Justice Albie Sachs' contribution to the law of contract: Recognition of relational contract theory

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Introduction

The enforcement of standard contracts recently placed the law of contract at the nexus between the rule of law[1] and transformative constitutionalism. Although the Constitution is value-based and instructs the judiciary to take note of substantive values,[2] standard contract terms received the benefit of the rule of law in the decisions of *Afrox Healthcare Bpk v Strydom*[3] and *Brisley v Drotsky*.[4] Such an

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[1]The term rule of law is used in a wide sense, meaning that both government and individuals are subject to the law and that all powers must be exercised in accordance with the law. Botha 'The legitimacy of legal orders (3): Rethinking the rule of law' (2001) *THRHR* 523 at 539 where he refers to *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E) where Froneman J held that he is of the opinion that rule of law is not synonymous with rigid formalism, and that it requires social and historical contextualisation to establish personal security for the indigent underclasses (1331D).

[2]Sections 1 and 39(1) and (2).

[3]2002 6 SA 21 (SCA); The *Afrox* case illustrates the inherent contradiction powerfully. The respondent signed a document on admission to a hospital which contained an exemption clause, providing that the respondent: 'absolved the hospital and/or employees and/or agents from all liability and indemnified them from any claim instituted by any person (including a dependant of the patient) for damages or loss of whatever nature (including consequential damages or special damages of whatever nature) flowing directly or indirectly from any injury (including fatal injury) suffered by or damage caused to the patient or any illness (including terminal illness) contracted by the patient whatever the cause/causes are, except only with the exclusion of intentional omission by the hospital, its employees or agents' (32G-I).The respondent contended that the indemnity clause was contrary to the public interest, that it was in conflict with the principles of good faith and that the admission's clerk had a legal duty to draw his (the respondent's) attention to the clause which he failed to fulfil (33G-H). The judiciary responded negatively to a defence of good faith. The necessity to consider whether the indemnity clause was contrary to the principle of good faith was disposed of because it had been considered and rejected in the previous decision of *Brisley v Drotsky* 2002 4 SA 1 (SCA) at 40I. Thus, in this case the majority also gave a decision in line with a formal

interpretation provides a clear illustration of the tension between the *status quo* and the transformation of contract law and leads to the rebuttable presumption that the hegemony of the rule of law poses a barrier to attempts to realise the normative values of substantive justice. It can be argued that the question of standard contracts has acquired a constitutional dimension as such a case was brought before the Constitutional Court in 2007.

In *Barkhuizen v Napier*[5] the question arose as to whether the enforcement of a time bar clause in a short-term standard insurance contract would be consistent with public policy in terms of the constitutional dispensation. In this case the insured client, the applicant, submitted that the time limitation clause in terms of which he was required to institute a claim within ninety days (instead of the usual three years prescription period), was subject to an implied term that the parties were obliged to act in good faith.[6] It was argued that according to the requirement of good faith, enforcement of the time bar clause would be considered to be unjust,[7] because it was unconstitutional and unenforceable since it violated his right to have the matter determined by a court in terms of section 34 of the Constitution and was consequently contrary to public policy. The majority decision of the Constitutional Court laid down a rule according to which the fairness of a term should be tested, but decided in favour of *pacta sunt servanda*. It was reaffirmed that 'As the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law',[8] and that in the circumstances of the case enforcement of the time bar clause would not be contrary to public policy.[9]

Attempts to apply open norms to temper unfair contract terms have been met with an interpretation giving effect to a rule of law characterised by formality. However, during the last decennia alternative theories of contract law have been developed, which theories are characterised by the values of discretion and understanding rather than the formalistic principles of classical contract law.[10] In his minority decision in the

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application of the rule of law and rejected the notion that a court could have the discretion to refuse to enforce a valid term of a contract.

[4](N 4); In *Brisley v Drotsky* the question whether enforcement of a non-variation clause would be contrary to the principle of good faith (12B and 12G-H) was addressed. The majority of the court (Harms JA, Streicher JA and Brand JA) rejected the idea that a court would have the discretion to refuse to enforce a valid term of a contract and agreed with Hutchison ('Non-variation clauses in contract: Any escape from the Shifren straightjacket' (2001) *SALJ* 720), that good faith is not an independent free floating basis for setting aside or not enforcing contractual principles. The Supreme Court of Appeal agreed that it is a basic principle, which generally underlies the law of contract; Hawthorne 'The end of bona fides' (hereafter referred to as 'End of bona fides') (2003) *SA Merc LJ* 271.

[5]2007 5 SA 323 (CC).

[6]At 346E-F.

[7]*Id* 346F.

[8]*Id* 347G-H.

