exercise of contractual autonomy, judges must likewise ensure that the exercise of contractual autonomy is constitutionally sound (i.e. both in the broader context of contracts in which the relevant right is usually implicated, as well as in the more specific context of the particular contractant before the court).

Similarly, in relation to the external reach dimension of contractual autonomy, which is also a function of the foundational constitutional triage, judges ought generally, to move further along the individualism-collectivism continuum, with a view to facilitating greater substantive contractual justice for the constitutional self.²³ In other words, in conducting the public policy balancing exercise, as articulated by the contract law machine's doctrine of legality, judges must take cognisance, both generally for all contract law cases and specifically in the context of the particular case before the court, of those

²¹ As per s 8(1) read with ss 39(1) and (2), and s 8(2) read with s 39(1) of the Constitution.

²² As per ss 39(2) and 8(3) of the Constitution.

²³ See discussion in chapter 2 at 2.4.

collectivist-type considerations based on the fuller internal conception of autonomy and mandated by the Bill of Rights.

4.2.3 The constitutionalisation of the legal methodology of contract law

Having thus canvassed the substance of constitutionalising contractual autonomy, Chapter Three considered the implications of traditional legal methodology, as employed by judges, to give effect to the legal concepts of contract law, operating within the common law framework (i.e. using the contract law machine).

The essential point here is that judges have to be alert to the influence of the established common law methodology itself, on the substance of our common law of contract. Briefly stated, contract law's methodology is grounded firmly in liberal legalism. In turn, liberal legalism has facilitated our law's entrenchment of the substance of contractual autonomy in classical liberal ideology and the attending individualist policy considerations, so much so, that these underpinnings have come to be naturalised within our extant common law of contract.²⁴

Nevertheless, when judges of the constitutional era assess the substance of the rules and standards of our contract law, as these currently operate within the contract law machine, they continue, for the most part, to employ the liberal legalist style of adjudication, without questioning its (potentially detrimental) influence on legal results, as measured in terms of the Bill of Rights.

On the contrary, judges seem to accept that the rules of our common law of contract themselves are value-neutral and as such, are constitutionally legitimate. In light of rules' affinity for formalist *deductive* legal reasoning and legal certainty, judges mostly continue, somewhat mechanically, to apply the long-established 'hard and fast' common law rules of contract, without question - they simply feed the 'hard facts' of problems into the 'common law of contract machine' and the machine in turn, spits out the 'logically correct' (and therefore *formally just*) legal solutions. This approach to the established rules of our contract law goes some way to explaining the general failure of judges,

²⁴ See discussion in chapter 3 at 3.2.

constitutionally to interrogate the relevant rules and doctrines articulating the internal content dimension of contractual autonomy.²⁵

In a similar vein, the standards featuring in our contract law machine, although more open-ended and therefore, more receptive to competing collectivist-type normative considerations, that ought to find application in a constitutionalised contract law, have been rather limited in effecting substantive contractual justice in post-apartheid contract cases. For one thing, judges of the constitutional era have confined their constitutionalisation of normative standards, somewhat exclusively, to the doctrine of legality and therefore, to the *external* (reach) dimension of contractual autonomy alone.²⁶ More significantly, judges have continued largely, to employ the fairly conservative *liberal legalist* approach to the doctrine of legality.

In most instances, judges invoke the pre-constitutional era, public policy scale. But this scale, in its liberal legalist conception, focuses firstly, on the general tendency of a contract/contractual clause in the abstract, as opposed to its actual proved result in the particular circumstances of a case.²⁷ Secondly, it takes as its point of departure, the pre-constitutional (thin) internal conception of contractual autonomy and accordingly, is tipped at the outset, strongly towards the classical liberal, individualist side of *pacta sunt servanda*. That the public policy scale of the classical liberal era is thus likely to facilitate a legal outcome that is classical liberal in nature, (rather than, constitutionally resonant), should be evident.

So, on the one hand, by uncritically applying the seemingly value neutral rules (and largely sub-ordinate standards) comprising our common law of contract, judges adjudicating in the constitutional era effectively have masked the normative facet of the internal content dimension of contractual autonomy. On the other hand, by principally confining the (constitutional) normative function of contract law standards to the doctrine of legality, with its traditional public policy scale, judges purporting to constitutionalise our contract law can

²⁵ See discussion in chapter 3 at 3.3.2; 3.5.1(b).

²⁶ See discussion in chapter 3 at 3.2.3; 3.3.3; 3.5.1(a). Note further, the limited operation of normative standards within the doctrines of mistake and improperly obtained consensus.

²⁷ *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 7I-9G.

effect mostly minor, constitutionally prompted adjustments on the fringes of contractual autonomy's external reach dimension.²⁸

That said, in *Barkhuizen*,²⁹ the CC does appear to have been aware of the influence of established common law methodology, insofar as it introduced a new level to the public policy scale. According to the CC, the public policy scale, operating within the constitutional context, must still comprise the original *tendency* level of the scale, on which the more general (objective 'soft fact') contextual considerations, that will apply broadly in all cases, must be placed. In addition, the scale now has a new secondary *enforceability* level, on which, the more case-specific (subjective 'hard fact') considerations that will apply in the context of the particular case before the court, should be placed. Still, the court was not systematic, in its application of the constitutionally adjusted public policy scale, in relation to the case before it.³⁰

In essence, what judges of the constitutional era need to do, is ensure that the legal methodology of contract law likewise reflects the fundamental shift from the pre-constitutional, classical liberal conception of contractual autonomy, to the foundational constitutional triage's more fluid conception of legal autonomy, as exercised, by the constitutional self. In other words, judges must ensure that the *legal process*, in terms of which our common law of contract is constitutionalised, facilitates more than minor adjustments on the fringes of contractual autonomy's external reach dimension.

To begin with, the legal method employed must facilitate the necessary normative interrogation of the internal content dimension of contractual autonomy, which moreover, has to *precede* a testing of the external reach dimension. Importantly, the manner in which judges ought to conduct such constitutional assessment and development of the contract law machine must, in all contract cases, articulate with what is envisaged by s 8(1), read with ss 39(1) and 39(2) of the Constitution. Further, where a substantive right(s) is

²⁸ See discussion in chapter 2 at 2.4.2. It must be noted that judges have, on occasion, indicated somewhat curiously, that if necessary, the doctrine of legality's public policy scale would house those (constitutional) normative considerations pertaining to the internal content component of contractual autonomy, too. Nevertheless, such (internal autonomy) considerations would be fundamentally inconsistent with those (external autonomy) considerations that are normally placed on the public policy scale. See discussion in chapter 3 at 3.3.4.

²⁹ *Barkhuizen* supra note 14 at paras 56-58.

³⁰ See discussion in chapter 3 at 3.3.5; 3.5.2.

implicated in a particular case, the approach of the judge must also articulate with what is contemplated by s 8(2), read with s 8(3).

Presumably, this would entail judges assessing the way in which, the established hard and fast rules, presently give effect to the internal component of contractual autonomy, against the more fluid, foundational constitutional triage's conception thereof. Insofar as the established rules fall short, judges ought to focus on developing, not only their substance, but also their form and attending method of application appropriately.

Most significant in terms of methodology, is that formalist, deductive legal reasoning attendant on rules, will need to yield to a *hybrid-type* of legal reasoning, where the very configuration of rules and standards needs to be adjusted, so as to accommodate a more contextual, fluid conception of contractual autonomy. This is not to say, that the internal content dimension of contractual autonomy collapses simply, into a policy enquiry. Rather, the constitutional concept of contractual autonomy must always be justifiable, both in terms of legal principle *and* policy; the balance between legal certainty and a normatively revised internal conception of contractual autonomy for the constitutional self, being crucial.³¹

What this means, is that contractual legal principles themselves must go through a transitional process of re-alignment, as per the foundational constitutional triage and the potentially applicable substantive rights (and duties); the triage replacing the classical liberal foundations of contract law. In other words, the legal principles of freedom of contract and *pacta sunt servanda*, as well as the ensuing rules and standards of contract law (and the configuration thereof), must now resonate principally with the *trriage's* conception of contractual autonomy. In the long run, such re-alignment will facilitate legal certainty. Additionally, any residual policy concerns, that may be pertinent to the case at hand, must be taken into account, in order to ensure an appropriately delineated internal (content) dimension of contractual autonomy.

So, in practical terms, what judges must do, is constitutionally assess and where necessary, develop gradually, on a case-by-case basis, the *form* (i.e. as a rule, a standard or a hybrid combination), and *configuration* (i.e. as

³¹ Collins op cit note 2 at 11-14.

predominantly rules-based or standards-based), in which the contract law machine broadly casts contractual capacity, offer and acceptance, and the doctrines of mistake, misrepresentation, duress, undue influence or bribery. At the same time, judges must similarly assess constitutionally and, where necessary, develop incrementally, the attending methodology, as currently employed by the contract law machine. Additionally, judges must develop a more context-sensitive methodology that will take better account of the particular context in which the parties before the court contracted and thereby, ensure that their respective exercises of contractual autonomy are constitutionally sound.

Importantly, such methodology must also accommodate the possibility of a substantive constitutional right(s) (and/or duties), tempering the internal exercise of contractual autonomy by a particular contractant. The basic idea here, is to ensure that the exercise of contractual autonomy remains constitutionally sound (i.e. both in the broader context of contracts in which the relevant right is usually implicated, as well as in the more specific context of the particular contractant before the court).

In the final event, if our law of contract effectively articulates the constitutionalised internal (content) dimension of contractual autonomy, freedom of contract and *pacta sunt servanda* will take on a different role, in terms of the *external* (reach) dimension of contractual autonomy. For one thing, the fact that the public policy scale is tipped at the outset, towards *pacta sunt servanda*, (the onus being on the party who wants to escape the contract to show that it is against public policy), will no longer import the strongly individualist bias of the classical liberal framework. On the contrary, the *succeeding* public policy scale will no longer have to contend with any deficiency in the internal (content) dimension of contractual autonomy.³² Rather, judges can focus exclusively, on what ought to be a two-level public policy scale and what comprises the relevant external reach dimension-considerations, that should be placed respectively on the primary *tendency* level of the scale (and so, apply generally in all contract law cases) and the

³² Note however, that the enquiry must still be cognisant of whether there was an *actual* or *apparent* exercise of autonomy.

secondary *enforceability* level of the scale³³ (and so, upon proof, apply specifically in the context of a particular case).

4.3 THE APPLICATION OF A SUBSTANTIVE CONSTITUTIONAL RIGHT

Thus far, I have focused mainly on the constitutionalisation of contractual autonomy, in terms of the foundational constitutional values of freedom, dignity and equality. However, it is necessary also to consider in more detail, the situation where one or more of the substantive constitutional rights find application.

To begin with, it must be appreciated that the enumerated rights are different from the values which underpin them. Whereas values are more fluid and therefore more adaptable and/or accommodating of differing contexts, rights are more concrete in nature, having functions that are considerably more specific, than their foundational value counterparts.³⁴ So, where a right(s) finds application, it is necessary for the triage, both to be informed by, and responsive to, such right(s).

Additionally, it must be remembered that the enumerated rights themselves may be different, *inter alia*, in terms of their purpose, reach, formulation, the kinds of interests they serve and/or the kind of obligations that they may impose. At this juncture, it must be acknowledged that contemporary human rights literature resists the notion of ‘categories’ of rights and, more especially, a rigid distinction between so-called civil-political rights and socio-economic rights.³⁵ I do not purport to engage here with this debate, save to say that I employ the so-called ‘categories’ of ‘economic, civil-political and socio-economic rights’ very loosely, and only to the extent that I look at three particular rights, that serve different purposes, in relation to the constitutional self. At best, the three rights that I look at, each represent a grouping of rights that serve a similar purpose and just so happen to dovetail with the traditional notion of ‘generations’ or ‘categories’ of rights.

³³ See discussion in chapter 3 at 3.3.3.

³⁴ Currie and De Waal *op cit* note 1 at chapter 3 especially at 32; chapters 6-7.; Catherine Albertyn and Beth Goldblatt ‘Equality’ in Stuart Woolman, Michael Bishop; Jason Brickhill; et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4 2012) chapter 35 at 35-8 to 35-14. See further Dennis Davis ‘Rights’ in MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law The Bill of Rights* 2ed (2005 Issue 13 September 2012) chapter 2.

³⁵ In this respect, see generally, Scott *op cit* note 1.

In relation to contract law therefore, each right interacts with different dimensions of the constitutionalised contracting self and accordingly, with different dimensions of freedom, dignity and equality. In particular, each right, after establishing its horizontal applicability, will serve primarily to implicate differing dimensions of each value of the foundational triage, as it operates along the atomistic-substantive and individualist-collectivist continuums of contractual autonomy. This is further influenced by the relevant right's interplay with pertinent policy concerns such as, 'social utility versus economic cost', together with the omnipresent constitutional end goal of a substantively progressive, post-apartheid South Africa.

Upon examination of each group of right in the abstract, it appears that the loosely termed 'civil-political' constitutional rights are most closely aligned with the atomistic, individualistic conception of autonomy which, in our law of contract translates into classical liberal speak. Our civil-political rights include such freedoms as 'freedom and security of the person', freedom from 'slavery', 'freedom of religion, belief and opinion' and 'freedom of expression'.³⁶ These seem to foster an essentially *negative* conception of individual freedom, basically requiring freedom from interference by the State and/or other individuals. This would then be complemented by comparable negative conceptions of dignity (as empowerment), and formal equality (on the basis of non-discrimination).³⁷ In relation to our extant contract law therefore, the implication of these loosely grouped rights will be minimal, for so long as there is non-interference. But where parties purport contractually to interfere with such a right, the internal dimension of contractual autonomy must still facilitate a free and fair exercise of choice (even if only minimally),³⁸ in relation to the relevant right, whilst the external dimension ought to focus on the bearing of such freedom, against freedom of contract, in the two-tiered public policy (legality) exercise.

Moving to what may loosely be called the socio-economic class of constitutional rights, it appears that these rights are most closely aligned with

³⁶ Sections 12; 13; 15; 16 of the Constitution respectively.

³⁷ See discussion of equality and dignity in chapter 2 at 2.4.3; 2.4.4.

³⁸ This must be determined in light of the minimal pre-conditions that are necessary for the exercise of the relevant right. In turn, such pre-conditions depend on the nature of the particular civil-political right in question.

the substantive, collectivist conception of autonomy which, to date, has been largely foreign to our common law of contract. Our socio-economic rights include such rights as ‘the right to have access to “adequate housing”, “health care services”, “sufficient food and water” and “a basic education”’.³⁹ Whilst all of the corresponding, full-blown positive duties attached to these rights, are not likely to fall on private individuals, these rights do, at the very least, appear to foster a more holistic conception of the constitutional self, where certain basic pre-conditions are recognised as crucial to the exercise of autonomy in substance, as opposed to mere form. This would then be complemented by comparable positive and more collectivist conceptions of dignity (as constraint), and substantive equality.⁴⁰ In relation to our contract law therefore, this loose class of right is crucial to the internal dimension of contractual autonomy. Socio-economic rights ought to inform the basic content threshold for an exercise of a choice in substance. Moreover, where a particular socio-economic right is implicated, such right should play a more elevated, if not primary, role in determining the (internal) content of contractual autonomy. In relation then, to the external dimension of contractual autonomy, where a socio-economic right is implicated, the enquiry should focus especially, on the collectivist implications for dignity and substantive equality.

Dealing finally, with the loosely classed economic rights, these rights seem to fall between the above outlined, civil-political and socio-economic classes of right. Indeed, whereas so-called economic rights such as, the ‘freedom of trade, occupation and profession’ and the right to ‘property’⁴¹ traditionally entail non-interference by the State and/or other individuals, they also presuppose a measure of *substantive* economic freedom, as an integral component of individual identity.⁴² In other words, an individual must, as a pre-condition, at least be *able economically* to realise his or her economic rights (if not, all of his or her fundamental rights).⁴³ However, in the face of

³⁹ Sections 26; 27; 29 of the Constitution respectively.

⁴⁰ See discussion of equality and dignity in chapter 2 at 2.4.3; 2.4.4.

⁴¹ Sections 22; 25 of the Constitution respectively.

⁴² Currie and De Waal op cit note 1 at 484-489.

