

ARTICOLE

**CLOSING THE GAP BETWEEN FORMAL AND SUBSTANTIVE FREEDOM OF
CONTRACT: CONSTITUTIONAL REALISATION OF SUBSTANTIVE FREEDOM**

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“Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust”¹

Abstract: *In most common law countries the law of contract is characterised by formal equality and formal freedom of contract. In South Africa the advent of the Constitution initiated a move away from formal equality. This move to substantive equality necessitates a reassessment of formal freedom of contract in order to establish substantive freedom. This may be effected by the Constitution and the Bill of rights. The latter emphasises human dignity, freedom and equality and the Constitution instructs in the Preamble to free the potential of each citizen. Within the law of contract support for substantive freedom is found in the requirement that human beings have an end, a manner of life in which their human potentialities should be realised. I refer to this objective as self-actualisation. Furthermore, recognition and protection of individuals’ human dignity and self-actualisation is found in John Rawls’ principle goods theory, his notion of moral reciprocity, Martha Nussbaum’s capabilities theory and Hugh Collins’ social market theory. It will be argued that Rawls, Nussbaum and Collins’ theories may be applied to establish substantive freedom over formal freedom of contract.*

Key words: *“Free the potential of each individual”; self-actualisation; substantive freedom of contract; Rawls’ principle goods; Nussbaum’s core capabilities; Collins’ social market theory*

1. Introduction

The South African Constitution is explicitly value based, human dignity being the *Grundnorm*. It is trite that the rule of law is one of the foundational values,² but it is obvious that the Constitution does not view the law through the traditional orthodox optic as a formally rational system, but purports to achieve an ideal which recognizes substantive moral values

and the existence of differing socio-economic conditions.³ Thus, the Constitution proclaims the attainment of substantive equality another foundational value⁴ and provides, over and above the traditional civil and political rights, a range of socio-economic rights guaranteeing fair labour relations,⁵ ecologically sustainable development,⁶ access to adequate housing,⁷ access to health care, food, water, social security,⁸ education,⁹ and protection of children.¹⁰ The Constitution on occasion instructs the state to achieve the realisation of these rights¹¹ and exacts that the judiciary take cognizance of substantive values.¹² Finally, the Preamble to the Constitution¹³ states as one of the objectives thereof, “improve the quality of life of all citizens and *free the potential of each person*” (my emphasis). This constitutional objective to empower the country’s citizens to achieve their potential, which in scientific literature is referred to as self-actualisation,¹⁴ is materialising in a multitude of projects, programmes and initiatives and the relationship with the law of contract may not be obvious at first glance. However, this article will argue that self-actualisation is a vehicle to achieve human dignity. The constitutional values of liberty and equality which are important components of human dignity play a dominant role in the law of contract, which is the mechanism by which, in a market economy the wealth of society is distributed. Today it is proposed that self-determination is critical to private law and that private law has to address incidences of subjugation especially within the ambit of contract law.¹⁵ Thus, to achieve self-actualisation it is necessary to establish substantive equality and substantive freedom of contract. In a previous paper I have argued for recognition of substantive equality¹⁶ and will now argue that to free the potential of each individual substantive freedom of contract becomes an inevitable requirement.

During the second half of the last century, legislative intervention levelled the playing field in several areas, because awareness spread that classical contract law did not address socio-economic inequalities, but replicated domination and exploitation of weaker parties. Although such interventions were decried as undermining freedom of contract on the basis that freedom of contract and protection of indigent contracting parties constituted antagonistic principles,¹⁷ certain authors¹⁸ have challenged the predominance of freedom of contract in an attempt to import social justice into contract law. However this interpretation never acted as a catalyst for the re-conceptualisation of the fundamental doctrine of freedom of contract in South Africa, neither did it engender a shift from formal freedom of contract to provide for substantive freedom of contract.

This paper will argue that substantive freedom of contract is part of the process of self-actualisation which aims to achieve human dignity. The American philosophers Rawls and Nussbaum have respectively, with their primary goods and core capabilities theories, elucidated this primordial inalienable human right. Their ideas are reflected in contract law in the theory of social contract law as set out in the work of Collins and others.¹⁹ Rawls and Nussbaum present a philosophical basis for an alternative to the nineteenth century interpretation of the concept of liberty, which will facilitate a transition from formal to substantive freedom of contract in order to arrive at self-actualisation.²⁰

2. Background: Classical contract law and legal tradition

Classical contract law has been described as the elegant constructions of legal doctrine by jurists and judges of the nineteenth century.²¹ Built upon the economic theories of Adam Smith and Jeremy Bentham²² and the political achievements of the American and French revolutions, freedom of contract was viewed as an expression of the centrality of the individual.²³ The other pillar, sanctity of contract was closely linked to party autonomy. Each party negotiates and concludes a contract in pursuit of her own interest. This contract represents a compromise of opposing interests, which benefits the common good. These principles require minimal supervision over the terms of the contract and the role of the judiciary was limited to application of abstract legal norms. The courts were to intervene where the contract was tainted by defects of will or illegality, but were not to consider the relative justice of a party's claim²⁴ or enter into policy considerations.²⁵

The other revolutionary requirement, equality, advanced less spectacularly. Equality was interpreted as equality before the law, which in itself was progress. However, the wealthy middle class adhered to the premise that inequality between individuals is the result of ordinary variations and competencies and that recognition of formal equality is the only possibility.²⁶ It pays testimony to the strength of legal tradition in South Africa that the essence of this doctrine is still in general use among lawyers and judges and reflected in major treatises on the law of obligations.²⁷

Freedom of contract was and is considered the essential prerequisite to a free market economy and it is seldom realised that the rules of classical contract law have been established to implement this market.²⁸ In consequence it stands to reason that after the economic collapse of the communist economic system freedom of contract flourished. In South Africa the new constitutional dispensation affirmed human dignity, equality and freedom as democratic values. However, the judiciary followed a strict application of the rule of law and continued to apply the principles of classical theory. Consumers contracting with powerful institutions such as banks, micro financiers and hospitals were denied protection against disadvantage or exploitation, which was equalled with disappointed expectations.²⁹ In 2002, in *Mort NO v Henry Shields-Chiat*³⁰ Davis J held that freedom of contract forms part of the fundamental right of freedom, which is enshrined in our Bill of Rights and informs the constitutional value of human dignity.³¹ In *Brisley v Drotzky*³² Cameron JA (as he was then) pointed out that the judiciary, bound by the constitution enshrining human dignity, the achievement of equality and the advancement of human rights and freedom as fundamental values, should show restraint in striking down contracts or declining to enforce them. He referred to the balance between contractual freedom, a framework within which the ability to contract enhances rather than diminishes self-respect and dignity.³³ These decisions can be interpreted as giving expression to individual freedom and human dignity and representing the ruling paradigm of classical contract law³⁴ which represents self autonomy and human dignity.

