THE LAW SYSTEM IN SOUTH AFRICA

Roman-Dutch law

Roman-Dutch law (Dutch: Rooms-Hollands recht, Afrikaans: Romeins-Hollandse reg) is a casuistic (judge-made) legal system based on Roman law as applied in the Netherlands in the 17th and 18th centuries. As such, it is a variety of the European continental civil law or *ius commune*. While Roman-Dutch law was superseded by Napoleonic codal law in the Netherlands proper as early as the beginning of the 19th century, Roman-Dutch law is still applied by the courts of South Africa (and its neighbours Lesotho, Swaziland, Namibia, Botswana and Zimbabwe), Guyana, Indonesia, East Timor, and Sri Lanka. It was largely drawn upon by Scots law. It also had some negligible impact on New York state,[1] especially in introducing the office of prosecutor (schout).


South Africa Law

South Africa has a 'hybrid' or 'mixed' legal system, formed by interweaving of a number of distinct legal traditions: A civil law system inherited from the Dutch, a common law system inherited from the British, and a customary law system inherited from indigenous Africans (often termed African Customary Law, of which there are many variations depending on the tribal origin). These traditions have had a complex interrelationship, with the English influence most apparent in procedural aspects of the legal system and methods of adjudication, and the Roman-Dutch influence most visible in its substantive private law. As a general rule, South Africa follows English law in both criminal and civil procedure, company law, constitutional law and the law of evidence; while Roman-Dutch common law is followed in the South African contract law, law of delict (tort), law of persons, law of things, family law, etc. With the commencement in 1994 of the interim Constitution, and in 1997 its replacement, the final Constitution, another strand has been added to this weave.

Sources of South African Law

South Africa's law is sourced from (1) statutory law made by the legislative body (the most important of which is of course the Constitution), (2) common law (this includes the Roman-Dutch 'old authorities' and judicial precedent gleaned from case law), (3) African customary law, and (4) foreign and international law. Note that Custom, and Legal scholarship are not in themselves sources of law, although they inform the interpretation and application of law.

Sources of law that are binding or authoritative must be followed by judges in making decisions, while persuasive sources are not binding on their decisions. The authoritative effect of a source for a particular decision depends on the type of
source, the position of the judge in the hierarchy of courts, and the other sources that are relevant to the question at hand.

**Constitution**
The Constitution of South Africa Act, 1996 (published as Act No. 108 of 1996) governs and applies to all law and conduct within the territory of South Africa. Any law or conduct which contravenes the provisions of the Constitution is invalid and therefore illegal.

**Statutory law**
Statutory law is the codified part of the South African Law. These laws are contained in Acts and By-laws, and various pieces of subordinate legislation, which is passed by the legislature of South Africa (Parliament).

**Common Law Precedent**
Not all law is contained in Acts passed by Parliament. Much of South African law is based on common law, and there is a great reliance on Common Law in South Africa. The development of the Common Law of South Africa is made possible by the fact that the South African courts follow the system of legal precedent or *stare decisis*. This enables a higher court to develop the law in such a way that it becomes a precedent for lower courts to follow. As law is not an empirical science, it cannot be expected of Parliament or any other legislative body to be able to presuppose all possible scenarios of life and enact relevant laws to cater for them. This is why South African Law places a great emphasis on the Higher courts to develop the law through their decisions, which become precedents and as such become law which is also known as case law.

**Roman-Dutch authorities**
It follows that if one's task is to research the provisions of a particular law applicable in South Africa, one should consult the codified legislation, case law and failing this, one can follow the originating sources, i.e. English Law or Roman-Dutch Law (also known as "the Old Authorities") as the case may be. Any application of such a source must be lawful within the context of the Constitution and the spirit in which it was written.

**Court System in South Africa**
There is a hierarchy of courts, consisting of Magistrates Courts, High Courts, a Supreme Court of Appeal, the highest authority in non- Constitutional matters, and a Constitutional Court, which is the highest authority in constitutional matters. The Constitutional Court has final authority to decide whether an issue is a Constitutional one.
History of South African law
May 31 1910 until 1961
From the "union" of the Cape Colony, Natal, Transvaal and Orange Free State in 1910 as a dominion within the British Empire called the Union of South Africa, and prior to the formation of the same territory as the Republic of South Africa in 1961, much of English law was incorporated into or formed the basis of South African law. It and the Roman-Dutch Law which held sway prior to this period forms the bedrock to which South Africa even now turns in its search for clarity in its law, and where there is a vacuum in its law.

April 6 1652 until 1910
From the 6 April 1652 landing of the Dutch in the Cape of Good Hope, the spread of the Roman-Dutch legal system and its legislation and laws took increasing hold, holding sway until the Union of South Africa as a dominion of the British Empire was formed on 31 May 1910. Even after this and to date, wherever British law does not stand, Roman-Dutch law forms the bedrock to which South Africa turns in its search for clarity in its law.

Prior to April 6 1652
With no written history, and the failure of the successive Dutch, British and Apartheid regimes to record the laws of pre-colonial southern Africa, there is a dearth of information about these laws. However, the current South African legal regime recognises the importance of these and no doubt over time, traditional indigenous law will more and more flavour South African legislation and other law as it emerges, and in doing so will reveal its colours to researchers such as historians and anthropologists.


South African Contract Law
South African contract law is "essentially a modernised version of the Roman-Dutch law of contract," which is itself rooted in Roman law. In the broadest definition, a contract is an agreement two or more parties enter into with the serious intention of creating a legal obligation. Contract law provides a legal framework within which persons can transact business and exchange resources, secure in the knowledge that the law will uphold their agreements and, if necessary, enforce them. The law of contract underpins private enterprise in South Africa and regulates it in the interest of fair dealing.

All law, including the common law of contract, is subject to constitutional control. The Constitution therefore exerts a strong if indirect influence on the law of
contract: "The principles of administrative justice frame the contractual relationship, it has been said, and the Constitution requires that all administrative action must be lawful, reasonable and procedurally fair."

The Constitutional Court appears to prefer an indirect application of the Constitution between private parties: an approach that tests the validity of a private contractual provision against the requirements of public policy [Public policy = A principle that no person or government official can legally perform an act that tends to injure the public], but also recognises that public policy is now determined with reference to the fundamental values embodied in the Constitution, and in particular in the Bill of Rights. The courts have shown a willingness to intervene if a party exercises a contractual power in a manner that fails to respect the constitutional rights of another party, and may even, in appropriate circumstances, be willing to compel one party to contract with another on constitutional grounds.

