The Substance of Contractual Autonomy in the Twenty-First Century: The South African Experience

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Abstract: *In this article, I look at the values of freedom, dignity and equality, as they are founded in the Constitution of the Republic of South Africa, 1996 and consider how they ought to constitutionalise the legal concept of contractual autonomy. I argue that the conception of contractual autonomy in the post-apartheid era has to be a shifting one that at once needs to be sensitive to the factual context, any applicable fundamental human rights (as entrenched in the Bill of Rights, Chapter Two of the Constitution), as well as the broader constitutional vision of a substantively progressive and transformative South Africa. To this end, I develop what I call the 'foundational constitutional triad' and use it as the framework for my ensuing analysis of the founding values. My analysis of the values then, reveals a distinct leaning toward a more full-bodied, substantive conception of legal autonomy. Indeed, this stands to reason given that the constitutional self is grounded essentially in the broader transformative project of South African society. In the end therefore, I maintain that if such an understanding of autonomy is carried forward into the South African law of contract, it would be able effectively to address the constitutional deficiencies of the extant conception of contractual autonomy.*

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A. INTRODUCTION

Autonomy comprises the central axis of contract law. Its manifestation as the principle of freedom of contract and the attendant maxim pacta servanda sunt can be traced back to foundational Roman legal sources of the Western European ius commune.[1] Moreover, the elevated emphasis on (a strongly individualist) freedom of contract during the ensuing classical liberal era (of the 18th and 19th century) continues to dominate the contract law ju-

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

risprudence of Commonwealth jurisdictions.[2] This, notwithstanding much of 20th century discourse, which centred on what was generally labeled 'the rise and fall of freedom of contract'.[3] As of the late 20th century, the principle of freedom of contract is back full-circle in its rise once more to primacy of place within the law of contract.[4] Yet, the traditional fixed ((neo-) classical liberal)[5] understanding of contractual autonomy appears to be out of step with modern society's challenges.

In South Africa, this issue has been brought to the fore by the Constitution of the Republic of South Africa, 1996, which expressly subjects all South African law, including the (private) common law of contract, to its Bill of Rights and the realisation of its (more collectivist (as opposed to purely individualist)) vision of a substantively equal, free and dignified post-apartheid society.[6] In more concrete terms, this means that the content and operation of autonomy within the South African common law of contract needs to reverberate firstly, with the foundational constitutional *values* of freedom, dignity and equality,[7] secondly, with those fundamental human *rights* (as entrenched in the Bill of Rights) that may be applicable in the particular factual context of a case[8] and finally, with the broader socio-economic, legal and political *vision* for post-apartheid South Africa.[9]

2 *Jack Beatson* and *Daniel Friedman*, From classical to modern contract law, in: Jack Beatson / Daniel Friedman (eds.), Good Faith and Fault in Contract Law, Oxford 1995, p. 7; *Luanda Hawthorne*, The principle of equality in the law of contract, Tydskrif vir Hedendaagse Romeins-Hollandse Reg 58 (1995), p. 164; *Deeksha Bhana* and *Marius Pieterse*, Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited, South African Law Journal 122 (2005), p. 866-868. Note that unless otherwise stipulated, I use the terms 'freedom of contract', 'contractual autonomy', 'liberty', 'freedom', 'free will', 'choice' and 'voluntary' loosely and interchangeably.

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

4 *Buckley*, note 3; *Atiyah*, note 3, p. 40, p. 355-358. See also *Stephen A Smith*, Future freedom and freedom of contract, Modern Law Review 59 (1996), p. 175-176, on the role of contracts and contract law in daily life.

5 *Bhana* and *Pieterse*, note 2, p. 866-872.

6 As per the preamble and sections 1, 7, 8(1) and 39(2) of the Constitution of the Republic of South Africa, 1996 (hereafter 'the Constitution'). See also *Deeksha Bhana*, The horizontal application of the Bill of Rights: A reconciliation of sections 8 and 39 of the Constitution, South African Journal on Human Rights 29 (2013), p. 362-374 and the authorities cited there.

7 As per sections 8(1) and 39(2) of the Constitution.

8 As per section 8(2) read with sections 9 to 35 of the Constitution.

9 *Bhana*, note 6, p. 352-354.

In this article, I focus particularly on the values of freedom, dignity and equality and propose for South African contract law, a 21st century concept of contractual autonomy, as grounded in a constitutional understanding of these foundational values. I begin my undertaking below by setting out my basic hypothesis, namely, that the constitutionalised conception of contractual autonomy necessarily is a shifting one which, at once, needs to be sensitive to the factual context, any applicable fundamental human rights, as well as the broader constitutional vision of a substantively progressive and transformative South Africa. Importantly, in doing so, I develop what I term the 'foundational constitutional triad',[10] which I then use as the basic framework in my ensuing analysis of each of the three foundational values. More specifically, I use the foundational constitutional triad to articulate the ideal of the 'constitutional self' exercising contractual autonomy. Notably, in relation to this latter ideal, I am especially critical of relevant constitutional (contract) law cases where the South African courts continue to foster the traditional classical liberal conception of contractual autonomy as articulated by an essentially classical liberal understanding of the foundational values. I argue instead that if South African courts are to take the constitutional mandate about contract law seriously, their understanding of the foundational values must at least begin to lean toward a more full-bodied, substantive conception of contractual autonomy, where the constitutional self is grounded essentially in the broader transformative project of South African society.

B. AUTONOMY AS CONTEMPLATED BY THE SOUTH AFRICAN CONSTITUTION: THE FOUNDATIONAL CONSTITUTIONAL TRIAD

As outlined above, in South Africa, the common law of contract, and in particular, contractual autonomy must now find a legal home in the South African Constitution, 1996. In the absence of an express right to freedom of contract (or a comparable right to free economic activity) in the Bill of Rights,[11] both the Constitutional Court (the 'CC') and the Supreme Court of Appeal (the 'SCA') have purported to situate freedom of contract within the foundational triad of what are now the fundamental *constitutional* values of freedom, dignity and equality. In this respect, the key is to appreciate the basic shift from the pre-constitutional classical liberal articulation of freedom, dignity and equality (in their *formal* atomistic conceptions of individual autonomy, good faith and inherent equity respectively), to

10 I use the word 'triad' to denote the tripartite relationship between the foundational constitutional values of freedom, dignity and equality. Thank you to Professor Andre van der Walt for his suggestion of the word 'triad'.

11 Notably, the constitutional right to freedom of trade, profession and/or occupation was significantly broader under section 26 of the interim Constitution, 1994 as compared with the corresponding right in section 22 of the Constitution.

the post-apartheid, substantively progressive and transformative constitutional conceptions of these values.[12]

At the outset, it is important to outline the manner in which this *foundational constitutional triad* is meant to articulate the ideal of the 'constitutional self', both fundamentally as well as in relation to the specifically enumerated rights. To begin with, the values of freedom, dignity and equality, in and of themselves are innately fluid and multi-faceted. Indeed, the respective internal facets of each value are associated with competing legal and political philosophies that extend beyond the pre-constitutional classical liberal ideology espoused by the South African common law and as such, can be diverse and not necessarily congruent with one another.[13] Moreover, the Constitution does not at the outset demand that a specific internal facet of a value predominate. Much depends on context. Furthermore, in terms of s 8(2) of the Constitution, the enquiry should be informed inter alia by the nature and scope of those enumerated right(s) that may be applicable. In this respect, it is also important to remember that the specifically enumerated rights, as set out in the Bill of Rights, are grounded likewise in the values of freedom, dignity and equality and accordingly, must comport finally with the overarching vision of the Constitution i.e. to realise a substantively equal, free and dignified post-apartheid South African society.[14]

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

In other words, what the Constitution envisages for the construction of the South African autonomous self and autonomy generally, is a comprehensive delineation and appreciation of the foundational constitutional values of freedom, dignity and equality, both individually and jointly,[15] all the while being informed by context and those enumerated rights that may be applicable. The basic idea is that the fluid legal *intra-action* (*within* each value respectively) and *inter-action* (*between* the values) must occur in such a manner that, in each case, the resulting concept of autonomy, although a necessarily shifting concept,

12 As per sections 1(a), 7(1), 39(1)(a) and 39(2) of the Constitution. See *Bhana*, note 6, p. 351-355; 373-374. There may be a possibility of invoking selected freedom and/or economic rights in relation to contract, but to date, such rights have been interpreted narrowly.

