CONSTITUTION AND CONTRACT: HUMAN DIGNITY, THE THEORY OF CAPABILITIES AND *EXISTENZGRUNDLAGE* IN SOUTH AFRICA*

Luanda HAWTHORNE**

Abstract: *The dominant paradigms within contract law range from a freedom orientated approach to a fairness orientated approach. The guiding principle of the freedom orientated approach is freedom and sanctity of contract which are the contractual expressions of autonomy and human dignity. Against the backdrop of individual liberty and formal equality the role of fairness is limited. This contract regime denies the judiciary any power to intervene in the bargain in order to foster substantive justice. The introduction of substantive equality and a concept of fairness by the South African Constitutional Court constituted a major paradigm shift within the South African law of contract. The impetus for this drive has been serious recognition of human rights. Today the state is both tasked to respect as well as to realise human dignity and courts, legislators and legal theorists are confronted by this dualism. In this paper I will argue that in order to concretize the constitutional values in the law of contract it is necessary to understand the interconnectedness between the modern constitutional state and contract. In addition it is also necessary to connect this understanding to the concept of human dignity defined within the ambit of Martha Nussbaum's capabilities theory and interpreted to make provision for an existence minimum. Enforcement of contracts which would result in a contracting party being denied an existence below a subsistence minimum should be unenforceable because enforcement is contrary to public policy since it compromises the contracting party's human dignity.*

Keywords: contract law; constitution, human dignity; socio-economic rights; Nussbaum's capabilities theory; subsistence level of existence; *Existenzgrundlage*

1 INTRODUCTION

During the 20th century the realization of democracy opened the door to pluralism within the law, in other words democracy saw the emergence of multiple paradigms, which are linked to political views. As individualism led to the development of individual liberties, the realization dawned that liberty has an economic as well as a political component, which gave birth to the emergence of a second generation of Human Rights. Accommodation of these socio-economic rights within Western legal philosophy and doctrine proved to be less harmonious than the seamless incorporation of the civil and political rights into the system of private law. In particular the law of contract, the divider of wealth within society, continued to

live under pretence of being value free.[1] Juxtaposing the different paradigms[2] within the law of contract has become the shared province of courts and legislatures, the latter introducing legislation protecting the weaker party, for example an employee or a consumer. Thus contract law has been oscillating between a freedom orientated approach and a fairness orientated approach. The guiding principles of the former remain party autonomy and minimalist state supervision over contracting with legislative intervention foreclosing only the worst excesses.

This paper will explain that harmonization of constitutional values into the law of contract has been impeded by the relationship between first generation human rights and classical contract law. It will be argued that recognition of second generation human rights and incorporation of these rights into national constitutions has removed freedom from its apex and placed the focus on human dignity. In consequence this paper argues for a more nuanced interpretation of human dignity which would include an economic component providing protection from want. Such an interpretation may be achieved taking cognizance of the constitutional emphasis of socio-economic rights and Nussbaum's capabilities theory. This broadened interpretation of human dignity may offer the possibility to declare a contract unenforceable if enforcement would reduce one contracting party to an existence below subsistence level. Enforcement in such an instance would be contrary to public policy because it compromised the contractant's human dignity.

2 LEGAL TRADITION AND THE CONSTITUTIONAL FOUNDATION OF THE CLASSICAL MODEL

Although academic literature highlights the contrast between a freedom-orientated approach as opposed to a fairness-orientated approach to contract law,[3] this distinction has remained mainly theoretical. The intellectual foundation of the classical model has rarely been challenged and the freedom-orientated rules have met with incidental tempering, but no cohesive alternative to this contract law paradigm has gained adherence.

The essence of the classical model is freedom and sanctity of contract,[4] which are viewed as the contractual expressions of self autonomy and human dignity. Self-autonomy controls both the process leading up to the conclusion of the contract as well as the terms of the contract,[5] while human dignity demands a reduction of supervision over contracting terms to an absolute minimum.[6] In economic terms, the contract is viewed as the market mechanism at the intersection of supply and demand, and as a compromise of opposing adversarial interests serving the common good by the parties' pursuit of their self-interest.[7] Unmentioned and largely ignored

remains the prerequisite for contractual freedom, namely equality of the contracting parties.[8] Formal equality[9] has proven itself to be insufficient as exploitation of the weaker members of society has been a continuous byproduct of the classical model.[10] Concomitant to this model has been the hesitation of the courts to develop principles that allow direct control over substantive fairness.

This situation was clearly illustrated by the South African Constitutional Court's approach in *Barkhuizen v Napier*,[11] where the court was faced with facts which represented contractual freedom in its most negative excess, namely the standard contract. Barkhuizen insured his car, which was subsequently written off in an accident. The insurer repudiated the claim. Barkhuizen instituted action two years later and the insurer responded by raising the special plea that the time-limitation clause in the contract required summons to be served within 90 days of repudiation. Barkhuizen alleged the claim to be contrary to public policy as well as inconsistent with section 34 of the Constitution, which guarantees access to court. The Constitutional Court rejected the direct testing of the constitutionality of a contractual term against a provision in the Bill of Rights and held that the proper approach of constitutional challenges to contractual terms of private parties is the determination whether the challenged term is contrary to public policy.[12] In consequence, private law claims will require to be founded on recognized causes of action and it is now accepted that an infringement of public policy is a suitable vehicle to found a constitutional attack. The court also held that public policy represents the legal convictions of the community, which must be determined by the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights, such as the values of human dignity, equality and freedom, and the rule of law.[13] It is significant that the concept of public policy is now coupled to human dignity, equality, freedom and the rule of law. The Constitutional Court[14] laid down a test to determine whether a particular contractual term or the enforcement thereof is contrary to public policy. It was held that in general the enforcement of an unreasonable or unfair term will be contrary to public policy,[15] which means that the court reduced the matter to determining fairness.[16] The fairness test is two-fold. The first part relates to the abstractly objective terms of the contract[17] *i e* whether the particular clause in the contract passes objective considerations of reasonableness and fairness.[18] If it is found that the terms pass the objective test the second question is posed *viz* whether these terms are "contrary to public policy in the light of the relative situation of the contracting parties"[19], or "whether the clause should be enforced in the light of the circumstances which prevented compliance" with the term in question.[20] Therefore, the relative situation of the contracting parties has become a relevant consideration in determining whether a contractual term is contrary to public policy.[21] The second test is clearly subjective in nature.[22]