A landmark was reached when the Constitutional Court was faced with the tension between contractual freedom and the Bill of Rights in the case of *Barkhuizen v Napier*.³⁵ The core of the decision is found in Ngcobo J rejecting the direct testing of the constitutionality of a

contractual term against a provision in the Bill of Rights.³⁶ Instead the learned judge held that the proper approach of constitutional challenges to contractual terms of private parties is a determination whether the challenged term is contrary to public policy.³⁷ The court noted that the determination of public policy had been facilitated by the advent of constitutional democracy,³⁸ as the legal convictions of the community, those values held most dear by the society, can now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights.³⁹

It appears that development of a more society based contract law is closely linked to constitutionalisation of contract law because fundamental rights may contribute to the manifestation of substantive freedom of contract.⁴⁰ It is substantive freedom of contract which is necessary to achieve the goal of self-actualisation.

2.1 The move from traditional to modern contract law

Although the judiciary has been reluctant to chip away at the foundation of contract as we know it, both legislator and courts have been well aware that the formal, implied equality of contracting parties is a fiction. Consequently, relief to the weaker members of society which in the classical model are vulnerable to exploitation,⁴¹ has been provided by development of formal equality into a more substantive parity between parties.

The catalyst for this move has been attempts to establish a society-orientated approach to contract law by way of introduction of consumer protection legislation⁴² which emphasises behaviour which takes account of the defensible interests of the other party to the contract. This predisposition invoked a new focal point which aimed at a contracting individual's socio-economic situation. In South Africa new ground was broken in 1997 when the Constitutional Court held in the *Mohlomi v Minister of Defence*⁴³ that the realities of the country, such as poverty, illiteracy marginalisation, lack of information and financial resources, must be taken into consideration.⁴⁴ Thus, imbalance of bargaining position gradually found recognition in South African case law as one of the factors to be taken into consideration when it had to be determined whether a clause or contract was contrary to public policy.⁴⁵ Recognition of the prevalence of such imbalance led to the Consumer Protection Act.⁴⁶

The history of South Africa and the resulting inequality give the constitutional value of equality a special place within the archetype human right, namely human dignity. Taking cognisance of equality in the law of contract and the shift from formal to substantive equality is thus a welcome addition in the elimination of unconscionability and unfair practices. However, as has recently been pointed out⁴⁷ the most reliable indicator whether a satisfactory balance of power between the parties was present during negotiations and contracting, is to be found in the outcome of the contract, namely in the equality of performances. Even-handed performances are the best guarantee that substantive equality rules the contracting process and that the parties respected the human dignity of their counter-parts. However, the take-it-or-leave-it standard contract and the lack of resources of the weaker party, make this hindsight approach costly and less practical.

Nevertheless, as the new constitutional dispensation in South Africa has clearly infused moral values into the legal system, a further move away from traditional contract law towards a value-based, society orientated law of contract has become possible. Acknowledgment of an imbalance of bargaining power clearly implies that real freedom of contract on the part of the weaker party is absent.

3. Substantive equality and freedom of contract: two sides of the same coin

A watershed in the movement from formal to substantive freedom has been the German Federal Constitutional Court⁴⁸ decision referred to as the “Suretyship” case of 1993.⁴⁹ In this case the Federal Constitutional Court interpreted section 2(1) of the Federal Constitution⁵⁰ of 1949. Section 2(1) reads: “Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law”.⁵¹ The interpretation given to section 2(1) was that of a guarantee for substantive freedom of contract, thus constructing an unconscionability doctrine. This doctrine required structural inferiority of one contracting party and unusually onerous consequences of the contract for the inferior party.⁵² In 2005 there were two decisions dealing with life insurance contracts which had a further impact on section 2(1).⁵³ These decisions extended the application of section 2(1) of the Grundgesetz to a general inequality of bargaining power. The lack of substantive freedom of contract consisted in the general inequality of bargaining power between insurance companies and consumers, as well as in the general lack of freedom of choice of insured persons after the conclusion of a life insurance policy. Consequently, the court extended its substantive understanding of freedom of contract. It broadened the scope of the principle of private autonomy as substantive freedom of contract.⁵⁴

Ciacchi has drawn attention to the parallelism between equality and freedom. She argues that acceptance of substantive equality which led to protection of the vulnerable against unusually disadvantageous contracts implies embracing a substantive understanding of freedom of contract, which will prevent and eliminate unconscionable contracts.⁵⁵

This has caused Cherenychenko to pose the question whether it is freedom of contract as a starting point which has been challenged or rather that it is the formal conception of freedom of contract characterising traditional contract law which should be reconceptualised.⁵⁶ The movement towards a society based contract law has introduced a need for the manifestation of substantive freedom which requires focussing on the presence of real freedom which would enable individuals to control decision making within the contracting dynamic.⁵⁷ Cherednychenko⁵⁸ has also argued that support for the interests of weaker contracting parties through control of the bargaining process aims to secure real freedom of contract for both contracting parties and not merely providing protection for the weaker party for its own sake.

As the philosophical basis of modern contract doctrine is changing, the principle of equality was emphasised.⁵⁹ The South African Constitution aims to realise freedom, equality and human dignity to satisfy needs and to allow citizens to achieve a good life.⁶⁰ Modern contract law demands not only market regulation, but also to take substantive values⁶¹ and the existence of differing socio-economic conditions⁶² into consideration as well.