13 *Bhana* and *Pieterse*, note 2, p. 876.

14 *Iain Currie* and *Johan De Waal*, The Bill of Rights Handbook, Cape Town 2013, p. 214-215.

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

plausibly articulates or works toward (or at the very least, is not inconsistent with) the Constitution's substantively progressive and transformative ambitions.[16]

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

C. THE FOUNDATIONAL CONSTITUTIONAL VALUE OF FREEDOM

The point of departure in South African contract law is the classical liberal elevation of the value of freedom (above equality and dignity) in its legal conception of contractual autonomy. Accordingly, freedom of contract appears naturally to be most at home with the foundational constitutional value of freedom.[17] Nevertheless, the (pre-constitutional) private law's essentially negative conception of individual liberty can be but one (formal) dimension of freedom and the foundational triad's conception of autonomy. Most importantly, autonomy must operate now within a *constitutionalised* law of contract that is meant likewise to work towards the realisation of a substantively equal, free and dignified post-apartheid South African society.

16 See *Sandra Liebenberg* and *Beth Goldblatt*, The interrelationship between equality and socio-economic rights under South Africa's transformative constitution, South African Journal on Human Rights 23 (2007), p. 337-341, who take as their point of departure, the interdependence/interconnectedness between substantive equality and socio-economic rights, for the attainment of transformation in South Africa. At p. 338-339, they quote *Craig Scott*, The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights, Osgoode Hall Law Journal (1989), p. 786: "The notion of the interdependence and interrelatedness of rights is a fundamental tenet of international human rights law. Its animating insight is that 'values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation'."

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

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

17 *Bhana* and *Pieterse*, note 2, p. 877. This section is grounded in, and builds upon, the discussion in *Bhana* and *Pieterse*, note 2, p. 877-879 of freedom generally, and *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* 1996 (1) SA 984 (CC), in particular.

There are major philosophical texts that deal with individual liberty. See for instance, the texts relied upon by Ackermann J in *Ferreira*. Most notably, these included *Isaiah Berlin*, Four Essays on Liberty, North Carolina 1969; *Karl R Popper*, The Open Society and its Enemies. Volume 1: The Spell of Plato, New Jersey 1962. I will not be engaging with the substance of these texts here. Rather, I focus more narrowly on how their view of autonomy has manifested in legal understandings of autonomy.

That said, the value of freedom itself has been the subject of interrogation by South Africa's CC and SCA in relatively few instances. To date, the leading CC case to speak expressly to the foundational value of freedom (albeit in the context of the interim Constitution and with reference to the right to freedom and security of the person) remains that of *Ferreira v Levin*.[18] Here, the differing understandings of the constitutional value of freedom by the respective members of the *Ferreira* Court served essentially to highlight the multi-faceted nature of freedom and therefore, autonomy too. So, whereas Ackermann J reaffirmed the broader pre-constitutional (classical liberal) conception of freedom and individual autonomy, Sachs J emphasised the need for a more substantive conception of freedom which, in its articulation of autonomy, must incorporate the reality of human interdependence as well as those pre-conditions integral to its actual enjoyment.[19] Chalskalson P and Mokgoro J, in turn, focused more narrowly on the physical integrity dimension of the right to freedom and security of the person, with Chaskalson P, although accepting that there was scope for a broader meaning of freedom in relation to this enumerated right,[20] was largely agnostic about it.[21] On the other hand, Chalskalson P was explicit in rejecting Ackermann J's articulation of freedom on the basis that it may well impede 'regulation and redistribution' (read transformative) policies of the post-apartheid 'social welfare' State.[22]

Looking more closely at the judgment of Ackermann J, it reiterated that individual freedom continues to be a 'core right' in the constitutional era by reason of its essential interaction with human dignity; the latter value being identified as the central axis of South Africa's constitutional democracy.[23] To this end, Ackermann J submitted:

> *"Human dignity has little value without freedom; for without freedom personal development and fulfillment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity…[So] an individual's right to freedom*

18 *Ferreira*, note 17.

19 On Ackermann J, see *Ferreira*, note 17, p. 1012-1019; on Sachs J, see *Ferreira*, note 17, p. 1109-1115 especially at para. 251.

20 Chaskalson P in *Ferreira*, note 17, paras. 170 (p. 1085G); 184-185. Mokgoro J outright rejects any such possibility in *Ferreira*, note 17, paras. 209-213.

21 O'Regan J and Kriegler J do not discuss freedom in *Ferreira*, note 17, as they deal with the case on other grounds.

22 *Ferreira*, note 17, para. 180. The discussion here draws from *Bhana* and *Pieterse*, note 2, p. 878. See also *Marius Pieterse*, Beyond the welfare state: Globalisation of neo-liberal culture and the constitutional protection of social and economic rights in South Africa, Stellenbosch Law Review 14 (2003), p. 6, where Pieterse exposits a model of the "welfare/social state" that purports to advance socio-economic justice for vulnerable groups, who have to navigate, what are still, predominantly capitalist market economies.

23 *Ferreira*, note 17, para. 48.

> *must be defined as widely as possible, consonant with a similar breadth of freedom for others."*[24]

Ackermann J then drove the point home by way of a contrast with the systematic denial under the apartheid regime of the basic "freedom to choose or develop one's own identity…to be fully human".[25] Nevertheless, in the generous delineation of the right to freedom of the person, Ackermann J relied mainly on the work of leading (classical) libertarian, Isaiah Berlin, to privilege the negative 'liberty' dimension of constitutional freedom and furthermore, to abstract and distinguish the legal concept of autonomy from the material conditions required for its exercise.[26] Hence, the right to freedom of the person was defined as "the right of individuals not to have 'obstacles to possible choices and activities' placed in their way by the…State".[27] At the same time, Ackermann J conceded that the State would need to curb the dangers of unlimited freedom by way of a justifiably limiting law of general application, as contemplated by the limitation clause of the interim Bill of Rights.[28]

In effect therefore, Ackermann J, although starting out with an ostensibly new appreciation of dignity as the key to our post-apartheid constitutional dispensation, ended up collapsing dignity wholly into its pre-constitutional conception of liberty, so that ultimately the classical liberal dimension of freedom (and autonomy) with its corresponding affinity for individualism prevailed.[29] Freedom's potential interplay with the foundational value of equality did not even feature. On the contrary, Ackermann J went so far as to rely on Kant to aver that freedom comprises the "only one innate right" of all human beings.[30] Nevertheless, this was somewhat counter-intuitive in light of the judgment's simultaneous espousal

24 *Ferreira*, note 17, para. 49.

25 *Ferreira*, note 17, para. 51. See further, *Francois Du Bois*, Freedom and the dignity of citizens, in: AJ Barnard-Naude, Drucilla Cornell and Francois Du Bois (eds.), Jan Glazewski (gen. ed.), Dignity, Freedom and the Post-Apartheid Legal Order The Critical Jurisprudence of Laurie Ackermann, Cape Town 2008, p. 112-148, where Du Bois defends Ackermann J's emphasis on freedom and the central constitutional relationship between freedom and dignity.

26 *Ferreira*, note 17, paras. 49; 52.

27 Drawn from *Bhana* and *Pieterse*, note 2, p. 878; *Ferreira*, note 17, para. 54. Ackermann J also refers to the US conception of liberty (para. 77 especially at footnote 92) and the ICCPR and ECHR (para. 88).

