

# Legal Pluralism, *uBuntu* and the Use of Open Norms in the South African Common Law of Contract

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## Abstract

In this article, a comparison is drawn between the role of good faith in the development of the Roman law of contract and the emerging role of *ubuntu* in the South African common law of contract. Firstly, it is shown how the Romans realised that their existing formal and rigid laws could not address the changing legal needs of the community due to the influx of foreigners (especially foreign traders) into Rome. In reaction to the changing commercial environment, they introduced flexible legal procedures and a more normative approach to these legal transactions to achieve fairness and justice between the contracting parties. This worked so well that the new flexible procedures and normative principles were transferred to the existing formalistic law. Gradually the existing *ius civile* became subject to a more normative interpretation in the interests of justice through the use of the open norm of good faith. It is argued that in a similar way, *ubuntu* can be used to address legal pluralism in the South African legal system, and its application as an underlying constitutional value could result in the better use of the open norm of good faith to address contractual unfairness.

## Keywords

*Bona fides*; common law of contract; contractual fairness; good faith; legal historical comparison; legal pluralism; Roman law of contract; *Ubuntu*.

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By understanding what is wrong, we may be able not only to understand our history, but also to shape it. If we lost something long ago which we have been unable to do without, we should try to remember what it was like. We should consider why it was so important.<sup>1</sup>

## 1 Introduction: History as a narrative

In *Ancient Roman Lawyers*, Tuori<sup>2</sup> employs three examples to show how Roman law scholars interpret Roman historical sources to support their modern ideals. He explains that "[h]istory is not fiction, but the writing of history has some characteristics of creative writing",<sup>3</sup> its fictional character being more pronounced where historical sources on a specific issue are in short supply.<sup>4</sup> He concludes his book with the following question:

Because facts are elusive in the light of the historical sources, all that remains are stories. But does the actualisation of legal history necessarily mean a distortion of history? If we imprint our ideals on the Romans, are we in fact any more talking about the Romans or ourselves? Because narration creates a story that gives meaning to fragmentary sources, is a story meaningful only when we can relate to it? Are the Romans of Roman legal history simply us, assembled in a historical togaparty?<sup>5</sup>

In a study which investigates the possible harmonisation of good faith and *ubuntu* in the South African common law of contract, there is a real danger of imprinting the ideals of one concept onto the other. The historical sources on the development of good faith in Roman law are rare and incomplete, and some date from later historical periods (and are consequently already a product of historical interpretation).<sup>6</sup> In a similar manner, due to the oral tradition in pre-colonial African jurisprudence,<sup>7</sup> most of the written sources on *ubuntu* are relatively new in historical terms<sup>8</sup> and the influence of colonialism

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<sup>1</sup> Gordley *Philosophical Origins of Contract* 9.

<sup>2</sup> Tuori *Ancient Roman Lawyers*.

<sup>3</sup> Tuori *Ancient Roman Lawyers* 181. Also see Van der Walt 2006 *Fundamina* 29.

<sup>4</sup> Tuori *Ancient Roman Lawyers* 181.

<sup>5</sup> Tuori *Ancient Roman Lawyers* 193.

<sup>6</sup> For example, see the discussion dealing with the Law of the Twelve Tables in n 52 below.

<sup>7</sup> For more detail on this aspect, see Bennett *Customary Law* 2-5.

<sup>8</sup> Gade 2011 *S Afr J Philos* 306, who states that the earliest written text he could find dates from 1846.

on these sources cannot be discounted.<sup>9</sup> Does this mean that any attempt to compare their roles in legal development is doomed to fail? Or that such a comparison would be of no value in the development of modern legal ideals?

Tuori<sup>10</sup> argues that we use legal history as a self-reflective tool "to remind us where we come from" and that we use historical narratives to construct our identity. These narratives are essential to ensure a sense of belonging to a community. He maintains that dismissing these narratives as mere stories ignores their cultural significance and the role they play in our imagination.<sup>11</sup> Van der Walt<sup>12</sup> proposes that the cultural significance of these stories in our modern law should be critically investigated. He specifically refers to the tradition in South African law of citing Roman rules as "universal and timeless" without considering the context within which these rules operated in Roman times.<sup>13</sup> He argues that historical research should not aim to support or develop a legal doctrine but rather to understand the application of the Roman law rules in their specific context.<sup>14</sup> Any historical investigation of Roman law should take cognisance of the political, social, economic and cultural context within which the Roman law rules operated and aim for "a reality dependent on the interpreter, who in turn, is conditioned by his legal and general cultural environment".<sup>15</sup> Consequently, he argues that legal historical research in the South African context must be approached within the framework of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution) and should aim to provide alternative historical accounts of traditional private law concepts and ideas.<sup>16</sup> Although he stresses that these alternative stories do not constitute "an uncontested or 'monolithic' view of what certain central rules or institutions of private law are", he argues that they can generate ideas about the role of law in societal transformation.<sup>17</sup>