It is trite that modern contract is based on the will of the parties. This basis is held to guarantee justice and party autonomy and is considered recognition of human dignity. De Kock and Hallebeek have set out how the seed for this principle is found in the *Nichomachean Ethics* of Aristotle where it is argued that man is responsible for his acts only to the extent that he acts freely and in the absence of ignorance or compulsion.⁶³ This is the postulate of equal freedom: every person should have the same freedom to structure his or her life, and in a peaceful and appropriate social order.

4. Improve the quality of life of all citizens and *free the potential of each person*

4.1 Introduction

The ideal to improve the quality of all citizens lives and free all individuals' potential, forms the essence of every philosophy, religion and ideology, but it may be ascribed to the troubled history of South Africa, that this message was incorporated in the preamble to the South African Constitution. This paper has no pretension to make a contribution to philosophy, theology or political science, but wants to draw attention to the relationship between the constitutional values and a new society orientated law of contract.

The contract law lawyer James Gordley has drawn attention to Aristotle's principle that actions which contribute to a distinctively human life are right and those that detract from it are wrong.⁶⁴ Today the South African academic, Sandra Liebenberg speaks of a fully human life in her "Value of Human Dignity".⁶⁵ The American legal philosophers John Rawls and Martha Nussbaum have also dealt with the concepts of a "complete life" and "a life that is worthy of the dignity of the human being". In psychology Abraham Maslow developed the theory of self-actualisation.⁶⁶ It will be argued that each of these seminal works has bearing on the principle of freedom of contract and is reflected in modern contract law, as represented in the work of Collins.

4.2 Self-actualisation: the tool to effect fulfilment of potential

Self-actualisation recognises the individual's need to fulfil her potential, "to be all that one can be". On a psychological level Maslow requires fulfilment of the following needs for an individual to establish self-actualisation. Self-actualisers need: truth; goodness; unity; beauty; justice and order; uniqueness; perfection; completion; simplicity; richness not environmental impoverishment; effortlessness; playfulness; self-sufficiency and finally meaningfulness⁶⁷. Thus the term self-actualisation can be used in a variety of contexts and different senses, but the overriding idea is that each individual has an innate potential, which is waiting to be realised.⁶⁸ Perceptibly, self-actualisation takes place in different areas of an individual's life and not only on a psychological level. In this article the concept self actualisation will be projected onto the law of contract to capture the notion that an individual who is empowered with real freedom is placed in a position able to fulfil her potential; one aspect of substantive freedom is the ability to contract from a position of true freedom and autonomy. Consequently, the contractual aspect of self-actualisation is found in the fact that substantive freedom of contract will aid

self-determination. The aim to self-actualise can also be identified as the purpose of the theories developed by the philosophers John Rawls and Martha Nussbaum and the lawyer Hugh Collins. These authors are supporters of citizens achieving a “fully human life”.⁶⁹

5. John Rawls' theory of basic goods

The American philosopher John Rawls developed a theory of justice as fairness in his seminal work *A Theory of Justice*.⁷⁰ He recognised the importance of constitutional fundamentals for any notion of justice.⁷¹ In keeping with the requirement of critical essentials, Rawls demands a social minimum of primary goods to be guaranteed to every citizen. These primary goods are “what persons need in their status as free equal persons, and as normal and fully cooperating members of society over a complete life”.⁷² His requirement of primary goods to effect a “complete life” clearly refers to self-actualisation. Possession of these primary goods are what situates an individual in a position to reach her potential. Rawls highlights that every citizen must possess primary goods above the threshold of the social minimum.⁷³ These goods include basic rights and liberties; freedom of movement and free choice of occupation; powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structures; income and means and the social basis of self respect.⁷⁴ It is a small step to deduct that these primary goods may empower an individual to free her potential. These are the goods required for self-actualisation.

Attention has been drawn by Thom Brooks,⁷⁵ to Rawls' demand that citizens must be in possession of a social minimum of primary goods in order to access “the adequate development and full exercise of their moral powers and a fair share of the all-purpose means, essential for advancing their determinate conceptions of the good”.⁷⁶ Rawls categorises two moral powers: the first involves a capacity for a sense of justice which entails an understanding and social engagement within a cooperative enterprise with others as free and equal; the second moral power is man's conception of the good.⁷⁷ The latter view, Rawls defines as “the capacity to have, to revise, and rationally to pursue a conception of the good.”⁷⁸ Brooks explains that in order to be able to exercise moral powers, man requires a guarantee of a social minimum.⁷⁹ The social minimum amounts to a fundamental minimum. According to Rawls it constitutes “the needs essential for a decent human life”.⁸⁰ These essentials make self-actualisation possible.

Rawls' essentials for a decent human life are given momentum in Martha Nussbaum's capabilities approach.⁸¹

6. Martha Nussbaum's capabilities approach

The capabilities approach constitutes an hypothetical structure which encompasses two primary normative points of view.⁸² The first is the assertion that the freedom to realise well-being is of paramount importance and secondly, that freedom to achieve well-being is implicit in an individual's capabilities, that is, their own opportunity to do and be what they

value.⁸³ Both claims are implicit in the value system of the South African Constitution and the psychological concept of self-actualisation.

The driving force of Nussbaum's theory concerns "human capabilities, that is, what people are actually able to do and to be – in a way informed by an intuitive idea of a life that is worthy of the dignity of the human being".⁸⁴ According to Nussbaum the minimum social justice in society may be found in the reality that ten core 'capabilities', or opportunities to function are available to each and every citizen.⁸⁵ She argues that every individual has an inalienable right to a basic level of these ten capabilities as these are prerequisites of a life worthy of human dignity. The ten "Central Human Capabilities" are the following: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.⁸⁶ It is noteworthy that, although based on another scientific discipline, these core capabilities concretise self-actualisation. In an instance where an individual is empowered by Nussbaum's capabilities the individual will be in a position to free her potential. Self-actualisation would have taken place. Nussbaum has articulated a coherent theory of self actualisation based on human rights and founded in human dignity. It is notable that the ten core capabilities have a recognisable call in South Africa, since they are directly or indirectly represented in the Bill of Rights.⁸⁷

In their respective theories on social justice and human dignity the philosophers Rawls and Nussbaum dealt with the essentials of self actualisation albeit within the ambit of civic rights. However, as the socio-economic aspect of human life is receiving more attention the various disciplines within private law are transformed and the work of contract lawyers such as Collins and Ciacchi reflect the demand for self actualization in contract. These authors have introduced a societal dimension within the theory of contract with the result that facilitating participation in the good life by individuals has been allocated place beside market efficiency. It is necessary re-emphasise that the requirement of a "good life" does not refer to a materially luxurious life, but identifies with the principle goods and core capabilities required by the philosophers Rawls and Nussbaum. Possession of these goods and core capabilities refer to civic rights and capabilities which are required to empower individuals contracting from a position of substantive freedom. This makes it possible to achieve freedom from unconscionable contracts. It is obvious that formal equality and formal freedom are not conducive to this goal.