In respect of the first test the Constitutional Court has unequivocally laid down that this test involves balancing the constitutional values of freedom and dignity which inform the maxim *pacta sunt servanda*, against another specific constitutional right or value.[23] Consequently, the infringement of a constitutional right is required as part of the formula.[24] This objective test imposes the unenviable duty on a court to achieve a balance between the different constitutional values, thus placing the rule of law and freedom of contract in potential conflict with substantive equality and human rights propounding transformation. It is submitted that in most cases balancing the principle of *pacta sunt servanda* against a constitutional right will result in terms of a contract, such as for example, exclusion of liability and time limitations, probably being considered reasonable. A conclusion that the term is reasonable leads to the second subjective question.

In terms of the second question the objectively reasonable term may be found to be unenforceable. The questions asked are whether the relative situation of the contracting parties determines that the term is contrary to public policy or whether the objectively reasonable term should be enforced in the light of the circumstances.[25] Consequently, the circumstances of the case and the relevant situation of the parties are scrutinized which not only makes the test subjective in nature, but involves contextualization of the contract.

Nevertheless, the Constitutional Court still navigates between Scylla and Charybdis by requiring the courts, on the one hand, to employ constitutional values to achieve a balance which may lead to striking down the unacceptable excesses of freedom of contract, while at the same time seeking to permit individuals the dignity and autonomy of regulating their own lives.[26] However, judicial reservation to intervene with consensual agreements is general in view of the traditional interpretation of human dignity and represents the view that limitation of individual autonomy is an extreme step and should be reserved for the legislature.

3 THE CHALLENGES OF THE CONSTITUTIONAL STATE

It is submitted that the South African Constitution may be the source of further confusion within contract law. The new South African democratic order is founded on recognition of human rights. The Constitution is the supreme law and all law or conduct inconsistent with it is invalid, and all obligations imposed by it must be fulfilled.[27] The Constitution strives towards a substantive normative vision coupled with a transformative political agenda while at the same time attempting to achieve social harmony, and social justice based on the rule of law.[28] The Constitution commences by stating that the South African state is founded on the values of human dignity, the

achievement of equality and the advancement of human rights and freedoms.[29] It provides that "Everyone has inherent dignity and the right to have their dignity respected and protected."[30] The pre-eminence of human dignity can be viewed as a reaction against the politics of the past, but is in essence a reflection of the fact that human dignity is the most important human right from which all other fundamental rights derive.[31] In consequence, human dignity is inherent to every human being, inalienable and independent of the state. In contrast, the other human rights can be suspended in a state of emergency[32] or limited in terms of law of general application.[33]

However, the Constitution also provides that the state has the duty to respect, protect, promote and fulfill the rights in the Bill of Rights.[34] Thus, the state is both tasked to respect as well as to realize human dignity.[35] This is the result of the confused vision of man held by the constitution, in which human dignity finds expression in autonomy and responsibility, but at the same time must be realized by the state. The Constitutional Court is confronted with this dualism within the Constitution in the interpretation of the values and ideals of the latter.

The interpretation and application of constitutional values and fundamental rights within the law of contract resorts within the domain of the courts. Thus, the role of the courts is to concretise and when necessary resolve conflicts between human rights. The premise of this essay is that human dignity is the paramount human right from which all other human rights derive and represent detailed refinements of human dignity.[36] In accordance with the interdependence principle[37] it is accepted that all human rights are "universal, indivisible and interdependent and interrelated.[38] Consequently, human dignity not only depends on civil and political rights but realizes socio-economic rights.[39] As stated in section 36(1) of the Constitution these other human rights can be limited but only to: "the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom…"[40]

It is submitted that concretizing human dignity is dependent on the "concept of man" held by a court. Thus, human dignity in a humanistic world view produces the interpretation that the freedom to make your own mistakes and acceptance of the consequences thereof is part of human dignity.[41] However, the twenty-first century interpretation of human dignity should be extended to include an economic component, namely freedom from want. As Botha[42] has pointed out in his seminal essay on human dignity, "dignity is a remarkably rich and evocative concept. Its plasticity, proximity to a range of constitutional rights and values, and affinity with a variety of legal and philosophical traditions makes it a powerful tool of constitutional analysis, consensus building and transformation". Consequently, the pivotal question which now requires attention pertains to the potential content and meaning of human dignity.

4. HUMAN DIGNITY

4.1 Introduction

To define human dignity[43] is difficult. In *National Coalition for Gay & Lesbian Equality v Minister of Justice* [44] Ackermann J states that: "[D]ignity is a difficult concept to capture in precise terms. At least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of society." Woolman[45] proposes five definitions which cabined together form a theory of 'dignity'. According to him the five definitions have as basis that: "[w]e recognize all individuals as ends-in-themselves capable of self-governance."