⁴³ In the context of contract law, there is an intrinsic link also between economic power and an individual's ability to realise his or her civil-political and socio-economic rights. In other words, the concern regarding economic ability/freedom will permeate all fundamental rights. The result is that doctrines developed to address concerns of economic freedom are likely to find application also when other fundamental rights are implicated.

concentrations of private power still largely along apartheid policy lines, such ability is especially stunted.⁴⁴ As a result, economic constitutional rights would be rendered meaningless for a majority of South Africans, unless they are grounded in a more positive conception of autonomy. In relation to our contract law, therefore, the implication of this loose class of right is that the internal dimension of autonomy must foster a fuller, substantive concept of contractual autonomy that facilitates true economic freedom. Most notably, this is likely to translate into the development of a more concrete, South African doctrine of economic duress and/or doctrine of abuse of unequal bargaining power, the content of which, will be informed by the nature of the particular right implicated in the relevant contracting context.⁴⁵ Once this is in place, freedom of contract would become more even-handed and, as a result, the external dimension of contractual autonomy can continue to invoke the two-tiered public policy scale, to determine the appropriate reach of freedom of contract, against competing economic freedoms and pertinent collectivist, (socio-economic / welfarist) goals of post-apartheid South Africa.

Having thus outlined, my 'basic constitutionalised approach' to contract law and further, how I foresee these three groups of rights⁴⁶ generally affecting our common law of contract, I will now apply my 'model' to three different substantive constitutional rights viz. the *economic* freedom of trade, occupation and profession (s22), the *civil-political* freedom of religion, belief and opinion

⁴⁴ Dennis Davis 'Freedom of trade, occupation and profession' in Stuart Woolman, Michael Bishop; Jason Brickhill; et al (eds) *Constitutional Law of South Africa 2ed* (2008 Revision Service 4 2012) chapter 54 at 54-2 to 54-3, explains that s 22 "must be read as a corrective to historical employment inequities created by Apartheid. In *JR 1013 Investments CC and Others v Minister of Safety and Security and Others*, Jones J noted[,]

"We have a history of repression in the choice of a trade, occupation or profession that (*sic*) resulted in disadvantage to a large number of South Africans in earning their daily bread. In the pre-Constitution era implementation of the policies of apartheid directly and indirectly impacted upon the free choice of a trade, occupation or profession: unequal education, the prevention of free movement of people throughout the country, restrictions on where and how long they could reside in particular areas, and the practice of making available structures to develop skills and training in the employment sphere to selected sections of the population only, and the statutory reservation of jobs for members of particular races. The result was that all citizens in the country did not have a free choice of trade, occupation or profession. Section 22 is designed to prevent a perpetuation of this state of affairs." [1997 (7) BCLR 950 (E) at 980B-E]."

⁴⁵ Such doctrines must be rooted in both autonomy and wrongfulness. Further, the right implicated need not be economic, but could well be civil-political or socio-economic – op cit note 43.

⁴⁶ The three groups of rights that I have discussed here, are those that are most often implicated in contract law cases. Additionally, there are other possible groups of rights that serve different purposes, the most obvious ones being, developmental and environmental rights or 'solidarity rights' like self-determination rights. These other groups of rights fall beyond the scope of this thesis.

(s15(1)) and finally, the *socio-economic* right to have access to health care services (s27(1)(a)).⁴⁷ In particular, I will show how each of these rights highlight distinct dimensions of the constitutional self and therefore, contractual autonomy (as contemplated by the foundational constitutional triage) and furthermore, how they may also require constitutional adjustments to pertinent common law methodologies.

As a final point, it is important to remember always that whilst, in the abstract, each group of right may have a natural affinity with a particular dimension of the constitutional self, the specific context of operation of the right ultimately is decisive. So for instance, the concerns associated with the economic freedom of contracting parties may well transcend the economic group of rights and, depending on the context, apply likewise where a so-called civil-political or socio-economic right is implicated.

Going forward then, my approach to each right will begin with a brief survey of the right's content, specifically as they each pertain to the notion of constitutional autonomy. I will do this as part of the *scope enquiry* into the respective rights' horizontal application. Thereafter, I will identify and assess the relevant types of contracts/contract clauses and attending contract law(s), implicated by the particular right and will determine whether the law is in need of constitutional development. If in need of development, I will propose a way forward as per the ensuing *form of horizontal application* enquiry.

4.3.1 Freedom of trade, occupation and profession (s 22)

(a) The content of s 22 of the Constitution

In terms of s 22 of the Constitution,

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

⁴⁷ I have chosen these three rights on the basis of the available literature and case law that deal with these rights, as well as their special connections to the concept of autonomy.

In relation to the concept of the constitutional self, this section is integral both in a 'material' and an 'idealistic' sense.⁴⁸ The German Constitutional Court expressed this best:

“...[T]he basic right aims at the protection of economically meaningful work, but it views work as a ‘vocation’. Work in this sense is seen in terms of its relationship to the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person’s existence through which that person simultaneously contributes to the total social product.”⁴⁹

In an idealistic sense therefore, s 22 articulates the more abstract notion of a career or a calling that is tied to the individualist idea of personal fulfillment and development, and the shaping of one’s identity.⁵⁰ Accordingly, the emphasis is on *autonomy* - the individual’s right to *self-determination* in pursuance of a livelihood - where government regulation would be limited strictly to the maintenance of qualitative standards of control in the public interest.⁵¹ So, in an idealistic sense, s 22, operating in a free-market economy, promotes the negative conception of individual liberty where the right to freedom of trade, occupation and profession relates simply to the *opportunity* to exercise (or not to exercise, as the case may be) such right.⁵²

In the material sense however, s 22 “intrinsicly relates to the *ability to implement* one’s choice [*my emphasis*]”.⁵³ In other words, the right to freedom of trade, occupation and profession, exemplifies ‘work’ as the fundamental *vehicle*, through which an individual is *enabled* to strive toward and realise his or her vision of the good life. Government regulation of this right therefore,

⁴⁸ Currie and De Waal op cit note 1 at 491. See also *Affordable Medicines Trust v The Minister of Health of the Republic of South Africa and Another* 2006 (3) SA 247 (CC) at para 30, where Ngcobo J submitted:

“What is at stake is more than one’s right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and constitutive of one’s dignity. Every individual has the right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. “It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person’s existence.”

⁴⁹ The *Pharmacy* decision, as quoted in Currie and De Waal op cit note 1 at 491 footnotes 39; 22; 23.

⁵⁰ i.e. what would be termed a ‘vocation’. Currie and De Waal op cit note 1 at 491; Robert LaGrange ‘Economic activity rights’ in MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law The Bill of Rights* 2ed (2005 Issue 13 September 2012) chapter 17 at 17-2.

⁵¹ Davis op cit note 44 at 54-3 to 54-7; LaGrange op cit note 50 at 17-5.

⁵² Currie and De Waal op cit note 1 at 493.

⁵³ LaGrange op cit note 50 at 17-2.

would be geared to socio-economic (welfarist-type) development, with a view ultimately to the positive improvement of the quality of life of all of its citizens.⁵⁴

So, in a country where citizens enjoy a substantially free, dignified and equal standard of living, it stands to reason that the former interpretation of s 22 would be emphasised; the material conditions necessary for an exercise of a choice, in substance, being present. In contrast, South Africa has one of the highest Gini-coefficients in the world (reflecting a highly unequal distribution of national income),⁵⁵ with the gap between the rich and the poor widening. Without a doubt, this is the legacy of apartheid's education, work (versus residence) location and job reservation policies.⁵⁶

In post-apartheid South Africa therefore, the latter 'material' interpretation of s 22 must take precedence. Indeed, in *Affordable Medicines Trust and Others v The Minister of Health of the Republic of South Africa and Another* the CC submitted:

"In broad terms this section has to be understood as both repudiating past exclusionary practices and affirming the entitlements appropriate for our new open and democratic society. Thus in the light of our history of job reservation, restrictions on employment imposed by the pass laws and the exclusion of women from many occupations, to mention just a few of the arbitrary laws and practices used to maintain privilege, it is understandable why this aspect of economic activity was singled out for constitutional protection."⁵⁷

Although the government has begun to redress the systemic inequities in economic opportunities,⁵⁸ it still has a long way to go. This is especially so within the private sphere, where the aftermath of apartheid is superior access to economic resources by relatively few, (mostly previously-advantaged) South

⁵⁴ On the implications of s22's reference only to citizens, see Davis op cit note 44 at 54-2; Currie and De Waal op cit note 1 at 489-490.

⁵⁵ http://en.wikipedia.org/wiki/Gini_coefficient (accessed 12/07/2012).

⁵⁶ Davis op cit note 44 at 54-1 to 54-3.

⁵⁷ *Affordable Medicines Trust* supra note 48, as per Ngcobo J at para 58. See also s 26(2) of the interim Constitution, which was especially alert to these concerns. In terms of s 26 of the interim Constitution of the Republic of South Africa, Act 200 of 1993,

"(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality."

That s 26(2) was not re-enacted in s 22 of the final Constitution, should not be taken to mean that these considerations are no longer relevant. On the contrary, they must be recognised as intrinsic to several of the enumerated rights in the Bill of Rights.

⁵⁸ In particular, the legislature has tightened labour law protections for employees and introduced black economic empowerment and affirmative action legislation. Government, in turn, has sought to implement these laws.

Africans. This in turn, translates into restricted and privileged access to better quality (private) basic education,⁵⁹ and following there-from, improved access to higher education and employment opportunities. The right to freedom of trade, occupation and profession therefore, is as much an issue of *private* market power wielded by private individuals, as it is an issue of government regulation and/or intervention.⁶⁰ As such, s 22 must apply horizontally to private individuals and the private common law, including the common law of contract.

This brings me to the final point on the content of the s 22 right. Section 22 has an express internal qualifier, which permits the law to regulate the 'practice' of a trade, occupation or profession. So, whereas a person should be enabled to choose his or her vocation, the "modern and industrial world of human interdependence and mutual responsibility" means that the law may also need to protect those persons involved in, and/or affected by, the practice of a particular trade, occupation or profession, especially where the trade, profession or occupation in question, implicates the broader public interest.⁶¹ So, for instance, it would be in the public interest for the law to stipulate certain basic safety conditions that must be satisfied, in order for a qualified pharmacist to compound and dispense medicines, to his or her customers. Along similar lines, the private law of contract may set specific parameters for contracts that affect a contracting party's right to practice his or her trade, occupation or profession. For instance, our law of contract may consider a contract, which purports to prevent a doctor from practising in a region that has a critical shortage of healthcare providers, to be against the public interest and therefore, illegal.

In *Affordable Medicines Trust*, the CC unpacked the distinction between the right to choose a trade, occupation or profession and the right to practice it. Relying on German Law, the court accepted that the distinction was one of degree, where the "choice and practise of a profession constituted the poles of

⁵⁹ This is accentuated by government failings in basic education. See for instance, the general failure of the Outcomes-Based Education model and the 2012 debacle relating to the non-delivery of textbooks. See *Section 27 v Minister of Education* Case No. 24565/2012, North Gauteng High Court, Pretoria (17/05/2012).

⁶⁰ Davis op cit note 44 at 54-5; 54-9 to 54-11; Currie and De Waal op cit note 1 at 483-487; LaGrange op cit note 50 at 17-5; 17-13 to 17-17.

⁶¹ *Affordable Medicines Trust* supra note 48 at para 60.

a continuum.”⁶² In the end therefore, the CC held that if, in objective terms, a governmental regulation of the practice of a profession impacts negatively on the individual’s very choice of profession, a court must determine if the regulation is reasonable and justifiable, as per s 36(1) of the Constitution. Conversely, if the regulation does not impact negatively on the individual’s choice, s 22 requires the regulation, only to be rationally connected to a legitimate government purpose.

Admittedly, this case dealt with the regulation by the State of the right to practice a profession. Nevertheless, the ‘choice–practice’ continuum may be useful also in the private realm of contracts. As outlined above, *private* market power, wielded by private individuals, is just as crucial an issue, in post-apartheid South Africa. Accordingly, where a contract implicates the choice and/or practice of a trade, profession or occupation, in the manner envisaged by the CC in *Affordable Medicines Trust*, our common law of contract should, at least, be informed by the CC’s approach.

(b) The identification, assessment and (potential) development of the law governing contracts in restraint of trade as against s 22 of the Constitution

Within the sphere of our common law of contract, the s 22 right to freedom of trade, occupation and profession appears to be most relevant to covenants in restraint of trade. Briefly stated, a covenant in restraint of trade is a contract, in terms of which, the covenantor (i.e. the party subject to the restraint), undertakes in favour of the covenantee (i.e. the party holding the right of restraint), not to carry on a particular trade, occupation or profession, usually within a particular area and for a stipulated period of time.

Restraint of trade contracts feature in two contexts especially. First, is the context of an employment contract, where the employer (covenantee) purports to protect its trade secrets, client base and other confidential information that an employee (covenantor) may be privy to.⁶³ Second, is the context of a sale of a business, where the buyer (covenantee) intends mainly to

⁶² *Affordable Medicines Trust* supra note 48 at paras 65; 87-93.

⁶³ See for instance, *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (N).

protect the goodwill and confidential information of the business, against exploitation by the seller (covenantor). What emerges therefore, is that restraints of trade are not (and indeed, should not be) used simply to prevent competition; the covenantee usually has what is termed a 'legitimate interest' such as trade secrets, customer connections or goodwill, which the law of contract deems worthy of protection.⁶⁴

Significantly, the restraint of trade contract implicates two basic considerations, freedom of contract and freedom of trade (occupation and profession). Furthermore, our common law of contract articulates both of these considerations in classical liberal terms. The contracting self is still the classical contracting self, as entrenched in the atomistic 'free will', laissez faire ideology of the classical liberal era, with its attending concept of *pacta sunt servanda*. Likewise, the economic trading/professional self is embedded in classical liberalism, as exemplified by the industrial revolution's rejection of social hierarchies and status relationships, and concomitant emphasis on the inherently enterprising spirit of individuals.⁶⁵

For the most part therefore, the considerations of freedom of contract and freedom of trade, in their classical liberal sense, complement each other in their respective functions in the free-market economy. However, in the context of a restraint of trade contract, these two considerations become diametrically opposed: whereas freedom of contract would demand that the contract be upheld and enforced (*pacta sunt servanda*), even if this should cause 'un-productivity', freedom of trade would insist on productivity (as based on free and fair competition), rather than un-productivity, even if this should lead to the invalidity or non-enforcement of a contract.⁶⁶ Moreover, classical liberalism per se cannot resolve this tension. Our law of contract therefore, as steeped in classical liberalism, had to make a policy choice as to the consideration it prefers.

Initially, following English law's policy, that freedom of trade is more important than freedom of contract, our common law of contract treated contracts in restraint of trade as invalid, unless the covenantee could show that

⁶⁴ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

⁶⁵ See discussion of the classical model of contract law in chapter 2 at 2.2.1.

⁶⁶ *Basson v Chilwan* 1993 (3) SA 742 (A) at 767C-F.

the contract was reasonable (inter partes) and not against public policy.⁶⁷ Subsequently however, the AD (as it then was) reversed this position on the basis that, the importation of this aspect of English law, undermined the integrity of the Roman Dutch law foundations of our contract law; the Roman Dutch law did not, in principle, prohibit restraint of trade agreements.⁶⁸

The upshot is that, in terms of the law as it currently stands, a contract in restraint of trade is valid and enforceable, unless the covenantor can show that in the circumstances, the covenantee's freedom of contract unreasonably limits the covenantor's freedom of trade and/or it would otherwise be against public policy to enforce the restraint.⁶⁹ The point of departure in terms of our common law of contract therefore, is that the (primary) consideration of freedom of contract trumps the (competing) interest of freedom of trade. Further, the courts appear to treat the legal issue regarding contracts in restraint of trade, as one that relates principally to the external reach dimension of contractual autonomy and in particular, to the *enforceability* (as opposed to the tendency) of the restraint, as per the doctrine of legality, with its public policy scale. In other words, the particular context of the specific covenantor and covenantee before the court, at the time of enforcement of the contract, occupies centre stage. In contrast, the courts pay little attention to the internal content dimension of contractual autonomy, either generally, or specifically, in relation to the particular parties in a case before it. The classical liberal conception of autonomy continues to prevail, with concerns pertaining to unequal bargaining power apparently situated on the enforceability level of the scale, within the doctrine of legality.⁷⁰

The implication then, of s 22 as an economic right, operating in post-apartheid South Africa, would be that the rules (and standards) articulating the internal content dimension of contractual autonomy must accommodate the *economic ability* of the covenantor, as a more contextual, constitutionalised contracting self (rather than the atomistic, classical contracting self), to exercise

⁶⁷ *Esso Petroleum Co Ltd v Harper's Garage (Stouport) Ltd* [1968] AC 269; [1967] 1 All ER 699; cf *Roffey v Caterall, Edwards & Goudre (Pty) Ltd* 1977 (4) SA 494 (N); *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C); *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T).

⁶⁸ *Magna Alloys* supra note 64 at 890-891.

⁶⁹ *Magna Alloys* supra note 64 at 891; *Basson* supra note 66 at 767C-H.