7. Hugh Collins and the social market theory

Throughout his body of work Collins argues for substantive freedom of contract so as to empower individuals to be in a position to conclude contracts which enable them to reach their full potential.⁸⁸ Collins identified that the so-called free market operated on principles of formal equality and formal freedom of contract, which allowed the stronger contracting party to exploit the weaker. In consequence, Collins has been advocating a change of direction towards a social market.⁸⁹ Support for a social market is found in European Union consumer protection and unfair commercial practices legislation, while in the United States scholars Kaplow and Shavell support the new paradigm,⁹⁰ arguing that legal rules should be chosen with regard to their

effects on the well being of individuals in society.⁹¹ Collins places the requirement of substantive freedom within the ambit of a social market which is characterised by protection of individuals from unconscionable contracts.⁹² According to Collins the most important characteristic of contracts is not acknowledgement that it constitutes a mechanism to distribute wealth, and establish power relations, but to provide the prospect for establishing meaning in the lives of contractants.⁹³ Thus Collins' social market theory⁹⁴ proposes as one of its goals achievement of an individual reaching his or her full potential. First, Collins identifies the regime of contract law as the determinant of the order of wealth and power. He explains that societies introduce rules, regulations and institutions which provide a way in which economic exchanges are brought about and in consequence establish the vehicles to allocate wealth and power.⁹⁵ Market exchanges are fundamental in creating this division; all market exchanges are regulated by the law of contract which means that the regime of contract law determines the order of wealth and power. Consequently, contract law functioning within a free market economy will produce an order which differs from that operating within a social market economy. Contract law branded by unqualified freedom of contract, is situated within the free market economy; while contract law characterized by substantive freedom of contract, may be located within a controlled, social market economy.⁹⁶ The latter regime meets the requirements of modern law of contract which goes further than enforcing voluntary choices because, it imposes mandatory terms on certain types of contractual exchange,⁹⁷ and determines the enforcement mechanisms. It establishes and regulates the remedies to which parties have access in order to justify their contractual rights, which, according to Collins,⁹⁸ also determines the strength and efficiency of those rights. Consequently, modern legislative interventions have distributive intentions and play a key role in shaping the market order.⁹⁹ Modern contract law considers markets as a united good, which requires guidance and enhancement.¹⁰⁰ Within this paradigm, contracts are regarded as creating obligations recognised by law on individuals contributing to markets.¹⁰¹ In terms of Collins' social market theory, contracts are not only recognized as a means of distributing wealth and founding power relations, but provide opportunities for the realization of meaning in the parties' lives.¹⁰² Thus it may be inferred that contracting needs to be situated within a substantively free location so as to enable contractants whose potential has been unleashed to conclude agreements which allow individuals to realise meaning in their lives.

Collins' social market theory robustly supports a requirement of substantive freedom over formal freedom of contract and blind individualism.¹⁰³ It is opportune to note that an understanding of freedom of contract as substantive rather than formal is within the ambit of South African dignity jurisprudence.

8. Constitutional Jurisprudence: human dignity and self-actualisation

In several decisions dealing with issues relating to human dignity the inherent value of individuals' potential clearly came to the fore. In *S v Makwanyane*,¹⁰⁴ O'Reagan J held that "The importance of dignity as a founding value of our new Constitution cannot be over-emphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings:

human beings are entitled to be treated as worthy of respect and concern.” In *Khosa v The Minister of Social Development*,¹⁰⁵ Mokgoro J states that: “... as a society we value human beings and want to ensure that people are afforded their basic needs ...” The landmark decision of *Government of the Republic of South Africa v Grootboom*,¹⁰⁶ has defined human dignity as embodying the citizens right to basic minimum conditions not only of survival but also to reach their full potential.¹⁰⁷ This case dealt with the State’s constitutional obligation to provide access to housing and provided the court with a forum to embark on an insightful analysis of socio-economic rights and the achievement of human dignity. Yacoob J¹⁰⁸ held that “Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 “The Bill of Rights”. The realization of these rights is also key to “... the evolution of a society in which men and women are equally able to achieve their full potential.” Yacoob J also referred to Chaskalson P’s statement in *Soobramoney v Minister of Health, KwaZulu-Natal*,¹⁰⁹ regarding the context within which the fundamental rights must be interpreted. The relevant circumstances in which the Bill of Rights is to be interpreted was described by Chaskalson P¹¹⁰ as one where the Constitution was adopted and a commitment was made to transform South African society into one in which there will be human dignity, freedom and equality, which lies at the heart of the new constitutional order. Moreover Yacoob J¹¹¹ emphasizes that: “A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.” After the *Grootboom* decision Yacoob J’s views have become accepted dogma within constitutional theory.¹¹² This jurisprudence supports a view which recognises substantive freedom above formal freedom. It recognises the Constitution’s adhortation in the Preamble to “Improve the quality of life of all citizens and free the potential of each person”.