Comparative research shows that the Dutch author Niewenhuis has held that human dignity essentially protects the value of an individual.[46] Cherednychenko[47] opines that human dignity means that an individual will not become an object of the state. She bases her opinion on the German *Grundgesetz*,[48] and states that "human dignity is thus about the State serving individuals and not individuals serving the State".[49] In a South African context Bhana and Pierterse[50] echo this opinion and emphasize the fact that human dignity as a value is contested especially when it is invoked in relation to the value of freedom. According to all the above authors which span Europe and Africa, the constitutional guarantee of human dignity works in a two-fold manner. On the one hand human dignity presupposes an individual's right to self-determination and obligation to self-responsibility;[51] on the other hand this Constitutional guarantee also protects individuals against themselves.[52] The same dualism has been described by Feldman as two sides of a coin:

> "We must not assume that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life choices deserve respect. If the State takes a particular view on what is required for people to live dignified lives, it may introduce regulations to restrict the freedom which people have to make choices which, in the State's view, interfere with the dignity of the individual, a social group or the human race as a whole … The quest for human dignity may subvert rather than enhance choice. … Once it becomes a tool in the hands of lawmakers and judges, the concept of human dignity is a two edged sword."[53]

Thus, human dignity is regarded as operating on two levels, *ie* has two roles. One role constitutes support for individual autonomy which is referred to as human dignity as empowerment, while the other constitutes constraint of individual autonomy and is known as human dignity as constraint.[54]

4.2 The function of human dignity: empowerment and constraint

Brownsword[55] informs us that the two-fold function of human dignity has been derived from the work of Kant. Human dignity as empowerment is described by Feldman as : "a readiness to confront the realities of one's circumstances, including talents and physical and mental limitations, and make the best of them without losing hope and a sense that one's life is worthwhile; to live according to a set of normative standards, whether accepted from outside or imposed from within, accepting both burdens and benefits in full measure; and readiness to accept responsibility for the consequences of one's own actions and decisions."[56] This aspect of human dignity (as empowerment) fosters individual autonomy and freedom of contract and limits paternalism by the State.[57] The premise of human dignity as empowerment is that individuals have a right to make their own choices and by implication there own mistakes; and on condition that these choices and mistakes are freely made must be respected. This side of human dignity is represented in the Supreme Court of Appeal decision of *Napier v Barkhuizen* [58] which decided in favor of *pacta servanda sunt*.[59] Cherednychenko classifies failure to respect free choices as failure to respect human dignity in a subjective sense.[60]

Human dignity as constraint has an objective nature.[61] This side of human dignity justifies the limitation of freedom of contract.[62] It implies that contracts freely entered into must be tested for consistency with human dignity. The content of a contract must not violate a contracting party's human dignity.

Pre-contractual conditions such as informed consent will not be sufficient to justify enforcement of a contract which compromises a party's human dignity.[63] It is this function of human dignity which married to public policy enables the judiciary to make decisions which are advantageous and beneficial to individuals and society as a whole.[64] Human dignity as constraint may prohibit or nullify unconscionable contracts on the basis that public policy considers them to be contrary to human dignity. In order for human dignity understood as constraint to be effective in protecting one contracting party against another it is necessary to provide a benchmark, which would be inclusion of a guarantee against want in its interpretation. Application of human dignity as constraint extended to include such an economic component has a dual function; first it will limit freedom of contract and secondly facilitate corrective justice between private contracting individuals.

The fact that the South African Constitutional Court has acknowledged the relevance of German law as a tool to the interpretation of human dignity, equality and freedom[65] allows utilization of the German Basic Law to project "freedom from want" onto our conception of human dignity. According to the German Basic law[66] the economic

component of protection from want is considered to be part of human dignity and it is recognized as the guarantee that everyone has a right to live at subsistence level (*Existenzgrundlage*).[67] Human dignity as constraint extended to guarantee a subsistence level of existence will entitle the State to protect contracting parties to the extent of such a minimum standard. The judiciary will be in a position not to enforce contracts which would impact negatively on individuals who concluded agreements which compromised their financial and social security to the extent that enforcement of the agreement would reduce their existence to below subsistence level. Thus, public policy co-determined by human dignity which includes an economic component providing protection against want makes provision for the possibility of finding that the enforcement of voluntarily concluded contracts which compromise a contracting party's subsistence existence as unenforceable.[68]

To facilitate an extension to the meaning of human dignity, support can be found in Martha Nussbaum's theory of capabilities and South African socio-economic rights jurisprudence.

5 NUSSBAUM'S THEORY OF CAPABILITIES

5.1 Introduction

The utility of socio-economic rights is found in what they enable human beings to be and to accomplish.[69] When citizens fail to achieve a subsistence level of existence they face challenges not only to life and health but to the development of their human capabilities, especially the ability to fulfill life plans and participate effectively in political, economic and social life.[70] These statements reflect the capabilities theory developed by the American legal philosopher Martha Nussbaum.

Nussbaum's theory revolves around: "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"[71]

5.2 Nussbaum's Central Human Capabilities theory

According to Nussbaum[72] the threshold of minimum social justice is the availability to all citizens of ten core 'capabilities", or opportunities to function. She maintains that everyone is entitled to a basic level of these ten capabilities because all ten are essential prerequisites of a life worthy of human dignity. Her ten "Central Human Capabilities" constitute the following: life;[73] bodily health;[74] bodily integrity;[75] *s*enses,

imagination, and thought;[76] emotions;[77] practical reason;[78] affiliation;[79] other species;[80] play;[81] and control over one's environment.[82]

Nussbaum has articulated a coherent theory of human rights grounded in human dignity. Most of her core capabilities are clearly reflected in the rights contained in the Bill of Rights of the South African Constitution and consequently strike one as being familiar rather than foreign. The first capability described as life is reflected in section 11 which protects all citizens' right to life. Her description of "bodily health" is covered by sections 26 and 27 which deal with housing, health care, food, water and social security respectively. "Bodily integrity" is dealt with in section 12 which covers freedom and security of the person. The right to "senses, imagination and thought" is described robustly, but may be based upon the right to education[83] freedom of religion, belief and opinion,[84] freedom of expression,[85] freedom of assembly, demonstration, picket and petition[86] and freedom of association.[87] "Practical reason" is reflected in the constitutional right to freedom of expression[88] and freedom of religion, belief and opinion.[89] "Affiliation" constitutes an extension of the right to freedom of association,[90] to political rights,[91] and the right to equality.[92] "Control over one's environment" is adequately dealt with in section 24 which deals with environmental rights, section 19 which covers political rights and section 25 which concerns property rights.