28 *Ferreira*, note 17, paras. 52; 66; which presume that any (statutory) limitation of contractual freedom will need to be justified in terms of section 33 i.e. the interim Constitution's limitations clause. Ackermann J *assumes* therefore, that freedom of contract enjoys constitutional protection, and presumably, that when freedom of contract conflicts with/is limited by other rights, such conflict will be resolved by the limitation analysis (paras. 53; 57; 69). Note however, the distinction between the interim Constitution's section 33, and the Constitution's section 36. Under the interim Constitution, section 33 stipulated that the limitation of certain enumerated rights (as listed in sections 33(1)(aa) and (bb)) by a law of general application, had to be reasonable, justifiable and *necessary*. The latter requirement does not feature in the section 36 limitations clause.

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

30 *Ferreira*, note 17, para, 52.

of the atomistic Berlinian understanding of autonomy, as opposed to the contemporary more full-bodied 'human agency' understanding of Kantian philosophy, as derived from its central tenet of "treating persons always as ends in themselves as opposed to mere means".[31]

The upshot is that Ackermann J's conception of the right to freedom of the person, as enumerated in the Bill of Rights, presumably is broad enough to accommodate the extant common law right to freedom of contract as a residual (economic) freedom right that resonates with South Africa's classical liberal common law of contract. So, according to Ackermann J's hypothesis of freedom, the constitutionalised conception of contractual autonomy should not deviate significantly from its pre-constitutional conception. At most, there could be minor constitutionally prompted adjustments on the fringes of the scope of operation of contractual autonomy as per the doctrine of legality.[32] [33]

Dealing then with the judgment of Sachs J, he was more mindful of the dangers of too expansive an interpretation of the s 11(1) right to freedom of the person.[34] To begin with, Sachs J made it clear that the negative, laissez faire conception of individual liberty is far from consonant with the modern reality of people's lives. On the contrary, positive action on the part of the State is necessary both for the protection against (the potential abuse of) private power as well as for the realisation of autonomy in substance. Sachs J submitted:

> *"[G]overnment is required to establish a lawfully regulated regime outside of itself in which people can go about their business, develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security…The reality is that meaningful personal interventions and abstinences in modern society depend not only on the State refraining from interfering with individual choice, but on the State helping [positively] to create conditions within which individuals can effectively make such choices."*[35]

31 See further discussion of dignity in Part E below. See also *Liebenberg*, note 16, p. 6-7; *Currie* and *De Waal*, note 14, p. 295; *Catherine Albertyn* and *Beth Goldblatt*, Equality, in: Stuart Woolman, Michael Bishop, Jason Brickhill, et al. (eds.), Constitutional Law of South Africa, Cape Town 2008 Revision Service 4 2012, chapter 35, p. 35-1 to 35-2; 35-9; *Woolman*, note 16, p. 36-1 to 36-4; 36-6 to 36-19.

32 In brief, the doctrine of legality determines whether the substance of what the parties agreed on - they each having exercised their contractual autonomy - is against public policy, the boni mores and/or the broader public interest. For a detailed discussion of these concepts, see *SWJ (Schalk) Van der Merwe, LF Van Huyssteen, MFB Reinecke and GF Lubbe*, Contract General Principles, Cape Town 2012, chapter 7. See also *Beatson* and *Friedman*, note 2, p. 8-9.

33 Ackermann J's generous delineation of freedom seems to resonate with recent SCA cases, as well as the first CC case's appreciation of the content and scope of operation of autonomy within the law of contract – see discussion of cases below.

34 *Ferreira*, note 17, para. 249.

35 *Ferreira*, note 17, paras. 250-251.

So Sachs J took as the point of departure, differing conceptions of autonomy which operate presumably on a continuum. This continuum extends from the negative, atomistic extreme of laissez faire in relation to an individual's personal arrangement of his or her affairs, to the positive, contextual extreme of full blown active State involvement in the individual's exercise of autonomy in substance. In this respect, Sachs J placed particular emphasis on the increasing reality of human interdependence and its corresponding affinity with the collective as integral to a constitutional conception of autonomy.[36]

Sachs J then proceeded to situate this fluid understanding of autonomy within the broader constitutional framework as grounded in the values of freedom and equality.[37] Here, Sachs J was able to appreciate firstly, the internal fluidity of each of the values of freedom and equality so that they can "at one and the same time [be] in tension with each other, and mutually supportive". Moreover, the interplay between the values of freedom and equality is also fluid, with neither value necessarily being dominant and much depending on context and the fundamental right(s) implicated. Even so, an important constraint in striking the balance between freedom and equality is that neither value should ever be sacrificed wholly in the name of the other.[38]

The upshot is that autonomy can no longer defend the general hegemony[39] of its pre-constitutional classical liberal conception upon the basis merely of the residual right to freedom of the person or even the broader foundational value of freedom, without something more.[40]

For purposes of the case before the court then, Sachs J delineated the right to freedom and security of the person as a right, which protects an individual from undue (State) interference and most notably, encompasses freedom from physical restraint and other freedoms that are analogous to physical freedom.[41] More importantly, the recognition within s 11(1) of the right not to incriminate oneself was held ultimately to depend on time, place and context, as well as on the general (countervailing) interest of the community in the fight against crime.[42]

36 *Ferreira*, note 17, para. 251. This reflects the principle of ubuntu, as espoused by the Constitution.

37 *Ferreira*, note 17, para. 252. This would now include the foundational value of dignity too. In relation to *Ferreira*, note 17, the interim Constitution was applicable, where sections 33(1) and 35(1) referred to an "open and democratic society based on freedom and equality". In contrast, the corresponding provisions of the Constitution refer to an "open and democratic society based on *human dignity*, equality and freedom…[*my emphasis*]".

38 *Ferreira*, note 17, para. 253.

39 *Alfred Cockrell*, The hegemony of contract, South African Law Journal 115 (1998), p. 286-317.

40 *Ferreira*, note 17, para. 254.

41 *Ferreira*, note 17, paras. 254-257. In brief, this case dealt with the constitutionality of section 417(2)(*b*) of the Companies Act 61 of 1973, in terms of which, an examination of a person in a winding-up proceeding may be required to answer questions put to him or her even if the answers may incriminate him or her.

42 *Ferreira*, note 17, para. 258.

In the end therefore, Sachs J's approach to freedom is most aligned with my earlier outlined framework comprising the multi-dimensional constitutional values of freedom, dignity and equality, both individually and jointly. Indeed, if carried forward into the South African law of contract, it would articulate a fluid conception of what should constitute an exercise of (contractual) autonomy by the 'constitutional self', who is now situated squarely within the broader South African community, as ensconced in ubuntu ('umuntu ngumuntu ngabantu').[43]

Nevertheless, subsequent cases have not followed through with Sachs J's approach. The SCA has adopted an approach to freedom of contract that resonates rather with Ackermann J's understanding of freedom. In *Brisley v Drotsky*,[44] Cameron JA (as he then was) purported to situate the South African common law of contract within the Bill of Rights. Cameron JA explained that South Africa's contract law is now subject to the Constitution,[45] which means that 'public policy', as applied to contracts, is now grounded in the Constitution and its foundational values of freedom, human dignity, and equality.[46] In terms of the broader constitutional framework, the values of freedom and human dignity embrace the fundamental principle of freedom of contract save for any 'obscene excesses'.[47] In other words, the SCA held that the constitutional values of freedom and dignity re-legitimate the classical liberal notion of autonomy of individuals to govern their own lives by contract, for so long as their 'self-respect and dignity' are not undermined.[48] Presumably, like Ackermann J therefore, the SCA anticipates that the Constitution will prompt mostly minor adjustments on the fringes of contractual autonomy's scope of operation in terms of the doctrine of legality. Indeed, this is borne out by *Afrox Healthcare Bpk v Strydom* where the SCA further

43 *Luanda Hawthorne*, Materialisation and differentiation of contract law, Tydskrif vir Hedendaagse Romeins-Hollandse Reg 71 (2008), p. 446 – translated as "a person is only a person through his relationship to others" and explains the movements from, individualism to collectivism; solitary to solidarity, independence to interdependence; see also *Stuart Woolman* and *Dennis Davis*, The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of fundamental rights under the interim and final Constitutions, South African Journal on Human Rights 12 (1996), p. 386-387, 392, and 395-399; *Marius Pieterse*, The interdependence of rights to health and autonomy in South Africa, South African Law Journal 125 (2008), p. 553-557, 568, 570-572. See also *Liebenberg*, note 16, p. 11-12, especially footnote 44; *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC), para. 51.