⁷⁰ See discussion in chapter 3 at 3.3.3(b).

a choice, in substance. This means that, in relation to the foundational triage, s 22 would elevate a more positive conception of freedom, complemented by corresponding substantive conceptions of equality and dignity, both generally in cases dealing with restraints of trade and more specifically, in the context of the particular restraint before the court.

So, for instance, this may require the recognition of a threshold education and work/business experience level, as a material (equality) precondition for the exercise of such contractual choice in all cases. This could be housed more concretely, by the development of a constitutionalised contractual doctrine of abuse of unequal bargaining power. Such a doctrine would need to ensure, or at least facilitate, a more substantive exercise of choice by covenantors generally. For instance, this could be effected by articulating the threshold requirements of autonomy, as generally applicable rules. At the same time, such a doctrine would need also to do this more specifically, in the particular case before the court, in light of the particular power dynamic between the covenantor and the covenantee in question. For instance, this could require the stronger party to show that his or her exploitation of bargaining power, in the course of negotiations, was reasonable, where the standard of reasonableness must be set by the triage and s 22.

Moving on to the external reach dimension, it is important to note that this has been the arena of constitutional interrogation of restraints of trade. More specifically, the main argument has been that the placing of the onus on the person who wishes to escape the restraint (i.e. the covenantor), to show that the restraint is unreasonable and/or against public policy, is unconstitutional because the covenantor is usually in a weaker bargaining position than the covenantee.⁷¹ As matters stand, the SCA has left open the question of the constitutionality of the onus regarding restraints of trade.⁷² Nevertheless, if our law of contract were to first address the internal content dimension of autonomy, as outlined above, any inequality in bargaining power

⁷¹ See for instance, *Knox D'Arcy Ltd v Shaw* 1996 (2) SA 651 (W) at 660C-D; 660I-661A; *Canon* supra note 63 at 209C-G; *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) at 862G; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at 13-17. The power dynamic between parties is especially pertinent to employment relationships. However, it may not be as pertinent in relation to the sale of a business.

⁷² *Reddy* supra note 71 at para 14.

will be dealt with appropriately.⁷³ Accordingly, the covenantor would, in relation to the covenantee, be better placed than his classical liberal counterpart, by reason of his or her more substantive (as opposed to formal) exercise of choice. That is to say, that the value freedom of contract would become more even-handed in its operation and effect. As a result, the question of which party should bear the onus in relation to the external dimension of contractual autonomy would become a non-issue.⁷⁴

In terms of the substance of the external reach dimension (legality) enquiry, the common law's emphasis, as outlined above, is on the *enforceability* of the restraint. The focus therefore, is primarily on the particular restraint contract before the court and the (potential) impact of its enforcement on the contracting parties before the court. Even so, the law governing contracts in restraint of trade has not been rendered unacceptably uncertain or unworkable.

Over time, the courts have developed guidelines, as to when a contract in restraint of trade would unreasonably limit the covenantor's freedom of trade and/or otherwise be against public policy. Most important, is whether the covenantee has a legitimate interest that is qualitatively and quantitatively proportionate to the covenantor's competing interest, in being free to carry on his or her trade, occupation or profession. In this respect, courts take cognisance of relevant factors, including the nature of the economic activity covered by the restraint, its duration and the area that it spans. At the same time, the courts are alert also, (albeit less so), to any broader public interest that is (potentially) impeded by restraint contracts generally, and/or by the particular restraint before a court.⁷⁵

⁷³ If the parties fail to measure up to the constitutionalised standard of internal contractual autonomy, the enquiry is unlikely to proceed to the issue of the external reach of autonomy. This will depend on the remedies available for an abuse of unequal bargaining power. This issue is beyond the scope of this thesis.

⁷⁴ Further, the factor of unequal bargaining power, as it affects the exercise of choice, would become a non-issue, given that there would no longer be a need for the public policy scale to cure a deficiency in the internal conception of autonomy. Cf Karin Calitz 'Restraint of trade agreements in employment contracts: Time for pacta sunt servanda to bow out? (2011) 22 *Stell LR* 50.

⁷⁵ In *Reddy* supra note 71 at para 16, the SCA confirmed the approach in *Magna Alloys* supra note 64, and *Basson* supra note 66, as constitutionally legitimate and resonant with the s 36(1) limitations analysis of the Bill of Rights:

"In *Basson v Chilwan* Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one party have an interest that deserves protection

Significantly, this approach of our courts is resonant with the reasonableness (proportionality) exercise fostered in s 36(1) of the Constitution.⁷⁶ At least to this extent therefore, the common law's approach to contracts in restraint of trade is likely to withstand constitutional scrutiny.

As a precursory step in this legality exercise however, it may be constructive for a court to assess and situate the restraint along the 'choice-practice' continuum, as delineated by the CC in *Affordable Medicines Trust*.⁷⁷ Indeed, this could assist a court in its development of a constitutional standard that the contract in restraint of trade must measure up to. The more the restraint contract and/or its operation impacts the covenantor's future *choice*⁷⁸ of trade, occupation or profession, the higher the standard of reasonableness (presumably a s 36(1)-type standard), to which the terms of the restraint contract (as per the tendency level of the public policy scale), and its enforcement (as per the enforceability level of the public policy scale), must be held. Conversely, the more the restraint contract and/or its operation impact merely upon the covenantor's future *practise* of a trade, occupation or profession (rather than the very choice thereof), the lower the standard of reasonableness (presumably a standard analogous to that of the 'rational-connection' test), to which the tendency of the restraint contract and its enforcement must be held.

On a final note, whilst the jurisprudence on contracts in restraint of trade is informative, for the development of context-sensitive guidelines for the application of the secondary enforceability level of the constitutionalised public

after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests."

⁷⁶ Reddy supra note 71 at para 17.

⁷⁷ *Affordable Medicines Trust* supra note 48 at paras 65; 87-93.

⁷⁸ The covenantor's future choice of trade, occupation or profession is a distinct, (albeit related) choice, from his or her original contractual choice (exercise of autonomy), of agreeing to the restraint of trade. Even so, it must be noted that a restraint of trade also affects the autonomous (continuous) self's *future* choice. This may need to be taken into account in the internal content dimension of contractual autonomy. This issue is beyond the scope of this thesis. See further, the discussion of waiver in 4.3.2(b)(iii).

policy scale,⁷⁹ I submit, that the courts' somewhat exclusive focus on the question of *enforceability* of the restraint is in need of adjustment. In dealing with restraints of trade in the constitutional era, I would argue that the broader *tendency* level of the public policy enquiry ought likewise, as per the two-tiered *Barkhuizen* scale, to *precede* the enforceability level of the scale. Furthermore, it ought equally to be informed by the foundational triage. There appears to be no reason in principle, to differentiate the determination of the appropriate reach of freedom of contract, against what I loosely term, competing (constitutional) economic rights. On the contrary, legal coherence would be promoted by the systematic development of, and adherence to, the *Barkhuizen* model.

4.3.2 Freedom of religion, belief and opinion (s15(1))

(a) The content of s 15(1) of the Constitution

In terms of s 15(1) of the Constitution,

“Everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

In brief, ‘religion, belief and opinion’ relates essentially to the basic belief system of an individual, which may or may not be articulated as an organised religion⁸⁰ - it comprises an individual’s basic moral outlook on life, an essential component of the self’s identity and, as such, his or her appreciation of his or her self-worth and dignity.⁸¹ To explain further, the empowerment dimension of dignity is elevated by s 15(1), in the sense that dignity lies in the recognition of the individual as an autonomous moral agent, capable of self-actualisation and governance through the exercise of *free choice* regarding religion, belief and opinion.⁸²

Significantly, the material conditions necessary for the constitutional self having a particular belief system are minimal. In this context, freedom is

⁷⁹ See discussion in chapter 3 at 3.3.3(b).

⁸⁰ Debates as to the precise definition of religion are beyond the scope of this discussion. For more on this issue, see Currie and De Waal op cit note 1 at 338. See further, and more generally, Christof Heyns and Danie Brand ‘The constitutional protection of religious human rights in Southern Africa’ (2000) 33 *CILSA* 53.

⁸¹ *MEC for Education, Kwa-Zulu Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 53.

⁸² See discussion of dignity in chapter 2 at 2.4.4.

connected largely, to the internal dialogue of the self about his or her understanding of the various relationships that give his or her life meaning. Most important, would be the relationships that he or she has with family, friends, the community in which he or she works and lives, as well as the broader South African society; all with their respective belief systems and practices that have varying degrees of influence and are not necessarily cohesive.⁸³ Moreover, the value of equality would operate mostly negatively in this context, to *abhor* unfair discrimination on the basis of religion, conscience, belief or culture.⁸⁴

Even so, in South Africa, the importance of the narrower concept of religion⁸⁵ to individual identity is somewhat paradoxical. On the one hand, religion was exploited by the apartheid regime as an apparatus through which to promote apartheid policy. As alluded to above, the law was infused with an “apartheid brand of Christianity” to the legal detriment of other religions.⁸⁶ It stands to reason therefore, that many South Africans now view religion with political circumspection, and would advocate rather, for a secular State, or at least one, that does not discriminate unfairly against any particular religion.⁸⁷ Further, at an individual level, such persons would place emphasis on the freedom *not* to exercise any particular religion too.⁸⁸

On the other hand, the individual and systemic experience and legacy of unfair discrimination, prejudice and hatred under the apartheid regime, has served, (albeit inadvertently), to facilitate introspection and therewith, a deepening of individual belief systems. In this respect, many sought, and

⁸³ Patrick Lenta ‘Muslim headscarves in the workplace and in schools’ (2007) 124 *SALJ* 296 at 296; Currie and De Waal op cit note 1 at 339-340; Paul Farlam ‘Freedom of religion, belief and opinion’ in Stuart Woolman, Michael Bishop; Jason Brickhill; et al (eds) *Constitutional Law of South Africa* 2ed (2008 Revision Service 4 2012) chapter 41 at 41-11 ffg.

⁸⁴ As per s 9(3) read with s 9(4) of the Constitution.

⁸⁵ In this discussion, I focus specifically on religion, although the same line of argument could apply likewise to ‘conscience, thought, belief and[/or] opinion’.

⁸⁶ Currie and De Waal op cit note 1 at 337 and the authorities cited in footnote 4. They refer to “the cosy relationship that existed between the apartheid regime and the three Afrikaans churches in South Africa...”. See also Farlam op cit note 83 at 41-1 to 41-2.

⁸⁷ See for instance, the secular approach of France, and the United States, as contrasted with the concept of reasonable accommodation, espoused by Germany. For more on these concepts, see Dennis Davis ‘Religion, belief and opinion’ in MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law The Bill of Rights* 2ed (2005 Issue 13 September 2012) chapter 10 at 10-1 to 10-8.

⁸⁸ Gerhard Van der Schyff ‘Limitation and waiver of the right to freedom of religion’ (2002) *TSAR* 376 at 379-381. Note however, that the author refers to the freedom not to exercise a religious practice as waiver. On ‘waiver’, see discussion in 4.3.2(b)(iii) below.

continue to seek, guidance from the religious and associated cultural belief systems of the communities, that they were born into and/or grew up in. This in turn, has entrenched the role of religious institutions within communities where, notwithstanding, their erstwhile *legal* marginalisation, such institutions *in fact* have enabled, and continue to enable, individuals to practise their religious beliefs as part of a community and so, foster the collective (sense of 'belonging') facets of their particular identities.⁸⁹ For these South Africans therefore, the individual and communal dimensions of religious (and cultural) belief and practice are integral to daily life. As such, they would expect their freedom to exercise their religions, beliefs and opinions to be respected, both by the State and their fellow South Africans. Indeed, this is now recognised by the complementing ss 30 and 31 of the Bill of Rights, as being fundamental in post-apartheid South Africa.⁹⁰

Against this background, it becomes clear that s 15(1) contemplates a *liberal* constitutional self who is free to exercise, or not to exercise, (as the case may be), a particular belief system, basically without interference by the State. Being integral to the (private) self's conception of the meaning of life, who necessarily lives with, and amongst, other individuals, s 15(1) must apply horizontally also to private persons and as a result, to the private common law of contract. This is endorsed by the largely negative nature of the duty imposed by s 15(1), together with s 9(4) of the Constitution, which provides expressly that "[n]o *person*... [*my emphasis*]" may discriminate unfairly on the basis, inter alia, of religion, conscience, belief or culture; the constitutional end goal (and thus, basic contract law parameter), being the fostering of an inclusive society that, not only is tolerant and accommodating of different religions, beliefs and opinions, but also celebrates its diversity.⁹¹

⁸⁹ Section 31 of the Constitution highlights this communal dimension. See also Currie and De Waal op cit note 1 at 339.

⁹⁰ Sections 30; 31 of the Constitution recognises culture as integral to religion and/or individual belief systems.

⁹¹ Lenta op cit note 83 at 297-299. Note that the notion of accommodating different religious beliefs may sometimes require positive action (so-called reasonable accommodation), even of private persons, such as private employers, or private schools.

- (b) The identification, assessment and (potential) development of the law governing contracts that relate to a party's exercise (or non-exercise) of religious freedom as against s 15(1) of the Constitution

In relation to our common law of contract, s 15(1) will operate in two ways. First, s 15(1) will operate in terms of its underpinning values, which need to be infused generally into the boni mores element of contract law's doctrine of legality. Second, s 15(1) will operate as a substantive right implicated in specific cases, where parties purport to regulate, by agreement, some manifestation of a contractant's beliefs, in terms of his or her "conscience, religion, thought, belief and[/or] opinion."⁹²

Dealing with s 15(1)'s broader operation as a set of values within our common law of contract, 'religion' appears to have been relevant to contracts in the pre-constitutional era, insofar as the boni mores element of legality's public policy enquiry, assumed an apartheid-Christianity-type of disposition. For the most part, the boni mores operating within this context were not alert to alternate belief-systems/religions. Rather, agreements having to do with religious practices, that were inconsistent with Christian values would be contra bonos mores and against public policy and therefore, void for illegality.⁹³ Moreover, there was no objection in principle, to the curtailing or restraining of any non-Christian religious freedoms, by way of contract.

Clearly, this understanding of the boni mores is not acceptable within a constitutionalised contract law. At the very least, the broader values of inclusion, tolerance and diversity, that are espoused by s 15(1), must now be infused into the boni mores, so that, the boni mores become more secular or multi-denominational, whichever is most appropriate, in terms of the foundational triage, as well as the particular context of the case before the court. Presumably, the constitutional infusion contemplated here, would adopt (or at least, be informed by), a s 39(2)-type of methodology.

Dealing next with s 15(1) as a substantive right, the pressing question relates to *how* it would apply horizontally to contracts, that relate to a party's

⁹² Note that one cannot really regulate or contract about a person's beliefs or faith, but only the external manifestation thereof. See Currie and De Waal op cit note 1 at 338-339; Lenta op cit note 83 at 297.

⁹³ For instance, an agreement purporting to govern a polygamous, or even a potentially polygamous marriage, would not be recognised by our common law. Another example would be a marriage brokerage contract.

exercise (or non-exercise,⁹⁴ as the case may be), of religious freedom. For this purpose, I propose to examine the cases of *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society*⁹⁵ and *MEC for Education, KwaZulu-Natal and Others v Pillay*.⁹⁶

In doing so however, I need at the outset, to draw attention to and canvass three important concepts: First, the distinction between a direct and an indirect contractual restriction of freedom of religion, second, the operation of the freedom of religion right at a collective level and finally, the concept of waiver that comes up in the literature discussing the contractual restriction of the right to freedom of religion.⁹⁷

(i) *Direct versus indirect contractual restriction*

Briefly stated, a contractual restriction is direct when a contract purports deliberately to restrict a particular facet of a party's religious practice. In other words, the party agreeing expressly to a particular restriction is likely to have applied his or her mind to the implications of such agreement, for his or her right to freedom of religion.

An example of a direct contractual restriction is found in the case of *Garden Cities*. In this case, the respondent Mosque had undertaken in a contract with the applicant, not to use sound amplification equipment, in making the Islamic call to prayer ('azaan'). Instead, the respondent had agreed, that at the relevant times, it would turn on a light that it would install on the top of the minaret. Subsequently, the respondent argued, that this agreement infringed on its freedom of religion, as the call to prayer is a fundamental tenet of Islam.⁹⁸

In contrast, a contractual restriction is indirect when a contract, although seemingly neutral, has the (inadvertent) effect purportedly of impinging on a party's right to freedom of religion. In other words, the party agreeing to such a

⁹⁴ I use this phrase loosely because the decision not to exercise a particular religion is in fact an exercise of such freedom. See further discussion in 4.3.2(b)(iii) below.

⁹⁵ 1999 (2) SA 257 (C).