The Roman-Dutch law of contract recognised the principle that all serious agreements ought to be enforced (pacta sunt servanda). All contracts are said to be consensual and bonae fidei, based simply on agreement and good faith.

Furthermore, a genuine agreement (or consensus), is required as the basis for contractual obligations, presupposes an actual meeting of the minds of the parties. Subjective consensus of this nature exists when all the parties involved:

a) Seriously intend to contract;
b) Are of one mind (or ad idem) as to the material aspects of the contract;
c) Are conscious of the fact that their minds have met;

Theories of contract
Furthermore, the will theory of contract postulates an extremely subjective approach to contract, whereby consensus is the only basis for contractual liability. The upshot is that, if there is no genuine concurrence of wills, there can be no contract. It is generally agreed, though, that unqualified adherence to this theory would produce results both unfair and economically disastrous.

Furthermore, in terms of the compromise reliance theory, the basis of contract is to be found in a reasonable belief, induced by the conduct of the other party, in the existence of consensus. This protects a party's reasonable expectation of a contract. The reliance theory should be seen as a supplement to the will theory, affording an alternative basis for contract in circumstances where the minds of the parties have not truly met.

South African law, with its Roman-Dutch roots, but strongly influenced by English law, has vacillated between a subjective and an objective approach to contract. It is now clear, however, that the subjective will theory is the point of departure; in
cases of dissensus, the shortcomings of that theory are corrected by an application of the reliance theory.

South African contract law is "essentially a modernised version of the Roman-Dutch law of contract," which is itself rooted in Roman law. In the broadest definition, a contract is an agreement two or more parties enter into with the serious intention of creating a legal obligation. Contract law provides a legal framework within which persons can transact business and exchange resources, secure in the knowledge that the law will uphold their agreements and, if necessary, enforce them. The law of contract underpins private enterprise in South Africa and regulates it in the interest of fair dealing.

Wikipedia online encyclopaedia.

In the case of estoppel, a party (the estoppel raiser) who relies reasonably on a misrepresentation by the other party (the estoppel denier), and acts thereon to his own detriment, may hold the estoppel denier to his misrepresentation; that means, the estoppel raiser may prevent the estoppel denier from relying on the true state of affairs. A successful plea of estoppel has the effect that the misrepresented facts are upheld as if they were correct. A fictional contract, in other words, will be recognised.

A document that incorrectly records the contract between two parties may be rectified to conform to the common intention. In such a case, the parties are in agreement; what is rectified is not the contract itself as a juristic act, but rather the document in question, because it does not reflect what the parties intended to be the content of their juristic act.

Legality
An underlying principle of the law of contract pacta sunt servanda (or sanctity of contract) is that agreements seriously concluded should be enforced, but agreements that are clearly detrimental to the interests of the community as a whole, whether they are contrary to law or morality ie. contra bonos mores, or if they run counter to social or economic expedience, is not enforced. These contracts are illegal on the grounds of public policy. The law regards illegal or unlawful contracts either as void and thus unenforceable, or as valid but unenforceable.

Void
Public policy has no fixed meaning, because it represents the public opinion of a particular community at a particular time. Considerations of public policy are to be found in legislation, the common law, good morals or the public interest. Most of the case law about performance contra bonos mores involves immoral or sexually reprehensible conduct. The legislator sometimes expressly or impliedly prohibits the conclusion of certain contracts. Since 1994, public policy in South Africa has been anchored primarily in the values enshrined in the Constitution.
The courts use their power to strike down a contract as *contra bonos mores* only sparingly and in the clearest of cases. It is required that the general tenor of the contract be contrary to public policy. When the relevant public interests are of a rival or even conflicting nature, the courts must balance the different interests against each other. Sanctity of contract often is given preference. The onus of proving illegality seems to rest on the party who relies on it, but a court will take notice of illegality in certain circumstances of its own accord. It is either the conclusion of a contract or its performance, or else the reason for its conclusion, that is regarded as objectionable and that renders the contract void.

Certain *pacta de quota litis* are against public policy and void. Unfair or unreasonable contracts can be against public policy and void if a more concrete indication of public interest is involved than mere injustice between the parties. [A *Pactum de quota litis* is an agreement by which the creditor of a sum difficult to recover, promises a portion to a person who undertakes to recover it]

The unfair enforcement of a contract by one of the parties is contrary to public policy and void.

An illegal contract that is void cannot be enforced—this is called the *ex turpi* rule—but the illegal part of an otherwise legal contract can be severed from the rest of the contract depending on the probable intention of the parties. If there has been performance on the void contract, in principle restitution should be granted, but the *par delictum* rule bars restitution where parties are equally morally guilty. This rule can be relaxed to see justice between the parties, depending on the facts of the case.


**METUS IN THE ROMAN LAW OF OBLIGATIONS**
- Graham Glover (Rhodes University)

Metus deals with cases where one of the parties was forced into a contract. On the other hand, there were the contracts bonae fidei. Contracts bonae fidei, or contracts of good faith, were governed by equitable principles rather than the strict and formal rules of the jus civile [the civil law of the Roman State]. The informing basis of such contracts was that the parties, in the negotiation and performance of the arrangement, should at all times act in good faith towards one another. In situations where a dispute concerning a contract bonae fidei arose, the judex [judge] was at liberty to decide the case on equitable grounds, and was not confined to merely interpreting and enforcing the contract, regardless of the consequences. Originally, the most common types of contract bonae fidei were the more complex and theoretically advanced consensual contracts — the sale contract (emptio venditio), the contract of hire (locatio conductio), the contract of partnership (societas) and the contract of mandate (mandatum). But by the late Republican period the real contract of deposit (depositum) had also been classified as a contract bonae fidei. Determining whether a particular contract was stricti juris [according to strict right of law] or bonae fidei was highly significant for cases involving metus, since the nature of the contract determined the nature of the action that the aggrieved party could claim for relief, if the party had any action at all, that is. First of all, the nature of the actions available in situations where a contract stricti juris was induced by metus will be discussed. Secondly, the position with regard to contracts bonae fidei will be examined.