Nussbaum's capabilities are situated firmly within the socio-economic rights of the South African Constitution.

6. SOCIO-ECONOMICS RIGHTS JURISPRUDENCE IN SOUTH AFRICA

6.1 Introduction

The fact that human dignity is not only the paramount human right but is interdependent and interrelated with socio-economic rights justifies an extended interpretation of human dignity which can include a right to a subsistence level of existence. Such an extended interpretation can be seen from both international and national human rights law. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights[93] both acknowledge that civil, political, social and economic rights are sourced from human dignity. In a South African context the Preamble to the Constitution specifies that South African citizens aim to establish a society based on social justice and fundamental human rights, and furthermore to improve the quality of life of all citizens and free the potential of each person. Our fundamental values are "human dignity, the achievement of equality and the advancement of human rights and freedoms".[94]

6.2 Socio-economic constitutional jurisprudence

These aims and values contained in the South African Constitution have been reflected in several cases heard by the Constitutional Court which deal specifically with the recognition of the State's obligation to honour socio-economic rights. Recognition of this obligation may facilitate an extension to the interpretation of human dignity to include a guarantee against want. Bhana & Pieterse[95] are of the opinion that the Constitutional Court has in its judgments supported an interpretation of human dignity as constraint.

In *S v Makwanyane* ,[96] O'Reagan J held that "The importance of dignity as a founding value of our new Constitution cannot be over-emphasized. Recognizing 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*,[97] 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 ,*[98] has defined human dignity as embodying the citizens right to basic minimum conditions not only of survival but also to reach their full potential.[99] 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 J[100] 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 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." Jacoob J also referred to Chaskalson P's statement in *Soobramoney* regarding the context within which the fundamental rights must be interpreted.[101] The relevant circumstances in which the Bill of Rights is to be interpreted was described by Chaskalson P[102] 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 J[103] 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.[104]

This notion of a right to develop capabilities in order to fulfill life plans and participate in political, economic and social life is echoed by Collin's social market theory, in terms of which contracts are not only recognised as a means of distributing wealth, and establishing power relations, but most importantly provide opportunities for the realization of meaning in the parties' lives,[105] and that mankind is entitled to live, in the words of Sandra Liebenberg[106] "fully human lives". It is submitted that if enforcement of a contract effectively denies a contractant the opportunity to realize her full potential the contract should not be enforced.

7. THE IMPACT OF SOCIO-ECONOMIC RIGHTS ON THE LAW OF CONTRACT IN SOUTH AFRICA

The constitutional guarantee of socio-economic rights and the constitutional jurisprudence opens the possibility that if enforcement of a contract results in one of the contracting parties being reduced to an existence below subsistence level a court can find the contract to be unenforceable since enforcement would be contrary to public policy because it compromised the contracting parties' human dignity.

However, it could be argued that within the ambit of the law of contract striking down a contract in terms of which, for example, one of the contracting parties would be reduced to living below existence level is not novel. In *Sasfin v Beukes*[107] the court found that such a contract was unconscionable and incompatible with the dictates of public policy. However, in that case Smallberger J A qualified this rule with two riders.[108] In respect of the first prerequisite he held that: "Agreements which are *clearly inimical to the interests of the community*, (my emphasis) whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy, not be enforced." The second rider he formulated as follows: "… that public policy favours the utmost freedom of contract, …"[109]. Consequently *Sasfin* decreed that harm had to have been caused to community interests not only to an individual contracting party and that over and above this standard, freedom of contract reigned supreme. Public policy as understood within the definition provided in the *Sasfin* case is therefore extremely narrow and limited. According to Barnard-Naude[110] *Sasfin* only goes so far as to check the worst features of the South African liberal contract law system and made no room to tinker with its regular operation characterized by formalism. At that stage of our jurisprudence no constitutional rights or values played a role in adjudication and consequently no mention was made of the fact that the contract was contrary to public policy because it compromised Beukes' human dignity. Human rights played no role in adjudication arguments at that stage.

However, the question which now arises is whether 'subsistence existence' constitutes a starting point or the end on the human dignity continuum. If one considers the arguments that basic socio-economic rights are required in order to achieve a minimum degree of for example: civic and political participation;[111] the right to live as a human being,[112] to develop as members of the community[113] and to develop basic capabilities to function independently as social beings,[114] and that individuals must realize their full potential,[115] it is submitted that a basic level of existence constitutes a starting point for judicial adjudication regarding the question whether a contract is contrary to public policy because it infringes a contractant's human dignity. It constitutes a starting point because the reach of basic socio-economic rights is much further than a subsistence level of existence. Existing at subsistence level hardly creates an opportunity to live as a human being, or allows for participation in the civic and political community, or for the development of capabilities which promote independence.

8. CONCLUSION

It is generally accepted that the South African Constitution is characterized by a substantive normative vision coupled with a transformative political agenda. It adheres to the ideal which recognizes substantive moral values and the existence of differing socio-economic conditions.[116] It is expressly value-based and demands that the judiciary take cognizance of substantive values.[117] The Constitutional Court has explicitly linked public policy to human dignity,[118] which entails that public policy must be permeated with respect for human dignity.