9. Opportunities in contract law: interdisciplinary support

The South African law of contract has taken developmental steps in diverse directions. Pre-1994 a quest for fairness led to emphasis of good faith; after 1994 pursuit of the constitutional imperative of section 39 focused the attention of both judiciary and legislator on inequality of bargaining power, which led to the Consumer Protection Act¹¹³ and the constitutional infusion of public policy.¹¹⁴ Nevertheless, the power of the standard contract and functional illiteracy are insurmountable barriers to real freedom of contract. It is significant that the insurance company “*Baloise Insurance*” in Belgium had their car insurance policy contracts drastically revised into ordinary language as research had shown that eighty-five percent of the insured did not read their contract because they could not understand the beginning and consequently gave up and just signed.¹¹⁵ Legalese does not only baffle the Belgians but is a universal phenomenon. Moreover, pre-contractual assistance by para-legals at legal aid clinics should be considered where transactions are of a longer duration. For example

exploitative cancellation clauses should be prohibited and so-called default clauses should be reconsidered. Interdisciplinary research should inform contract lawyers of the concretisation of human dignity in constitutional law, the development of informed consent in medical law, and self-actualisation in psychology and the poverty level in economics.

10. Conclusion

The three fundamental values of the South African constitution are intrinsic of the human condition and an interpretative work in progress. The recent advent of a constitutional democracy and the ideological past of South Africa coincided with the implosion of the socialist economic model. The resulting free market euphoria and the supremacy of the constitution and the rule of law were obstacles to a paradigm shift within the law of contract. However, as both human dignity and equality were given content by the Constitutional Court and legislation, consumer protection and judicial interpretation gradually changed the traditional contractual landscape. Traditional truisms that the parties in the written document set the four corners of the agreement and that the fairness of a contract's terms is a matter for the parties and not for the courts were questioned by pioneers like Ciacchi, Cherednychenko and Collins and are now being addressed with growing understanding and enthusiasm.

This paper has argued that one of the constitutional imperatives is to attain self-actualisation to achieve human dignity. Within the ambit of contract this can be attained by promoting substantive freedom of contract. Substantive freedom of contract prevents exploitation of one contracting party by another and provides protection from unconscionable agreements.¹¹⁶ It enhances freedom and autonomy in contracting.

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¹ Rawls *A theory of Justice* (1999) 3.

² Sec 1: The Republic of South Africa is one, sovereign, democratic state founded on the following values:

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

³ Botha "The legitimacy of legal orders (3): rethinking the rule of law" 2001 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR)/ Journal of Contemporary Roman-Dutch Law* 523 at 535.

- ⁴ Sec 1(a); sections 9(2), 9(3) and (4) address the victims of unfair discrimination and prohibit discrimination on a wide variety of grounds. Sec 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- ⁵ Sec 23. (1) Everyone has the right to fair labour practices. (2) Every worker has the right— (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike. (3) Every employer has the right— (a) to form and join an employers’ organisation; and (b) to participate in the activities and programmes of an employers’ organisation. (4) Every trade union and every employers’ organisation has the right— (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers’ organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1). (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
- ⁶ Sec 24. Everyone has the right— (a) to an environment that is not harmful to their health or wellbeing; and
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
- ⁷ Sec 26. (1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
- ⁸ Sec 27. (1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3) No one may be refused emergency medical treatment.
- ⁹ Sections 9(2), 9(3) which prohibits discrimination on grounds of for example sexual orientation, age and disability; 28 recognises the rights of children. Cf also Botha (n 3) 535; Hawthorne “The principle of equality in the law of contract” 1995 *THRHR* 157 at 160ff.

- ¹⁰ Sections 8(2), 8(3), 9(4), 32(1)(b), and 39(2). Cf Hawthorne "The Principle of equality" (n 9) 1995 *THRHR* 163 n37; Bhana and Pieterse "Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited" 2005 *South African Law Journal (SALJ)* 865; Lubbe "Taking rights seriously: The bill of rights and its implications for the development of contract law" 2004 *SALJ* 395.
- ¹¹ Sec 7 (2), 24(b), 25(5), 26 (2), 27 (2), 28(1)(h), 29 (1) (b), 32 (2), 33 (3) and 35(2)(c); Hawthorne "The new learning and transformation of contract law: reconciling the rule of law with the constitutional imperative to social transformation" 2008 *SAPR/PL* 77 78.
- ¹² Sec 39(1) and (2).
- ¹³ *We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to -*
Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
Improve the quality of life of all citizens and free the potential of each person; and
Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.
May God protect our people.
Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso.
God seën Suid-Afrika. God bless South Africa.
Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika.
- ¹⁴ Abraham Maslow defines self-actualisation as "man's desire for self-fulfilment ... the tendency for him to become actualised in what he is potentially"; Maslow *Motivation and personality* (1954) 46ff; See also Maslow *The farther reaches of human nature* (1971) 41ff; Maslow *Towards a psychology of being* (1999) 93ff.
- ¹⁵ Ciacchi "Freedom of contract as freedom from unconscionable contracts" in Kenny, Devenney and O'Mahony (eds) *Unconscionability in European private financial transactions* (2010) 8; Mak *Fundamental rights in European contract law* (2008) 25ff.
- ¹⁶ Hawthorne "Equality and the law of contract: the possible impact of Aristotle's theory of commutative justice" 2015 *Studia Universitatis Babes-Bolyai Serie Jurisprudentia* Numeral 3.
- ¹⁷ Ciacchi (n 15) 7ff.
- ¹⁸ Hesselink "The principles of European contract law: Some choices made by the Lando Commission" in Hesselink, de Vries (eds) *Principles of European contract law, Preadviezen uitgebracht voor de vereniging voor burgerlijk recht* (2001) 7, 49; Lurger "The 'social' side of contract law and the new principle of regard and fairness" in Hartkamp and Veldman *et al* (eds) *Towards a European Civil Code* (2004) 273ff; Lurger *Consumer law – Forerunner for a part of European contract law code? The case of Austrian consumer law* in Grundmann and Schauer (eds) 205-218; Wilhelmsson "Varieties of Welfarism in European contract law" 2004 *European LJ* 712ff.
- ¹⁹ Kaplow and Shavell *Fairness versus Welfare* (2002) 3; see also Nieuwenhuis *Waartoe is het recht op aarde?* (2006) 1ff; Ciacchi (n 15) 8. Mak (n 15) 25ff; Cherenychenko *Fundamental Rights, contract law and the protection of the weaker party* (2007) 10-11 and *passim*.