### 3.5 The exceptio metus

An aggrieved party who had been induced into an agreement by metus did not have to seek an action as a plaintiff in Roman law. The aggrieved party could also wait until the other party attempted to enforce the agreement, and raise a defence that the contract had been coerced. This defence was known as the exceptio metus, and if successful, allowed the defendant to avoid performance of the obligation. Just like the actio quod metus causa [an action that imposes an extra punitive measure against the defendant who wrongly compels the plaintiff to assume an obligation], if the agreement induced by metus was stricti juris in form, the defendant would have to seek an exception metus expressly from the praetor injure, otherwise the defendant would have had no defence under the jus civile. It is not known exactly when the exceptio metus was introduced into the law, but it was probably of late Republican origin, since it is referred to in the writings of
Cicero. Like the *actio quod metus causa*, the *exceptio* was *in rem scripta*. In other words, the defence could be raised against any plaintiff, whether or not the plaintiff was the person who had made the threats, or some bona fide third party who was to benefit from the transaction.

4 *Metus* and contracts *bonae fidei*

4.1 An action on account of *metus*
In situations where a contract *bonae fidei* had been entered into because of *metus*, an aggrieved party who had performed in terms of that contract was entitled to seek an action against the aggressor. This had been the position since the Romans began to recognise the class of contracts *bonae fidei*. In such cases there was no need for the praetorian reform that was necessary with regard to contracts *stricti juris*. In fact, it is likely that the availability of an action for *metus* where the contract was one of good faith may have provided the legal inspiration for the introduction of the *actio quod metus causa* in the late Republican period, to alleviate the problem faced by those coerced into a *stricti juris* contract in the pre-classical period.

The nature of an action on account of *metus* where a contract *bonae fidei* was concerned was different to that where the contract was *stricti juris*. In such cases the *actio quod metus causa* was not the appropriate action, since that was a special action that had to be sought from the praetor where the contract was *stricti juris*, and where the question of *metus* would otherwise have been irrelevant.

Since such contracts were predicated upon the existence of good faith, rather than formality, matters like fraud, duress and mistake could automatically be taken into account when adjudicating the case, and a remedy granted to an aggrieved party. There was no need for the issue expressly to be raised or inserted in the formula, since the generic formula allowed such issues to be adjudicated upon as a matter of course. *Metus* (like *dolus* [Evil intent, embracing both malice and fraud]) was undoubtedly a violation of the good faith that was supposed to exist between contracting parties, and provided grounds for an action. Where a plaintiff sought restitution by way of action, the plaintiff would usually institute the generic action relevant to the particular *bonae fidei* contract he or she had concluded. For example, where a contract of purchase and sale had been concluded due to *metus*, the plaintiff would institute an *actio empti* [An action employed in behalf of a buyer to compel a seller to perform his obligations or pay compensation].

4.2 A defence of *metus*
In situations where the person coerced into a contract *bonae fidei* by *metus* was sued for performance, the bona fide nature of the contract meant that *metus* could automatically be raised as a defence. It was not necessary for the defendant to seek a specific *exceptio* [an exception or defense available to a person who is being sued for non-performance of contractual obligations that s/he can defend by
proving that the plaintiff did not perform their side of the bargain] from the praetor that would have to be inserted in the formula. The *judex* had the inherent power to refuse to entertain the plaintiff’s case on the ground of *metus*, since this sort of behaviour violated the precepts of good faith.

5.1 Fear caused by a threat of harm
It is evident from the words of Cicero that the formula Octaviana originally gave is a remedy *quae per vim aut metum abstulerant*. Literally, this would refer to what had been taken away by physical application of force (*vis*) or fear (*metus*). Yet the reference to *vis* came to be dropped in time.

At one time the words of the edict were: "what has been done through force or under duress". For mention was made of force because of the compulsion brought to oppress the will, whereas duress expressed the alarm of a mind brought about through present or future danger. But the mention of force was later omitted.

5.2 The threat must be *contra bonos mores*
There has been some debate about what the Romans considered to be the true theoretical basis for an action based on *metus*. Was it because of the unlawful or illegitimate nature of the threat which had inspired the conclusion of the agreement? Or, was it because the act of duress suppressed the essential contractual element of consensus, rendering the purported agreement involuntary? Evidence of the uncertainty as to which of these two competing theories formed the true juridical basis of the law may be found in a single passage in the Digest, which is attributed to Ulpian, and which refers to both possibilities: Nothing is so opposed to consent, which is the basis of cases of good faith, as force and fear; and to approve anything of this kind is contrary to good morals.

There are a few passages in the *Corpus Juris Civilis* which suggest that contracts concluded because of *metus* were void for lack of consent. However, the majority of the Roman authorities saw the illegitimate nature of the threat which induced the agreement as the key ingredient in a case of *metus*, and did not see the act of duress as vitiating the consent of the aggrieved party. The jurist Paul penned the famous phrase "Si metu coactus... tamen coactus volui", or "If I entered [into an agreement] under duress, nevertheless when compelled, I had the intention to enter". Support for this thinking may be found in the Institutes: Suppose, for instance, that, being coerced by duress ... you promise, in response to Titius’s demand what you had no need to promise, obviously you are bound at civil law, and the action which claims that you "ought to give" is operative: but it is inequitable that judgment should be given against you, and so you are given the defence of duress, or a defence is devised for you to resist the action.

In other words, although the jurists recognised that the victims of duress formed
their will to contract under coercion, this consent was legally valid, since these persons had exercised a choice — to agree to the terms of the contract, rather than suffer harm. However, it was because the unscrupulous and predatory act of intimidation had unjustly induced the contract that the praetor would grant an action. The cardinal principle appears to have been that the threat should have been contra bonos mores.

But we understand force to be severe and such as is used contrary to sound morals, but not that which a magistrate properly brings to bear, of course, if that is done lawfully and in accordance with the legal powers of his position. Yet should a magistrate of the Roman people commit a wrongful act, Pompeius states that the edict is applicable.