44 *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (Judgment of Cameron JA), paras. 88-95. *Brisley* dealt with the enforceability of a non-variation clause in the context of a previous verbal variation made in good faith between the lessor and lessee.

45 *Brisley*, note 44, para. 88.

46 *Brisley*, note 44, para. 91.

47 *Brisley*, note 44, para. 94; in casu it was held that equality was not relevant as the non-variation clause favoured both parties.

48 *Brisley*, note 44, paras. 94-95. On self-respect and dignity see Part E below.

elevated the status of the South African common law principle of freedom of contract to a constitutional value *itself*.[49]

So, the pre-constitutional conception of autonomy appears not to have been disturbed by the Constitution. On the one hand, the SCA has since recognised the impact of the constitutional value of equality (and dignity) on contractual validity, at least insofar as it acknowledges that a court must take cognisance of inequalities in bargaining power in order to ensure that parties are not "forced to contract…on terms that infringe…dignity and equality".[50] On the other hand, the SCA continues to conceive of dignity and equality essentially in the classical liberal tradition, with not much being said about the competing (more positive/substantive) conceptions of these values.[51] Likewise, the enumerated rights that have been implicated in the various cases, whether civil, political, economic, socio-economic or cultural in nature, seem not to have had any significant bearing on the ideal of a "full and integrated…[constitutional] self" in any particular case.[52] Indeed, the SCA, in ascertaining the constitutional compliance of individual exercises of contractual autonomy, simply assumes that the implicated enumerated right(s), as grounded in the foundational constitutional triad of values, works essentially with the classical liberal conception of autonomy.[53]

In any event, the SCA has yet to take account of alleged inequalities in bargaining powers. Apparently, this has been due to the failure thus far, of the relevant contracting party to bring evidence that would satisfy the court that he or she was in a weaker bargaining position. The basic classical premise that parties contract on an equal footing thus prevails.[54]

49 *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), paras. 17-24 especially para 23 where freedom of contract was referred to as "[d]ie grontwetlike waarde van kontrakteersvryheid..." (the foundational constitutional value of freedom of contract (my translation)). Drawn from *Bhana* and *Pieterse*, note 2, p. 883.

50 *Afrox*, note 49, para, 12; *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), paras. 14, 16.

51 See discussion of equality in Part D and dignity in Part E below.

52 *Scott*, note 16, p. 804.

53 *Johannesburg Country Club v Stott* 2004 (5) SA 511 (SCA), para. 12, has come the closest to acknowledging that the enumerated 'Right to Life' may have some bearing on the constitutional concept of autonomy. Significantly, the courts are yet to deal with the impact of the various socio-economic rights, as set out in the Bill of Rights, on the question of what constitutes an exercise of contractual autonomy in a constitutional context. Even so, these rights are linked intrinsically to a constitutional/transformative conception of capacity (so-called capabilities-based approach), for instance, which at one and the same time draws on and facilitates substantive freedom, dignity and equality. See also *DL Pearmain*, Contracting for socio-economic rights: A contradiction in terms? (1), Tydskrif vir Hedendaagse Romeins-Hollandse Reg 69 (2006), p. 292-294, 296-297; *DL Pearmain*, Contracting for socio-economic rights: A contradiction in terms? (2), Tydskrif vir Hedendaagse Romeins-Hollandse Reg 69 (2006), p. 474-477; *Marius Pieterse*, Indirect horizontal application to the right to have access to health care services' South African Journal on Human Rights 23 (2007), p. 177; *Pieterse*, note 22, p. 19; *Scott,* note 16, p. 804, 806-808.

54 *Napier*, note 50, para. 15. See also *Deeksha Bhana*, The law of contract and the Constitution: *Napier v Barkhuizen* (SCA), South African Law Journal 124 (2007), p. 275-278, for a critical analysis of the SCA's treatment of equality and bargaining power in *Napier*. For a discussion of the

Additionally, the SCA contemplates that (potential) deficiencies in the conception of what must constitute an exercise of autonomy itself can be cured solely by contract law's legal policy (now constitutional) corrective as per the doctrine of legality. In terms of this corrective however, it is the scope of operation of autonomy (as opposed to its classical liberal content) that is delineated when the doctrine of legality invalidates relevant terms for being contrary to public policy.[55] Accordingly, the SCA's contemplated approach to autonomy is flawed in so far as autonomy remains grounded in the classical liberal conception of autonomy with its strongly individualist leanings.

The result is that the common law of contract is 'constitutionalised' almost exclusively in the negative liberty image of the values of freedom, dignity and equality and accordingly, appears to survive constitutional scrutiny largely intact and undisturbed. Moreover, such approach seems to have taken root in further SCA judgments as well as the first CC judgment dealing with the constitutionalisation of contract law.[56]

In *Barkhuizen v Napier*, the CC was presented with an opportunity to pronounce on the constitutionalisation of South African contract law. In particular, it was asked to decide on the constitutionality of a contractual time limitation clause in an insurance contract that reduced the time that the insured had to institute action against the insurer to 90 days. The plaintiff argued that this clause was against public policy and therefore illegal because it undermined his constitutional right of access to the courts. So, the primary focus of the enquiry was on the doctrine of legality, as the constitutional corrective for the scope of operation of contractual autonomy.[57] Still, in examining this dimension of contractual autonomy, the CC needed first to re-position the common law of contract *as a whole* and therefore, the concept of *contractual autonomy as a whole*, within the framework of the Bill of Rights.[58] In other words, the CC needed first to assess and legitimate the *content* of contractual autonomy in terms of the Bill of Rights (i.e. the conception of what constitutes an exercise of autonomy by the constitutional contracting self) before considering its ensuing *scope of operation* (i.e. the legal/constitutional limits of an exercise of contractual autonomy).[59] Indeed, Ncgobo J (as he then was), writing the majority judgment for the CC, took as his

use of the so-called 'evidence-technique' in relation to the issue of unequal bargaining power, see *Deeksha Bhana*, 'The role of judicial method in contract law revisited' South African Law Journal 132 (2015), p. 142-144, 147-148.

55 *Napier*, note 50, para. 16.

56 *Brisley*, note 44, paras. 88-95; *Afrox*, note 49, paras. 14-24; *Napier*, note 50, paras. 6-14; Ngcobo J's majority judgment in *Barkhuizen*, note 43, especially para. 30; *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 SCA, paras. 50-51; compare *Stott*, note 53, para 12.

57 *Barkhuizen*, note 43, paras. 28-30.

58 *Barkhuizen*, note 43, paras. 23; 28-30. See also *Bhana*, note 6, p. 362-374.