The fact that in the law of contract the Supreme Court of Appeal[119] focuses their interpretation of human dignity primarily as empowerment while the Constitutional Court[120] supported an interpretation of constraint is the consequence of the contradictory messages sent by the Constitution. On the one hand the constitution respects and protects the humanistic, liberal, Western man/woman who finds his/her realization in the right to liberty, but at the same time welfare statism is also encountered, which means that the Constitution reflects the eternal tension between freedom and equality which lies at the root of the problem within contract. Moreover, the Constitution guarantees social and economic rights,[121] which guarantees are the constitutional imposition on the State to assist individuals in the exercise of their rights.[122] However, in regard to contracts concluded between private individuals this assistance takes place by means of indirect horizontal application of the Bill of Rights[123] because the vehicle to test whether contractual terms are in conflict with

the Constitution is public policy.[124] Public policy represents the legal convictions of the community and is to be determined by the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights such as the values of human dignity, equality and freedom, and the rule of law.[125] Consequently, human dignity has become a key element in the determination of public policy and can provide the tools to extend its scope.

Thus, in the *Barkhuizen* case the Constitutional Court justifies the limitation of freedom and sanctity of contract while on the one hand it also seeks to permit individuals dignity and autonomy to regulate their lives. This paradox is the result of different interpretations of the values underlying classical contract law and the Constitutional state.

Moreover, the Constitution's transformative aspirations are at odds with the insistence on legal certainty and regularity which characterizes traditional understandings of the rule of law. [126] It is this paradox within the Constitution which is clearly reflected in its instruction to the State to both respect and realize human dignity which causes confusion and inconsistencies within adjudication. In order to overcome this confusion it is necessary for the judiciary to concretize human rights especially the right to human dignity and if necessary establish a hierarchy of rights.

In this essay an attempt was made to provide first steps in this respect. It is submitted that human dignity constitutes the paramount right from which all other rights derive, and secondly that human dignity is composed of two aspects viz human dignity as empowerment and human dignity as constraint. Adherence to the view that human dignity should be interpreted as constraint is consistent with the Constitution's normative vision and transformative political agenda. Such an interpretation is also in keeping with the Constitutional ideal of recognition of substantive moral values and the existence of different socio-economic conditions.

It was further argued that the meaning of human dignity should be extended to include a guarantee against want. Recognition of a right to a subsistence level of existence has found support in constitutional jurisprudence and in comparative literature. The question which arose in this regard was whether a subsistence level of existence constitutes the beginning or the end of the human dignity continuum. It was submitted that it constitutes a beginning and that Nussbaum's ten core capabilities which are reflected in the rights in the Bill of Rights could be indicators to concretize human dignity in a way that a contracting party could have a contract declared unenforceable because it was contrary to public policy since it infringed her human dignity as interpreted within the ambit of the capabilities theory. This could be

that the enforcement of the contract concluded infringed her human dignity in a manner which prevented her from having a basic existence or that she was prevented from participating effectively in political, economic and social life. Sadly the realization of such an interpretation will depend on economics.

Finally it is submitted that a positive aspect of the problem that the constitution can be interpreted in many ways may be found in the fact that the Constitutional Court may take cognizance of "the spirit of the times", in her interpretation of constitutional values. Thus, the choice between the liberal state and the welfare state can be made by this court in the context of continuously changing political and economic dispensations, because both nationally and internationally "new values" such as free trade, the struggle against climate change, freedom of movement, the fight against poverty, and the fight against terrorism, are continuously emerging and contending with each other.

---

[*] I would like to thank Prof M C Nussbaum for specifically drawing my attention to her theory of capabilities as discussed in her chapter titled "Human Dignity and Political Entitlements" which appeared in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (2008) 351.

[**] Professor, Department of Private Law, School of Law, University of South Africa; hawthl@unisa.ac.za.

[1] S A Smith *Contract Theory* (2004) at 50 refers to the contract scholarship which aims at providing fairness in the law of contract.

[2] *Cf* The discussion regarding divergent ideological premises by M Nortje "Unfair Contractual Terms-Effect of the Constitution" (2010) *THRHR* 517 at 528.

[3] Smith (note 1 above) 50ff; R Brownsword, G Howells and T Wilhelmsson *Welfarism in Contract Law* (1994) *passim*; S A Smith *Atiyah's Introduction to the Law of Contract* (2006) ch 12; J Beatson and D Friedmann "From Classical to Modern Contract Law" in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) 3; J Wightman *Contract: A Critical Commentary* (1996) *passim*; H Collins *The law of Contract* (*Contract*) (2003) ch 2; C Willet (ed) *Aspects of Fairness in Contract* (*Aspects*) (1996) *passim*; R Brownsword, N J Hird and G Howells (eds) *Good Faith in Contract: Concept and Context* (1999) *passim*; A D M Forte (ed) *Good Faith in Contract and Property* (1999) *passim*; C Willet *Fairness in Consumer Contracts* (*Fairness*) (2007) ch 1; E H Hondius "The Protection of the Weaker Party in Harmonized European Contract Law: A Synthesis" (2004) *Journal of Consumer Policy* 245ff; T Hartlief "Freedom and Protection in Contemporary Contract Law" (2004) *Journal of Consumer Policy* 253ff; R Brownsword *Contract Law: Themes for the Twenty-First Century* (*Themes*) (2006) Ch 3.