- ²⁰ Grundmann “European contract law(s) of what colour”? 2005 *European Review of Contract Law* 184; Cherenychenko (n 19) 10f and *passim*.
- ²¹ Campbell and Collins “Discovering the implicit dimensions of contracts” in Campbell, Collins and Wightman *Implicit dimensions of contract* (2003) 25. The reference to classical contract doctrine is a reference to doctrine; For an in-depth analysis see the seminal work by Atiyah *The rise and fall of freedom of contract* (1979) 226ff; Adams and Brownsword *Understanding contract law* (2004) 185-204; Collins *The law of contract* (2003) 3-10; Collins 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 disembodied 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; Adams and Brownsword *Key issues in contract* (1995) at 217; Brownsword “Freedom of contract, human rights and human dignity” in Friedmann and Barak-Erez (eds) *Human rights in private law* (2002) 181, 185ff.
- ²² Atiyah (n 21) 25, 292ff.
- ²³ Atiyah (n 21) 226ff, 388ff; Adams and Brownsword *Understanding* (n 21) 185-204; Collins (n 21) 3-10; Brownsword “After Investors: Interpretation, Expectation and the Implicit Dimension of the ‘New Contextualism’” in *Implicit Dimensions* (n 21) 24; Pretorius “Individualism, Collectivism and the limits of good faith” 2003 *THRHR* 638, 639-641.
- ²⁴ This view has been expressed by Brand JA as recently as 2012 in *Potgieter v Potgieter* 2012 1 SA 637 (SCA) para [36] where he stated that “the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge. (See also *Brisley* para [24]; *Bredenkamp* para [38]; Nienaber “Regters en juriste” 2000 *TSAR* 190 at 193; Hefer “Billikheid in die kontraktereg volgens die Suid-Afrikaanse regskommissie” 2000 *TSAR* 143).
- ²⁵ Hawthorne “Legal tradition and the transformation of orthodox contract theory: The movement from formalism to realism” 2006 *Fundamina* 71 76ff.
- ²⁶ Hawthorne “Distribution of wealth, the dependency theory and the law of contract” 2006 *THRHR* 48 53ff; Hawthorne “New learning” (n 11) 2008 *SAPR/PL* 77 79; Friedmann *Law in a changing society* (1959) 124; Horwitz *The transformation of American Law 1780-1860* (1977) 181ff; Antonioli “Consumer Protection Fair dealing in marketing contracts and European contract law – a uniform law?” in Collins (ed) *The forthcoming EC directive on unfair commercial practices – contract consumer and competition law implications* (2004) 288ff.
- ²⁷ For South Africa see Van der Merwe, Van Huyssteen, Reinecke, Lubbe *Contract general principles* (2012) 9ff; Christie and Bradfield *Christie’s The law of contract in South Africa* (2011) 8ff; Kerr *The principles of the law of contract* (2002) 7ff; Hutchison and Pretorius *The law of contract* (2012) 21ff.

- ²⁸ Parties are free to choose their own terms and if one chooses more skilfully than the other, this is considered the working of the free market. See Horwitz "The rise of legal formalism " (1975) *American J of Legal Hist* 251 at 256-7: "What came to be certified as purely 'legal', of course were those rules of law that had been established ... to implement a market regime."
- ²⁹ For example: *Deeb v Absa Bank Ltd Friedman v Standard Bank of SA Ltd* 1999 4 SA 928; *Mort NO v Henry Shields-Chiat* 2000 (1) SA 464 (CPD); *De Beer v Keyser* 2002 1 SA 827 (SCA); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Absa Bank v Lombard* 2005 SA 350 (SCA). Van der Merwe *et al* (n 27) 45; Kerr (n 27) 131ff; Glover and Kerr "May essential provisions of a contract be determined by one of the parties alone?" 2000 *SALJ* 201; Hutchison "Non-variation clauses in contract: Any escape from the Shifren straightjacket" 2001 *SALJ* 720; Hawthorne "Public policy - has the unruly horse died?" 2003 *THRHR* 116; Hawthorne "The end of *bona fides*?" 2003 *Merc LJ* 271; Bhana and Pieterse (n 10) 2005 *SALJ* 865; Naudé and Lubbe "Exemption clauses – a re-think occasioned by Aprox Healthcare Bpk v Strydom" 2005 *SALJ* 441; Bhana "The law of contract and the Constitution Napier v Barkhuizen (SCA)" 2007 *SALJ* 269 274; Hawthorne "New learning" (n 11) 2008 *SAPR/PL* 77; Barnard-Naudé "'Oh, what a tangled web we weave ...' Hegemony, freedom of contract, good faith and transformation – towards a politics of friendship in the politics of contract" 2008 *Constitutional Court Review* 155 especially 189ff; Nortjie "Unfair contractual terms – Effect of Constitution: Bredenkamp v Standard Bank of South Africa Ltd 2009 5 SA 304 (GSJ) and 2009 6 SA 277 (GSJ)" 2010 73 *THRHR* 517 especially at 528f.
- ³⁰ *Mort NO v Henry Shields-Chiat* 2000 (1) SA 464 (CPD).
- ³¹ At 475G-J, 476F-J.
- ³² *Brisley v Drotsky* 2002 4 SA 1 (SCA).
- ³³ At para [94] and para [95].
- ³⁴ The reference to classical contract law is a reference to the doctrine in general use among lawyers and judges and reflected in major treatises on the law of obligations. Cf Van der Merwe *et al* (n 27) 8ff; Christie and Bradfield (n 27) 7ff; Kerr (n 27) 7ff; Hutchison and Pretorius *The law of contract* (2012) 21ff; For an in-depth analysis see the seminal work by Atiyah (n 21) 226ff; Adams and Brownsword *Understanding* (n 21) 185-204; Collins (n 21) 3-10; Campbell and Collins in *Implicit dimensions* (n 21) 25; Adams and Brownsword *Key issues* (n 21) at 217: "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" in *Human rights in private law* (n 21) 181, 185ff.
- ³⁵ 2007 (5) SA 323 (CC).
- ³⁶ Thus avoiding the question of the horizontal effect to human rights. Direct horizontal effect would entail that the rights in the Bill of Rights must not only be respected by the state, but by all private persons. Consequently, the private law would hence be interpreted and if necessary corrected in order to realise the citizen's human rights to the largest possible extent. This aspect of the Barkhuizen decision elicited strong reactions see in this regard Rautenbach "Constitution and contract – exploring "the possibility that certain rights may apply directly to contractual terms or the common law that underlies them" 2009 *TSAR* 613; Sutherland "Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) Part 1 2008 *Stell LR* 390 at 394ff; Bhana and Pieterse (n 10) 2005 *SALJ* 865; Woolman "The amazing, vanishing bill of rights" 2007 *SALJ* 762.