## 2 The research approach and structure of the articles

A mere chronological discussion of the development of good faith in Roman contract law to its present role in the South African common law and *ubuntu* from its indigenous origins to its current role in South African contract law

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<sup>9</sup> Pieterse "'Traditional' African Jurisprudence" 440-441; Bennett *Customary Law* 5-7.

<sup>10</sup> Tuori *Ancient Roman Lawyers* 191-192.

<sup>11</sup> Tuori *Ancient Roman Lawyers* 193.

<sup>12</sup> Van der Walt 2006 *Fundamina* 30.

<sup>13</sup> Van der Walt 2006 *Fundamina* 32.

<sup>14</sup> Van der Walt 2006 *Fundamina* 33.

<sup>15</sup> Van der Walt 2006 *Fundamina* 33.

<sup>16</sup> Van der Walt 2006 *Fundamina* 36.

<sup>17</sup> Van der Walt 2006 *Fundamina* 36.

would not provide a meaningful story about these concepts. Burckhardt<sup>18</sup> points out that "it may be right to begin at the beginning in any kind of study, but not in history". Rather, it should be considered where and why these concepts have been linked with modern law and what part of their legal history could throw more light on modern legal ideals. For that reason, this article starts with the contemporary ideas that will guide the interpretation of the legal historical sources, and as pointed out by Van der Walt above, these refer to the ideals of South Africa's new constitutional order. The Constitutional Court decisions of *Barkhuizen v Napier*,<sup>19</sup> *Everfresh Market Virginia v Shoprite Checkers*<sup>20</sup> and *Botha v Rich*<sup>21</sup> are discussed as they provide good illustrations of the constitutional ideal of harmonising the concepts of good faith and *ubuntu* in the South African common law of contract.

In *Barkhuizen v Napier* the Constitutional Court considered the role that good faith and *ubuntu* could play in the development of the common law of contract. First the Court held that public policy implicates notions of fairness, justice, equity and reasonableness, and as such, it must take into account the principle of "simple justice between man and man".<sup>22</sup> Lubbe<sup>23</sup> linked this notion with good faith and it would seem that the Court also makes this link, because later in the judgment it states that good faith refers to "justice, reasonableness and fairness".<sup>24</sup> However, instead of linking the notion of "simple justice between man and man" with good faith the Court explicitly links it with *ubuntu*.<sup>25</sup> Therefore, it seems that the Court is of the view that both notions refer to justice, fairness and reasonableness and can be incorporated under the policy consideration of simple justice between man and man.

In *Everfresh Market Virginia v Shoprite Checkers*, the Constitutional Court stressed the importance of good faith in the law of contract and the urgency and importance of determining its role in a constitutional framework.<sup>26</sup> The Court also emphasised the importance of *ubuntu* in determining the spirit,

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<sup>18</sup> As quoted by Schulz *Principles of Roman Law* 4.

<sup>19</sup> *Barkhuizen v Napier* 2007 5 SA 323 (CC) (hereafter *Barkhuizen v Napier*).

<sup>20</sup> *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 SA 256 (CC) (hereafter *Everfresh Market Virginia v Shoprite Checkers*).

<sup>21</sup> *Botha v Rich* 2014 4 SA 124 (CC) (hereafter *Botha v Rich*).

<sup>22</sup> *Barkhuizen v Napier* para 51.

<sup>23</sup> Lubbe 1990 *Stell LR* 20.

<sup>24</sup> *Barkhuizen v Napier* para 80.

<sup>25</sup> *Barkhuizen v Napier* para 51.

<sup>26</sup> *Everfresh Market Virginia v Shoprite Checkers* para 77 (majority) and para 22 (minority). See also *Barkhuizen v Napier* para 82.

purport and objects of the Constitution.<sup>27</sup> In his minority judgment, Justice Yacoob<sup>28</sup> made the following statement:

The values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce takes place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.