[9]*Id* 348F.

[10]Hawthorne 'Relational contract theory: Is the antagonism directed at discrete exchanges and presentiation justified?' in Glover *Essays in honour of AJ Kerr* (2006) 138; Feinman 'Relational contract

Barkhuizen case, Justice Sachs discussed several of these theories, amongst them relational contract theory, and finds the point of departure not in a mechanical interpretation of the parties' intentions according to formal principles, but rather the determination of what is deemed to be proper conduct in the circumstances.[11] Justice Sachs held that the amelioration of unfair standard terms requires a principled approach, using objective criteria consistent both with contract law principles and with sensitivity to the manner in which economic power in public affairs should be regulated to ensure standards of fairness in an open and democratic society.[12]

It appears that the fundamental principles of orthodox contract law, namely, freedom and sanctity of contract, continue to rule supreme regardless of the fact that no real freedom exists at conclusion of a standard contract. This paradigm operates squarely within the rule of law but generates decisions that invite criticism on the grounds of substantive equality and substantive justice.

This failure has inevitably led to a reconsideration of the fundamental assumptions of the classical model of contract law and has brought about the emergence of other competing theories. As identified by Justice Sachs, relational contract theory has been recognised as an alternative way in which to deal with standard form contracts in other open and democratic societies.[13] In his analysis of the tension between contractual fairness and standard contracts Sachs J emphasises the lack of transparency within the ambit of the latter.[14] Judicial recognition of relational contract theory by Sachs J in his quest to pursue fairness and reasonableness in the law of contract necessitates an explanation of the difference between contracts in terms of the classical and the relational models. Following this I will address the value of implicit dimensions in contract law and, in particular, the role of solidarity and co-operation in relational contract theory, which both mirror and reflect rules of modern consumer protection legislation. These rules are a response to the standard contract and to quote the honourable Justice Sachs: 'seek[s] to achieve [a] reconciliation of the interests of both parties to the contract on the basis of standards that acknowledge the public interest without unduly undermining the scope for individual volition'.[15] Sachs J's endorsement of the necessity that contracting parties must be aware and

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theory in context' (2000) *Northwestern Univ LR* 737 739; Adams and Brownsword *Key issues in contract* (1995) 354; Pretorius 'Individualism, collectivism and the limits of good faith' (2003) *THRHR* 638.

[11] At 374A-B.

[12] *Id* 365F-G.

[13] *Id* 371H-372A and Sachs' reference to s 39(1) of the Constitution which provides that: 'When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'.

[14] In paras 357D-F he states; 'The basic issue, … is whether, objectively speaking and taking account of the fact that the clause relied upon was contained in a standard-form document annexed to but not forming an intrinsic part of what appears to have been the actual negotiated terms of the contract, the enforcement of the time bar would be consistent with public policy in our new constitutional dispensation'.

[15] At 374H especially 376C-375B.

have knowledge and understanding of all the terms in their contract is found in the mandatory information obligations of consumer protection legislation. It will be argued that these obligations can be transposed directly or indirectly by means of the relational norms of solidarity and co-operation onto classical contract law.

The context of classical contract law

The rational individualist is the product of the Enlightenment[16] and developed the concept of natural inalienable rights of which, at the time, liberty was held to be the most important. As the American and French Revolutions transformed these natural rights into positive political rights, freedom of contract became the cornerstone of a theory of the law of contract[17] known today as classical contract law.[18] Originating in the 19th century, the theoretical formation of the law of contract is relatively new, and the European and North American jurists of the 19th century devised this radical system of contract law in terms of which to interpret and regulate economic practices. This vision of contract law still persists today and provides the basic framework of the legal analysis of market transactions. The regime is characterised by a relatively small set of fundamental principles and

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[16]Atiyah *The rise and fall of freedom of contract* (1979) 226; Adams and Brownsword *Understanding contract law (*hereafter referred to as *Understanding)* (2004) 168-186; Collins *The law of contract* (2003) 3-10; Brownsword 'After investors: Interpretation, expectation and the implicit dimension of the "new contextualism"' in Campbell, Collins and Wightman (eds) *Implicit dimensions of contract* (hereafter referred to as *Implicit dimensions*) (2003) 124; Pretorius (n 10) 639-641.

[17]Mill *On liberty* (1859) 15.