³⁷ Policy considerations can make enforcement of certain contracts undesirable. Thus, certain contracts are, for the sake of public interest, not enforced. The landmark case in this respect in the South African law of contract is *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A), in which decision the Appellate Division (as it was then) held that agreements inimical to the interests of the community or run counter to social or economic expedience, will not be enforced on the grounds of public interest.

³⁸ Para [28].

³⁹ Listing, among others, the values of human dignity, equality and freedom, and the rule of law (paras [28-29]) Ngcobo J added that public policy is interwoven with fairness, justice, equity, reasonableness, *ubuntu* and simple justice between men, and recalls that public policy is the general sense of justice of the community, the *boni mores*, manifested in public opinion (par [73]).

⁴⁰ Cf Cherednychenko (n 19) 11.

⁴¹ Antonioli "Consumer Protection" in Collins (ed) *The forthcoming EC directive* (n 26) 288ff; Collins (n 21) 5 and 35f, who explain that these ideologies underlie the law of contract and play a major role in contract law adjudication; Hawthorne "Legal tradition" (n 25) 2006 *Fundamina* 71; Atiyah (n 21) 226ff, 388ff; Adams and Brownsword *Understanding* (n 21) 185-204; Collins (n 21) 3-10; Brownsword "After Investors" in *Implicit Dimensions* (n 21) 24; Pretorius "Individualism" (n 23) 2003 *THRHR* 638, 639-641.

⁴² The Consumer Protection Act 68 of 2008 became effective on 24 October 2010.

⁴³ 1997 1 SA 124 (CC)

⁴⁴ At 12 para [14].

⁴⁵ *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) at para [12]; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para [59] Ngcobo J stated: "In *Afrox* the Supreme Court of Appeal recognised that unequal bargaining power is indeed a factor that *together with other factors* [my emphasis] plays a role in the consideration of public policy [footnote excluded]. This is a recognition of the potential injustice that may be caused by inequality of bargaining power". And further in para [59]: "[T]he relative situation of the contracting parties is a relevant consideration in determining whether a contractual term is contrary to public policy. I endorse this principle. This is an important principle in a society as unequal as ours"; *Bredenkamp v Standard Bank of SA Ltd* 2009 5 SA 304 (GSJ) para [61]; 2009 6 SA 277 (GSJ) paras [21-26]. Cf Hawthorne "Contract law: Contextualisation and unequal bargaining position redux" 2010 *De Jure* 395.

⁴⁶ 68 of 2008.

⁴⁷ Hawthorne "Equality" (n16) 2015 *Studia Universitatis Babes-Bolyai Serie Jurisprudentia* Numeral 3. Gordley *The philosophical origins of modern contract doctrine* (1991); "Contract law in the Aristotelian tradition" in Benson (ed) *The theory of contract law* (2001) 286; "The moral foundations of private law" 2002 *The American Journal of Jurisprudence* 1-23; "Equality in exchange" 1981 *California LR* 1587-1656. For a full list of Gordley's work consult www.law.tulane.edu/uploadedFiles/Faculty_and_Admin/CVs/jgordley_cv.pdf (at 29-02-2016).

⁴⁸ *Bundesverfassungsgericht* (BVerfG).

⁴⁹ BVerfG 19 October 1993, BVerfGE 89, 214 (referred to as the *Bürgschaft* case)

⁵⁰ Grundgesetz (GG).

⁵¹ This provision was defined in 1957 by the German Federal Constitutional Court as a catch- all fundamental right to general freedom of action, embracing all manifestations of freedom which are not covered by other more specific fundamental rights. See Ciacchi (n 15) 9.