59 Briefly stated, I argue that contractual autonomy comprises two dimensions viz. the internal (content) dimension, which focuses on what, in law, constitutes an exercise of contractual autonomy by the contracting self, and the external (reach) dimension, which deals with the scope of operation, in law, of such exercise of contractual autonomy. See further, *Deeksha Bhana*, 'Contractual Autonomy Unpacked: The Internal and External Dimensions of Contractual Autonomy Operating in

point of departure, the quintessential doctrine of pacta servanda sunt, it being the embodiment of freedom of contract and contractual autonomy. At the same time however, the CC endorsed the approach to freedom of contract as adopted by the SCA.[60] So, whilst the CC expressly recognised that pacta servanda sunt is not a 'sacred cow', but is subject to constitutional control, it applied its mind only to the scope of operation of autonomy. This, notwithstanding that pacta servanda sunt is premised on a holistic conception of autonomy. Moreover, like the SCA, even when assessing the scope of operation of autonomy, the CC did so only in the classical liberal image of the values of freedom, dignity and equality.[61]

To reiterate, an acceptable 'constitutionalisation' of this doctrine would require a more rigorous interrogation of its classical liberal (negative) autonomy grounding, both in terms of its content and its scope of operation, especially in light of the largely unsatisfactory results yielded thus far by the SCA's essential maintenance of the pre-constitutional position in relation to contracts.[62] In more concrete terms, this would mean that the legal rules appertaining both to the content and scope of operation of contractual autonomy must foster a fuller (more positive) conception of freedom of contract, along the lines of Sachs J's approach in *Ferreira*.[63]

Be that as it may, the majority of the CC in *Barkhuizen* assumed, as the SCA had done, that the parties validly consented to the term in question. Admittedly, the CC did allude to the preceding content dimension of autonomy by way of a reference to "the extent to which the contract was freely and voluntarily concluded" as a "vital factor" that must inform the operation of the foundational constitutional triad. The prospect of a more fluid conception of what should constitute an exercise of autonomy by the constitutional contracting self thus finds some measure of support. In addition, the CC acknowledged the relevance of inequalities in bargaining power "in a society as unequal as ours".[64] Nevertheless, the CC

the Post-Apartheid Constitutional Context' South African Journal on Human Rights 31 (2015), p. 528-551.

60 The CC did however disagree with the SCA in so far as the SCA has refused to give weight to the mere fact that "a term is unfair or may operate harshly… [at para. 12 *Napier*, note 54]". *Barkhuizen*, note 43, para. 72. See also *Botha v Rich NO* 2014 (4) SA 124 (CC), paras. 49; 51 where the CC appears to have invoked fairness per se firstly, to adjust the consequences of an established contractual defence and secondly, to strike down a cancellation clause.

61 *Barkhuizen*, note 43, paras. 15; 30; 55; 57. This 'formal' conception of dignity further explains why the court did not explicitly make the link between dignity and the common law's more substantive conception of good faith comprising justice, reasonableness and fairness. See also *Barkhuizen*, note 43, paras. 80-82, and the discussion of dignity in Part E below. Compare, the more recent cases of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC), paras. 22-24, 36, 70-72; *Botha*, note 60, paras. 45-46, 49, 51 and *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), paras. 53-62, 135-147; where the CC appears more receptive to collectivist-type considerations. However, the CC has not been very clear or systematic in its discussions.

62 See SCA cases cited in note 56.

63 *Ferreira*, note 17.

64 *Barkhuizen*, note 43, paras. 57, 59, 64-65.

again took its lead from the SCA in dealing with these factors firstly, on the basis of a lack of evidence and secondly, as factors pertinent purely to the scope of operation dimension of contractual autonomy, without a concrete grasp of its innate connection with its content counterpart.[65]

On a final note, the majority judgment of the CC did go further than the SCA in relation to the autonomy-limiting considerations of contractual fairness and justice – it introduced a second, subjective stage to the doctrine of legality's traditionally objective public policy enquiry, in terms of which a court must also determine whether enforcement of the time-limitation clause would be reasonable in the particular circumstances of the case. Presumably, the CC subjectivised the public policy enquiry in this manner in order to deal with the shortcomings yielded by its failure sufficiently to distinguish the foregoing content dimension of what should constitute an exercise of autonomy by the constitutional contracting self.[66]

This then brings us to Sachs J's minority judgment in *Barkhuizen*. To begin with, Sachs J recognised the reality of the standard form contract and that the time limitation clause in casu did not form part of the terms of the contract that were actually negotiated by the parties.[67] Indeed, Sachs J carefully exposited the evolution of contracts from the 19th century laissez faire tradition, modeled on arms' length negotiation between parties of roughly equal standing, to the modern proliferation of the standard form, presented on a 'take-it-or-leave-it' basis, where in effect, one party's will is imposed on the other. To this extent therefore, Sachs J purported to tackle the question of what constitutes an exercise of autonomy by the constitutional contracting self.[68]

Nevertheless, South African contract law's treatment of the standard form contract has been mainly to assimilate the classical liberal laissez faire conception of autonomy artificially and to focus instead on autonomy's scope of operation in relation to potentially onerous, one-sided and/or unreasonable clauses.[69] Accordingly, Sachs J also situated the analysis of the time-limitation clause within the parameters of the contractual doctrine of legality's public policy enquiry. Within South Africa's constitutional context, this meant that

65 *Barkhuizen*, note 43, paras. 66; 70; compare paras. 87-88 where the majority held that the facts simply did not require consideration of the content dimension of autonomy.

66 *Barkhuizen*, note 43, paras. 58, 72-78. For a critique of the majority's introduction of a second subjective stage to the doctrine of legality's traditional public policy test, see the minority judgment of Moseneke DCJ *Barkhuizen*, note 43, paras. 92-119 . See further, the subsequent (narrow) interpretation of this test, by the SCA, in *Bredenkamp*, note 56, paras. 41-51; compare *Botha*, note 60, paras. 49, 51; where the CC invokes a 'free floating' notion of fairness without any reference to *Barkhuizen* or *Bredenkamp*.

67 *Barkhuizen*, note 43, paras. 122, 123, 129, 134-138. For a general analysis of Sachs J's judgment, see *Luanda Hawthorne*, Justice Albie Sachs' contribution to the law of contract: Recognition of relational contract theory, SA Public Law 25 (2010), p. 80-93.

68 *Barkhuizen*, note 43, paras. 135-138, 151-157. In casu, the court did not look at the implications of the section 34 right of access to court for the delineation of the concept of autonomy.

69 *Barkhuizen*, note 43, para. 139.

such clause had to be assessed in terms of the foundational constitutional triad of freedom, dignity and equality.[70] In this respect, Sachs J was particularly mindful, on the one hand, of the reality of private power, parties' compromised freedom and the potential injustice in relation to imposed standard form terms.[71] On the other hand, pacta servanda sunt in the classical liberal sense, contractual certainty and the economic need for such contracts were also held to be relevant.[72] In the end, Sachs J held that the time-limitation clause should not be enforced against the insured.[73]

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

Significantly, the SCA has since purported to interpret the *Barkhuizen* judgment rather narrowly in relation to the potential for constitutionally prompted adjustments on the fringes of autonomy as per the doctrine of legality.[74] At the same time, both the SCA and the CC have unfortunately remained steadfast in their maintenance of the pre-constitutional classical liberal conception of what constitutes an exercise of autonomy, even in the context of the CC's more recent efforts to infuse a greater degree of fairness in contract law.[75]

70 *Barkhuizen*, note 43, para. 140: note the emphasis on the fluidity of equality and dignity, which can, in contradistinction to classical autonomy, denote an infringement of good faith in a manner that outweighs pacta sunt servanda. See also paras. 142 ff; 167.

71 *Barkhuizen*, note 43, paras. 150-157.

72 *Barkhuizen*, note 43, paras. 158-161.

73 *Barkhuizen*, note 43, paras. 184-185.

74 *Bredenkamp*, note 56, paras. 47-51. This is a fairly interesting development, especially since the CC is the apex court in South Africa. Even more interesting is that the SCA reconfirmed *Bredenkamp* in the later case of *Maphango v Aengus Lifestyle Properties (Pty) Ltd*. 2011 (5) SA 19 (SCA) paras 23-25; See further *Deeksha Bhana*, 'Contract law and the Constitution: An evaluation of *Bredenkamp v Standard Bank of South Africa Ltd (SCA)*' Southern African Public Law 29 (2014), p. 508-521.

75 See *Botha*, note 60, paras. 49; 51 and *Cool Ideas 1186 CC*, note 61, paras. 53-62; 135-147.

D. THE FOUNDATIONAL CONSTITUTIONAL VALUE OF EQUALITY

I. Equality as a substantive, transformative value

The equality jurisprudence of the South African constitutional era is wide ranging and much has been written about it.[76] In this section, I do not purport to conduct an in-depth analysis, but engage the equality jurisprudence only in so far as it impacts on the judicial understanding of the notion of constitutional autonomy in relation to contract law.