[18]Classical contract law is a reference to doctrine in general use among lawyers and judges and is reflected in major treatises on the law of obligations. Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract general principles* (2007); Christie *The law of contract* (2001); Kerr *The principles of the law of contract* (2002); For an in-depth analysis see the seminal work by Atiyah *Rise and fall* (n 16) 226; Adams and Brownsword (*Understanding*) (n 16) 185-204; Collins (*Contract*) (n 16) 3-10; see also Campbell and Collins 'Discovering the implicit dimensions of contracts' in Campbell, Collins and Wightman (*Implicit dimensions*) (n 16) 25 which defines classical theory as follows: 'The classical law, by which is meant the elegant constructions of legal doctrine by jurists and judges of the nineteenth century, is thought by many modern writers to be an inadequate form of legal reasoning about contractual relationships. The classical law's doctrines facilitated an understanding of contracts as a disembedded association between individuals. ... They [these doctrines] corresponded to the description of the system of economic relationships as a market in which "faceless buyers and sellers ... meet ... for an instant to exchange standardised goods at equilibrium prices"'. Collins quotes Y Ben-Porath 'The F-connection: Families, friends and firms and the organisation of exchange' (1980) *Population Development Review* 1; and Adams and Brownsword *Key issues in contract* (hereinafter referred to as *Key issues*) (1995) 217 state: 'According to the classical view, the social function of contract is not simply to facilitate exchange: contract is a vehicle for maximising economic self-interest. Contractors may legitimately pursue their own interests" prioritising their own interests against those of the other side, subject only to such minimal constraints as those pertaining to fraud and coercion"'; Brownsword 'Freedom of contract, human rights and human dignity' in Friedmann and Barak-Erez (eds) *Human rights in private law* (2001) 181, 185; Mill (n 14) 15; Brownsword *Themes for the twenty-first century* (hereafter referred to as *Themes*) (2000) 33.

keeps government regulation to an absolute minimum. The classical law of contract maximises the liberty of individual citizens, encourages self-reliance and adopts a neutral stance with regard to permissible patterns of social life. Thus, it facilitates the creation of legal obligations on any terms which individuals freely choose and gives legal effect to voluntary choices made by the parties to a contract. Once a voluntary choice is exercised the law is obliged to enforce the obligation undertaken. The persistence of this model of contract is to be explained by the fact that the law can be presented as objective and neutral, not a matter of politics or preference but a settled body of rules. However, the total absence of contextualisation has led to state intervention during the 20th century with the advent of the ideal of social justice and its extension to market transactions. This resulted in differentiation between different types of contracts such as consumer law, landlord and tenant and employment law, which differentiation is ultimately incompatible with the unity of classical contract law. This discordance demands a reconsideration of the fundamental assumption of this paradigm of contract law.

The traditional classical form of contract constitutes what is referred to as a discrete exchange. Discrete exchanges are the most common contracts where the minimum of requirements are necessary to establish an agreement.[19]An example of a discrete exchange is the purchase of petrol at a service station along a highway[20] or of a cappuccino in a coffee shop.[21] An essential characteristic of discrete exchanges is 'presentiation' which may be defined as bringing the future into the present. At the time of contracting, the parties to a classical discrete exchange are required to set out when, how and where the contractual obligations are to be effected in the future.[22] The aim is to establish, insofar as the law is able to, the entire relation at the time of the expressions of mutual assent. Total presentation through 100% predictability is sought as of the time of acceptance of the offer.[23]

The underlying rationale of presentiation is found in the fact that in classical law, individuals have no obligations to each other except those created by the coercive rules of the state, or the individuals' undertakings to each other in their contract.[24]

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[19]This part of the paper is based on my article 'Relational contract theory, principles of European contract law – long-term contracts and the impact of implicit dimensions' (2007) *THRHR* 371; see also Macneil *New social contract* (1980) 11; Macneil 'Values in contract: Internal and external' (1983-1984) *Northwestern Univ LR* 340 at 344; Macneil 'Relational contract: What we do and do not know' (1985) *Wisconsin LR* 483 at 485.

[20]Macneil 'The many futures of contracts' (1974) *Southern California LR* 691 at 720.

[21]Collins 'Introduction: The research agenda of implicit dimensions of contracts' in Campbell, Collins and Wightman *Implicit dimensions* (n 16) 18; Macneil 'Relational contract: What we do and do not know' (1985) *Wisconsin LR* 483 at 485.

[22]Macneil 'Restatement (second) of contracts and presentation' (1974) *Virginia LR* 589 at 592.

[23]*Ibid*.

[24]Gordon 'Macaulay, Macneil, and the discovery of solidarity and power in contract law' (1985) *Wisconsin LR* 565 at 569.

Consequently, if contract law outcomes are to be rationalised on the basis of consensus, the outcomes must appear to flow from the parties' agreement.