As a result, a contract induced by metus was considered to be prima facie valid (since the aggrieved party had consented to the contract), but voidable because the agreement had been unlawfully induced. The above passage provides evidence that the Romans would ascertain the illegitimacy or otherwise of a threat by utilising a fairly broad test, which examined not only the nature of the threat itself, but also the goal which the threat was designed to achieve. First, a threat that was unlawful in nature, (eg, a threat to murder a person if he did not sign a contract of indebtedness) was considered to be contra bonos mores. But additionally, a prima facie valid threat that was designed to achieve a manifestly unjust purpose was also considered to be contra bonos mores. Three examples of this broader form of unlawfulness may be found in the texts. First, a magistrate who threatens to use his legal powers of enslavement to extort a payment of a sum of money from a victim would act unlawfully, since his powers were being used illegitimately for financial gain. Secondly, where a person apprehended another committing adultery, it would be unlawful to threaten to have that person prosecuted to induce (or blackmail) the adulterer into agreeing to pay an amount of money in return for silence. And thirdly, if someone made a threat which induced his debtor to pay a greater sum of money than the debtor in fact owed, this would be unlawful conduct.

### 5.3 Serious evil

The third main element of a claim for metus in Roman times was that the threat should be one of serious evil (maioris malitatis). Gaius provided a more detailed explanation of this requirement: Moreover, we say that the duress relevant to this edict is not that experienced by a weak-minded man but that which reasonably has an effect upon a man of the most resolute character.

The question of serious evil was therefore inextricably linked with the question of character. Perhaps as a result of the influence of Stoic philosophy, the Romans extolled the virtues of the homo constantissimus, or "the [person] of the most steadfast character". The Romans took a very restrictive view of the sorts of threat
which would amount to legally actionable *metus*. A Roman was expected to take responsibility for his actions, and it was considered poor form for a Roman to attempt to avoid the consequences of what he had done, unless there was a very good reason for doing so. The test was thus objective in nature. First of all, the threat had to be an imminent one, and not merely a contingent threat. Secondly, the types of threat which would ground an action for *metus* in Roman times were extremely limited. The threat could only be directed against the victim himself or his children, and had to constitute a threat of physical harm: either of death, enslavement, imprisonment (particularly private imprisonment by an individual), an attack upon the person’s chastity, or the accusation of a capital charge.

### 6.1 Unjustified enrichment in the Roman law of obligations

The Romans did not recognise a discreet "system" of enrichment law as a distinct branch of the law of obligations. However, the general principle that unjustified enrichment ought not to be countenanced was recognised at least as a matter of principle in Roman law, even if this sort of obligation was classified by the Romans as being quasi-contractual. The leading articulation of the principle against unjustified enrichment in Roman law is the statement of the jurist Pomponius, who said in the Digest "[f]or it is by nature fair that nobody should enrich themselves at the expense of another", and "[b]y the law of nature it is fair that no one become richer by the loss ... of another". On the basis of this principle of equity, it was possible for an aggrieved party in Roman times to seek relief in cases where that party had been unjustifiably impoverished in some way.

But since the Romans did not go as far as viewing unjustified enrichment as a distinct source of obligations, cases of unjustified enrichment were treated in a rather ad hoc fashion. The Romans did not develop one all-embracing enrichment action. Rather, in circumstances where unjustified enrichment occurred, it was ultimately possible to seek relief in terms of certain specific enrichment actions, each with their own particular characteristics, and each designed to deal with a particular practical problem. The most famous of these were the *condictiones* [*condictio* = A general term for actions of a personal nature, founded upon an obligation to give or do a certain and defined thing or service], although there were other forms of enrichment action, like the action of the *negotiorum gestor* [one who, spontaneously and without authority, undertakes to act for another during his absence, in his affairs, for example].

In the light of the fact that *metus* was considered an unlawful act in Roman law, the *condictio* that was relevant to cases of coercion was the *condictio ob turpem vel iniustam causam* [instances of unjustified enrichment]. The relevant title of the Digest identifies a number of situations where a payment or transfer made under compulsion could be recovered in terms of this *condictio*. As far as *metus* in particular is concerned, the most explicit passage is D 12 5 7, which reads: "It is agreed that money exacted under a stipulation itself extorted by force is
This passage suggests that, at least as far as the stipulation was concerned, the condicio ob turpem vel intustam causam as well as the traditional stricti juris actions for metus could have been instituted.

HEGEMONY IN THE CONTEXT OF THE SOUTH AFRICAN LAW OF CONTRACT

(From Constitutional Court Review 2008, Volume 1)

Hegemony [= the predominant influence or domination, as of a state, region or group, over another or others] as a critical concept was originally developed in the work of Antonio Gramsci who employed the word to explain how capitalism maintains control ‘not just through violence and political and economic coercion, but also ideologically, through a culture in which the values of the bourgeoisie became the “common sense” values of all.’ In Gramsci ideology operates in such a way that the dominant class in fact instils a false sense in the dominated class that the good of the dominant class is also the good of the dominated class.

This condition serves conformity and perpetuates a status quo. John and Jean Comaroff aptly describe the cultural effect of hegemony: [W]e take hegemony to refer to that order of signs and practices, relations and distinctions, images and epistemologies — drawn from a historically situated cultural field — that have come to be taken for granted as the natural and received shape of the world and everything that inhabits it.

Gramsci insisted that hegemony is only transformed once the dominated class realised the importance of creating its own culture which depends on the realised that it had unwittingly adopted the values of the bourgeoisie and that its own values in fact opposed the values of the bourgeoisie. Breaking hegemony thus depends fundamentally on the contestation of values and ideals and perhaps more importantly on the contestation of the relationships between and the content of these values and ideals.

When it comes to the relationship between law and hegemony, Litowitz points out that law fulfils a dual function in relation to hegemony. On the one hand, the law represses (through the State’s monopoly on physical force) any disturbance that might challenge the hegemony. On the other hand, the law authorises and legitimates the status quo and so produces and perpetuates the hegemony without the need to revert to physical force. This contribution will focus primarily on this second dimension of hegemony, as I shall interrogate specifically how law — a particular version of contract law — endorses and thus normalises or legitimates the individualist or libertarian worldview. For Gramsci, as for Litowitz, this second dimension of hegemony is the more dangerous one as it carries within it the potential to paralyse all resistance and silence all questioning.
Litowitz argues that the concept of hegemony requires the attention of students of law, precisely because it possesses this profound ‘ability to induce submission to a dominant worldview.’ A site of everyday resistance and struggle comes to be either dismissed and ignored or actively undermined and suppressed.

However, contesting the hegemonies upon which the law as hegemony is founded can be the first step in raising consciousness upon which refusal and resistance of things as they are and supposedly always have been, can be built. This is the central motivation behind the present focus on the hegemonic order(ing) in the South African law of contract.