These statements imply that *ubuntu* and good faith are not so far removed from each other and that they may be based on the same or similar values. In addition, Justice Yacoob is of the view that the Constitution may require more emphasis on these values than is found in the common law of contract currently, due to a shift in the legal convictions of the community, which requires a greater concern for contractual justice.<sup>29</sup>

As the law stands today, good faith is not an independent rule that can be used to strike down a contract due to unfairness but operates as an underlying principle that finds expression through existing doctrines and rules in the law of contract.<sup>30</sup> However, the Constitutional Court in *Botha v Rich* showed a willingness to use the principle of good faith in a more flexible manner to counter any injustice resulting from the rigid application of the existing rules and doctrines of the common law of contract and to prevent the unfair enforcement of a contract term.<sup>31</sup> Although the Court did not refer to the concept of *ubuntu* expressly, it will be argued that its application of the principle of good faith is a step forward in developing the concept of good

<sup>27</sup> *Everfresh Market Virginia v Shoprite Checkers* para 71 (majority) and para 23 (minority).

<sup>28</sup> *Everfresh Market Virginia v Shoprite Checkers* para 23.

<sup>29</sup> Also see Louw 2013 *PELJ* 66. This shift in the legal convictions of the community is also reflected in the *Consumer Protection Act* 68 of 2008, which has introduced measures to promote contractual fairness in contracts governed by the Act (especially s 48). The scope and application of the Act falls outside the scope of this article.

<sup>30</sup> As re-iterated by the Supreme Court of Appeal on numerous occasions: *Potgieter v Potgieter* 2012 1 SA 637 (SCA) paras 32-34; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 5 SA 19 (SCA) para 23-24; *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 3 SA 511 (SCA) para 28; *South African Forestry Co Ltd v York Timbers Ltd* 2005 3 SA 323 (SCA) paras 26-31; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para 32; *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 22. The Constitutional Court has questioned the limited role of good faith *obiter* (*Everfresh Market Virginia v Shoprite Checkers* para 77 (majority) and para 22 (minority); *Barkhuizen v Napier* para 82).

<sup>31</sup> *Botha v Rich* para 45 read with para 51.

faith in accordance with the ideals of *ubuntu* as an underlying constitutional value.<sup>32</sup> Cornell and Fuller<sup>33</sup> argue that since *ubuntu* requires that justice should be done between individuals, good faith should develop from an abstract value underlying the substantive law of contract into an independent substantive rule that can be used to strike down an unfair contract term that would otherwise be enforceable. To date, *ubuntu* has not been applied in this way, but it is the possible future story the Constitutional Court envisages for *ubuntu* and by implication good faith.<sup>34</sup>

Once upon a time, good faith (*bona fides*) played a prominent role in ensuring contractual fairness in Roman law:

During the later Republic, the expansion of the Roman power in the Mediterranean world and the social and economic changes by which it was accompanied had a profound effect on the character and development of Roman law. By the end of this period the old system of law had partly been abolished or changed in such a way that its scope was extended to meet the needs of a complex and highly sophisticated society. It was in response to changed social, economic and political conditions that Roman law broke through the barrier of formalism, was secularised and internationalised, and from a system that was strictly and often unjustly applied, became a highly developed system marked by its flexibility and adaptability to new and changing conditions.<sup>35</sup>

In fact, Schermaier<sup>36</sup> argues that the story of good faith in Roman law is the first illustration of how "equitable ideas" can revolutionise a legal system. Furthermore, by investigating the principles underlying the Roman law of contract in their greater historical context, Roman law "can offer solutions, or at least give assistance for the solution, of modern legal problems".<sup>37</sup> Therefore, the aim is to investigate the introduction and development of good faith (*bona fides*) in the Roman law of contract in a way that informs the emerging role of *ubuntu* in the South African common law of contract.

Four themes are explored in order to construct a more contextual legal history of good faith in Roman contract law and compare this history with the emerging role of *ubuntu* in the South African common law of contract today. These themes are:

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<sup>32</sup> See Du Plessis 2019 *PELJ* 14-19.

<sup>33</sup> Cornell and Muvangua "Introduction" 24.

<sup>34</sup> *Contra* the approach of the Supreme Court of Appeal in the recent case of *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA).

<sup>35</sup> Mousourakis *Historical Context of Roman Law* 181.

<sup>36</sup> Schermaier "Bona Fides in Roman Contract Law" 65.

<sup>37</sup> Erasmus 1989 *SALJ* 677 quoting Beinart 1971 *Acta Juridica* 140.