However, empirical research has shown that enforcement, in practice, is often achieved by other means than state sanctioned rules.[25] There exists a hidden sub-culture which constitutes a powerful enforcement mechanism based upon social approval and various codes of conduct typical of particular contracts.[26] This enforcement is effected by certain implicit dimensions, which are those conceptions which are to be understood, though not expressed in words, but are deep rooted and settled. This social mechanism of enforcement does not fall within the ambit of the reigning paradigm of contract law which favours literal enforcement of written contracts, and total adherence to the rule of law, but can be found in relational contract theory embodied in the norms of solidarity and cooperation. State-sanctioned rules and these social norms are found at a juncture which materialises in long-term relational contracts. This legal intersection between law and society constitutes the beginnings of an important paradigm shift within the ambit of contracting, since traditional classical contract theory does not recognise solidarity and co-operation as norms of adjudication while relational theory introduces them as such and could give effect to the constitutional imperative of substantive justice.

Long-term contractual exchanges

Relational contracts, also referred to as long-term or intertwined exchanges, are far more complex than discrete exchanges. They cannot be specific and precise in allocating the respective obligations,[27] and lack a great meeting of minds in respect of all the terms of the agreement.[28] It is difficult to discern when they are to begin and end.

The content of these contracts are formed by means of an incremental process in which parties gather increasing information and gradually agree to more and more as they proceed.[29] Relational roles are long-term and involve primary relations and diverse ongoing obligations. MacNeil, the father of relational contract theory, describes how in relational exchanges, one finds intricate linkings of habit, custom, internal principles and rules, social exchange and other social principles, dependence and expectations.[30] Gordon rather crudely states that in terms of the relational view

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[25]Gordon (n 24) 568.
[26]Macneil *The new social contract* (n 19) 27; Gordon (n 24) 569.
[27]Macneil 'Contracts: adjustment of long-term economic relations under classical, neoclassical, and relational contract law' (1977-1978) *Northwestern Univ LR* 854 at863; Macaulay 'The real and the paper deal' in Campbell, Collins and Wightman *Implicit Dimensions* (n 16) 81.
[28]Whitford 'Ian Macneil's contribution to contracts scholarship' (1985) *Wisconsin LR* 547.
[29]Macneil 'Economic analysis of contractual relations: Its shortfalls and the need for a rich classificatory process' (1981) *North Western Univ LR* 1018 at 1041; Macaulay 'Non-contractual relations in business: A preliminary study' (1963) *American Society Review* 55.
[30]Macneil *The new social contract* (n 19) 66.

of contracts, parties treat their contracts more like marriages than one night stands.[31] Obligations grow out of the commitment that they have made to one another, together with the conventions that trade usage has established for such commitments.[32]

Relational rules can be summarised as follows:[33]

- obligations in long-term agreements change as circumstances change;
- the object of contracting is not primarily to allocate risks but to signify a commitment to co-operate;
- in bad times, parties are expected to support one another rather than standing on their respective rights;
- the parties will treat the others' insistence on literal performance as wilful obstructionism;
- in the event of unexpected contingencies causing severe losses, the parties are to search for equitable ways of dividing the losses;
- and finally, the sanction for bad behaviour is obviously refusal to deal in the future.

Relational contract theory[34] emphasises the interdependence of individuals in social and economic relationships and focuses on the requirements of trust, mutual responsibility, solidarity and co-operation because the ambit of the agreement is the extended relationship. Relational exchange is more common in any given production system than discrete exchange[35] since a number of people work together in the pursuit of economic gain. From this it is clear that the nature of relational contracts is to be found in the paradigm of co-operative utility maximisation which distinguishes them from discrete exchanges characterised by individual utility maximisation.[36]

In relational exchanges immediate individual self interest as the measure of economic rationality has to be rejected in favour of the common interest. The relevant form of self-interest is cooperation.[37] Thus it has been shown that traditional remedies are not used by parties to long-term contracts even where these would win them a short-term gain, but disputes are frequently settled without reference to the contract or to potential or actual legal sanctions. There is hesitancy to speak of legal rights or of threats to sue in negotiations.[38] The remedy of choice is to be found in the implicit dimension of cooperation present,

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[31](N 24) 569.
[32]Macneil 'Values in contract: Internal and external' (n 19) 362.
[33]Macneil *The new social contract* (n 19) 27; Gordon (n 24) 569.
[34]Feinman (n 10) 737 at 748.
[35]Macneil 'What we do and do not know' (n 21) 487.
[36]Campbell and Harris 'Flexibility in long-term contractual relationships: The role of co-operation' (1993) *J of Law and Society* 167; Schafer and Ott *The economic analysis of civil law* (2004) 278.
[37]Collins *Contract* (n 16) 329.
[38]Macaulay 'Non-contractual relations in business' (1963) *American Sociological Rev* 55 states that: 'Disputes are frequently settled without reference to the contract or to potential or actual legal sanctions. There is hesitancy to speak of legal rights or of threats to sue in ... negotiations'.

tacitly or impliedly, in long-term exchanges.