**Public policy as handmaiden and adversary of freedom of contract**

Colonialism and imperialism of course carried the individualist understanding of freedom of contract grounded in the will to the numerous colonies. It is thus not surprising that the South African law of contract from its very inception reflects the hegemony of the will. 71. CFC Van der Walt: ‘Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksbedinge’ (1986) 103. South African Law Journal 646 658. Also, Dalton makes the point that dealing with unfairness via those constructs that affect the will of the parties (duress, misrepresentation, undue influence etc) effectively constitutes a privatisation of the public enquiry into contract when ‘the undoing of a defective deal [is] presented as depending upon the absence of will or intent rather than on mere inequivalence of exchange.’

One of the most frequently quoted passages — ‘the most privileged statement of all’ — justifying the privileging of the ‘will theory version’ of freedom of contract as the basis of contractual obligation in the South African law of contract, is to be found in a late nineteenth century case from the English law, Printing and Numerical Registering Co v Sampson:

"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice. Therefore you have this paramount public policy to consider — that you are not lightly to interfere with this freedom of contract."

In Burger v Central South African Railways Innes CJ ‘developed’ this basic premise and held in no uncertain terms that the South African law of contract does not recognise the right of a court to release a party to a contract from his obligations on considerations of fairness. And this is precisely the point, (as will hopefully become clearer below): when the focus is on the South African law of contract particularly, the rise of the hegemonic order(ing) of (freedom of) contract
should be considered in the context of the fall of numerous values, principles and 
rights that came to be understood as freedom of contract’s adversaries and so 
became regarded as opposed to it.

A doctrinal aspect that has remained uncontroversial in the grand narrative of the 
South African law of contract has been the recognition that contracts concluded 
contre bonos mores and/or contrary to public policy fall foul of the validity 
requirement of legality and are therefore either void or unenforceable.80 The 
extent of this power to declare void or unenforceable contracts or terms contrary to 
public policy was expressed as follows in Morrison v Angelo Deep Gold Mines 
Ltd:81

"[I]t is a general principle that a man contracting without duress, without fraud and 
understanding what he does, may freely waive any of his rights. There are certain 
exceptions to that rule, and certainly the law will not recognise any arrangement 
which is contrary to public policy."

The dialectic that emerges here is that, on the one hand, public policy generally 
favours the utmost freedom of contract but, on the other, contracts concluded in 
violation of public policy are unenforceable or void. Public policy is thus regarded 
(from the perspective of freedom of contract) as both a legitimating and controlling 
device in our law of contract.82 The resolution/synthesis of this dialectic is, 
however, not impossible when one understands that the exercise of alleged 
freedom of contract is precisely not freedom of contract — that is, it is not freedom 
that can legitimize a contractual arrangement — when it is exercised contrary to 
public policy. This understanding also points to a deeper problem with the notion 
of autonomy as freedom of contract, which is said to form the cornerstone or 
foundational principle of the law of contract. The public policy requirement 
communicates that some contracts that are freely entered into (that is, in which the 
willsof legally competent parties overlap) will not be enforced for want of legality 
(in the broad sense). This means that, as a matter of a contract’s validity, there is a 
constitutive limit on freedom of contract that inevitably denies absolute party 
autonomy.

And since legality is determined externally (not by the parties but with reference to 
‘the interests and convictions’ of the society in which the contract is concluded)83 it 
means that the cornerstone of the law of contract is both autonomous and 
heteronymous.

Our courts, however, do not approach the matter in this way. Freedom of contract 
is consistently opposed to other ideals, values and rights, instead of integrally 
connected to and thus determined by those other values and rights. When public 
policy is, for instance, considered in relation to restraint of trade clauses, the 
position is taken that ‘two values or freedoms come into conflict ... namely
freedom of contract and freedom of trade.’84 In our law the position (since the decision in Magna Alloys)85 has been that restraints of trade are in principle enforceable in accordance with freedom of contract, unless the restraint is contrary to public policy, the measure of public policy in relation to restraints of trade being reasonableness.86 On this formulation, freedom of contract is said to be the ‘preferred value’.87

When the Constitution states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law ‘to the extent that they are consistent with the Bill’ of Rights99 it places the common law notion of freedom of contract on an equal footing with all the rights in the Bill of Rights. In so doing, it contests the a priori elevation of a liberal notion of freedom of contract in the common law in the sense that it calls for rights in the Bill of Rights. Drucilla Cornell distinguishes the concept of synchronisation from both Dworkinian coherence and liberal conceptions of balancing: ‘Synchronisation recognises that there are competing rights situations and real conflicts, which may not be able to yield a “coherent” whole.’100 For Cornell, synchronisation refuses closure and so calls for an ongoing, never-ended (re-)thinking of the whole even as it marks the failure of constructive coherence. For Cornell ‘the tension between the promise of synchronisation and the failure of its achievement’ opens the law to its transformative potential.100

In this context and on this approach, freedom of contract as *pacta servanda sunt* [= promises must be kept], becomes internally defined by the right in section 22 and, for that matter, any other right in the Bill of Rights as well as the founding values and ideals of the Constitution. But such an approach is only possible once one accepts that section 22 (and indeed all the rights in the Bill of Rights) is on an equal footing with freedom of contract (as the Constitution clearly says it is). Simply put, there cannot be talk of freedom of contract where the restraint of trade (or whatever contractual provision) is found to unreasonably and unjustifiably limit a right in the Bill of Rights or can be said to be contrary to the spirit, purport and objects of the Constitution. It goes without saying that where the limitation of a constitutional right is alleged in the context of restraints of trade, such an approach would — in this context — require the prioritisation of direct horizontal application of the Bill of Rights, even though indirect horizontal application might lead to the same result.102

However, in *Sasfin v Beukes*105 the Appellate Division considered the extent to which ‘simple justice between man and man’106 can trump the public interest in the strict enforcement of contracts generally. Primarily, the case centred around the validity of a deed of cession in which a customer of a bank (a doctor) ceded all his future debtors to the bank regardless of whether he owed the bank money or not.107 The cession effectively rendered the doctor the slave of the bank. The majority of the court was of the opinion that these aspects of the cession could not
be severed from the rest of the agreement and held that the entire transaction was unenforceable.108