In contradistinction to the classical model of contract law, the constitutional value of equality extends beyond the recognition of mere formal equality in the sense of "sameness of treatment".[77] Indeed, the Constitution emphasises a more substantive conception of equality which must focus instead on "context" and "equality of outcome" and take proper cognisance of unfair discrimination, including "systemic group-based inequalities" and "entrenched patterns of structural disadvantage" that continue to be experienced both at an individual and a collective level.[78] This broader understanding of equality is underscored by the Constitution's substantively progressive and transformative mandate for South African society. In other words, the value of *substantive equality* interacts inevitably with freedom and dignity as part of the foundational constitutional triad's broader legal project of transforming the socio-economic landscape of South Africa.

76 On South African equality jurisprudence, see generally, *Albertyn* and *Goldblatt*, note 31; *Catherine Albertyn*, Substantive equality and transformation in South Africa, South African Journal on Human Rights 23 (2007), p. 253-276; *Liebenberg* and *Goldblatt*, note 16; *Sandra Liebenberg*, Socio-Economic Rights Adjudication Under a Transformative Constitution, Cape Town 2010, chapter 2; *Hawthorne*, note 2; *Catherine Albertyn* and *Beth Goldblatt*, Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality, South African Journal on Human Rights 14 (1998), p. 248-276; *Johan De Waal*, Equality and the Constitutional Court, South African Mercantile Law Journal 14 (2002), p. 141-156; *Catherine Albertyn, Sandra Fredman* and *Judy Fudge*, Introduction: Substantive equality, social rights and women: A comparative perspective, South African Journal on Human Rights 23 (2007), p. 209-213.

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

78 *Currie* and *De Waal*, note 14, p. 211-214; *Albertyn*, note 76, p. 276; *Liebenberg* and *Goldblatt*, note 16, p. 342-343; *Bhana* and *Pieterse*, note 2, p. 879-880; *Albertyn*, note 77, p. 225.

Furthermore, the value of equality recognises that the responsibility for the constitutional conception of autonomy can no longer be that of the individual alone. Nor can it be shouldered exclusively by the State. Indeed, the Constitution envisages a post-apartheid South African society which strives for social justice and equality, where an individual member primarily finds meaning, not in an atomistic conception of the self, but rather, in the collective as a situated, social being. Indeed, the constitutional self, even if most private in outlook, would accept the context of an aspirant egalitarian community ensconced in ubuntu, at least, insofar as he or she will do to, and/or expect of and for others, only that which he or she would have done to, and/or would expect of and for himself or herself.[79]

That said, there have been instances in which the CC, somewhat curiously, has employed (neo-) classical choice analysis in the course of its equality judgments. The CC has done this, notwithstanding, its express rejection in *Ferreira v Levin* of Ackermann J's classical liberal conception of freedom. In relation to long-term domestic partnerships and sex work for instance, the CC by and large has ascribed the lack of legal protection afforded to women to their (formally) autonomous choices not to marry or to partake in sex work respectively. So, in this manner, individual autonomy was atomised, responsibility privatised and systemic socio-economic, religious and cultural factors, which are pertinent to South African society and to poor women especially, have been rendered extraneous to the enquiry.[80]

Critics have therefore, bemoaned the failure of the CC generally to recognise a more substantive conception of freedom (and thus, also of individual autonomy) as crucial to the transformative value of substantive equality (as complemented by socio-economic rights) that would enable every South African to live his or her vision of a dignified "good life".[81]

79 See also the preamble of the Constitution; *Pearmain* (2), note 53, p. 474; *Liebenberg*, note 16, p. 3 especially at footnote 7; p. 11 especially at footnote 44.

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

81 See *Bonthuys*, note 77, p. 23-26; *Albertyn*, note 76, p. 265; 267-270;272; *Albertyn* and *Goldblatt*, note 31, p. 35-83; *Pearmain* (1), note 53, p. 292-293; *Pieterse*, note 22, p. 19. In relation to reproductive autonomy, see *Joanna Birenbaum*, Contextualising choice: Abortion, equality and the right to make decisions concerning reproduction, South African Journal on Human Rights 12 (1996), p. 485-490, 500-503. See also *Liebenberg* and *Goldblatt*, note 16, p. 340-341, where they argue that poverty is more a product of systemic 'group-based discrimination', rather than 'individual blameworthiness/responsibility', or 'some pre-ordained natural economic order'.

II. Equality and the constitutional self (the content of autonomy)

As a function of constitutional autonomy therefore, (substantive) equality must engage with and inform both the question of what constitutes an exercise of autonomy (i.e. the content of autonomy) as well as its ensuing scope of operation.

Dealing first with the content of autonomy, equality contemplates a more positive exercise of a real *choice* by the individual; a choice that is sensitive to the material (social and economic) conditions, which advance or hinder the individual's ability to develop his or her potential fully, and so, realise his or her vision of the good life.[82]

At a broader level therefore, substantive equality envisages a "dismantling" of those "(unequal) power relations and (institutional) hierarchies" which unduly constrain the extant legal conception of individual choice (or human agency). At the very least, this must entail an unmasking and addressing of those systemic and structural inequalities that impede the true capability for meaningful exercise of choice by many South Africans in their everyday lives. However, I submit that the value of equality would go further to inspire and establish "new norms and conditions" that, like freedom, will foster a "*transformative meaning*" of autonomy.[83] Presumably, the goal is to *enable* genuine participation by all South Africans, on a substantively equal footing, in the "political, economic, social and cultural spheres of our democracy".[84] In this manner, all South Africans will be able materially to shape their own identities and ultimately their own lives.

So, looking through the lens of substantive equality, the constitutional contracting self necessarily differs from the liberal contracting self. In contrast to the acontextual, atomistic classical self, the constitutional self necessarily is a more contextual self, situated within an interwoven network of social and economic power structures. Accordingly, a constitutionalised law of contract can no longer abstract the contracting self from the context in which contracting parties actually operate. The law must be more alert to the impact on autonomy of the lived social and economic realities of contracting parties.[85]

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

> *"Human identities are multidimensional, fluid, unpredictable, often contradictory and always evolving. Moreover, social constructs such as gender, race, sexual orientation and class, as well as the power structures that accompany them, shape individuals differently in different contexts. Individual experiences of power, disadvantage, oppression or harm are therefore varied, contingent and particular, both within and*

82 *Pieterse*, note 77, p. 409-413; *Bonthuys*, note 77, p. 23-26; *Albertyn*, note 77, p. 219-220, 223.

83 *Albertyn*, note 76, p. 274-276; *Liebenberg and Goldblatt*, note 16, p. 338, 342. On the impact of status quo norms, see *Pieterse*, note 77, p. 413-418; *Bonthuys*, note 77, p. 17-23.

84 *Liebenberg* and *Goldblatt*, note 16, p. 337.

85 *Albertyn*, note 77, p. 225 and the authorities cited there.

> *across social groups…Furthermore, individuals…often experience compounded disadvantage, flowing from discrimination or marginalisation that relates to more than one aspect of their complex identities. This phenomenon is often referred to as intersectional discrimination and requires us to appreciate the multiplicity of particular contexts within which the impact of discrimination is felt."*[86]

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

In addition, it must be borne in mind that the law of contract regulates the legal relationship between two or more contracting parties. As such, the law must be concerned not only with the broader social and economic context (i.e. the systemic and structural inequalities affecting the contracting parties), but also, with the power dynamic *between* the contracting parties. Most notably, courts need to be mindful of the *relative* nature of this power dynamic in their assessment of how it impacts on contractual autonomy. To illustrate, in *Barkhuizen v Napier*, Mr Barkhuizen was profiled by the CC essentially as a white middle-class man who drove a BMW motor vehicle.[87] As such, he was considered implicitly to be a socially and economically privileged individual who, like the classical contracting self, was able to look after his own interests. That Mr Barkhuizen was, in the context of the contract, also a typically vulnerable consumer of insurance from an insurance company, which was far more resourced than he was, and moreover, had the weight of the insurance industry behind it, was not taken into account. The argument was that there was a lack of evidence of this. Nevertheless, in ignoring this reality, a significant aspect of Mr Barkhuizen's identity effectively was ignored by the court. By presuming rather, that there was an equality of bargaining power between the parties, the power dynamic between Mr Barkhuizen and the insurance company in terms of the contract – i.e. Mr Barkhuizen's relatively weaker position - was rendered invisible.[88]

Accordingly, the value of substantive equality provides impetus for a constitutionalised contract law's development of a fuller concept of autonomy, particularly, in terms of the relative bargaining powers of contracting parties. Obviously, not every instance of unequal bargaining power can mean that the exercise of autonomy by the weaker party is deficient. Conversely, a powerful private contractant cannot be saddled with absolute responsibility

86 *Pieterse*, note 77, p. 405-406.