The role of implicit dimensions in contracts – the text between the lines

In regard to the role of implicit dimensions in contracts, ie the text between the lines, Collins[39] has found that contracts are embedded in conventions, norms, mutual assumptions and unarticulated expectations. The implicit dimensions of a contract are those conceptions which are to be understood, though not expressed in words. These notions are free from doubt or questioning, they are deep-rooted and settled. Typical relational exchanges rely on implicit dimensions which are present at formation and provide for the development of the relationship.[40] For example, in an employment contract, understandings may evolve which stem from the specific behaviour of the parties. These are distinct from the general understandings because they relate to behaviour rather than background knowledge. The building trade provides another good illustration. From a private householder's point of view, plumbing or electrical services have large credence elements and an individual will not be in a position to tell whether standard practices and specifications have been observed or how contingencies such as a change in materials, delay or defective materials would be handled. The implicit understanding that the service will be provided in good faith and to the client's advantage, in most western countries, will cause the contractor to be inclined to justify the trust and to deliver what is expected

Solidarity and co-operation in contract law

It is a given that contractual behaviour relies upon several contexts for its meaning and purpose;[41] for example, linguistically, historically (whether the pre-contractual negotiations form part of the contract)[42] and socially. The social aspect of contracting provides that the parties to contracts conduct themselves in terms of their economic interests in successfully completing the contract to the benefit of both parties and with reference to their expected long-term business relationship.[43]

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[39]Collins 'Introduction: The research agenda of implicit dimensions of contracts' in Campbell, Collins and Wightman *Implicit dimensions* (n 16) 2.
[40]Collins *id* 11; Wightman 'Beyond custom: Contract, contexts and the recognition of implicit understandings' in Campbell, Collins and Wightman *Implicit dimensions* (n 16) 167.
[41]Collins *Implicit dimensions* (n 16) 14; Linzer 'Uncontracts: Context, contorts and the relational approach' (1988) *Annual Survey of American Law* 139 at 158.
[42]Brownsword 'After investors: Interpretation, expectation and the implicit dimension of the new contextualism' in Campbell, Collins and Wightman *Implicit dimensions* (n 16) 111.
[43]Collins *Implicit dimensions* (n 16) 4.

However, long-term relational contracts[44] are also based on the implicit foundations of mutual trust and solidarity. Solidarity invokes a unity or communion of interests and responsibilities between contracting parties. The solidarity of relational exchange is organic by nature. It issues and evolves from the continuing relationship between the parties. This organic solidarity,[45] emerges because economic purposes and actions are founded in society and entrenched power hierarchies. State enforcement of contractual obligations arising from discrete exchanges is adversarial and counterproductive. Social conditions such as a reliable reputation and trustworthiness[46] are considered more powerful than state enforced norms and sanctions of contract law and constitute the impetus for cooperation.[47]

Contained within the concept of organic solidarity is cooperation. Cooperation signifies working together with a contracting party to promote the common objective of fulfilling contractual obligations in order to bring a contract to fruition and consequently to maximise the individual's utility. The incentive to cooperate is to be found in the economic self-interest which motivated the parties to contract in the first place.[48] In competitive markets, the fact that the parties know that the other could have entered into a similar agreement with a rival, usually strengthens the incentive to cooperate.

Traditional contract doctrine fails to recognise a general obligation of the parties to cooperate and to assist each other; it also does not recognise an independent duty to perform in good faith.[49] In some instances of long-term relations the duty of cooperation has been given recognition through the imposition of equitable fiduciary duties of good faith and loyalty, for example, in respect of the contracts of employment, partnership,[50] agency[51] and insurance,[52] but this does not constitute a general rule.

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[44]Macneil *The new social contract* (n 19) 52, 90-102. Macneil bases his theory on that of Emile Durkheim *The division of labor in society* (1964). The parties know that the other usually could have entered into a similar agreement with a rival.

[45]Gordon (n 24) 565 at 568; Linzer (n 41) at 183 especially186 where reference is made to a case where a court forced a party to share a windfall.

[46]Wightman 'Beyond custom: Contract, contexts, and the recognition of implicit understandings' in Campbell, Collins and Wightman *Implicit dimensions* (n 16) 165.

[47]Gordon (n 24) 574.

[48]Collins *Contract* (n 16) 330.