In this case the Appellate Division was willing to evaluate the substantive fairness of the disputed deed of cession to come to a conclusion that the cession was clearly unreasonable and irreconcilable with the public interest. Lewis describes the decision as ‘the one decision which yields a ray of light in the field of contractual policy, where the court was both bold and innovative in escaping the shackles of formalism’.109 Be that as it may, one again sees the opposition between freedom of contract and other values in Smalberger JA’s judgment where it is held that unlawfulness comes into play where the public interest in the strict enforcement of contracts in accordance with the principle of freedom of contract, is trumped by other relevant factors.110 These relevant factors are expressed by the Court to ensure that ‘public policy ... properly take into account the doing of simple justice between man and man.’111

The uneasiness with which the Appellate Division approaches the issue of unfair contracts is illustrated in the following famous dictum:

No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should however be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.112

In this case the court refused to declare a deed of suretyship void on the grounds of public policy, holding that, although ‘somewhat rigorous’, the surety was not left ‘helpless in the clutches of the plaintiff’. This prompts one to ask whether one party should necessarily be left helpless in the clutches of the other for the court to exercise its Sasfin power? If so, very little of the work of reform and transformation of the law of contract can be expected to be done through the utilisation of the Sasfin principle.

In order to evaluate critically the apparently unproblematic nature of the Constitutional Court’s dismissal of the application for leave to appeal, it is necessary that we recall here what was said in the decision of the Constitutional Court in Carmichele. In this case the applicant (plaintiff in the Court a quo) also did not invite either the trial court or the SCA [= Supreme Court of Appeal] to develop the common law in accordance with the spirit, purport or objects of the Bill of Rights.202 She argued the issue relating to the development of the common law in determining whether a legal duty (in the context of the law of delict [law of delict]
engages primarily with the circumstances in which one person can claim compensation from another for harm that has been suffered) was owed to her, it would have developed the common law and would have found that such a legal duty exists.203

To quote from the judgment of Ackermann and Goldstone JJ:
Despite the failure by the applicant to rely directly upon the provisions of either section 35(3) of the [Interim Constitution] or section 39(2) of the Constitution in the High Court and SCA, counsel for the respondent did not object to this issue being raised in this Court. If covered by the pleadings, and in the absence of unfairness, parties are ordinarily not precluded from raising new legal arguments on appeal. [Reference omitted.]204

Furthermore, in the course of the Carmichele judgment the Court stated the following:
In South Africa, the [Interim Constitution] brought into operation, in one fell swoop, a completely new and different set of legal norms. In these circumstances the courts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. We would add, too, that this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under section 39(2).205

The Carmichele judgment made it clear that there is a general obligation on courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. The judgment also makes it clear that the duty exists whether or not the parties in any particular case explicitly invite the court to develop the common law. Furthermore, it is clear that the Carmichele judgment envisages that there might be circumstances where a court is obliged to raise the matter on its own and require full argument. This would be required presumably when the legal issue ‘can hardly be described as an insignificant one, lying at an exotic periphery’206 of the law in question.

In the light of these findings in Carmichele regarding the general obligation to develop the common law, it is not clear why the Constitutional Court considered it material (and thus fatal to the applicant’s application for leave to appeal) in Crown Restaurant that the trial court was not invited to develop the common law.

Carmichele tells us that judges have a general obligation to consider the development of the common law in light of the spirit, purport and objects of the Bill of Rights, even when they are not invited by parties before them to do so. This is particularly important when a significant legal issue calls for constitutional resolution. By the time that this case came before the trial court it was clear that much dispute existed over, inter alia, the status of the exceptio doli generalis
An exception or *exceptio* whereby a defendant can raise the defence that the plaintiff has not acted in good faith] in our law, the role of good faith and the enforceability of a Shifren clause [= a non-variation clause] and/or a no indulgence clause in circumstances of subsequent verbal amendments/indulgences (that is, in the context of the waiver question). Moreover, it was (and still is) by no means clear how these matters are affected by the normative transformation of the legal order occasioned by the Constitution. Given the fact that the Constitution ‘brought into operation, in one fell swoop, a completely new and different set of legal norms’ it could certainly be asked whether the question of the development of the common law in this area should not have been raised by the trial court judge — as mandated by Carmichele — even though he was not explicitly invited to consider the development of the common law. It is thus not clear, under the circumstances, why further exploration by the trial court of the issues that were eventually raised in the Constitutional Court, was ‘understandably not undertaken’.

Cameron JA then added that the judgments in Brisley and Afrox ‘affirmed that the common law of contract is subject to the Constitution’ and that public policy, as rooted in the founding values of the Constitution — human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism — is the proper instrument by way of which the courts can invalidate agreements that are offensive to the values of the new constitutional order.

Cameron JA’s judgment openly maintains an explicit opposition between public policy and good faith. However, Cameron JA offers no justification as to why good faith should be regarded as more of an imprecise and vague notion than the notions in which public policy are supposedly rooted: dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism. Dignity particularly has in the past been repeatedly criticised for being an imprecise notion. Some have even gone so far as to describe equality as an empty concept. Are the concepts of non-racialism and non-sexism not also open concepts? And what about ‘the advancement of human rights and freedoms’? Moreover, can it not be said that in a constitutional democracy founded on these values, good faith — as the ethical element of contract — encompasses, in fact embraces, all these founding values at once? Hector MacQueen and Alfred Cockrell have argued that the South African courts have long conceded that public policy is a dynamic concept in the South African law of contract. It nevertheless, argues MacQueen and Cockrell, falls to be distinguished from good faith. Whereas good faith applies community standards ‘much more directly’ to the relationship between the contracting parties, public policy enunciates moral and social standards that are not necessarily dependent on the relationship between the parties. The SCA appears to have, at least implicitly, accepted a dynamic conception of public policy. At the same time it appears to have adopted the view that public policy should be distinguished from good faith, but not along the
The SCA rejects any direct reliance on good faith on the basis that it is too imprecise a notion. Yet, it accepts direct reliance on public policy — a concept as dynamic and as imprecise as public policy. Such a basis for the opposition between good faith and public policy is incoherent and arbitrary. The point is that both good faith and public policy are open-ended norms, imprecise notions, text that calls for interpretation and justification much like the entire Bill of Rights and the founding values and ideals of the Constitution. Both good faith and public policy amount to devices by way of which freedom of contract (as embodying the value of autonomy) is limited (and thus constituted) in the South African law of contract. To privilege public policy on the basis that good faith is too imprecise a notion (and thereby suggesting that public policy is somehow more precise) sits uncomfortably with the context of — and openness to — an entire legal order that is founded on more or less ‘imprecise’ notions namely dignity, equality and freedom, notions to which meaning is given in a long process over time at the same time as their meaning always depends — at least to a certain extent — on context. Good faith aspires to an ideal of civic friendship (a ‘politics’ of friendship if you will) which requires, mandates and demands negotiation (contracting) otherwise — that is, with respect for and consideration of the other contracting party. I believe that the Constitution aspires to the post-liberal ideal of civic friendship precisely because of its foundational injunction to respect the dignity of all others. This, I would argue, requires that we afford content to good faith in the law of contract that would maintain it as a post-liberal concept. I want to emphasise here that I do not consider the dignity of which the Constitution speaks (and on which the instant conception of civic friendship and good faith turns) to be inevitably fated as a radically individualistic concept that, moreover, forms the basis of exclusively negative freedom. This argument is possible because of the links drawn in our early dignity jurisprudence between dignity and ubuntu.