⁹⁶ *Pillay* supra note 81. I have chosen these two cases because they raise important issues about the contract-religion interface.

⁹⁷ See for instance, Van der Schyff op cit note 88; Currie and De Waal op cit note 1 at 39-43.

⁹⁸ *Garden Cities* supra note 95 at 270A-270J. This case is discussed further in 4.3.2(b)(iv) below.

restriction is not likely to have applied his or her mind to the precise implications of such agreement, for his or her right to freedom of religion.

An example of such a contractual restriction is found in the case of *Pillay*. Here a learner's parent had signed the school's code of conduct, in terms of which, she agreed that her learner daughter would adhere, inter alia, to the clause restricting the type of jewellery that could be worn to school.⁹⁹ This clause, although seemingly neutral in effect, was held to impinge on the learner's freedom of religion and associated Hindu culture, insofar as it prevented her from expressing her heritage by way of wearing a gold nose-stud at school.¹⁰⁰

In summation, the courts should be mindful of this distinction, both when *formulating* the general threshold (internal) content of contractual autonomy that may restrict the fundamental right to freedom of religion, as well as when *applying* such threshold requirement in the context of a particular case.

(ii) *Operation of the right to freedom of religion at a collective level*

Thus far, my discussion of rights in relation to contract law has been at the individual level i.e. it contemplates a particular *individual* exercising his or her right, exclusively, for him or herself. This would occur where, as in the case of *Pillay*, the individual agrees, by way of contract, to exercise (or not to exercise) his or her right to freedom of religion, in some particular way or form.¹⁰¹ Importantly, the communal dimension of freedom of religion - i.e. where people exercise their religious freedom, through practice, in community with others - would feature insofar as it informs, and evidences, the actual exercise of autonomy by the individual. Additionally, the communal dimension would be relevant to the determination of the external reach of such an exercise of autonomy. This much is clear - our contract law is designed specifically to deal

⁹⁹ *Pillay* supra note 81 at paras 4-10. The relevant provision stated,

"Jewellery: Ear-rings – plain round studs/sleepers may be worn, ONE in each ear lobe at the same level. No other jewellery may be worn, except a wristwatch. Jewellery includes any adornment/bristle which may be in any body piercing. Watches must be in keeping with the school uniform. Medic-Alert discs may be worn."

¹⁰⁰ *Pillay* supra note 81 at paras 60-68. As will be explained in 4.3.2(b)(v) below, although this case involved a State school, its facts, and some of the legal principles discussed by the CC, lend themselves to application of the s 15(1) right in the private law context, too.

¹⁰¹ Here, Ms Pillay's parent acted on her behalf, as she was a minor child, at the time.

with exercises of *individual* autonomy, with the result that this aspect of the *Pillay*-type scenario should not pose a problem in principle.

In contrast, where a right operates at a collective level, i.e. when a collective (communal (religious)) institution exercises a right for the community of persons that customarily identify with that particular institution, the situation is far from clear-cut. In *Garden Cities* for instance, the Northpine Islamic Society had agreed, by way of a contract with Garden Cities Incorporated that the Mosque would not sound the call to prayer and in so doing, collectively agreed not to exercise this aspect of the religious practice for the Muslim community of District Six.¹⁰²

Yet, our common law of contract is able to accommodate the institution's collective exercise of the right, only insofar as all of the affected persons agree *individually*, to the particular exercise of the freedom of religion right, by the religious institution.¹⁰³ In reality however, the attainment of such agreement is improbable and impracticable, because persons' associations with the relevant religious institutions are usually informal and fairly fluid.¹⁰⁴ Indeed, in *Garden Cities*, there did not appear to be specific agreement by the individuals affected by the Northpine Islamic Society's undertaking, but even so, they were in effect bound by it.¹⁰⁵

The basic shortcoming, is that our contract law presently does not have a collective conception of autonomy and, as a result, is unable to deal effectively with scenarios, where a religious institution undertakes *collectively* to exercise (or not to exercise) the right to freedom of religion, in some particular way or form.¹⁰⁶

To sum up, if contract law is to deal with rights operating at a collective level, our constitutionalised conception of contractual autonomy will need to be developed accordingly. Presumably, this would entail a reading of s 15(1)

¹⁰² Or at least, not to amplify the call electronically – the applicant abandoned the claim for no call to prayer to be made. *Garden Cities* supra note 95 at 270G-H; 271B-C.

¹⁰³ Or at the very least, for each individual to give a mandate to the Mosque, to act as his or her agent. In this way, the right is still exercised at an individual level i.e. by way of an exercise of individual autonomy as opposed to collective autonomy.

¹⁰⁴ For instance, there is no formal register of members. Further, people may move in and out of the area; there may also be persons working, or visiting, in the area, who may go to the Mosque, etc.

¹⁰⁵ *Garden Cities* supra note 95 at 273E-F.

¹⁰⁶ I do not propose here, to develop such collective conception of autonomy. I merely draw attention to it as something to be mindful of, and leave it for further study.

together with s 31, and an elevated role for collective dignity and equality respectively.¹⁰⁷

(iii) *The concept of waiver of fundamental constitutional rights*

The final preliminary observation that I wish to make, relates to the notion of contractual waiver of fundamental constitutional rights. I raise it here, because it comes up in the cases and literature particularly in relation to the right to freedom of religion and other classical-type rights.¹⁰⁸

The notion of waiver, i.e. “an undertaking not to exercise a fundamental right in future”,¹⁰⁹ is seemingly controversial. On the one side, the argument is that constitutional rights can *never* be waived. Rather, when dealing with constitutional rights, the issue is one of interpretation and/or limitation of the relevant right.¹¹⁰ The competing side of the argument is that, in principle, the waiver of a constitutional right is possible, depending on the nature (or purpose) of the particular right. This is because waiver of the right would actually entail exercise of the right, as is the case with religious freedom.¹¹¹ To explain further, in deciding, and then undertaking contractually, not to observe a particular religious belief or practice, the constitutional self in fact exercises his or her religious freedom, in very much the same vein as he or she would have done, if he or she had decided and agreed (whether expressly or impliedly), rather to observe such religious belief or practice.

For purposes of this thesis, it is not necessary to engage with this debate. As should be apparent, from the earlier-outlined methodology proposed for the application of a substantive right in contract law, I submit that the right to freedom of religion must be balanced against, and reconciled with,

¹⁰⁷ Again, I merely draw attention to this possibility. Note further, that if the collective conception of autonomy is treated as a non-contractual issue, one ought to be wary of the dangers associated with parallel versions of contract law. See further, Jeremy Waldron ‘The dignity of groups’ in AJ Barnard-Naude, Drucilla Cornell and Francois Du Bois (eds); Jan Glazewski (gen ed) *Dignity, Freedom and the Post-Apartheid Legal Order The Critical Jurisprudence of Laurie Ackermann* (2008) 66-90.

¹⁰⁸ See generally, Van der Schyff op cit note 88; Currie and De Waal op cit note 1 at 39-43; Stuart Woolman ‘Category mistakes and the waiver of constitutional rights: A response to Deeksha Bhana on *Barkhuizen*’ (2008) 125 *SALJ* 10; *Garden Cities* supra note 95; *Wittman v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T); Kevin Hopkins ‘Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm’ (2002) 119 *SALJ* 155 especially at 172.

¹⁰⁹ Currie and De Waal op cit note 1 at 40.

¹¹⁰ Woolman op cit note 108 at 12-13, 20-23.

¹¹¹ Currie and De Waal op cit note 1 at 41.

contractual autonomy, as contemplated by the foundational constitutional triage.¹¹² Articulated further, once it is accepted that the right does apply horizontally to the common law of contract, the pertinent question firstly, is whether the particular contractant validly exercised his or her individual contractual autonomy in relation to the relevant right and, secondly, whether the external reach of such exercise of autonomy is legally acceptable, in light of the policy considerations associated with the right.

At all times therefore, the relevant substantive right is meant to be *engaged* with analytical rigour, rather than sacrificed. The concept of contractual waiver in the sense of forfeiture of the right therefore, is misconceived.¹¹³ The only caveat that I would add here, is that, in cases dealing with such a ‘waiver-type’ exercise of a substantive right, the courts ought to be especially mindful of the extent to which, the relevant (constitutionalised) contractual undertakings affect the choice of the autonomous (continuous) *future self*, regarding the substantive right in question - this would be particularly pertinent in the context of long-term continuing contracts, or contracts subject to suspensive conditions, that may not be fulfilled in the immediate future.¹¹⁴

To conclude, my usage of the terminology ‘freedom not to exercise’ or ‘non-exercise’, of a right, should not be entangled with the (non-) issue of contractual waiver of fundamental constitutional rights.

(iv) *Garden Cities Incorporated Association Not For Gain v Northpine Islamic Society*

In terms of *how* s 15(1) would apply to the *Garden Cities* scenario, it would be useful first, to outline the findings of the court. Briefly stated, the court focused on the *electronic amplification* of the call to prayer and held that this was not a precept of Islam, but merely a ritual that is practiced widely.¹¹⁵ Accordingly, it was open to the parties to restrict such practice by way of contract. Furthermore, the relevant prohibiting clause was fundamental, in the sense that *Garden Cities Incorporated* would not have entered into the contract without the

¹¹² See discussion in 4.2 above.

¹¹³ Currie and De Waal op cit note 1 at 42.

¹¹⁴ See discussion in chapter 2 at 2.3.3(b) especially at 34; see also 4.3.1(b) op cit note 78.

¹¹⁵ *Garden Cities* supra note 95 at 271B-C; 272F-H.

clause. In other words, freedom of contract and *pacta sunt servanda* supported the enforcement of the prohibiting clause. In the final event, the clause was also held to be in the interests of the other members of the community.¹¹⁶

In an obiter dictum then, the court submitted that, even if it had to deal with the call to prayer itself, (as opposed to its electronic amplification), and had accepted that it was a fundamental precept of Islam, the sanctity of contract should still prevail for two reasons.¹¹⁷ First, it would not be easy for the other contractant to know if the relevant right (read ‘precept of faith’)¹¹⁸ relinquished, was fundamental or not. Second, even if a fundamental precept, this was not relevant, as equally integral to the right to freedom of religion, is “the right to discard established dogma and believe in something new or nothing at all”.¹¹⁹

The prohibiting clause therefore, was upheld and Northpine Islamic Society was found to be in breach of contract.

In approaching this particular case and, more specifically, in considering the effect of the right to freedom of religion, it is submitted, that the analysis¹²⁰ could well have benefitted from distinguishing at the outset, between the *internal* content and *external* reach dimensions of contractual autonomy and then, properly situating the relevant considerations within these two dimensions.

In doing so, the court is likely to have exposed the added complication of Northpine Islamic Society’s purported *collective* exercise of the right to freedom of religion, for the Muslim community of District Six.¹²¹ But the collective conception of autonomy aside, the judgment failed even to interrogate the threshold (internal) content of contractual autonomy, when dealing with the fundamental right to freedom of religion. Indeed, the court mentions that the relevant clause was fundamental to Garden Cities, but does not explore the reasons why the Northpine Islamic Society ostensibly had agreed to the clause,

¹¹⁶ In the form peace and quiet / no nuisance. *Garden Cities* supra note 95 at 271C–271I.

¹¹⁷ *Garden Cities* supra note 95 at 272B.

¹¹⁸ *Garden Cities* supra note 95 at 272A – I submit that the term ‘right’ was used incorrectly here, as all rights enshrined in the Bill of Rights are fundamental.

¹¹⁹ *Garden Cities* supra note 95 at 272B.

¹²⁰ As well as the parties’ framing of the case. For further discussion of this case, see NMI Goolam ‘Time for the bell to toll on the tolling of bells? *Garden Cities Incorporated Association Not for Gain v Northpine Islamic Society* 1999 (2) SA 268 (C) (1999) 62 *THRHR* 641; Marius Pieterse ‘Many sides to the coin: The constitutional protection of religious rights’ (2000) 38 *CILSA* 300 at 312; Van der Schyff op cit note 88.

¹²¹ See discussion in 4.3.2(b)(ii) above.

when it never intended to abide by it. This, notwithstanding, the clause having comprised a direct contractual restriction, that the Northpine Islamic Society was aware of, and in some way, must have applied its mind to.

It appears that the court simply relied (albeit implicitly), on the established classical liberal conception of the atomistic, independent contracting self,¹²² in relation to the Northpine Islamic Society. Even so, it is unclear whether in the context of this particular case, the court was convinced that there was a free and fair exercise of choice by Northpine Islamic Society, in its apparent “discarding of established dogma” regarding the call to prayer.

Arguably, this is because bargaining power may have been an issue between the parties here, and the common law of contract, as currently articulated, is deficient in its accommodation of this issue.¹²³ Indeed, if the court had inquired into the internal (content) dimension of autonomy, as per the foundational triage and s 15(1) of the Constitution, it is likely to have identified this deficiency, both generally, in contracts of this nature and in the context of the particular contract, before it. Further, if such deficiency did, in fact, turn out to be in issue, the court could have then situated the necessary development of our contract law, within the earlier proposed, constitutionalised, contractual doctrine of abuse of unequal bargaining power.¹²⁴ Here, the potential impact of unequal bargaining power on an individual’s religious identity and sense of community would be especially relevant.

More significantly however, this may have been a case where the doctrine of mistake could have been relevant, with a view to weighing up the reasonable reliance by Garden Cities on the appearance of consensus, against the excusability of the Northpine Islamic Society’s mistaken belief, that it was not bound by the prohibiting clause. Notably, the ‘otherwise excusable’ category of mistake would have to be informed by the foundational constitutional triage, working in conjunction with s 15(1) of the Constitution. For instance, this category may now require, that where the right to freedom of

¹²² As articulated by the extant contract law rules, standards, doctrines and principles articulating the internal content dimension of contractual autonomy.

¹²³ The extant rules regarding capacity, offer and acceptance, mistake, misrepresentation, duress and undue influence, do not accommodate the impact of inequalities in bargaining power on the exercise of contractual autonomy, not even in relation to the (modern) liberal conception of autonomy.

¹²⁴ See discussion in 4.3.1(b) above.

religion is implicated, the mistaken party (which would be Northpine Islamic Society, in casu), needs only to show that his or her mistake was unintentional, rather than non-negligent.¹²⁵

Moving to the external reach dimension of autonomy, if our law of contract was to deal holistically with the internal content dimension of autonomy, as outlined above, freedom of contract and *pacta sunt servanda* could operate fully against the right to freedom of religion. This means that the balancing exercise would not be as fraught, and apparently unsolvable, if courts were to approach the concept of contractual autonomy correctly.¹²⁶

Furthermore, if the Northpine Islamic Society was held bound on the basis of apparent consensus, (as opposed to actual consensus), the specific external reach dimension policy considerations appertaining to reasonable reliance, would also have to be brought into play. At the tendency level of the public policy scale therefore, the court ought to be mindful generally, of *reliance-based* distributive justice concerns (for instance, those considerations that traditionally have been housed within the law of delict and have been subordinate to freedom of contract – in casu this may translate loosely to ‘insult’ (or impairment of dignity) of the broader Muslim community of South Africa). Looking then at the enforceability level of the public policy scale, the court should be alert to the circumstances in which the mistaken and non-mistaken parties find themselves, in the particular context of the case (for instance, the presence or absence of tangible harm to the mistaken and non-mistaken party respectively – for Garden Cities Incorporated, the harm may comprise the noise pollution/nuisance experienced by non-Muslim members of the community, in having to hear the ‘azaan’ five times a day; for Northpine Islamic Society, the harm may relate to the specific implications for its individual members, of inadequate expression of a fundamental tenet of Islam).¹²⁷

This brings me to my final point on *Garden Cities*. The court’s engagement with the right to freedom of religion itself was not very rigorous. At the tendency level of the legality enquiry, the court ought carefully to have evaluated the general nature of the contractual clause that was before it, and to

¹²⁵ See discussion of the doctrine of mistake in chapter 2 at 2.3.3(c).

¹²⁶ Van der Schyff op cit note 88 at 379-380.