[49]*Barkhuizen v Napier* (n 5) 347G-H where Ngcobo J states that: 'As the law currently stands good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law'.

[50]*Wegener v Surgeson* 1910 TPD 571 579; *Olifants Tin 'B' Syndicate v De Jager* 1912 TPD 314 at 318; *Doucet v Piaggio* 1905 TH 267; *Truter v Hancke* 1923 CPD 43 at 49; *Purdon v Muller* 1961 2 SA 211 (A) 231A; Henning and Delport 'Partnership' in LAWSA vol 19 183 at 244-246; Bamford *Bamford on the law of partnership and voluntary association in South Africa* (1982) (3rd ed) 30.

[51]*Leites v Contemporary Refrigeration (Pty) Ltd* 1968 1 SA 58 (A); *Page v Ross* (1880-1886 2 BAC 52; *Evans and Jones v Johnston* 1904 TH 238; *Mallinson v Tanner* 1947 4 SA 681 (T); *S v Heller* (2) 1964 1 SA 524 (W); Joubert *Die Suid-Afrikaanse verteenwoordigingsreg* (1979) 215.

[52]*Fine v The General Accident, Fire and Life Assurance Corporation Ltd* 1915 AD 213 218; *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1922 AD 33 40; *Bodemer v American Insurance Co* 1961 2 SA 662 (A) 668; *LAWSA* vol 12 115.

Ubuntu

The concept of ubuntu[53] may be used to concretise solidarity.[54] Ubuntu may be defined as 'humanity, or fellow feeling'.[55] It relates to a Zulu concept '*umuntu ngumuntu ngabantu*' which means that 'a person is only a person through his relationship to others'. Ubuntu defines the individual in terms of her relationship with others; individuals only exist in their relationship with others. Louw[56] holds that the Cartesian concept of individuality now transforms from solitary to solidarity, and from independence to interdependence, from individuality *vis-a-vis* community, to individuality *à la* community. This same vision is articulated by the honourable Justice Sachs in *Port Elizabeth Municipality v Various Occupiers*[57] where he held that the South African Constitution and Bill of Rights have been acknowledged as having 'a unifying motif … which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern' and that ubuntu 'suffuses the whole constitutional order and combines individual rights with a communitarian philosophy'.[58] In *Dikoko v Mokhatla*,[59] Justice Sachs returned to the concept of ubuntu stating again, that 'In present day terms it [ubuntu] has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.'[60]

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[53]The concept of ubuntu was first mooted as a constitutional concept in *S v Makwanyane* 1995 3 SA 391 (CC) which case was followed by several academic discussions on the subject. See in general Mchunu 'The need for traditional African jurisprudence in the South African legal system' (1996) *The Magistrate* 55; Mqeke 'Customary law and human rights' (1996) *SALJ* 304; Mokgoro 'Ubuntu and the law in South Africa' (1998) *Potchefstroom Elektroniese Regstydskrif* (*PER*) (http:// www.puk.ac.za/ lawper/1998 vol 1) 1;Van Niekerk 'A common law for Southern Africa: Roman law or indigenous African Law' (1998) *CILSA* 158; De Kock and Labuschagne 'Ubuntu as a conceptual directive in realizing a culture of effective human rights' (1999) *THRHR* 114; Bohler-Muller 'What the equality courts can learn from Gilligan's ethic of care: A novel approach' (2000) *SAJHR* 623; Barrie 'Ubuntu ungamantu ngabanye abantu: The recognition of minority rights in the South African constitution' (2000) *TSAR* 271; Cornell 'A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation' (2004) *SAPR/PL* 666; Hoctor 'Dignity, criminal law and the Bill of Rights' (2004) *SALJ* 304; Bekker 'The re-emergence of ubuntu: A critical analysis' (2006) *SAPR/PL* 332; Hawthorne 'Materialisation and differentiation of contract law: Can solidarity maintain the thread of principle which links the classical ideal of freedom of contract with modern corrective intervention?' (2008) *THRHR* 438, 445.

[54]Contextualisation in this regard will help bring about responsibilisation of indigent consumers.

[55]Collins *English dictionary* (online) (2000).

[56]Louw 'Ubuntu: An African assessment of the religious other' http://www.bu.edu/wcp/Papers/Afri /AfrilLouw.htm.

[57]2004 12 BCLR 1268 (CC).

[58]At 1288 D-E.

[59]2007 1 BCLR 1 (CC).

[60]At 33 C-E, he reiterates his *dictum* from *Port Elizabeth Municipality v Various Occupiers* quoted above.