- ⁵² BverfG 19 October 1993, BVerfGE 89, 214 this is the reference to the famous *Bürgschaft* case known as the “Suretyship” judgement; see also BverfG 6 February 2001 BVerfGE 103, 89 (2001) *Neue Juristische Wochenschrift* 957
- ⁵³ BVerfG 26 July 2005, 1 BvR 782/94 and 1 BvR 957/96 (2005) *Neue Juristische Wochenschrift* 2363; BVerfG 26 July 2005, 1 BvR 80/95 (2005) *Neue Juristische Wochenschrift* 2376.
- ⁵⁴ Ciacchi (n 15) 12f.
- ⁵⁵ Ciacchi (n 15) 8.
- ⁵⁶ Cherednychenko (n 19) 10.
- ⁵⁷ Cherednychenko (n 19) 11.
- ⁵⁸ *Ibid.*
- ⁵⁹ Liebenberg “Towards an equality promoting interpretation of socio-economic rights in South Africa: Insights from egalitarian liberal tradition” 2015 *SALJ* 411ff; Hawthorne “Constitution and contract: Human dignity, the theory of capabilities and *Existenzgrundlage* in South Africa” 2011 *Studia Universitatis Babes-Bolyai. Series: Iurisprudentia* Numeral 2 (at studia.law.ubbcluj.ro).
- ⁶⁰ Gordley “Aristotelian tradition” in Benson *Theory* (n 47) 286;
- ⁶¹ Ss 1, 7 and 39(1) and (2).
- ⁶² Hawthorne “Constitution and contract” (n 59) 2011 *Studia Universitatis Babes-Bolyai. Series: Iurisprudentia*– Numeral 2; Hawthorne “New learning” (n 11) 2008 *SAPR/PL* 77 78; Botha (n 3) 2001 *THRHR* 523 535.
- ⁶³ De Kock and Hallebeek “Precontractual duties to inform in early modern scholasticism” 2010 *Tijdschrift voor Rechtsgeschiedenis* 91; Also Gordley “Equality” (n 47) 1981 *California LR* 1587-1656; “Aristotelian tradition” (n 47) 265-335; *Philosophical origins* (n 47); “Moral foundations” (n 47) 2002 *The American Journal of Jurisprudence* 1-23.
- ⁶⁴ Gordley “The moral foundations of private law” 2002 *The American Journal of Jurisprudence* 8.
- ⁶⁵ Liebenberg “The value of human dignity in interpreting socio-economic rights” 2001 *South African Journal of Human Rights (SAJHR)* 7ff; “Equality promoting interpretation” (n 59) 2015 *SALJ* 411ff.
- ⁶⁶ Maslow *Motivation* (n 14) 46ff ; *Human nature* (n 14) 41ff; *Psychology of being* (n 14) 93ff.
- ⁶⁷ Maslow defines self-actualisation as “man’s desire for self-fulfilment ... the tendency for him to become actualised in what he is potentially”; *Motivation* (n 14) 46ff; *Human nature* (n 14) 41ff; *Psychology of being* (n 14) 93ff.
- ⁶⁸ Maslow *Motivation* (n 14) 46f.
- ⁶⁹ This is how Sandra Liebenberg phrases this ideal in “Value of Human Dignity” (n 65) 7 and Liebenberg “Equality promoting interpretation (n 59) 23ff, 59ff.
- ⁷⁰ 1971.
- ⁷¹ Rawls *Political liberalism* (1996) 28.
- ⁷² Rawls (n 1) xiii.
- ⁷³ Rawls (n 1) 243, 267.
- ⁷⁴ Rawls (n 71) 181
- ⁷⁵ Brooks “The capabilities approach and political liberalism” in Brooks and Nussbaum (eds) *Rawls’s political liberalism* (2015) 153.
- ⁷⁶ Rawls (n 71) 187.
- ⁷⁷ Brooks (n 75) 153.
- ⁷⁸ Rawls *Justice as fairness* (2001) 19.
- ⁷⁹ Brooks (n 75) 153.
- ⁸⁰ Rawls (n 78) 129.

- ⁸¹ Hawthorne "Constitution and contract" (n 59) 2011 *Studia Universitatis Babes-Bolyai. Serie: Jurisprudentia* 2011 Numarul 2 (at <http://studia.law.ubbcluj.ro>); Brooks (n 75) 154ff.
- ⁸² Stanford Encyclopedia of Philosophy *The capability approach* (at <http://plato.stanford.edu/entries/capability-approach/>); Sen "Capability and well being" in Nussbaum and Sen (eds) *The quality of life* (1993) 30-53.
- ⁸³ Sen (n 82) *ibid*.
- ⁸⁴ Nussbaum *Women and Human Development-The Capabilities Approach* (2000) 5.
- ⁸⁵ Nussbaum "Human dignity and political entitlements" in *Human dignity and bioethics: essays commissioned by the President's council on bioethics* (2008) 351.
- ⁸⁶ "Human dignity" (n 85) 377.
- ⁸⁷ Hawthorne "Constitution and contract"(n 59) 2011 *Studia Universitatis Babes-Bolyai. Serie: Jurisprudentia* 2011 Numarul 2 (<http://studia.law.ubbcluj.ro>).
- ⁸⁸ Collins (n 21) 21f; 403-405; Collins "Introduction: The research agenda of implicit dimensions of contracts" in *Implicit dimensions* (n 21) 1ff.
- ⁸⁹ *Ibid*. CHECK
- ⁹⁰ Kaplov and Shavell *Fairness versus Welfare* (2002); also Niewenhuis (n 19) 1ff.
- ⁹¹ *Fairness versus Welfare* (2002) 3.
- ⁹² Collins (n 21) 25.
- ⁹³ Collins (n 21) 404; Nieuwenhuis (n 19)1; 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 at 434f.
- ⁹⁴ Collins (n 21) 21ff.
- ⁹⁵ Collins (n 21) 10.
- ⁹⁶ Collins (n 21) 22.
- ⁹⁷ Cf Ch 4 of the National Credit Act 34 of 2005; Sec 4 (2) of the Prevention of Illegal Eviction Act 19 of 1998; Sec 5 of the Rental Housing Act 50 of 2000.
- ⁹⁸ Collins (n 21) 13.
- ⁹⁹ Ramsay "Consumer credit law, distributive justice and the welfare state" 1995 *Oxford Journal of Legal Studies* 177; Kronman "Contract law and distributive justice" 1980 *Yale L J* 472; Lucy "Contract as a mechanism of distributive justice" 1989 *Oxford Journal of Legal Studies* 132.
- ¹⁰⁰ Collins (n 21) 22.
- ¹⁰¹ *Ibid*.
- ¹⁰² Collins (n 21) 404.
- ¹⁰³ Hawthorne "Materialisation" (n 93) *THRHR* 438 at 443ff.
- ¹⁰⁴ 1995 (3) SA 391 para [328].
- ¹⁰⁵ 2004 (6) SA 505 (CC) at para [52].
- ¹⁰⁶ 2000 (11) BCLR 1169.
- ¹⁰⁷ Cf Liebenberg "Value of Human Dignity" (n 65) 1; Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" 1992 2 *SAJHR* 451.
- ¹⁰⁸ At para [23].
- ¹⁰⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) footnotes excluded.
- ¹¹⁰ At para [8].
- ¹¹¹ At para [44].

¹¹² Cf Liebenberg "The Interpretation of Socio-Economic Rights" in Woolman *Constitutional Law* **CHECK** (n 31) 33-37; Liebenberg "Value of human Dignity" (n 65) 4ff; Liebenberg "Equality promoting interpretation" (n 59) 23ff, 59ff.

¹¹³ 68 of 2008.

¹¹⁴ *Barkhuizen v Napier* 2007 5 SA 323 (CC).

¹¹⁵ www.baloise.be/nl/over-baloise-insurance/pers/press-room/Baloise-insurance-maakt-komaf-met-kleine-lettertjies.html at 8-3-2016. The project took eight months and the language aims at the average literacy capacity of a fourteen year old. Other policies will be reworded as well in future.

¹¹⁶ Ciacchi (n 15) 8.