¹²⁷ See discussion of the doctrine of mistake in chapter 2 at 2.3.3(c).

have considered its broader impact on the relationship between the constitutional self and the right to freedom of religion, in post-apartheid South African society. In doing so, the court ought to have been more mindful also, of the s 15(1) right to freedom of religion's communal dimension, as complemented by ss 30 and 31 of the Constitution. Finally, it should have highlighted the overarching prohibition of unfair discrimination on the basis of religion, conscience or belief. In this respect, it should have highlighted also, the potential for intersectional unfair discrimination, especially on the basis of race, given the strong intersection in South African society between religion, race and community.¹²⁸

In more concrete terms, I submit that if the court had engaged more rigorously with s 15(1), it is likely to have uncovered the tendency of a *Garden Cities* type of contractual clause, to reinforce apartheid's marginalisation of persons (and communities) observing Islamic norms and practices. In post-apartheid South Africa, it is arguable that the *Garden Cities* type of contractual clause would tend to feature mostly in (previously advantaged) residential areas, in relation to practices of alternate (and usually, minority) religions that may be unfamiliar to established residents. Furthermore, to the extent that an alternate religious practice may impact on the status quo dynamic of the general community space, the practice may be seen as an unwelcome intrusion, by those members of the broader community, who are not associated with the relevant religion. Accordingly, the *Garden Cities* type of clause could be used potentially to regulate or even avoid completely, by way of contract, *any* unwelcome intrusion (even if reasonable), by an alternate religious practice. This cannot be acceptable in the post-apartheid era, where the s 15(1) vision of an inclusive and tolerant South African society, which celebrates its diversity, is crucial.

In the final event, as concerns the enforceability of the *Garden Cities* contractual clause,¹²⁹ the court ought fully to have interrogated the particular circumstances of the contracting parties, at the time of enforcement of the clause, in order to determine whether, the Northpine Islamic Society's right to

¹²⁸ As per s 9(3) read with s 9(4) of the Constitution, as well as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹²⁹ Strictly speaking, if the tendency level of the enquiry shows that the clause is against public policy, the enforceability level of the enquiry would not be necessary.

freedom of religion would be unreasonably and unjustifiably infringed, if Garden Cities Incorporated was allowed to enforce the clause.¹³⁰ Here, the court could have sought guidance from the restraint of trade jurisprudence, as to how it should conduct the ‘enforceability level’ of the public policy, balancing exercise. In this respect, a particularly influential factor, could be the fact that the Northpine Islamic Society represents the District Six Muslim community, a community that may have an especially oppressive, ‘forced-removals’, apartheid history.¹³¹

(v) *MEC for Education, KwaZulu-Natal v Pillay*

At the outset, it must be noted that, although this case involved a State School and therefore, the State, its facts (as well as some of the legal principles discussed by the CC) tend to lend themselves to application of the s 15(1) right in the private law context, too. Accordingly, I will focus on the facts of this case insofar as the learner’s parent had signed the School’s code of conduct that contained the relevant provision and further postulate, how a court ought to handle the matter, if instead, the school were a private school or individual.

As mentioned above, the *Pillay* scenario involved a clause that appeared neutral, but had the inadvertent effect of impinging on a party’s freedom of religion. In other words, it is unlikely that upon agreement to the clause, the parties applied their minds specifically, to the implications of the clause, in relation to the right to freedom of religion, belief and opinion. On the contrary, in the context of a multi-cultural, diverse and tolerant, post-apartheid South Africa, it is more likely that the parties would expect the clause to operate rather, in a manner that would at least respect, if not positively accommodate, this fundamental right.¹³²

¹³⁰ In this respect, the presence of unequal bargaining power may be a factor that could indicate the substantive unfairness of the contract.

¹³¹ Evidence of these hard facts would need to be brought before the court.

¹³² *Pillay* supra note 81 at paras 78-79; Lenta op cit note 83 at 297-299. See further, Lourens Du Plessis ‘Affirmation and celebration of the ‘religious Other’ in South Africa’s constitutional jurisprudence on religious and related rights: Memorial constitutionalism in action?’ (2008) 8 *African Human Rights Law Journal* 376; Ntombizozo Dyani and Mtendeweka Owen Mhango ‘The protection of religious freedom under the Promotion of Equality and Prevention of Unfair Discrimination Act – *Member of the Executive Council for Education: KwaZulu-Natal v Pillay*’ (2009) 72 *THRHR* 486.

In other words, when dealing with an indirect contractual restriction, the emphasis, in terms of the foundational constitutional triage, shifts from freedom to equality (coupled with dignity as constraint). Indeed, the CC accepted as much, in its treatment of the *Pillay* case as an ‘equality case’ that had to be resolved by way of an application of the Promotion of Equality and Prevention of Unfair Discrimination Act.¹³³ Admittedly, this case involved a State school and as such, the court did not pay much attention to the implications of the clause in contract law. Nevertheless, s 9(4) of the Constitution makes clear that private persons are also bound by the Promotion of Equality and Prevention of Unfair Discrimination Act.¹³⁴ Accordingly, the court’s emphasis on equality ought to apply also, when dealing with two private individuals.

The pertinent question then, is how to translate and situate the court’s vertical approach, to an indirect contractual restriction, within the constitutionalised contract law framework.¹³⁵

First, looking at the internal content dimension of contractual autonomy, it is necessarily determined on conclusion of the contract. As such, when agreeing to a facially neutral clause, the internal content dimension of contractual autonomy is unlikely to implicate the constitutional right to freedom of religion, belief and opinion, given that the parties did not at that point anticipate its application. A thinner, more abstract concept of autonomy therefore, would apply generally in the *Pillay*-type of case.¹³⁶

At the same time, the external reach dimension of contractual autonomy would, at both the tendency and enforceability levels of the public policy enquiry, elevate the equality dimension of the foundational constitutional triage, especially in relation to the enforceability level of the public policy scale. It is in

¹³³ Act 4 of 2000; *Pillay* supra note 81 at paras 69-79. For further discussion of this case, see Du Plessis op cit note 132 at 396-407; Patrick Lenta ‘Cultural and religious accommodations to school uniform regulations’ (2008) 1 *Constitutional Court Review* 259. More generally, see Patrick Lenta ‘Is there a right to religious exemptions’ (2012) 129 *SALJ* 303.

¹³⁴ Section 9(4) of the Constitution reads,

“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

¹³⁵ This is necessary if we want to avoid parallel systems of contract law from being created – see discussion in chapter 1 at 1.2.1 on the importance of a single, integrated, constitutionalised system of contract law.

¹³⁶ As per the foundational constitutional triage. Note also, that given that the contract was signed, the principle of caveat subscriptor would apply. On caveat subscriptor, see discussion in 4.3.3(c) below.

conducting this balancing exercise that the Constitutional Court's approach to Ms Pillay's wearing of the nose stud, as an expression of her right to freedom of religion and culture, can be adopted.

Notably, the consideration of freedom of contract was not central. Rather, having established that the religious practice was important to Ms Pillay, equality occupied centre stage. This meant that Ms Pillay could not, on the basis of her right to freedom of religion and culture, be unfairly discriminated against. Here, the court looked at the importance of the school's purpose for having the clause and whether, a granting of an exemption to Ms Pillay, in relation to her nose ring, would defeat that purpose. The court held that it would not and accordingly, that Ms Pillay should have been exempted from the operation of the clause in this case.¹³⁷

So, in relation to the external reach dimension of contractual autonomy, the CC's approach would translate into freedom of contract not being the primary consideration, at either the tendency, or the enforceability, level of the public policy enquiry. Rather, when dealing with a *Pillay*-type of clause, the focus should be on (substantive) equality. Further, at the enforceability level of the enquiry, most crucial would be the need to weigh up the importance of the particular religious practice to the affected contractant, against the importance of the particular purpose that is served by the relevant prohibitive clause, in the particular circumstances of the case. Significantly, this approach appears to resonate also, with the restraint of trade jurisprudence, on the legal enforceability of contracts. In conducting the enforceability enquiry therefore, the courts should draw from and build upon this jurisprudence too.

In the end therefore, the upshot of the *Pillay* judgment is that we have guidance from the Constitutional Court itself, in terms of how to interpret and apply s 15(1), read together with s 9(4), in relation to our common law of contract.

(vi) *The concept of 'reasonable accommodation' and contract law*

Although the *Pillay*-type scenario lends itself to a forbearance remedy, of the relevant clause simply being unenforceable, in the circumstances of wearing

¹³⁷ *Pillay* supra note 81 at paras 101-102. The provision, it was argued, was meant to promote discipline amongst learners – see para 22.

the nose-stud to school, s 15(1) may well require, a private individual (contractant) to take *positive* steps, to accommodate an individual (co-contractant)'s right to exercise his or her freedom of religion, in the course of the conclusion and/or operation of contracts. This is based on the concept of 'reasonable accommodation', as espoused by s 15(1) of the Constitution.¹³⁸

The concept of 'reasonable accommodation' raises a number of broader substantive issues within the sphere of contract law. Most significantly, the duty of a contractant, to accommodate a co-contractant's right to exercise his or her freedom of religion, may impinge on the contractant's very exercise of contractual autonomy. This could be the case, for instance, where a Muslim learner insists on attending a particular (private) Catholic school, for some reason. In such a case, could the Catholic school be compelled to admit her into the school and if so, to what extent would the school need to accommodate her religious beliefs?

Arguably, these questions fall to be dealt with, primarily in terms of the internal dimension of contractual autonomy, as complemented by the development of an *implied* contractual term that would be required by a constitutionalised contract law.

In relation to the internal content dimension of contractual autonomy, its *normative* facet would be especially relevant to the question of reasonable accommodation. In other words, a constitutionalised normative standard of reasonableness is pivotal to the determination of whether, the concept of reasonable accommodation would require an individual to conclude a contract, in the particular circumstances of the case. For purposes of my example therefore, the school could only be *reasonably* compelled to admit the Muslim learner. So if the reason that the Muslim learner wants to attend the school is because she is adept at science, and the school has an excellent science programme, the school could well be compelled to admit her. If however, there is a Muslim school nearby that has equally good science programme, the Catholic school may not have to admit her.¹³⁹

¹³⁸ Lenta op cit note 83 at 299.

¹³⁹ The enquiries into whether, the Catholic school would have to admit the Muslim learner, and if so, to what extent it would have to accommodate her, are necessarily intertwined. On the notion of being 'forced to contract' see discussion in 4.3.3(b) below.

Likewise, when it comes to the nature of the positive steps required, in terms of the principle of 'reasonable accommodation', our constitutionalised contract law may have to develop an implied term, to the effect that such steps need only be reasonable.¹⁴⁰ In turn, what is reasonable will depend on how onerous (and costly) such steps would be, bearing in mind always, that the duty would be imposed on a private individual, as opposed to the State. So, in relation to my example, upon admittance of the Muslim learner to the Catholic school, the school may well, in addition to granting *Pillay*-type exemptions to the learner,¹⁴¹ be required, for instance, to make available Muslim headscarves, as an added (optional) part of uniforms that learners are required to wear, in terms of the school's (contractually binding) code of conduct. In contrast, it may be unreasonable to expect the private school to build a special prayer room on its premises, so as to accommodate a particular learner (or even group of learners)'s freedom of religion.¹⁴²

In the end therefore, our contract law remedies relating to s 15(1) may need to be developed in this direction too.

4.3.3 The right to have access to health care services (s 27(1)(a))

For purposes of the discussion below, I use the right of access to health care services, as an example of a socio-economic right. Accordingly, the conclusions reached here, apply also to other rights such as, the right to have access to "adequate housing", and "sufficient food", where access is mostly by way of contract.

(a) The content of s 27 of the Constitution

In terms of s 27(1)(a) of the Constitution,

"Everyone has the right to have access to health care services, including reproductive health care..."

Further, s 27(2) provides that,

¹⁴⁰ See *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at para 28, where the court held that an implied term must be sufficiently certain and "good law in general"; cf paras 29-31.

¹⁴¹ For instance, by exempting the Muslim learner from having to attend, and/or participate, in Bible study classes.

¹⁴² Lenta op cit note 83 at 317-319.

“The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to have access to health care services].”

Finally, s 27(3) provides that,

“No one may be refused emergency medical treatment.”

At the outset, it must be noted that while we tend generally to think of socio-economic rights as operating predominantly against the State, there are clear and important *private* dimensions to such rights that need to be thought of in terms of horizontal application.

Within the private arena, access to socio-economic rights is essentially *relational* in nature, meaning that the rights are realised through relationships with others.¹⁴³ The logical legal paradigm of such relationships would be contract. In other words, the right of access to health care in the private sphere is facilitated and controlled ultimately by the common law of contract.¹⁴⁴ It stands to reason therefore, that the constitutional right of access to health care services must apply horizontally to contracts that purport, by way of an exercise of private power, to regulate the very object of the s 27 socio-economic right.

The more critical question relates to the *extent* to which, the right of access to health care services, ought to apply to our common law of contract. To begin with, classical contract law did not have a ‘conceptual foundation’ for the protection of an individual’s right of access to basic socio-economic goods and services; the idea being, that the recognition of contractual liberty suffices for this purpose.¹⁴⁵ As a result, the (potential) power¹⁴⁶ exercised by private health care providers was in no way policed by our law of contract – contracts impacting upon an individual’s access to health care were not treated any differently to other contracts. On the contrary, the thin classical liberal conception of autonomy, with its maxim of *pacta sunt servanda*, enabled health

¹⁴³ Marius Pieterse ‘Relational socio-economic rights’ (2009) 25 *SAJHR* 198 at 198-202.

¹⁴⁴ Pieterse op cit note 143 at 201-202. See also Marius Pieterse ‘Indirect horizontal application of the right to have access to health care services’ (2007) 23 *SAJHR* 157 at 158-159.

¹⁴⁵ Sandra Liebenberg ‘The application of socio-economic rights to private law’ (2008) *TSAR* 464 at 475.

¹⁴⁶ As a result of superior bargaining power - on bargaining power and the general vulnerability of the consumer, see the discussion in 4.3.3(c) below.

care providers contractually even to exclude liabilities that would otherwise attach for medical malpractice or negligence.¹⁴⁷

With the advent of the Constitution however, the classical liberal position on socio-economic rights can no longer stand. Without a doubt, the constitutionalised concept of contractual autonomy, as grounded in the foundational triage of freedom, dignity and equality, must accommodate the right of access to socio-economic goods. Once again however, to what *extent*?

At first glance, the horizontal application of the s 27(1) right, when read with s 27(2), would appear merely to be negative, in the sense that a private individual must not be prevented actively from seeking medical attention by anyone.¹⁴⁸ Nevertheless, s 27(2) stipulates that the State must take reasonable measures, progressively to realise the right of access to health care. Such measures must include judicial measures which, when read with ss 8(2) and 8(3), translates into a development of the common law, including the common law of contract.¹⁴⁹ At the very least therefore, the underlying public law values associated with the constitutional recognition of the right of access to health care, must filter into contract law.¹⁵⁰ Notably, this infiltration may, in appropriate circumstances, translate into a more *positive* application of s 27(1) to contract law.

In reading s 27 with s 8(2), the precise scope of horizontal application of the right of access to health care to our common law of contract is determined by the *content* of the right (and any corresponding duties). Importantly, the content of the right of access to health care is not fixed – it is context sensitive and furthermore, depends on the socio-economic status of the particular contracting parties, as well as the influence of private power in the circumstances.¹⁵¹

Broadly speaking however, the right of access to health care services would appear to be most pertinent to the development of the internal content threshold of a more positive concept of contractual autonomy. Indeed, good health is a core requirement for the constitutional self's basic survival and

¹⁴⁷ See for instance, the scenario in *Afrox* supra note 14.

¹⁴⁸ Liebenberg op cit note 145 at 467-468.

¹⁴⁹ Liebenberg op cit note 145 at 468 citing Jonathan Klaaren 'A remedial interpretation of the Treatment Action Campaign decision' (2003) 19 *SAJHR* 455 at 460-461.

¹⁵⁰ Pieterse op cit note 144 at 160-169.

¹⁵¹ Liebenberg op cit note 145 at 467; Pieterse op cit note 144 at 161.

ensuing ability to pursue his or her vision of the good life.¹⁵² In the words of Sandra Liebenberg,

“The purpose of [socio-economic] rights is to ensure that everyone has access to the socio-economic goods and services referred to in the relevant provisions. These goods and services must be adequate in quality and quantity so as to facilitate the development of people to their full potential and their participation as [substantive] equals in all spheres of society.”¹⁵³

Articulated further, s 27(1) serves to recognise the right of access to health care, as one of the material requirements, necessary for the protection of an individual’s fundamental human rights and the effective realisation of his or her life aspirations. Good health and general well-being are crucial for purposes of empowering an individual to live with dignity, making real choices for him or herself, on a substantively equal footing with all other individuals.¹⁵⁴

In relation to the external reach dimension of contractual autonomy then, an enquiry must be cognisant of health’s linkage also to *collective* dignity - the good health of every member of a community is an important function of collective dignity. Indeed, the right of access to health care services recognises the values of human solidarity and interdependence as especially poignant in South Africa, where conditions of ‘poverty and material deprivation’ remain a ‘lived reality’ for a majority of South Africans.¹⁵⁵ In other words, health must be appreciated as a crucial collective cog which, at one and the same time, is a product of, and exacerbates, socio-economic vulnerabilities. The HIV Aids pandemic epitomises this reality – whereas those that live below the poverty line are especially vulnerable in terms of contracting the virus, by reason, inter alia, of lack of access to adequate health care, (sex) education and economic resources, the contracting of the virus itself exacerbates conditions of disadvantage and poverty. For women, this reality is often aggravated by gender-based relational power structures,¹⁵⁶ which impede access to socio-economic rights. Most notably, sex (and the attending health issues) becomes a systemic weapon that is used against women, whether violently or otherwise,

¹⁵² Marius Pieterse ‘The interdependence of rights to health and autonomy in South Africa’ (2008) 125 *SALJ* 553 at 555-557.