This clearly illustrates that in the South African legal context within which the law of contract operates, development and change can be brought about. The recognition of ubuntu or solidarity as the underlying constitutional value capable of harmonising freedom and equality, can pave the way for the introduction of a principle of solidarity, in which solidarity is the means by which to link modern corrective intervention with the classical ideal of freedom of contract. Not only does solidarity justify the protection of weaker parties, it also provides for a duty to co-operate.[61]

Alternative approaches to contract law

Relational contract theory forms part of a movement described by Ramsay[62] as 'new learning' within contract law. Forms of 'new learning' are the social market theory of Collins,[63] recent forms of consumer protection,[64] and relational contract theory.[65] The various forms of 'new learning' originate from differing paradigms and show different methods of legal reasoning,[66] but the factor that binds all 'new learning' together is the transformation of the law of contract[67] based on a questioning of the Brahmans of freedom and sanctity of contract. This gives the 'new learning' special relevance in South Africa. Moreover, recent economic events are bound to give further impetus to 'new learning' since the international recession was caused by unregulated free markets, which ultimately proved themselves incapable of rectifying their own disasters. In this context it should be highlighted that the learned Justice Sachs relied upon the 'new learning' in his minority decision in the *Barkhuizen* case.[68]

The link between Sachs J and the heterogenous new learning, which ranges from relational contract theory to the various appearances of consumer protection, is found in the inequality of bargaining positions between the contracting parties. The response of the classical model in the guise of formal equality has proven to be illusory and new learning is developing models attempting to redress the balance in order to restore party autonomy, evaporated consensus, and mutual beneficence, in her quest to end exploitation of the weaker in society. In this context Sachs J's grand tour of new learning may be open to technical criticism, but it is of immeasurable value for the development of new avenues in the South African law of contract which remains tardy in becoming 'constitutional contract law'.

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[61]Lurger 'Prinzipien' (1998) 2 *Electronic J of Comparative Law* http://www.ejcl.org/art 21 - 1 html 9.
[62]Ramsay 'Consumer law, regulatory capitalism and the "new learning" in regulation' (2006) *Sydney LR* 9.
[63]Collins 'Contract' (n 16) 403.
[64]Adams and Brownsword *Understanding Contract Law* (n 16).
[65]Hawthorne (n 10) 137.
[66]Collins 'Contract' (n 16) 20.
[67]*Ibid*.
[68]In his minority judgment in *Barkhuizen v Napier* (n 5) 356.

The fact that Sachs J points out that standard contracts 'dishonour the moral and philosophical foundations of contract law',[69] that the work of Collins is cited by our highest court[70], that the role of consumer protection as a response to the standard contract as well as the cognizance of the alternative way relational contract theory deals with the highest good of contract, namely fairness, make this minority decision a milestone in the development of the South African law of contract.

Sachs J's rejection of the technical and formal in favour of fairness is in keeping with the new constitutional dispensation. Thus, the honourable Judge questions 'the enforceability … of terms which might technically be brought within what is referred to as 'the contract', but which did not form part of the actual consensus or real agreement between the parties'.[71] He continues that:

> The potential unreasonableness in the eyes of the community, leading to a possible finding of violation of public policy, lies in holding a person to one-sided terms of a bargain to which he or she apparently did not actually agree, in respect of which there is nothing to indicate that his or her attention was drawn and the legal import of which a reasonable person in his or her position could not be expected to be drawn.[72]

The statements precede the Consumer Protection Act,[73] but reflect the mandatory information obligations which characterise all modern consumer protection legislation which demands that contracting parties know which terms they are agreeing to.

It can also be argued that solidarity and cooperation as developed by relational contract theory and closely linked if not synonymous with Sachs J's ubuntu requirement that a contracting party has the duty to draw a co-contractant's attention to all the terms in the contract. As the process of projecting the norms of relational theory onto orthodox contract law has already begun to take place, confirmation of the requirements of disclosure and transparency by Sachs J will tip the scale in favour of 'new learning'.

Relational contract theory entered through the back door in the South African common law in *South African Forestry Co Ltd v York Timbers Ltd,*[74] where the

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[69]At 369D-F.
[70]At 362D-F; 372A-B; 372G-373A-C.
[71]At 366C-E.
[72]At 366D-E.
[73]Act 68 of 2008.
[74]2005 3 SA 323 (SCA). In this instance the contract provided for a particular procedure to be followed should the parties fail to come to an agreement in respect of a price revision. The appellant had a right to approach the Minister as a preliminary step to arbitration and to refer the question of price revision to arbitration should the Minister be of the opinion that the parties would not be able to reach an agreement (341B-C). The court found that although there was no specific duty on the defendant to co-operate with the appellant in following this procedure, the corollary of the appellant's right was a duty on the defendant not to frustrate the appellant in exercising his rights (341C). Consequently the defendant had a duty to co-operate which was inferred from the rights and duties in the contract. But should the contract not have provided for such inference the importation of the

Supreme Court of Appeal gave recognition to the relational obligation to cooperate. This case exemplifies the judiciary's ability to give effect to the constitutional imperative of substantive justice by employing the tools of 'new learning'.