87 *Pieterse*, note 77, p. 403 especially at footnote 27; *Barkhuizen*, note 43, para. 14.

88 Compare the minority judgment of Sachs J at para. 149; see also paras. 122-124; 135-139; see also the minority judgment of Moseneke DCJ at paras. 95-103. See further *Bhana*, note 54, p. 275-278.

for his or her more vulnerable co-contractant.[89] Still, the implications of unequal bargaining power for the constitutional self must be investigated further and autonomy developed as a more positive conception, having a content that is normatively in line with and advances the broader constitutional goal of a substantively equal society.[90]

III. Equality and the scope of operation of constitutional autonomy

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

> *"The value of equality…aides the transformation of South African society into an ultimately more egalitarian one through measures which may, to varying extents, limit a variety of individual liberty interests. In the contractual realm…, such liberty-limiting measures include provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 which declares the imposition of contractual 'terms, conditions or practices' that have the effect of perpetuating the consequences of past unfair discrimination, as well as the unfair limiting or denial of contractual opportunities, as practices which may amount to (prohibited) unfair discrimination. (Item 9b of the Schedule to the Act read with s29 thereof. See also ss 7-8.)"*

In other words, absent compelling individualist considerations, a (private) contract which promotes unfair discrimination within South Africa's more 'welfarist' post-apartheid society ought to be struck down for being unconstitutional and against public policy. Likewise, there may now be a duty also to *enter* into a contract where the basic reason for refusing to contract with the other party constitutes unfair discrimination.[91]

At the very least, this means that the common law of contract's automatic liberalist privileging of freedom above equality can no longer apply. Rather, in light of the substantively progressive and transformative mandate of South Africa's Constitution, it is more likely that the value of substantive equality will carry more weight, especially within the doctrine of legality's public policy exercise.[92] Accordingly, the scope of operation of a constitutionalised contractual autonomy can be curbed (or extended) significantly more than its classical liberal counterpart.[93]

89 On the public-private divide, see *Bhana*, note 6, p. 351-354, 374-375.

90 This question is left for further research.

91 As per *Hoffmann v South African Airways* 2000 (1) SA 1 (CC). Note however that in this case the employer was a State-owned enterprise. Where both contracting parties are private individuals the implications may be different. On the significance of the distinction between public and private individuals, see *Bhana*, note 6, p. 374-375.

92 *Bhana* and *Pieterse*, note 2, p. 882.

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

IV. The SCA and CC's approach to equality in contract law cases of the constitutional era

As outlined earlier, the CC and the SCA have both accepted that South African contract law is subject to its Constitution. Nevertheless, in so doing, they have continued to emphasise the classical liberalist conceptions of freedom and dignity. At the same time, they have significantly downplayed the (potential) role of substantive equality within a constitutionalised contract law.[94]

To begin with, in *Brisley v Drotsky* Cameron JA (as he then was) held that the value of equality was not relevant to the case at hand because the contractual principle in issue (i.e. the *Shifren* principle)[95] protects both the 'stronger' and the 'weaker' contracting parties in the same manner.[96] Nevertheless, in so holding, Cameron JA did not take sufficient cognisance of the relative contexts of the parties in casu and how the *Shifren* principle would, in reality, affect each party differently.[97]

This aside, what is more significant, is that Cameron JA failed even to appreciate that the value of substantive equality must at least have an "indirect impact on the matter", lest the classical liberal conception of contractual autonomy continue to operate undisturbed.[98] As should be evident from this discussion of equality, a conception of autonomy that is moderated by the value of equality (both in terms of its content and scope of operation) is crucial to the alignment of South African contract law with the substantively progressive and transformative goals of its Constitution. The continued operation of the classical liberal conception of contractual autonomy unmoderated by the value of equality is untenable insofar as it entrenches the status quo in the private sphere and thereby privatises the systemic inequalities and patterns of disadvantage fostered by apartheid and patriarchy.

Admittedly, the SCA and the CC have indicated subsequently that equality has a role to play in a constitutionalised contract law, in so far as contracting parties can prove the presence of unequal bargaining power. All the same, the courts are yet to interrogate the implications of such power dynamic between contracting parties, ostensibly due to a lack of evidence of an inequality of bargaining power in the first place, even in the context of standard

94 As per Cameron JA, in *Brisley*, note 44, paras. 90, 94-95; confirmed in *Afrox*, note 49, paras. 17-24; *Napier*, note 50, paras. 12-16. The CC also accepted this position in *Barkhuizen*, note 43, para. 15.

95 In terms of the *Shifren* principle (as established in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A)), where a contract contains a 'non-variation clause', which imposes formalities for variation of the contract, the contracting parties cannot vary the contract informally.

96 *Brisley*, note 44, para. 90.

97 See *Bhana* and *Pieterse*, note 2, p. 885, for a discussion of how non-variation clauses in lease agreements generally tend to favour the 'stronger' lessor above the 'weaker' lessee.

98 *Bhana* and *Pieterse*, note 2, p. 882.

form contracts.[99] The classical liberal premise of parties contracting at arms' length on a (formally) equal footing thus remains intact.

E. THE FOUNDATIONAL CONSTITUTIONAL VALUE OF DIGNITY

As previously alluded to, the value of human dignity appears to be linked fundamentally to Kantian philosophy's moral ideal of treating a human being "never simply as a means but always at the same time as an end".[100] Indeed, the common point of departure is that every individual has intrinsic worth by reason of their basic human dignity and as such, are worthy of equal concern and respect.[101] As a function of autonomy, this conception of human dignity translates into two essential components namely, dignity as *empowerment* and dignity as *constraint*.[102] In an earlier article, Marius Pieterse and I conceptualised each of these components. Briefly stated, we defined 'dignity as empowerment' as that conception of dignity, as espoused by Ackermann J in *Ferreira*, which "enhances individual liberty by locating dignity in 'capacity for autonomous action' and accordingly holding that dignity is enhanced by the protection of autonomous choices".[103] In turn, dignity as constraint was defined as that conception of dignity which constrains liberty "by implying that society should not tolerate exercises of autonomy that affront human dignity".[104] We submitted further that whereas the classical liberal (internal) conception of contractual autonomy appeared to dovetail with dignity as empowerment, it seemed inimical to dignity as constraint.[105]

Upon further reflection however, I submit that dignity as empowerment and dignity as constraint are not inconsistent conceptions. On the contrary, they must and in fact do work together within South African contract law. Indeed, whereas dignity as empowerment necessarily relates to the issue of what constitutes an exercise of autonomy (i.e. the content of autonomy), dignity as constraint must inform its scope of operation. That said, the connection between dignity and classical liberalism needs to be revised with a view ultimately to

99 *Bhana*, note 54, p. 275-278. See *Afrox*, note 49, para. 12; *Napier*, note 50, paras. 8-9; *Barkhuizen*, note 43, para. 59.

100 *Liebenberg*, note 16, p. 6.

101 *S v Makwanyane* 1995 (3) SA 391 (CC) at para 328 (per O' Regan J); *Liebenberg*, note 16, p. 13; *Currie* and *De Waal*, note 14, p. 251-252.

102 *Bhana* and *Pieterse*, note 2, p. 881.

103 *Bhana* and *Pieterse*, note 2, p. 880-881. See also discussion in Part C above.

104 *Bhana* and *Pieterse*, note 2, p. 881.