¹⁵³ Liebenberg op cit note 145 at 473.

¹⁵⁴ *Ibid.*

¹⁵⁵ Pieterse op cit note 144 at 157-159. See also Currie and De Waal op cit note 1 at 593 especially footnote 117.

¹⁵⁶ Pieterse op cit note 143 at 201-205. South African society is still very patriarchal in nature, so that, women, are often (financially) dependent on their male counterparts.

to entrench patterns of dependency and so, undermines the intrinsic dignity and equality of South African society as a whole.

Moving on to the question of *how* s 27(1) would apply concretely to contracts that implicate a party's right of access to health care, I look at the case of *Afrox Healthcare Bpk v Strydom*.¹⁵⁷ Before doing so however, I consider the possibility of compelling a private health care provider to contract with an individual in need of health care.

(b) Forced to contract?

To begin with, s 27(3) compels health care providers, whether public or private, to provide emergency medical treatment.¹⁵⁸ More significantly, if a contract is accepted as the appropriate legal paradigm, to regulate the relationship between the (private) health care provider and the patient, the implication is that s 27(3) *forces* a health care provider to contract with the patient. To expound, in the case of a medical emergency (as contemplated by s 27(3)), the foundational constitutional triage articulates a conception of contractual autonomy, which prefers a more collectivist understanding of each of the values and moreover, elevates the values of dignity (as constraint) and (substantive) equality, above that of freedom.¹⁵⁹

Arguably, the main reason for s 27(3), at least in relation to the private realm, is to prevent the prevailing power dynamic, between (private) health care providers and (impending) patients, from frustrating the receipt of (potentially life-saving) emergency medical care. The implication for contracts therefore, is that the substantive right not to be refused emergency medical treatment

¹⁵⁷ *Afrox* supra note 14.

¹⁵⁸ Note, that in terms of emergency medical treatment, the Constitution guarantees treatment itself, as opposed to mere access to treatment. Note further, that s 27(3) forms the basis of the subsequently enacted s 5 of the National Health Act 61 of 2003, in terms of which, "[a] health care provider, health worker or health establishment [whether public or private] may not refuse a person emergency medical treatment." On the horizontality of s 27(3), see Marius Pieterse 'Enforcing the right not to be refused emergency medical treatment: Towards appropriate relief' (2007) 18 *Stell LR* 75 at 78-80; 88; see also Currie and De Waal op cit note 1 at 592-594.

¹⁵⁹ See *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) at para 51, where Sachs J submits:

"The special attention given by s 27(3) to non-refusal of emergency medical treatment relates to the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse. It provides reassurance to all members of society that accident and emergency departments will be able to deal with the unforeseeable catastrophes which could befall any person, anywhere and at any time."

For discussion, see Pieterse op cit note 158 at 77-80.

comprises an example of where the Constitution has stepped in, to mitigate the general imbalance of bargaining power, between health care providers and patients, when contracting – in the context of a medical emergency, the basic principle, in terms of the Constitution, is that a health care provider has no say as to *whether* to contract with the particular person in need of care.

Using this principle as the point of departure then, it becomes important to know what precisely constitutes “emergency medical treatment” because this, in turn, will determine the *extent* to which a (private) health care provider can be compelled to contract with the patient in need of such emergency treatment.

Here, the discussion of emergency medical treatment in *Soobramoney v Minister of Health, KwaZulu-Natal*¹⁶⁰ may be helpful. In brief, the CC defined emergency medical treatment as the urgent medical treatment required in those circumstances, where a person experiences a sudden, unexpected (physical and/or psychological) trauma.¹⁶¹ Further, the CC submitted that the extent of the obligations imposed by s 27(3) should be interpreted against the backdrop of s 27(2), so that, the resource constraints of the State are borne in mind.¹⁶² Finally, the CC delineated the duties imposed by s 27(3) in negative terms, in the sense that, where emergency care is available and adequate, the health care provider may not turn away any person in need of such care. Notably, the CC did not outline any corresponding positive obligations for the State actively to ensure that, emergency medical treatment is available and adequate in the first place.¹⁶³

The CC’s interpretation of s 27(3) in *Soobramoney*¹⁶⁴ has been subject to criticism, largely due to its watering down of the provision’s (potentially) transformative role in the post-apartheid era.¹⁶⁵ Nevertheless, the criticism relates mainly to the extent of the obligations imposed by s 27(3) on the *State*,

¹⁶⁰ *Soobramoney* supra note 159 at paras 11-20; 38; 51. Note further, that the CC dealt with the operation of s 27(3) against the State. See also Pieterse op cit note 158 at 83-84.

¹⁶¹ *Soobramoney* supra note 159 at paras 20; 38; 50. See also Pieterse op cit note 158 at 80; 83, where “serious injuries sustained in motor vehicle accidents” and “chest pains possibly indicating imminent cardiac arrest” are cited as examples of medical emergencies, contemplated by s 27(3).

¹⁶² *Soobramoney* supra note 159 at paras 29-30; 43; 52-54; 59; Pieterse op cit note 158 at 83.

¹⁶³ Pieterse op cit note 158 at 84.

¹⁶⁴ *Soobramoney* supra note 159 at para 20.

¹⁶⁵ Pieterse op cit note 158 at 83-85 and the authorities cited there.

rather than private individuals. In general terms, it may well be appropriate for the extent of the contractual obligations of private health care providers, to be delineated in terms of the narrower *Soobramoney* definition of emergency medical treatment. The only caveat would be that the CC's contemplated application of s 27(2), in relation to s 27(3), is not suited to the private law context, given that s 27(2) refers to the resources of the State alone. Rather, resource constraints of private health care providers ought to be accommodated under the *scope* of horizontal application enquiry, as per s 8(2) of the Bill of Rights. Accordingly, as with all enumerated rights, the extent of the duty to provide emergency medical treatment, in terms of the imposed contract, must depend likewise on the context in which s 27(3) finds application, (both generally, when dealing with emergency medical treatment contracts and specifically, in relation to the particular contract and parties before the court).¹⁶⁶

So, bringing this interpretation back to the internal content dimension of contractual autonomy, the values of dignity and equality, as outlined earlier, would dominate the triage's delineation of health care providers' freedom of contract, in relation to emergency medical treatment – whereas providers have no say as to *whether* to contract in the narrowly defined emergency context, they remain free to exercise their autonomy in relation to the terms upon which they contract. Further, their freedom not to contract in non-emergency contexts remains valid.¹⁶⁷

Still, the terms of an emergency treatment contract may be restricted, insofar as they cannot lead constructively to a denial of emergency medical treatment by, for instance, insisting on payment upfront. Health care providers can however, at least charge a reasonable price for their services.¹⁶⁸ In other words, s 27(3) requires the contents of emergency medical treatment contracts, also to be reasonable, both generally and in the particular circumstances of the case.¹⁶⁹

¹⁶⁶ As per s 8(2) read with ss 39(1) and 39(2) of the Constitution.

¹⁶⁷ At least insofar as s 9(4) of the Constitution does not apply. See discussion of s 9(4) of the Constitution below.

¹⁶⁸ DL Pearmain 'Contracting for socio-economic rights: A contradiction in terms? (1)' (2006) 69 *THRHR* 287 at 291; Pieterse op cit note 158 at 80-81.

¹⁶⁹ This could be a constitutionally implied term. See *York Timbers* supra note 140 at para 28; cf paras 29-31. See also, the discussion in 4.3.2(b)(vi) above.

In practical terms, this means that patients could challenge the reasonableness of the terms of such emergency treatment contracts. This is where the external reach dimension of contractual autonomy, is most likely to come into play. Here, I would submit, once again, that a s 36(1)-type standard of reasonableness ought to be invoked, where on the tendency level of the public policy scale, the broader implications for (economically) sustainable and quality private health care provision in South Africa, ought to be taken into account.¹⁷⁰ Further, on the enforceability level of the scale, an important factor will be the nature of the particular health care provider before the court - for instance, whether it is an individual medical practitioner or a big private hospital - and its ability in the circumstances of the case, to have provided adequate emergency medical care.

On a final note, the other constitutional provision that may force one to contract in this context is s 9(4). Briefly stated, s 9(4) prevents a person from discriminating unfairly against another, on any of the grounds listed in s 9(3). In other words, a health care provider cannot refuse to contract with a (potential) patient, whether in an emergency situation or not, if such refusal of access to health services would amount to unfair discrimination.¹⁷¹ Here, the foundational constitutional triage, read with ss 9 and 27 of the Constitution, articulates a conception of contractual autonomy, which elevates the values of substantive equality and ensuing dignity, above that of freedom. Once again however, although the provider may have no say as to whether to contract, this would not prevent it, along the same lines as s 27(3), from at least negotiating a contract on reasonable terms and so, for instance, charging a reasonable price for its services.¹⁷²

¹⁷⁰ Pieterse op cit note 158 at 78. Here, the general failings of emergency health care provision in the public sphere, would also be relevant.

¹⁷¹ A statutory example of this obligation can be found in the Medical Schemes Act 131 of 1998, which prohibits schemes from discriminating unfairly, when deciding on membership applications. In terms of s 24(2)(e) of the Medical Schemes Act,

“(2) No medical scheme should be registered under this section unless the Council is satisfied that –

(e) the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health;”.

See also s 29(1)(n) of the Medical Schemes Act.

¹⁷² Pearmain op cit note 168 at 291.

(c) *Afrox Healthcare Bpk v Strydom*

In brief, this case dealt with a contract between Mr Strydom and a private hospital, run by Afrox Healthcare Bpk. On admission to the hospital for an operation, Mr Strydom had signed a contract with the hospital, in terms of which, he agreed, inter alia, to an exclusion clause. The exclusion clause excluded liability of the hospital for the negligence of its staff. Accordingly, when Mr Strydom sued the hospital for damages suffered, as a result of a nurse's negligent post-operative care, the hospital raised the exclusion clause as a defence.¹⁷³

In turn, Mr Strydom purported to invoke the doctrine of mistake. He argued that he was mistaken about the existence of the exclusion clause in the contract, because it was an unexpected clause. As such, he explained that Afrox had had a legal duty to draw his attention to the exclusion clause, before it could be binding on him and that Afrox had failed to comply with this legal duty. (To expound, Afrox had failed to draw Mr Strydom's attention to the unexpected exclusion clause and so, made a misrepresentation by omission, in relation to the existence of the clause. The argument therefore, was that Afrox had caused Mr Strydom's mistake, by its misrepresentation and thereby, rendered his mistake justus (legally excusable)).¹⁷⁴

Further, Mr Strydom argued that the clause was contrary to public policy firstly, because in concluding the contract, he was in a weaker bargaining position than Afrox, in relation to the exclusion clause. Secondly, because the exclusion clause undermined s 39(2) of the Constitution, insofar as it undermined the spirit, purport and objects of the s 27(1)(a) right of access to health care. Mr Strydom argued that his right of access to health care services required such services to be rendered in a professional (non-negligent) manner. In the final event, Mr Strydom argued that even if the two preceding public policy arguments failed, the clause was nevertheless unenforceable on the basis that it was unreasonable, unfair and in conflict with the principle of good faith.¹⁷⁵

¹⁷³ *Afrox* supra note 14 at paras 2-3.

¹⁷⁴ *Afrox* supra note 14 at para 7. See also, the discussion of the doctrine of mistake in chapter 2 at 2.3.3(c).

¹⁷⁵ *Afrox* supra note 14 at para 7.

In dealing with Mr Strydom's first argument, the court applied the caveat subscriptor rule,¹⁷⁶ and held further, that there was no legal duty to point out the exclusion clause, because it was not an unexpected clause. The court explained that an exclusion clause is "the rule rather than the exception" in standard form contracts. The doctrine of mistake therefore, was not applicable. In this respect, the court emphasised that the test as to whether a clause is unexpected did not depend on the subjective expectations of Mr Strydom, as to the contents of his contract with Afrox. Rather, it was an objective test as to whether an exclusion clause is to be expected (generally) in such a contract.¹⁷⁷

In terms of whether the exclusion clause was contrary to public policy, the court rejected the argument that Mr Strydom was in a weaker bargaining position than Afrox, on the basis that there was no evidence of this (hard) fact.¹⁷⁸ Further, whilst the court was willing to accept that s 27(1)(a) and the foundational constitutional values were applicable in the circumstances,¹⁷⁹ it held ultimately that freedom of contract and *pacta sunt servanda* prevailed, because there were sufficient safeguards (outside of contract law), to ensure professional, (non-negligent) health care.¹⁸⁰ Finally, the court dismissed Mr Strydom's good faith argument on the basis that good faith was an underlying value that could not override established legal rules.¹⁸¹

Once again, in approaching this particular case, it is submitted that the court's analysis¹⁸² could well have benefitted from distinguishing at the outset, between the *internal* content and *external* reach dimensions of contractual

¹⁷⁶ Briefly stated, in terms of the caveat subscriptor rule, a party is bound to a contract that he or she signs, whether he or she read it or not - *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A).

¹⁷⁷ *Afrox* supra note 14 at para 36.

¹⁷⁸ *Afrox* supra note 14 at para 12.

¹⁷⁹ *Afrox* supra note 14 at paras 17-18.

¹⁸⁰ *Afrox* supra note 14 at paras 23-24.

¹⁸¹ *Afrox* supra note 14 at para 32. For further discussion of this case, see Danie Brand 'Disclaimers in hospital admission contracts and constitutional health rights *Afrox Healthcare v Strydom*' (2002) 3 *ESR Review* 17; Dire Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Healthcare v Strydom*' (2002) 17 *SA Public Law* 473; RM Jansen and BS Smith 'Hospital disclaimers: *Afrox Healthcare v Strydom*' (2003) 28 *Journal for Juridical Sciences* 210; Tjakie Naude and Gerhard Lubbe 'Exemption clauses – A rethink occasioned, *Afrox Healthcare Bpk v Strydom*' (2005) 122 *SALJ* 441; Deeksha Bhana and Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *SALJ* 865 at 875-876; 883-889. More generally, see H Lerm 'Exclusionary clauses in medical contracts revisited' 2011 (74) *THRHR* 47.

¹⁸² As well as the parties' framing of the case.

autonomy, and then, properly situating the relevant considerations within these two dimensions.

Dealing first with the internal content dimension, socio-economic rights foster a more positive, capabilities-based approach to autonomy. As discussed earlier, socio-economic rights ought to inform the basic content threshold, for an exercise of a choice, in substance. In other words, the right of access to health care is likely to infiltrate the initial requirement of contractual capacity, as well as the doctrines articulating improperly obtained consensus and mistake.

In terms of the element of contractual capacity, our law should now accommodate a contractant's subjective feelings of vulnerability, pain and distress when dealing with a health issue, with a view ultimately to developing a fuller conception of autonomy.¹⁸³ Likewise, our law should be alert to the reality that illness itself can impact on contractual capacity, by way of the symptoms of an illness that are experienced and/or the side-effects of medication taken. Indeed, taking account of these factors would dovetail with the subjective nature of the contractual capacity enquiry (and, which could have been investigated in *Afrox* had the issue been raised).

That said, some authors have argued that the extant element of contractual capacity *limits* private access to health care services by child-headed households, as well as the unassisted elderly and mentally ill, and for this reason, its requirements ought to be relaxed, when dealing with such vulnerable persons.¹⁸⁴ To do so however, would be to misunderstand the function of contract law and contractual autonomy itself. As outlined in Chapter Two, contract law's axis of contractual autonomy is meant to attribute liability to

¹⁸³ Pieterse op cit note 152 at 565-567; Pearmain op cit note 168 at 291-293.

¹⁸⁴ Pearmain op cit note 168 at 292-293, who highlights the difficulties of contractual capacity, as a function of access to various socio-economic rights:

"A lack of contractual capacity or bargaining power is just an indirect, systemic means of rationing access to limited resources since, all things being equal, only those with contractual capacity and sufficient bargaining power will be able to access such resources to the fullest...It is in the nature of things that the needs of the poor, the young, the elderly and the disabled for housing, food, water and health care will be the most urgent and it is also in the nature of things that their capacity to contract and their bargaining power is likely to be the least effective...in alleviating their situation."