Drucilla Cornell draws the further link between Ubuntu, (Kantian) dignity and friendship as follows: In Kant, I am a friend to myself because of the dignity of my humanity. Under Ubuntu, I am a friend to myself because others in my community have already been friends to me, making me someone who could survive at all, and therefore be in the community. It is only because I have always been together with others and they with me that I am gathered together as a person and sustained in that self-gathering.

Judge Dennis Davis has been foremost amongst those who have argued that the notion of respect for equal dignity (civic friendship) is translated into the law of contract by way of good faith. He has also opposed this concept to South Africa’s political past. As Davis J puts it: This concept of good faith is congruent with the underlying vision of our Constitution ... to the extent that our Constitution seeks to transform our society from its past, it is self-evident that apartheid
represented the very opposite of good faith ... Our Constitution seeks to develop a community where each will have respect for the other ... Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. Where one party promotes its own interests at the expense of another in so unreasonable a manner as to destroy the very basis of consensus between the two parties, the principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract. In his judgment in Mort Davis J quoted the words of Reinhard Zimmermann in relation to this aspect: The principles of equality and dignity require that the parties to a contract do none other but ‘adhere to a minimum threshold of mutual respect in which the unreasonable and one-sided promotion of one’s own interest at the expense of the other infringes the principle of good faith to such a degree as to outweigh the public interest in the sanctity of contracts’. This is the formulation for which Barkhuizen leaves the door open. Ultimately in our context, respect for the Other resides, as Davis J has also indicated, in the acknowledgement that: [A] transformative constitution needs to engage with concepts of power and community ... the concept of contractual autonomy within the concept of a community of contracting persons must mean something distinct from a libertarian connotation, particularly if the concept of Ubuntu is to play any role in our law. These statements about the law of contract as law subordinated under the new Constitution are explicit interpretations of the constitutional mandate as requiring a re-emphasis on the ethical element of contract in the furtherance of a post-liberal or positive freedom of contract. A freedom of contract that comes to understand that conduct cannot be characterised as free when it disrespects/ violates dignity, when it pretends that contract is a relation between things and not between persons, when it does not proceed according to respect for whoever is on the other side of the negotiation. To quote Colombo: ‘Good faith implies a developed sense and a high level of awareness of personal responsibilities towards society.’

When Lubbe argues that our understanding of dignity in contract should be informed by Kant’s precept that people should not act contrary to the equally necessary self-esteem of others, as human beings, that is, [they are] under obligation to acknowledge, in a practical way, the dignity of humanity in every other human being, he already acknowledges the relational aspect of contract that would amount to a Hegelian version of contract as ‘reciprocal recognition.’ Rosenfeld explains that under this paradigm contract is not only compatible with the reconciliation of individual autonomy and communal values, but it is also suited to foster the mutual determination of the individual and — or, perhaps more precisely, against — the communal.

In turn this understanding of contract in terms of relationality and mutual recognition bears marked resemblances with Nancy’s analysis of existence as ‘being singular plural.’ Once we understand that both good faith and freedom of contract are essentially relational concepts it becomes possible to think a law of
contract beyond continuing and continuous exploitation, subservience and injustice — beyond ‘our proud and deadly dualisms.’

The legislature has made substantial inroads in this regard and, at the time of writing the Consumer Protection Bill had been approved by Parliament and is awaiting the President’s signature. Amongst various other consumer protection mechanisms the Bill explicitly prohibits ‘unfair, unreasonable or unjust’ contracting. In addition, courts will be required in terms of clause 52(3) to decide whether a contract is unconscionable, unjust, unreasonable or unfair. Although guidelines for the determination of the unreasonableness, injustice or unfairness are set out in clause 48(2) they are explicitly intended not to limit the generality of the section prohibiting unreasonable, unfair or unjust contracting. This Bill thus already points to a future law of contract that will be required to be far more concerned than it has been up to now, with good faith as the ethical element of contract and thus with the spirit of the ideal of civic friendship in South Africa.

References

16 JM Russel Philosophical classics (2007) 94.
17 As above. Also see TR Bates ‘Gramsci and the theory of hegemony’ (1975) 36(2) Journal of the History of Ideas 351 352: ‘The concept of hegemony is really a very simple one. It means political leadership based on the consent of the led, a consent which is secured by the diffusion and popularisation of the world view of the ruling class.’
19 Russell (n 16 above) 95.
20 Bates (n 17 above) makes the point that the theory of hegemony recognises that man is ruled not just by force but also by ideas. The author also points to the Marxist mantra that ‘the ruling ideas of each age have ever been the ideas of its ruling class.’
22 As above.