105 *Bhana* and *Pieterse*, note 2, p. 881; *Gerhard Lubbe*, Taking fundamental rights seriously: The Bill of Rights and its implications for the development of contract law, South African Law Journal 121 (2004), p. 421-422; *Robert Brownsword*, Freedom of contract, human rights and human dignity, in: Daniel Friedman and Daphne Barak-Erez (eds.), Human Rights in Private Law, Oxford 2001, p. 183-184, 191-195.

align the value of dignity with the foundational constitutional triad's broader legal project of (substantively) transforming the socio-economic landscape of South Africa.[106]

Looking more closely at the classical conception of autonomy, dignity as empowerment, as discussed and adopted by Ackermann J in *Ferreira*, captures the notion of the individual as an autonomous moral agent, capable of self-actualisation and governance, the upshot being that respect for one's autonomous choices means respect for one's dignity. In the same tradition then, dignity as constraint limits the exercise of autonomy only in those rare cases where the contract is said to offend the conception of dignity, as articulated by the classically limited doctrine of legality.[107]

This understanding of dignity goes some way to explaining the approach of the SCA to the constitutionalisation of contractual autonomy. In *Brisley*, Cameron JA (as he then was) interpreted dignity in the classical liberal tradition, so that a contractant's dignity remains grounded in his or her freedom to govern his or her own life, by deciding for him or herself whether, and if so, with whom and on what terms to contract.[108] In addition, as outlined earlier, the value of (substantive) equality was said to have no relevance. The effect of Cameron JA's interpretation therefore, is that the constitutional value of dignity simply reaffirms the classical understanding of the atomistic, independent (negative-liberty based) contracting self. In relation to the scope of operation of autonomy then, Cameron JA made it clear that 'obscene excesses' of autonomy must be rejected as counter-intuitive to individual dignity and self-respect.[109] Even so, in light of the contracting self's classically liberal point of departure, it would appear that the notion of 'obscene excess' implicitly would privilege a classically liberal delineation of individualist and collectivist considerations.

In subsequent cases, the SCA and even the CC have confirmed Cameron JA's classical articulation of dignity operating in the constitutional era.[110] Nevertheless, such a thin conception of dignity would undermine the (potential) role of the value of human dignity, which, together with freedom *and equality*, must foster a constitutional '*transformative meaning*' of autonomy (both in terms of its content and its scope of operation).

In fact, contemporary Kantian thinking on human dignity (as empowerment) contemplates a more positive, *capabilities-based* approach that must be alert to those material conditions[111] necessary for the effective development and exercise of human potential and

106 See generally, *Susie Cowen*, Can "dignity" guide South Africa's equality jurisprudence? South African Journal on Human Rights 17 (2001), p. 34-58.

107 *Ferreira*, note 17, para. 49.

108 *Brisley*, note 44, paras. 94-95.

109 *Brisley*, note 44, para. 93.

110 See *Afrox*, note 49, para. 22; *Napier*, note 50, paras. 12-13; *Barkhuizen*, note 43, para. 57. Compare *Everfresh*, note 61, paras. 22-24, 36, 70-72; *Botha*, note 60, paras. 45-46, 49, 51 and *Cool Ideas 1186 CC*, note 61, paras. 53-62, 135-147.

111 For instance, those conditions that support a basic dignified living standard, and/or counter circumstances of poverty, group-based disadvantage and systemic inequality. On basic conditions, see the works of *Martha C Nussbaum* as cited in *Liebenberg*, note 16, p. 1-13 especially at p. 2

agency.[112] Moreover, dignity as empowerment ought to extend beyond the individualist notion of self-worth and self-respect to recognise the collective in so far as individuals, engaged in the process of shaping their own lives, value their essential interconnectedness (social and otherwise) with fellow human beings, so much so, that it is considered constitutive of their very own identities.[113]

This fuller conception of dignity as empowerment then would set the stage for a more substantive conception of the 'dignity as constraint' component. Indeed, the emphasis ought to be on dignity as a collective good, grounded in ubuntu and espousing a basic threshold for the living of a dignified life in a socially democratic South Africa.[114] As such, dignity as constraint must inform the scope of operation of a transformative conception of autonomy. In other words, those exercises of autonomy that are offensive to the dignity of the collective and therefore, the dignity also of the particular individuals concerned cannot be countenanced. In the context of contract law, this means that agreements which undermine or transgress such dignity would constitute an "obscene excess" of autonomy that must be struck down as contrary to public policy. Presumably, the content of dignity would be informed primarily by the value of substantive equality as well as the enumerated socio-economic rights.[115]

F. CONCLUSION

In this article, I looked at the values of freedom, dignity and equality, as founded in the Constitution of South Africa, 1996 and considered how they ought to constitutionalise the legal concept of contractual autonomy. Here, I took as my point of departure that the conception of contractual autonomy in the post-apartheid era has to be a shifting one that at once needs to be sensitive to the factual context, any applicable substantive rights, as well as the broader constitutional vision of a substantively progressive and transformative South Africa. At the same time, I developed what I call the 'foundational constitutional triad' and used it as the framework for my ensuing analysis. I did so because the triad is able to ac-

(footnote 4); p. 7-8 (footnotes 26, 28); p. 9-10 (footnotes 38-39); compare the approach of *Amartya Sen* also cited in *Liebenberg*, note 16, p. 1-13 especially at p. 2 (footnote 4); p. 8 (footnote 29). See also *Woolman*, note 16, p. 36-2 to 36-4, 36-7 to 36-18, 36-66 to 36-70, including the discussion of A Sen's approach at p. 36-67, 36-68. See generally, *Martha C Nussbaum*, Women and Human Development The Capabilities Approach, New York 2000; *Amartya Sen*, Development as Freedom, Oxford and New York 1999.

112 Authorities as cited in note 111. See also *Liebenberg* and *Goldblatt*, note 16, p. 336-337; *Pieterse*, note 22, p. 21.

113 Authorities as cited in notes 111 and 112.

114 Authorities as cited in notes 111 and 112. See also *Everfresh*, note 61, paras. 22-24, 36, 70-72.

115 *Bhana* and *Pieterse*, note 2, p. 881; sections 26-29 of the Constitution. See further, *Jeremy Waldron*, The dignity of groups, in: AJ Barnard-Naude, Drucilla Cornell and Francois Du Bois (eds.), Jan Glazewski (gen. ed.), Dignity, Freedom and the Post-Apartheid Legal Order The Critical Jurisprudence of Laurie Ackermann, Cape Town 2008, p. 66-90.

commodate the intrinsically multi-faceted nature of each value as well as the multi-dimensional interplay between them. More importantly, in being so equipped, the triad is able effectively to articulate the ideal of the 'constitutional self' exercising contractual autonomy.

Focusing then on each foundational value in turn, I began with freedom. Here, I argued that the substantive notion of freedom held forth by Sachs J in the leading CC case of *Ferreira v Levin*[116] is best suited to a constitutional conception of the contracting self. Importantly, this fuller constitutional conception of autonomy reflects a more concrete interaction between individualist and collectivist considerations and envisages more movement toward the collectivist end of contract law's normative continuum. Indeed, this is likely to facilitate the realisation of South Africa's constitutional vision within its law of contract. Thereafter, I looked at equality and dignity and argued likewise for a more substantive conception of these values to work with the value of freedom.

To sum up, freedom, dignity and equality, both in their *intra-action* and *inter-action*, lean toward a more full-bodied, substantive conception of legal autonomy, with the constitutional self being grounded essentially in the broader transformative project of South African society. Accordingly, if such an understanding of autonomy is carried forward into the South African law of contract, it would be able effectively to address the constitutional deficiencies of the predominant (neo-) classical liberal conception of contractual autonomy. Indeed, not only is it sufficiently fluid to facilitate real contractual justice in every case, it is also definitive enough for the transformation of the South African law of contract itself into an essential *constitutional* tool for the enabling of individuals in South Africa to realise their respective visions of the good life.

116 *Ferreira*, note 17, paras. 249-258.