[4] D Campbell and H Collins "Discovering the Implicit Dimensions of Contracts" in D Campbell, H Collins and J Wightman *Implicit Dimensions of Contract* (2003) 25 define 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'"; also J Adams and R Brownsword *Key Issues in Contract* (1995) 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"; R Brownsword "Freedom of Contract, Human Rights and Human Dignity" ("Human Dignity") in D Friedmann and D Barak-Erez (eds) *Human Rights in Private Law* (2001) 181, 185ff. Thus the reference to classical contract doctrine is a reference to the doctrine in general use among lawyers and judges and reflected in the major treatises on the South African law of obligations, such as S Van der Merwe, L F Van Huyssteen, M F B Reinecke, G F Lubbe *Contract General Principles* (2007); R H Christie *The Law of Contract* (2001); A J Kerr *The Principles of the Law of Contract* (2002). For an in-depth analysis see the seminal work by P S Atiyah *The Rise and Fall of Freedom of Contract* (1979) 226ff; J Adams and R Brownsword *Understanding Contract Law* (2004) 185-204; Collins (note 3 above) 3-10.

[5] In regard to a freedom-orientated approach to contract *cf* Atiyah (note 4 above) 226ff; Beatson and Friedmann (note 3 above) 15f; Collins (note 3 above) ch 2; Brownsword *Themes* (note 3 above) ch 3; Willet *Fairness* (note 3 above) 4ff and 18ff.

[6] In the common law the theories of Jeremy Bentham and Adam Smith provided the philosophical and economic springboard for the elevation of contractual freedom to an ideological *a priori* Atiyah (note 4 above) 25 and 292ff.

[7] M Horwitz "The Rise of Legal Formalism" (1975) *American J of Legal Hist* 251 at 256-7 states that "What came to be certified as purely 'legal', of course were those rules of law that had been established … to implement a market regime."

[8] L Hawthorne "The Principle of Equality in the Law of Contract"("Equality") (1995) *THRHR* 157; R Feenstra and M Ashmann *Contract* (1980) 6; Atiyah (note 4 above) 69ff. PJ Aronstam *Consumer Protection, Freedom of Contract and the Law* (1979) 14; Collins (note 3 above) 11.

[9] W Friedman *Law in a Changing Society* (1959) 124; also J C Smith and D N Weisstub *The Western Idea of Law* (1983) 609ff.

[10] Friedman (note 9 above) 124; M Horwitz *The Transformation of American law 1780-1860* (1977) 181ff; L Antoniolli "Consumer Protection, Fair Dealing in Marketing Contracts and European Contract Law – a Uniform Law?" in H Collins (ed) *The Forthcoming EC Directive on Unfair Commercial Practices – Contract Consumer and Competition Law Implications* (2004) 288ff.

[11] 2007 (5) SA 323 (CC).

[12] At par [23] in regard to the question of horizontality the Constitutional Court held that the question had still to be decided by that court and proceeded to apply the indirect horizontal approach (at par [30]) using public policy as the vehicle to test whether the contractual term challenged is contrary to public policy as evidenced by the constitutional values. In regard to the scholarly debate relating to the question of horizontality cf I 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; P Sutherland "Ensuring contractual fairness in consumer contracts after *Barkhuizen v Napier* 2007 5 SA 323 (CC) Part 1 2008 *Stell LR* 390 at 394ff; D Bhana & M Pieterse "Towards a reconciliation of contract law and Constitutional values: Brisley and Afrox revisited 2005 *SALJ* 865; & S Woolman "The amazing vanishing bill of rights" 2007 *SALJ* 762). This issue will not be addressed in this paper. It is necessary to keep in mind that 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) 7, in which decision the Appellate Division (as is 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.

[13] At pars [28 and 29].

[14] At pars [56-59]; *cf* L Hawthorne "*Breedenkamp v Standard Bank of SA Ltd* 2009 (5) SA 304 (GSJ); and *Breedenkamp v Standard Bank of SA Ltd* 2009 (6) SA 277 (GSJ); *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) Contract law: Contextualisation and unequal bargaining position Redux" (2010) *De Jure* 395ff.

[15] At par [51].

[16] At par [56].

[17] At par [59].

[18] At pars [48] & [73].

[19] At par [59].

[20] At pars [56] and [58].

[21] At par [59].

[22] *Cf* P J Sutherland "Ensuring Contractual Fairness in Consumer Contracts after Barkhuien v Napier 2007 5 SA 323 (CC) Part II" (2009) *Stell LR* 50 at 55 who interprets the first question differently. He is of the opinion that the first question involves both an objective and a subjective enquiry, first whether the terms of the contract are contrary to public policy as well as whether the terms were subjectively contrary to public policy because of the parties relative bargaining position.

[23] In the *Barkhuizen* case the right to access to justice at par [57].

[24] At pars [30] and [36]. F D J Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: the Influence of the Common Law and the Constitution" (2009) *SALJ* 71 at 84.

[25] At pars [56-59].

[26] At par [70].

[27] Section 2.

[28] L Hawthorne "The 'New Learning' and Transformation of Contract Law: Reconciling the Rule of Law with the Constitutional Imperative to Social Transformation" (2008) 23 *SAPR/PL* 77; H Botha "The legitimacy of legal orders (3): Rethinking the rule of law" ("Rule of Law") (2001) *THRHR* 523.

[29] Sec 1.

[30] Sec 10.

[31] S Woolman "Dignity" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* (2009) (*Constitutional Law*) 36-1; H Botha "Human Dignity in comparative perspective" (2009) 2 *Stell LR* 171f; L W H Ackermann "The Legal Nature of the South African Constitutional Revolution" (2004) 4 *New Zealand L R* 650; In *Dawood & Another v Minister of Home Affairs & Others* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at par [35] O'Regan J held that "[H]uman …dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. …"; also in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) at par [144] the court held that dignity together with the right to life is "the most important of all human rights, and the source of all other personal rights". The same is applicable in regard of the German Basic Law (*Grundgesetz*) *cf* O Cherednychenko *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (2007) 248 n 44.