See further, Pearmain op cit note 168 at 296-297; DL Pearmain 'Contracting for socio-economic rights: A contradiction in terms? (2)' (2006) 69 *THRHR* 466 at 474-477; Pieterse op cit note 143 at 201-202; 207; Marius Pieterse 'Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa' (2003) 14 *Stell LR* 3 at 19; Catherine Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253 at 272-273.

a contracting party, basically in terms of his or her actual (subjective) or apparent (objective) exercise of autonomy (as per the internal content dimension of contractual autonomy). Importantly, the underlying premise (and essential pre-requisite) here, is that the contracting party does, in fact, have the *ability* to exercise such (actual or apparent) autonomy. Hence, the foundational element of contractual capacity – without the requisite capacity, there simply cannot be a valid exercise of autonomy by an individual, for the purposes of contract law.

In the end, therefore, a relaxation of the element of contractual capacity would refute our law's very foundation of contractual autonomy and voluntarily assumed obligations. To be sure, the legal lacuna, as identified by the relevant authors, resides not in contract law, but rather, in the laws of guardianship and curatorship respectively. As such, the concern regarding the impaired capacity of the respective vulnerable groups must be addressed there.¹⁸⁵

Moving on to the issue of bargaining power, the earlier proposed doctrine of abuse of unequal bargaining power must likewise be relevant, in relation to contracts for the provision of health care. Here, the general power dynamic between (private) health care providers and patients is dependent on several factors.

To begin with, the socio-economic status of a patient is directly proportional to the extent of enjoyment of the right of access to health care services. This is especially so, in terms of the quality of health care: the higher the cost of care, the better the quality that is generally expected. So, in relation to Mr Strydom, his bargaining power, in terms of the quality of care that he could have negotiated for, in his contract with Afrox, would depend, inter alia, on how much he was willing/able to pay for such care.¹⁸⁶

That said, a more significant factor would be the reality of certain standard terms that tend to be included in all health care contracts of a particular kind. So, for instance, if as in *Afrox*, the exclusion clause is “the rule rather than the exception” in all (private) hospital contracts with patients, and furthermore, no hospital would be willing to admit a patient without such

¹⁸⁵ On the laws of guardianship and curatorship, see generally, RA Jordaan and CJ Davel *Law of Persons* 4ed (2005) at chapters 4; 6.

¹⁸⁶ This position can be justified in terms of basic economics of supply and demand.

exclusion clause in the contract, Mr Strydom would in effect have been forced to 'agree' to such clause; his bargaining power being nullified, in relation thereto.¹⁸⁷

Additionally, information asymmetries also contribute to unequal bargaining powers, in the sense that patients generally are not privy to the economic factors, which influence the cost of health care services. Indeed, whereas the doctrine of informed consent¹⁸⁸ goes some way to balancing out information asymmetries, in terms of medical treatment options, there are no similar duties of disclosure in terms of costs of treatment and therefore, normally there is minimal contractual negotiation, in relation thereto. So, in relation to Mr Strydom, it would be relevant whether he was simply given the 'hospital bill' as per the hospital's imposed tariffs, (which tends to be the usual practice), or whether, he had negotiated the costs/tariffs upfront.

Such diluted bargaining power is exacerbated then, by the fact that patients generally *need* the relevant medical treatment and as such, are *necessarily* vulnerable in their having to rely on, and trust, health care providers to provide the appropriate care. Being in such a vulnerable position, tends to make patients' wills more pliable, in the sense that they may 'agree' to whatever terms are proposed by the health care provider, with a view simply, to getting the required treatment. Here, Mr Strydom's sensitivity and appreciation of his need for the operation, as based on the nature of his illness and his relationship with his doctor, would be relevant.

Finally, in relation to health care provision, the bargaining power enquiry must also accommodate relational undertones (which, although not necessarily pertinent to Mr Strydom per se, remain crucial for the broader progressive constitutionalisation of our contract law). Not all persons have direct contractual access to health care providers. Many are dependent on inter-personal (familial) relationships, inter alia, for the funds, transport and relief from child-care responsibility, necessary to gain the relevant access to health

¹⁸⁷ Deeksha Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 SALJ 269 at 275-278.

¹⁸⁸ Briefly stated, the doctrine of informed consent "upholds patients' rights to autonomy and meaningful participation in health-related decision-making within the doctor-patient relationship." – Pieterse op cit note 152 at 565. For a fuller discussion of the relationship between the doctrine of informed consent and the right of access to health care services, see Pieterse op cit note 152 at 565-567.

care. Such relational dependence is compounded by the deteriorating state of public health facilities.¹⁸⁹

Even so, the delineation of health care services as public or private has no relevance in the mind of the average individual. For the average individual, health care provision is associated with communal values of care-giving and benevolence. Accordingly, patients (and their next of kin) trust health care providers implicitly, to act in their best (health-care) interests, as part of a relational collectivist-type duty, which transcends the public-private divide and so, shifts emphasis away from the fact that the health care provider in question, happens to be a private entity. In relation to Mr Strydom, such trust appears to have translated into an expectation that he would not be treated negligently by hospital staff.

The upshot is that the issue of unequal bargaining power is far more complex than suggested by the court in *Afrox* and it is unfortunate, that the court did not take advantage of the opportunity to unpack this issue, in greater detail. At the very least, it could have provided guidance, as to the type of evidence and/or factors that may show the existence of unequal bargaining power, in future cases.

The final component of the internal content dimension, that ought to have been assessed in *Afrox*, is the relationship between unequal bargaining power, the caveat subscriptor rule and the doctrine of mistake.

In essence, the caveat subscriptor rule binds a party to a contract, upon signature, whether he or she has read the contract or not.¹⁹⁰ The basic rationale for this rule is that signature denotes agreement – it presumes that a party would read the proposed contract and only upon satisfaction with all of its proposed terms, would he or she sign it. Generally speaking therefore, the rule considers it unreasonable for a signatory not to read his or her contract, before signing it.

In the modern context however, standard form contracts have become proliferate and parties increasingly do not read their contracts. Accordingly, the rationale for the caveat subscriptor rule has been adjusted - whereas the original rationale still applies when contracts are in fact read, insofar as parties

¹⁸⁹ Pieterse op cit note 143 at 205-207.

¹⁹⁰ George supra note 176.

do not read their contracts, the rule assumes further, that upon signature, such parties are willing to assume the risk of being bound to contractual terms that they have not read/are not aware of.¹⁹¹ Contracting parties therefore, are still said to be bound upon the basis of actual subjective consensus.

But our courts have gone further than this. In practical terms, the application of the caveat subscriptor rule has proved quite harsh, particularly in relation to exclusion clauses that feature in standard form contracts (as in the case of *Afrox*). So, in an effort to mitigate the (potentially) harsh effect of the caveat subscriptor rule, the courts have developed the doctrine of mistake, to enable (mistaken) parties to escape any *unexpected* clauses that appear in signed, unread contracts.¹⁹² The argument is that the mistaken party was unaware and/or unwilling to assume the risk of being bound to unexpected clauses and so, should be allowed to escape the application of such clauses.¹⁹³

Nevertheless, a clause can only be unexpected if a signatory does not read his or her contract and, in terms of the caveat subscriptor rule, it is unreasonable for a signatory not to read his or her contracts. So, in allowing a party to escape a so-called 'unexpected' clause, the premise of the caveat subscriptor rule is subverted to such an extent, that it appears now, to be reasonable *not* to read one's contracts.¹⁹⁴ Indeed, our law creates an interesting anomaly: the party who does not bother to read his or her contract, may avoid the (potentially) harsh effect of the caveat subscriptor rule, by way of the doctrine of mistake, whilst the more conscientious party who does read his or her contract, may not.

The essential problem here, is that the courts have failed to appreciate that the potentially harsh operation of the caveat subscriptor rule, is not so

¹⁹¹ See generally, Minette Nortje "Unexpected terms' and caveat subscriptor' (2011) 128 *SALJ* 741; Minette Nortje 'Of reliance, self-reliance and caveat subscriptor' (2012) 129 *SALJ* 132.

¹⁹² See for instance, *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) and *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) cf *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA).

¹⁹³ See generally, Nortje (2011) op cit note 191; Nortje (2012) op cit note 191.

¹⁹⁴ This problem is compounded by the inconsistency of the courts' approach to the determination of when a clause is unexpected. In *Afrox* supra note 14, for instance, the court invoked the broader commercial context in which exclusion clauses tend to operate, and thus held that the exclusion clause, in casu, was not unexpected. In contrast, in *Mercurius Motors* supra note 192, the court focused on the tenor of the contract alone, operating in the abstract, and found that the exclusion clause in question, was unexpected. See generally, C-J Pretorius 'Exemption clauses and mistake: *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA)' (2010) 73 *THRHR* 491.

much an issue of mistake (due to not reading one's contracts), as it is an issue of the prevailing unequal bargaining power in standard form contracts. Arguably, the main reason for the increasing trend of parties not to read their contracts is that, even if a party were to read his or her contract and thereby, be alerted to (potentially) harsh clauses, he or she generally has no real power to negotiate for something else. The party either agrees to the presented contract as it is or does not contract at all.¹⁹⁵

Therefore, in a constitutional context, which recognises the potential for abuses of unequal bargaining power and so, purports to develop our contract law accordingly, the courts have an opportunity to resolve the anomaly created by the notion of unexpected clauses. So, in relation to Mr Strydom, the court could have linked the issue of unequal bargaining power, if proved, also to the operation of the caveat subscriptor rule.¹⁹⁶

Dealing finally, with the external reach dimension of autonomy, if our law of contract was to articulate the internal content dimension of autonomy, as outlined above, a fuller, more positive concept freedom of contract and *pacta sunt servanda* could operate, against the right of access to health care services.¹⁹⁷ Indeed, upon closer examination of the internal content dimension of contractual autonomy, the court in *Afrox*, would probably have uncovered the deficiency of the classical liberal conception of contractual autonomy in relation to the right of access to health care and so, would not have elevated the ensuing hegemonic understanding of freedom of contract to being a constitutional right itself.¹⁹⁸ In turn, this process would have led to a more rigorous engagement, by the court, with the s 27(1) right of access to health care services.

In terms of the first tier of the public policy scale, the court ought to have assessed the tendency of the exclusion clause that was before it, and more especially, ought to have considered its broader implications for the relationship

¹⁹⁵ Bhana op cit note 187 at 275-276.

¹⁹⁶ The SCA indicated that the presence of unequal bargaining power, if proved, would be situated within the legality enquiry. *Afrox* supra note 14 at para 12. See also chapter 3 at 3.5.1(b)(i).

¹⁹⁷ Note, that if Mr Strydom was held to be bound to the contract, on the basis of apparent consensus, the specific external reach dimension policy considerations appertaining to reasonable reliance, would also have to be brought into play. See earlier discussion in 4.3.2(b)(iv), of how apparent autonomy would operate on the public policy scale.

¹⁹⁸ *Afrox* supra note 14 at paras 17-24 especially para 23.

between the constitutional self and the socio-economic right of access to health care services, in post-apartheid South Africa. In this respect, the communal dimensions of dignity and substantive equality, as well as the potential undermining of the doctrine of informed consent, would be most pertinent.

In more concrete terms, I submit that if the court had engaged more rigorously with s 27(1), it would have exposed the potential for the *Afrox*-type of exclusion clause to undermine the important, constitutional goal of access to adequate health care, by all South Africans, particularly in light of the general failings of public health facilities. At the very least, the collectivist values of solidarity and interdependence, operating in post-apartheid South Africa, are likely to require that the standard of health care observed, must be reasonable (or non-negligent). Indeed, to hold otherwise would simply elevate contract law over the law of delict in the context of exclusion clauses, and perhaps, even in relation to the doctrine of informed consent. That said, the commercial viability of the private health care industry, in light of medical negligence liability, would also need to be borne in mind.

Yet, the notion of individuals contractually assuming the risk of a negligent, or even a grossly negligent, standard of care (as hinted at in *Afrox*), cannot be tolerated in the face of s 27(1), which envisages healthy, capable and fulfilled members of communities, across South Africa. Even so, the assumption of risk by patients, may translate to a lower economic cost (and arguably greater access to health care), for them. Nevertheless, the attending broader risk of a generally unhealthy and un-well society may be too high, unless of course, there are adequate alternate safeguards (such as, professional disciplinary bodies), that are effective in addressing such danger.

So, in the end, the decision to uphold or void the *Afrox*-type of exclusion clause must be the product, of a careful balancing of all considerations pertaining to its potential impact, on the right of access to health care services.

In the final event, as concerns the enforceability of the exclusion clause in *Afrox*, the court once again, ought to have interrogated the particular circumstances of the contracting parties, at the time of enforcement, drawing from the restraint of trade jurisprudence, as required. Here, influential factors would include the nature, size and viability of *Afrox*, as a private health care provider and a commercial enterprise. Further, in relation to Mr Strydom, his

bad faith argument would be relevant here. In particular, Mr Strydom would need to convince the court, that enforcement of the exclusion clause in the circumstances, would be in bad faith and therefore, subjectively unreasonable.¹⁹⁹ In this respect, evidence of an inequality of bargaining power on conclusion of the contract, may also attest to the unreasonableness of enforcement of the clause, in the particular circumstances of the case.

4.4 CONCLUSION

In this chapter, I surmised the main points of each of the previous chapters and teased out the pertinent connections between them. In so doing, I put together a manual for the basic constitutionalising of the substance, form and attending mechanics of operation of our common law of contract and, in particular, of contractual autonomy, in terms of the foundational constitutional triage of freedom, dignity and equality. In this respect, I highlighted also the general and case-specific dimensions of the constitutionalisation process that are mandated by ss 39(2) and 8(3) of the Bill of Rights respectively.

Thereafter, I shifted focus to the situation where a specific substantive constitutional right finds application, and considered the implications thereof. First, I looked at the three broad groupings of enumerated constitutional rights that are most often implicated in contract law cases viz. economic, civil-political and socio-economic rights.

Next, I considered the application of the guidelines for the constitutionalisation of our law of contract that I had just set out, to three different substantive constitutional rights; the right to freedom of trade, occupation and profession (s 22), the right to freedom of religion, belief and opinion (s 15(1)) and the right to have access to health care services (s 27(1)(a)). Notably, I chose these three specific rights, because they are broadly representative of three groups of rights, which are each situated differently in relation to contractual autonomy. Furthermore, they each have a special connection to the concept of autonomy. My arguments in respect each right therefore, would find broader application, at least, within the sphere of contract law.

¹⁹⁹ See discussion in chapter 3 at 3.3.3(b).

Dealing then with each right in turn, I have shown how, on the basis of their respective natures, they implicate distinct dimensions of the constitutional self and therefore contractual autonomy and attending methodologies.

In particular, I have shown how a proper invocation of the distinction between the internal and external dimensions of autonomy, and the correct situating of (especially constitutional) considerations in relation thereto, would resolve much of the judiciary's current adjudicatory problems pertaining to the constitutionalisation of our common law of contract. At present, the courts are overworking the external reach dimension of contractual autonomy, whilst its internal counterpart continues largely to assume its pre-constitutional classical liberal conception. This, I argue, effectively frustrates efforts to constitutionalise our contract law and cannot continue.

So, using the three rights, I have shown how courts can, and indeed must, over time, facilitate fairly radical change to the current conception of contractual autonomy (both externally and internally), through fairly small and mostly uncontroversial developments, that will ensure a proper application of the Constitution to contract law. I have shown further, that all of this is possible without sacrificing certainty or doctrinal coherence within our contract law. On the contrary, the systematic approach which I have advocated for here, can resolve certain inconsistencies within our law. Significantly, in the course of doing so, I have critiqued the manner in which pertinent cases have been decided, by the post-apartheid judiciary.

In the end, I have provided a blueprint for future similar litigation which, although still grounded essentially in the established common-law methodology, introduces a greater measure of flexible, purposive adjudication.