71 CFC Van der Walt ‘Die huidige posisie in die Suid-Afrikaanse reg met betrekking tot onbillike kontraksideinde’ (1986) 103 South African Law Journal 646 658. Also see Dalton (n 60 above) 1001 who makes the point that dealing with unfairness via those constructs that affect the will of the parties (duress, misrepresentation, undue influence etc) effectively constitutes a privatisation of the public enquiry into contract when ‘the undoing of a defective deal [is] presented as
depending upon the absence of will or intent rather than on mere inequivalence of exchange.’
72 Van der Merwe et al (n 37 above) 22.
73 Cockrell (n 53 above) 56.
74 See Brisley (n 13 above) 16B-C; Afrox Healthcare (n 13 above) 40H-41A; South African Forestry (n 13 above) 338J-339B; and Napier (n 13 above) para 7.
75 Cockrell (n 53 above) 46. See, for example, Wells v South African Alumenite Company 1927 AD 69 73 (Wells); Roffey v Catterall, Edwards & Goudré (Pty) Ltd 1977 4 SA 494 (N) (Roffey) 504G-H; Sasfin (Pty) Ltd v Beukes 1989 1 SA 1 (A) (Sasfin) 9F; Edouard v Administrator, Natal 1989 2 SA 368 (D) (Edouard) 379A; Baart v Malan 1990 2 SA 862 (E) (Baart) 868A; De Klerk v Old Mutual Insurance Co Ltd 1990 3 SA 34 (E) (De Klerk) 44; Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd 1993 1 SA 179 (A) (Benlou Properties) 187H; Standard Bank of SA Ltd v Wilkinson 1993 3 SA 822 (C) (Standard Bank) 830D; and Basson v Chilwan and Others 1993 3 SA 742 (A) (Basson) 761G. See also V Terblanche (2002) ‘The Constitution and general equitable jurisdiction in South African contract law’ unpublished LLD thesis, University of Pretoria, 2002 153 who refers to the ‘privileged position of 19th century contract law theory in South Africa.’
76 1875 LR 19 (Printing and Numerical Registering Co) Eq 462 per Jessel MR. 77 Printing and Numerical Registering Co (n 76 above) Eq 465. The mood is also expressed in more general terms by Kotze CJ in Brown v Leyds (1897) 4 OR 17 (Brown) 31 who held that ‘no Court of Justice is competent to inquire into the internal value, in the sense of the policy, of the law, but only in the sense of the meaning or matter of the law’.
78 1903 TS 571 (Burger).
79 Burger case (n 78 above) 576.
80 Van der Merwe et al (n 37 above) 192-193, 200-203. (2008)
81 1905 TS 775 (Morrison) 779.
82 See Van der Merwe et al (n 37 above) 17.
83 Van der Merwe et al (n 37 above) 191.
84 Van der Merwe et al (n 37 above) 213. Also see Roffey (n 75 above) 505F (per Didcott J): ‘I am satisfied that South African law prefers the sanctity of contracts ... Freedom of trade does not vibrate nearly as strongly through our jurisprudence ... it is intrinsically the less commanding of the two ideas.’
85 Magna Alloys & Research (SA) (Pty) Ltd v Ellis 1984 4 SA 874 (A) (Magna Alloys).
112 Sasfin (n 105 above) 9A-B. (emphasis added)
113 L Hawthorne ‘Public policy and micro lending — has the unruly horse died?’ (2003) 66 THRHR 116 118.
114 These sentiments are also reflected in cases decided by the lower courts in the aftermath of Sasfin. See in this regard Standard Bank (n 75 above) 825C-827A and
Pangbourne Properties Ltd v Nitor Construction (Pty) Ltd 1993 4 SA 206 (W) (Pangbourne Properties) 210G-214F.
115 Dalton (n 60 above) 1037.
116 Van der Merwe et al (n 37 above) 219.
117 Donelly v Barclays National Bank Ltd 1990 1 SA 375 (W) (Donelly).
118 n 117 above, 381F.
119 As above.
120 Donelly (n 117 above) 381H.
121 As above.
122 As above.
123 1989 3 SA 773 (A) (Botha).
124 Botha (n 123 above) 782I-783C.

200 Crown Restaurant (n 194 above) para 4 (emphasis added).
201 Crown Restaurant (n 194 above) para 6.
202 Carmichele (n 193 above) para 41.
203 Carmichele (n 193 above) para 28.
204 Carmichele (n 193 above) para 31. Also see para 38: ‘It does not appear to have been suggested that there was any obligation on the High Court or the SCA to develop the common law of delict in terms of section 39(2) of the Constitution.’
205 Carmichele (n 193 above) para 36. Also see para 39: ‘we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.’ (emphasis added.)
206 Carmichele (n 193 above) para 59.

215 Barkhuizen (n 13 above) para 1.
216 Napier (n 13 above) para 28. The court held that this lack of evidence was attributable to the way in which the matter came before it, namely by way of ‘a terse statement of facts’ (para 9).
218 Napier (n 13 above) para 7 (emphasis added).
219 Napier (n 13 above) para 6.
220 Napier (n 13 above) para 7.
224 As above.
225 See Magna Alloys (n 85 above) 891 and Sasfin (n 75 above) 71-J.
226 See South African Forestry (n 13 above) para 32.
227 Perhaps the privileging of public policy can be explained by reference to the privileging of the mantra that public policy generally favours the strict enforcement of contracts, whereas good faith does not, without more, favour such a privileging of liberal ideology.

272 As above.
274 n 273 above, 509.
275 Douzinas & Geary (n 68 above) 40.
276 But also see Grové (n 130 above) 689.
277 Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others 2002 6 SA 202 (C) (Shoprite) 215G-216A.
279 n 168 above, 475B-C.
280 Advtech (n 95 above) 388A.
281 The mantra in Ackermann J’s celebrated minority judgment in Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 1 SA 984 (CC) (Ferreira) para 49 ‘to deny people their freedom is to deny them their dignity’ should perhaps then be reconsidered in this light because, on this understanding in the law of contract, to deny people their dignity is to deny one’s own freedom (of contract).
285 As above.
286 JL Nancy Being singular plural (2000). In this work Nancy denounces the liberal idea of an individual atomistic self as the subject of ontology. As Nancy puts it: ‘That which exists, ... coexists because it exists. The co-implication of existing [l’exister] is the sharing of the world.’
Curia (Page: 357, Webster's Revised Unabridged Dictionary 1828 and 1913)

Cu"ri*a (k"r?-?), n.; pl. Curle (-). [L.]

1. (Rom. Antiq.) (a) One of the thirty parts into which the Roman people were divided by Romulus. (b) The place of assembly of one of these divisions. (c) The place where the meetings of the senate were held; the senate house.

2. (Middle Ages) The court of a sovereign or of a feudal lord; also; his residence or his household. Burrill.

3. (Law) Any court of justice.

4. The Roman See in its temporal aspects, including all the machinery of administration; -- called also curia Romana.

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