The reason for the Constitutional Court's reluctance to apply the same in *Barkhuizen* may be found in Henk Botha's thesis[75] that the Constitution attempts to combine a commitment to the rule of law with a transformative political agenda giving recognition to transformation and social justice. Botha[76] remarks that there exists tension between the Constitution's transformative aspirations and the insistence on legal certainty and regularity which characterises traditional understandings of the rule of law. Botha[77] proposes that the rule of law be reconceived to accommodate more substantive forms of legal reasoning and context-sensitive modes of inquiry. However, the legal reasoning of the majority decision of the Constitutional Court in the *Barkhuizen* case was formalistic and refrained from social contextualisation.

The facts of *Barkhuizen* were tailor-made for an application of the new learning. The insurance contract is subject to the open norm of utmost good faith which could today place a mandatory information obligation on the insurer.[78] Furthermore, many insurance contracts are long-term relational contracts, while finally the contract in question was a standard contract.[79] Relational contract theory would have introduced the obligation to cooperate, would have recognised implicit dimensions and the requirements of solidarity, disclosure and transparency.

Botha's argument that the rule of law should not be equated with rigid formalism and should allow for social contextualisation does not alter the fact that the rule of law and social transformation are inherently antagonistic. Thus the caution of the judiciary mandated to uphold the rule of law is understandable. However, 'the new learning' theories are developments taking place within the rule of law and represent the common denominator, that markets require steering in order to distribute wealth, to establish acceptable power relations and to

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duty to co-operate would have been inferred from the underlying principle of good faith (341C). The court however made no specific mention of relational theory or its norms. Hawthorne 'The first traces of relational contract theory – the implicit dimension of co-operation' (2007) *Merc LJ* 234; Schwartz 'Relational contracts in the courts: An analysis of incomplete agreements and judicial strategies' (1992) *The Journal of Legal Studies* 271.

[75]Botha (n 1) 523 at 524 n 5.

[76]*Ibid*

[77]*Id* 539. He refers to *Ngxuza v Secretary, Department of Welfare, Eastern Cape Provincial Government* 2000 12 BCLR 1322 (E) where Froneman J is of the opinion that the rule of law is not synonymous with rigid formalism, and that it requires social and historical contextualisation to establish personal security for the indigent underclasses (1331D).

[78]The relation of the facts by Sachs J brings the asymmetries of information of the insurance contract to life. Keep in mind that the provision of mandatory information characterises all recent consumer protection legislation.

[79]The absence of true consensus on the details of the contract is also vividly described by Sachs J at 358B-361G especially 361B-G.

provide meaningful opportunities. The introduction of the duties of solidarity and cooperation, an essential part of the relational contract theory concretised in the obligation of disclosure and transparency, would fit within the values and norms of the Constitution.

The 'new learning' shows how in other jurisdictions the transformation to substantive justice within the law of contract has been effected without derogating to the rule of law. The transformative imperative finds expression in the Constitution as a result of the political, social and economic history of the last century. It would appear that transformation has become the task of the legislature and that the judiciary has deemed its task to ensure sustainable transformation within the rule of law. In this respect a remark by Klare,[80] that 'to balance justice in order to relieve the tension between social transformation and the rule of law, the judiciary must abandon the idea that law is neutral, objective and determinate', remains relevant.

The argument that the imposition of mandatory information obligations is in conflict with the generally accepted opinion that contractual obligations must originate from the free exercise of individual autonomy, must be rejected. Party autonomy requires parties to be in a position to make free and informed choices, which means that information obligations in reality promote party autonomy by placing the recipient of the information in a position to make an informed choice, which will benefit her own interests.

It should be recognised that the introduction of information obligations by the new consumer legislation changes the framework within which parties negotiate, but does not shatter the existing doctrines of freedom of contract and *pacta sunt servanda* as founded on the European *ius commune* and the English common law. Moreover, these new rules hold the promise that the outcome will be able to stand the test of reasonableness, fairness and justice. Consequently, the innovations found in the 'new learning' in reality restore individual autonomy thus bridging the gap between corrective intervention and classical contract law and effectively preventing the disintegration of the latter.

[80]Klare 'Legal culture and transformative constitutionalism' (1998) *SAJHR* 146; Botha (n 1) at 541.