CHAPTER 5

CONCLUSION

5.1 INTRODUCTION

The distribution of private power in contemporary South African society remains a function both of apartheid policy and private law. So, whereas apartheid has been abolished, the judiciary's maintenance of the classical liberal underpinnings of private law, serves essentially to entrench the status quo (unequal) private power dynamics, distribution of wealth and attending patterns of poverty and disadvantage of the apartheid regime. In the words of Sandra Liebenberg:

“A presumption in favour of liberty rests on a seductive myth that the existing *status quo* is the result of a natural state of affairs which cannot be attributed to communal responsibility. It obscures the extent to which historical decisions, the design of political, economic and social institutions and the ‘unarticulated normative baseline’ of private law rules [including contract law rules] create and perpetuate classes of marginalised and subordinated groups...In the end, it is the power of the law which enforces prohibitions on accessing certain services and institutions if one does not have the income to pay for them. The restrictions may be justifiable. However this is precisely the point. [U]nder (sic) a constitutional dispensation which is committed to transforming unjust social [and economic] relations all legal rules [including contract law rules] are subject to scrutiny and justification in terms of the normative rights and values of the Constitution.”¹

As a result, the constitutionalisation of our private law and, in particular, our common law of contract, continues to be a critical issue for the dismantling of such systemic (private) inequities and for the concomitant realisation of the substantively progressive aims of the Constitution.² In terms of the foundational values of freedom, dignity and equality, every person should, at least, be *enabled* effectively, to unlock their potential for themselves and so, to realise their particular visions of the good life.³

¹ Sandra Liebenberg ‘*Grootboom* and the seduction of the negative/positive duties dichotomy’ (2011) 26 *SA Public Law* 37 at 47. See also Lucy Williams ‘The legal construction of poverty: Gender, “work” and the “social contract”’ (2011) 22 *Stell LR* 463 at 468-470 and chapter 1 at 1.1 especially at 1-3.

² As required in terms of ss 8 and 39 of the Constitution. See chapter 1 at 1.1; chapter 4 at 4.2.1.

³ See chapter 1 at 1.1 especially at 1-2; 1.3. See also the preamble; s 1; s 7(a) of the Constitution.

Nevertheless, although it is beyond doubt that the Bill of Rights is horizontally applicable,⁴ there has been considerable debate about the *manner* in which our system of contract law should be constitutionalised.⁵ This is the issue that I have grappled with in this thesis.

In this chapter, I present a synopsis of the arguments advanced, and conclusions reached, in this thesis. Further, I draw attention to those issues that have not been interrogated in this thesis and are left for further research. Finally, I sketch a way forward for the judicial process of constitutionalising our common law of contract.

5.2 THE ARGUMENT OF THIS THESIS

Chapter One took as its point of departure, that the common law of contract must be re-legitimated in terms of the Constitution, and in particular, the Bill of Rights. In this respect, I accepted that the Bill of Rights was horizontally applicable to the traditionally classified 'private' law of contract and focused instead, on the respective roles of ss 8 and 39 of the Constitution. I found that, whilst each of these provisions embodies elements of both direct and indirect horizontality, they can, and indeed, must work together, in order to constitutionalise our common law of contract, in a systematic and integrated manner. In the end, I showed that this calls for the constitutional development⁶ of South African contract law to take place within the common law framework,

⁴ As per ss 8 and 39 of the Constitution. See chapter 1 at 1.1; chapter 4 at 4.2.1.

⁵ See *Brisley v Drotzky* 2002 (4) SA 1 (SCA) at paras 40-44; 69-69; 88-95; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras 17-32; *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA) at para 12; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at paras 6-16; *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at paras 15; 23-30. See also Johan Van der Walt 'Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence' (2001) 17 *SAJHR* 341; Christopher J Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in South African law' (2003) 19 *SAJHR* 57; Deeksha Bhana and Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: *Brisley* and *Afrox* revisited' (2005) 122 *SALJ* 865; Deeksha Bhana 'The law of contract and the Constitution: *Napier v Barkhuizen* (SCA)' (2007) 124 *SALJ* 269; Stuart Woolman 'The amazing vanishing Bill of Rights' (2007) 124 *SALJ* 762; PJ Sutherland 'Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 CC – Part 1' (2008) 19 *Stell LR* 390. See further Luanda Hawthorne 'The principle of equality in the law of contract' (1995) 58 *THRHR* 157; Gerhard Lubbe 'Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law' (2004) 121 *SALJ* 395; Dire Tladi 'One step forward, two steps back for constitutionalising the common law: *Afrox Healthcare v Strydom*' (2002) 17 *SA Public Law* 473; Kevin Hopkins 'Insurance policies and the Bill of Rights: Rethinking the sanctity of contract paradigm' (2002) 119 *SALJ* 155.

⁶ As opposed to the constitutional *assessment* of contract law.

though with constitutional adjustments, as required.⁷ In this respect, I emphasised the general and case-specific dimensions of the constitutionalisation process that is contemplated by ss 39(2) and 8(3) of the Constitution respectively. Whilst the entire body of contract law must be constitutionalised incrementally, over time, (essentially within the common law tradition), constitutional justice must be done simultaneously, in every individual contract case, too.

Importantly, I took as my fundamental premise, that the principle of contractual autonomy comprises, and must continue to comprise, the keystone principle of our contract law. In doing so, I set out the scope of my thesis as one that would interrogate the substance, form and attending legal mechanics of operation of contractual autonomy; the idea being that a constitutionalisation of contractual autonomy would, in effect, constitutionalise or, at the very least, set the stage for the constitutionalisation of our contract law, in its entirety.⁸

In Chapter Two, I focused on the substance of contractual autonomy. I began my analysis by unpacking its long established (neo-) classical liberal underpinnings. In particular, I showed how the classical liberal preference for an atomistic, independent conception of the contracting self, as bolstered by strongly individualist values, was out of step with the constitutional vision of the self, operating in a substantively progressive South African society. In other words, the formalistic, laissez faire (free market economy) understanding of contractual autonomy must give way to more substantive, interdependent (social market economy) conceptions, that pay greater attention to collectivist values.⁹

Having thus shown the need for a shift away from the classical liberal paradigm, I fleshed out the *constitutionalised* basis for the post-apartheid conception of contractual autonomy. For this purpose, I constructed a triage comprising the intrinsically fluid and multi-faceted foundational constitutional values of freedom, dignity and equality. This triage, in turn, formed the basis of a shifting concept of contractual autonomy that at once is context sensitive and

⁷ See chapter 1 at 1.2; chapter 4 at 4.2.1.

⁸ See chapter 1 at 1.4 especially 1.4.2.

⁹ See chapter 2 at 2.3; chapter 4 at 4.2.2.

dependent on the applicability of substantive rights, as well as on the broader constitutional vision of a post-apartheid South Africa.¹⁰

Moving to Chapter Three, I drew attention to the conservative legal culture and the attending liberal legalist methodology employed in our common law of contract. I showed how the extant contract law machine ensconces the classical liberal ideology's conception of freedom of contract and *pacta sunt servanda* and so, for the most part, frustrates bona fide efforts to constitutionalise our contract law. I argued consequently, that the legal methodology of contract law must dovetail, likewise with the foundational constitutional triage's basis of contractual autonomy. In other words, common law reasoning, with its current configuration of rules and standards, must be re-aligned with the more fluid, constitutional conception of contractual autonomy. For this process, it is imperative that legal reasoning is justifiable, both in terms of principle and policy, including the policy of legal certainty.¹¹

Finally, in Chapter Four, I consolidated the theoretical foundations of this thesis and considered the practical implications of the conclusions reached, by contemplating their application in a number of concrete contexts.¹² Here, I submitted that the foundational constitutional triage of freedom, dignity and equality must occupy centre stage where the triage is identified firstly with the 'objective normative value system' of the Bill of Rights¹³ and secondly, with any substantive constitutional right(s) finding application, both in the abstract and in more concrete terms.¹⁴

In the abstract, I focused on three broad groupings of rights – economic, civil-political and socio-economic rights – and postulated how this would implicate contractual autonomy and so, generally affect the legal outcome of a case. In more concrete terms then, I chose three rights that are broadly representative of each of the groupings and have special connections with autonomy: the economic right to freedom of trade, occupation and profession, the civil-political right to freedom of religion, belief and opinion and finally, the socio-economic right of access to health care services.

¹⁰ See chapter 2 at 2.4; chapter 4 at 4.2.2.

¹¹ See chapter 3 especially at 3.3; 3.4; chapter 4 at 4.2.3.

¹² See chapter 4 at 4.2; 4.3.

¹³ As per s 39(2) of the Constitution. See chapter 1 at 1.2.2.

¹⁴ See chapter 4 at 4.3.

In relation to each right then, I examined their basic content and nature, focusing on their interplay with the distinct dimensions of the constitutionalised contracting self, as per the foundational triage. In this respect, I emphasised the distinction between the internal (content) and external (reach) dimensions of autonomy as pivotal, and showed how a proper (substantive and methodological) invocation of this distinction in contract law, can resolve much of the uncertainty surrounding the question of how, precisely, to approach the constitutionalisation process.

The upshot is that, whilst there cannot be a ‘one-size-fits-all’ approach, with much depending on the broader and particular context of every case, a systematic and principled approach to the constitutionalisation of the current conception of contractual autonomy remains possible and, indeed, crucial. Importantly, development of the content of contractual autonomy and the attending legal method must continue to take place within the established common law framework, incrementally over time, as cases present themselves before the courts.¹⁵

5.3 LIMITATIONS OF THIS THESIS AND SUGGESTIONS FOR FURTHER RESEARCH

The focal point of this thesis has been the conceptual framework of South African contract law, operating in a constitutional context. So, whereas this thesis shows conceptually *how* to approach the constitutionalisation of contract law, this represents what ought to be the point of departure, for the constitutional exercise. There are a myriad of contexts and avenues that are yet to be explored within this conceptual framework.

To begin with, I have focused solely on the *autonomy* element of the ‘valid formation of a contract’ dimension of our contract law. Significantly, in doing so, I canvassed the classical, neo-classical and modern conceptions of contractual autonomy. However, I did not purport in any way to reconcile the relevant conceptions. Further, I did not interrogate the broader philosophical underpinnings of the concept of autonomy. Rather, I focused more narrowly on how its leading philosophical conceptions have manifested in the prevailing *legal* understandings of autonomy, and contractual autonomy, in particular.

¹⁵ See chapter 4 at 4.3.1; 4.3.2; 4.3.3.

Similarly, I did not examine the scientific or medical (psychological) meaning of autonomy and/or the ability to exercise such autonomy. Nor did I purport to deal with the collective conception of autonomy, (and therefore, the collective dimensions of freedom, dignity and equality), as exercised collectively by a group of persons, as opposed to individually.

Beyond the foundational element of contractual autonomy then, the 'contents of a contract' dimension of contract law, with its legal concepts of 'incorporation' and 'interpretation', has not been evaluated at all. Nor have the 'breach of contract' and 'contractual remedies' dimensions been examined.¹⁶ That said, these dimensions of our contract law, operating in the constitutional era, are equally grounded in the Bill of Rights. Accordingly, to the extent that these aspects of our contract law flow from the traditional common law conception of contractual autonomy,¹⁷ their constitutionalisation must flow ultimately from the reconceptualised, constitutional notion of autonomy. Further, I would submit that their constitutionalisation should take place, likewise within the conceptual framework developed in this thesis.

This brings me to an important point: In this thesis, I have not embarked, nor purported to embark, on the actual process of constitutional assessment and development of the specific rules, standards and doctrines of our contract law. For instance, in relation to the element of contractual capacity, I highlighted the potential constitutional deficiencies of its current substance and form. However, I did not purport to prescribe the actual development required. Similarly, in relation to the doctrine of mistake and the established categories of improperly obtained consensus, I simply pointed out where, and why, constitutional development may be required. At most, I have provided a framework as to *how* to approach the constitutionalisation process. The actual assessment and development aspect of the constitutionalisation process of South African contract law represents the next step, and is left for further research.

¹⁶ For a discussion of the law's current treatment of these dimensions of contract law see SWJ (Schalk) Van der Merwe, LF Van Huyssteen, MFB Reinecke and GF Lubbe *Contract General Principles* 4ed (2012) at chapters 9-11.

¹⁷ Insofar as the common intention of the parties is determinative, I would submit that these aspects of our contract law must flow from the concept of contractual autonomy.

Furthermore, I have looked, generally, only at the civil-political, socio-economic and economic groupings of rights, because these are the groupings usually implicated in contract law cases. I did not look at other groupings, like, for instance, developmental and environmental rights, or 'solidarity rights', such as self-determination rights. These may be interesting to explore in further research. Moreover, I looked only at three substantive constitutional rights, one from each grouping, that are broadly representative of the kinds of methodological adjustments and substantive jumps that need to be made within our contract law. Still, given that the enumerated constitutional rights are context-sensitive, it was not practicable to hypothesise about all potential permutations, in relation to their application. Most notably, I did not interrogate the implications for contracts, of the operation of substantive rights, at a collective level. Nor did I focus particularly, on standard form contracts or the scenario where the State is a party to a contract. The upshot therefore, is that, although we now have a conceptual framework within which to assess the implications for contracts, of the rights enumerated in the Bill of Rights, the specific implications of the different rights and the varying contexts within which they operate are left for further research.

As a common lawyer, this position regarding rights and varying contexts, dovetails also, with my emphasis in this thesis, on the constitutionalisation of the common law of contract from *within*, i.e. essentially from the common law platform, which embraces the common law tradition of incremental, judicial development, over time, as cases present themselves before the courts.

The embracing of the common law platform, (as constitutionally adjusted), also explains why I have not engaged with the debate on the subject of legislative intervention, either as a preferred or secondary route, for constitutionalising our contract law.¹⁸ This thesis has proceeded rather, on the premise that legislative intervention may not be required and that common law

¹⁸ See for instance Jonathan Lewis 'Fairness in South African contract law' (2003) 120 *SALJ* 330; Tjaki Naude 'Unfair contract terms legislation: The implications of why we need it for its formulation and application' (2006) 17 *Stell LR* 361; Tjaki Naude 'The use of black and grey lists in unfair contract terms legislation in comparative perspective' (2007) 124 *SALJ* 128; Tjaki Naude 'The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective' (2009) 126 *SALJ* 505; RD Sharrock 'Judicial control of unfair contract terms: The implications of Consumer Protection Act' (2010) 22 *SA Merc LJ* 295; Luanda Hawthorne 'Responsive governance: Consumer protection legislation and its effect on mandatory and default rules in the contract of sale' (2011) 26 *SA Public Law* 431.

development is a more doctrinally sound way of constitutionalising contract law. Even so, it may be worthwhile for further research to contemplate whether, and where, legislation would be appropriate. In this respect, recent interventions such as the National Credit Act¹⁹ and the Consumer Protection Act²⁰ ought to be assessed. Admittedly, I have not interrogated any of these pieces of legislation. Still, I submit that the interpretation of such legislation by the courts must be informed by, and dovetail with, the constitutionalised judicial approach advocated for in this thesis.²¹

In the final event, a comparative analysis of the contract laws of other jurisdictions has fallen largely beyond the scope of this thesis. This is necessarily so, given the somewhat unique South African context of transformative constitutionalism, with its mandate of doing public-law-type justice within the private law context. Nevertheless, the international experience of continental jurisdictions especially, with the concept of substantive fairness in contracts, may be informative, for purposes of the actual constitutional development of our contract law. Once again, this is left for further research.

5.4 WAY FORWARD

To sum up, the conceptual framework developed in this thesis, represents a systematic, integrated approach to the constitutionalisation of our common law of contract. Such approach, will yield a legally sound, principled and (acceptably) certain body of post-apartheid contract law, that will work toward the achievement effectively, of the broader constitutional project of a substantively progressive and transformative South African society, based on freedom, dignity and equality.

It is important to realise further, that contract law is but one building block in a private law system that is perpetuating the social and economic inequality and hardship experienced by an overwhelming majority in our country, and which, needs to change. Accordingly, there needs to be similar developments

¹⁹ 34 of 2005.

²⁰ 68 of 2008.

²¹ See chapter 1 at 1.4.2.

in other areas of private law too, also within the common law framework, and this is an urgent area for further research.

Still, in the words of the SCA:

“A court cannot attack and overthrow principles of common law from within the shadows of the Constitution”²²

This statement epitomises the general fear of private lawyers that the Constitution will create such chaos in the realm of our long-established common law system that it will lead ultimately to the common law’s demise. Indeed, this fear explains why courts, in the post-apartheid era, have resorted to a form of common law purism and ‘business as usual’ adjudication, which has not only retarded constitutional transformation, but has also stunted development in the celebrated common law tradition itself.

Nevertheless, I have shown in this thesis, that such fear is unfounded and that, the constitutionalisation and transformation of our common law of contract can be effected without sacrificing its doctrinal coherence and legal certainty. To be sure, the constitutionalisation process must take place ultimately, by invocation of the common law framework, in a manner that re-engages the basic substantive building blocks of our contract law system (i.e. contractual autonomy/freedom of contract and *pacta sunt servanda*), and then, re-imagine the way in which the courts work with them (i.e. legal methodology).

In this way, South African private law will eventually be freed from the shackles of its oppressive past and be enabled to do substantive justice between the peoples of South Africa, both individually and collectively.

²² *Brisley* supra note 5 at para 24 which reads “n Hof can nie skilling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie.” Translation from Bhana and Pieterse op cit note 5 at 873.

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