[32] Sec 37.

[33] Secs 7(3) and 36.

[34] Sec 7(2). This principle also appears in the German Basic Law. Sec 1(1) states that "[*D*]*ie Würde des Menschen ist unantasbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.*"

[35] *Cf* the German distinction between *Abwehrfunktion* and *Schutzfunktion* of basic rights. H Dreier *Grundgesetz Kommentar* (2004) 103 and 218.

[36] *Cf Dawood & Another v Minister of Home Affairs* (note 31 above); Botha "Human Dignity" (note 31 above) 177 and at 199.

[37] M Pieterse "The Legitimizing/Insulating Effect of Socio-Economic Rights" (2007) 22 *Canadian Journal of Law and Society* 1 at 2 n 4.

[38] Sec 5 of the Vienna Declaration and Programme of Action A/CONF/157/23 (12 July1993); *Cf Dawood v Minister of Home Affairs* (note 31 above) par [35] where the court held that human dignity "is a value that informs the interpretation of many, possibly all, other rights"; *S v Mamabolo* 2001 (3) SA 409 (CC) par [41].

[39] Pieterse (note 37 above) 2.

[40] Botha "Human Dignity" (note 31 above) 198.

[41] *Napier v Barkhuizen* 2006 2 ALL SA 469 (SCA).

[42] Botha "Human Dignity" (note 31 above) 201.

[43] Woolman "Dignity" (note 31 above) ch 36, 36-7ff; Botha "Human Dignity" (note 31 above) 182.

[44] 1999 (1) SA 6 (CC) par [29].

[45] Woolman "Dignity" (note 31 above) at 36-6ff states that the five definitions are "Individual as an end-in-herself"; "equal concern and equal respect"; 'self-actualisation"; 'self-governance" and "collective responsibility for the material conditions for agency."

[46] A J Nieuwenhuis *Tussen Privacy en Persoonlijkheidsrecht*: *een Grondrechtelijk en Rechtsvergelijkend Onderzoek* (2001) 86.

[47] Cherednychenko (note 31 above) 249 refers to sec 1(1) of the *Grundgesetz*.

[48] Sec 1(1) of the Grundgesetz states: *"[D]ie Würde des Menschen ist unantasbar. Sie zu achten und zu schützen ist Verpflichtung aller staat lichen Gewalt"*; *cf* Dreier (note 35 above) 218ff.

[49] Cherednychenko (note 31 above) 249.

[50] (note 12 above) at 880f; *Cf* also G Lubbe "Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law (2004) *SALJ* 395 at 421f.

[51] Cherednychenko (note 31 above) *ibid*.

[52] Cherednychenko (note 31 above) 250; Dreier (note 35 above) 218ff where *Schutz gegen sich selbst* is discussed.

[53] S Feldman "Human Dignity as a Legal Value: Part I" (1999) *Public Law* 682, 685.

[54] Feldman (note 53 above) *ibid*; Brownsword "Human Dignity" (note 4 above) 191; Cherednychenko (note 31 above) 251ff; Bhana & Pieterse (note 50 above) at 880f; Lubbe (note 50 above) at 421f.

[55] Brownsword "Human Dignity" (note 4 above) 191f cites and discusses Kant *The Metaphysics of Morals* (Gregor translation and editor 1996) at 209; *cf* also L W H Ackermann 'Equality and the South African Constitution: The Role of Dignity' (2000) 60 *Heidelberg Journal of Int L* 537, 540ff; C Albertyn and B Goldblatt "Equality" in S Woolman *Constitutional Law* (note 31 above) ch 35, 35-9 and at ch 36, 36-3.

[56] Feldman (note 53 above) 685.

[57] Brownsword "Human dignity" (note 4 above) 193; Cherednychenko (note 31 above) 252; Bhana & Pieterse (note 50 above) 881.

[58] 2006 2 ALL SA 469 (SCA); D Bhana "The law of contract and the Constitution: Napier v Barkhuizen (SCA) (2007) *SALJ* 269 at 274; Bhana & Pieterse (note 50 above) 883.

[59] At par [28].

[60] Cherednychenko (note 31 above) 252.

[61] Feldman (note 53 above) 686; Cherednychenko (note 31 above) 251f (where a printing mistake may cause confusion).

[62] Brownsword "Human dignity" (note 4 above) 194ff; Bhana & Pieterse (note 50 above) 881. Lubbe (note 50 above) 421f.

[63] Cherednychenko (note 31 above) 252.

[64] Cherednychenko (note 31 above) *ibid*.

[65] Botha "Human Dignity" (note 31 above) 173 where he refers to the statement made by Ackermann J in *Du Plessis v De Klerk* 1996 3 SA 850 (CC) at par [92] where the learned judge held that "I do believe that the German Basic Law was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted."

[66] Dreier (note 35 above) 171 states that "*Aus dem Menschenwürdesatz ergibt sich schlieslich als soziale Komponente die Garantie eines in Parallele zu den gesamtwirtschaftlichen Entwicklungen konkretisierbaren materiellen Existenzminimums*"; also Dreier (note 35 above) at 386.

[67] The German Constitutional Court held in the *Handelsvertreter* case, BVerfG 7 February 1990, BVerfGE 81, 242 at 253 that the restraint of trade clause was formulated so broadly that it would effectively prevent the contracting party from working in his line of business for 2 years: "*Dem Beschwerdeführer wird aufgrund der Verurteilung zur Wettbewerbsunterlassung seine berufliche Tätigkeit in einem Ausmass verschlossen, das seine Existenzgrundlage berürht."*

[68] This has been achieved by the National Credit Act 34 of 2005 in section 90 which makes certain exclusionary provisions unlawful.

[69] S Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" ("Value of Human Dignity") (2005) *SAJHR* 12; S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (*Socio-Economic Rights*) (2010) 23ff, 59ff.

[70] Liebenberg "Value of Human Dignity" (note 69 above) *ibid.*

[71] M C Nussbaum *Women and Human Development-The Capabilities Approach* (2000) 5.

[72] M C Nussbaum "Human Dignity and Political Entitlements" in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* ("Entitlements") (2008) 351; *cf* in general *Women and Human Development: The Capabilities Approach* (2000).

[73] Nussbaum "Entitlements" (note 72 above) 377 describes life as "Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living."

[74] *Ibid* she describes bodily health as "Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter."

[75] *Ibid* she describes bodily integrity as "Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction."

[76] *Ibid* she describes senses, imagination and thought as "Being able to use the senses, to imagine, think, and reason-and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid non-beneficial pain."

[77] *Ibid* she describes emotions as "Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)."

[78] *Idem* at 378 describes practical reason as "Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance)."

[79] *Ibid* she describes affiliation as two-fold: A. "Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)" and B. "Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin."

[80] *Ibid* she describes the capability in respect of other species as "Being able to live with concern for and in relation to animals, plants, and the world of nature."

[81] *Ibid* she desribes play as"Being able to laugh, to play, to enjoy recreational activities."

[82] *Ibid* she describes control over one's environment as having two components, the first political "Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association." and the second material "Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers."

[83] Sec 29.

[84] Sec 15.

[85] Sec 16.

[86] Sec 17.

[87] Sec 18.

[88] Sec 16.

[89] Sec 15.

[90] Sec 18.

[91] Sec 19.

[92] Sec 9.

[93] In the Preamble 1966.

[94] Sec 1(a) of Act 108 of 1996.

[95] Bhana & Pieterse (note 50 above) 881.

[96] 1995 (3) SA 391 par [328].

[97] 2004 (6) SA 505 (CC) at par [52].

[98] 2000 (11) BCLR 1169.

[99] *Cf* Liebenberg "Value of Human Dignity" (note 69 above) 1; N Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 2 *SAJHR* 451.

[100] At par [23].

[101] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) footnotes excluded.

[102] At par [8].

[103] At par [44].

[104] *Cf* S Liebenberg "The Interpretation of Socio-Economic Rights" in S Woolman *Constitutional Law* (note 31 above) 33-37; Liebenberg "Value of human Dignity" (note 69 above) 4ff; Liebenberg *Socio-Economic Rights*) (note 69 above) 23ff; 59ff.

[105] Collins (note 3 above) 404; H Nieuwenhuis *Waartoe is het Recht op Aarde*? (2006) 1 where he coins the phrase "cathecism" referring to the social market theory being propagated in the United States of America by L Kaplow and S Shavell in *Fairness versus Welfare* (2002) 3. L 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.

[106] Liebenberg "Value of Human Dignity" (note 69 above) 7; Liebenberg *Socio-Economic Rights*) (note 69 above) 23ff; 59ff.

[107] 1989 (1) SA 1 (A).

[108] At 7.

[109] At 9.

[110] A J Barnard-Naude "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 at 174.

[111] Haysom (note 99 above) 451.

[112] *S v Makwanyane* (note 31 above) pars [326-7].

[113] Liebenberg "Value of Human Dignity" (note 69 above) 12; Liebenberg *Socio-Economic Rights*) (note 69 above) 23ff, 59ff.

[114] Liebenberg "Value of Human Dignity" (note 69 above) *ibid*; S Hocter "Dignity, Criminal Law and the Bill of Rights" (2004) 121 *SALJ* 265 at 315.

[115] *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 by Yacoob J at par [23].

[116] Botha "Rule of Law" (note 28 above) 523 at 535.

[117] Sections 1, 7 and 39(1) and (2).

[118] *Barkhuizen v Napier* (note 11 above) par [29].

[119] In *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) par [12]; Bhana (note 58 above) 269, 274; Bhana & Pieterse (note 50 above) 881; Lubbe (note 50 above) 421; and more recently in *Bredenkamp v Standard Bank* 2010 (4) SA 468 SCA at par [53].

[120] In *Barkhuizen v Napier* (note 11 above) the Constitutional Court definitely rejected (at pars [72-73]) the opinion held in *Napier v Barkhuizen* (2006 (4) SA 1 (SCA) at par [12]) that "Nor does the fact that a term is unfair or may operate harshly by itself lead to the conclusion that it offends against constitutional principle … (I)n appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements."

[121] For example the Constitution recognises the right to labour relations (sec 23), the right to housing (sec 26), the right to health care, food, water and social security (sec 27) and the right to education (sec 29).

[122] Sections 7(2), 24(b), 25(5), 26(2), 27(2), 28(1)(h) and 35(2)(c).

[123] Sections 8(2), 8(3), 9(4), 32(1)(b), and 39(2). *Cf* Hawthorne "Equality" (note 8 above) 163 n 37; Bhana & Pieterse (note 50 above) 865; Lubbe (note 50 above) 395.

[124] Policy considerations can make enforcement of certain contracts undesirable. Thus, certain contracts are, for the sake of public interest, not enforced. *Sasfin v Beukes* (note 12 above) is the landmark decision in this respect in South African law of contract. In this decision the Appellate Division (as is 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.

[125] *Barkhuizen v Napier* (note 11 above) at par [28].

[126] Botha "Rule of Law" (note 28 above) 523 at 524 n5.