- (a) addressing legal pluralism;
- (b) using open norms<sup>38</sup> to supplement and correct the existing law;
- (c) harmonising values from different legal systems; and
- (d) concretising open norms intended to realise contractual justice.

The first two themes are investigated in this article while the remaining two themes are examined in a further article<sup>39</sup> which also contains the final conclusion. Each theme is explored with reference to the introduction and development of good faith in the Roman law of contract<sup>40</sup> where after a comparison is then drawn with the emerging role of *ubuntu* in the South African common law of contract.

Furthermore, as this investigation relates to the future role of *ubuntu* in the common law of contract, the focus will be on the concept of *ubuntu* in its modern appearance. As Pieterse<sup>41</sup> explains:

[A] return to its [*ubuntu*'s] pre-colonial state is neither practically nor ideologically feasible. Yet, certain of the values underlying pre-colonial thinking still reverberate through contemporary African society. Through engaging with these values, in their contemporary manifestations, a view emerges of law and society that might prove useful...

Finally, Himonga<sup>42</sup> argues that the best approach to determining the possible future role of *ubuntu* in law is to focus on the judicial descriptions of *ubuntu* as found in South African law. Therefore, both articles focus on the legal description of *ubuntu* as found in the decisions of the Constitutional Court.

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<sup>38</sup> Open norms are rules or standards that have no fixed or restricted meaning, can apply to various factual situations and enable value judgments (Bennett, Munro and Jacobs *Ubuntu* 30; Hawthorne 2013 *Fundamina* 300-301; Bhana and Pieterse 2005 *SALJ* 868). Bennett, Munro and Jacobs *Ubuntu* 61 also use the term "metanorm", which they define as a term "of a higher order". Such norms "do not apply directly to the facts of cases" but rather "regulate the application of lower order rules to bring about more equitable results."

<sup>39</sup> Du Plessis 2019 *PELJ*.

<sup>40</sup> These sections consist mostly of the traditional account of the development of *bona fides* as found in standard Roman law sources. As a detailed study of Roman law no longer forms part of the law curriculum in South Africa, it was considered necessary to provide a detailed overview of the development of *bona fides* in both articles.

<sup>41</sup> Pieterse "'Traditional' African Jurisprudence" 439.

<sup>42</sup> Himonga "Exploring the Concept of Ubuntu" 2. Also see Bennett, Munro and Jacobs *Ubuntu* 31.

### 3 Addressing legal pluralism

#### 3.1 *The role of good faith in addressing legal pluralism in Rome*

##### 3.1.1 *Introduction*

The exact age and origin of the *bonae fidei* actions are unknown and contested.<sup>43</sup> The generally accepted theory is that these actions were introduced by the peregrine praetor, who had jurisdiction over disputes between foreigners.<sup>44</sup> This suggests that *bona fides* played an important role in dealing with legal pluralism in Rome and it is this idea that is explored here. First though, some historical context of the pre-existing Roman law is necessary to understand where the *bonae fidei* actions fit into the greater Roman law history.

##### 3.1.2 *An historical overview of the ius civile*

For the purposes of this investigation, the story of the *ius civile* starts in the early republic of Rome.<sup>45</sup> Prior to this period Rome was a monarchy, until 509 BC when the king was expelled from Rome.<sup>46</sup> The early republic was characterised by the struggle of the orders between the patricians and the plebeians.<sup>47</sup> In the early republic, private law was based on customs more than legislation<sup>48</sup> and all state affairs were managed by two consuls selected annually from the patrician class.<sup>49</sup> As a result, the patricians controlled the

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<sup>43</sup> Schermaier and Dedek "Bona Fides" 1155; Schermaier "Bona Fides in Roman Contract Law" 68.

<sup>44</sup> Schermaier and Dedek "Bona Fides" 1155; Du Plessis *Borkowski's Roman Law* 266; De Zulueta *Institutes of Gaius Part II* 167.

<sup>45</sup> The Republican period was from 510 BC to 27 BC (Du Plessis *Borkowski's Roman Law* xii).

<sup>46</sup> Van Warmelo *Principles of Roman Civil Law* para 11; Watson *Law of the Ancient Romans* 3. This period (753 BC to 510 BC) is commonly referred to as the Monarchy or the period of the kings (Du Plessis *Borkowski's Roman Law* xii). The founding date of Rome is traditionally cited as 753 BC (Van Warmelo *Principles of Roman Civil Law* para 6).

<sup>47</sup> Van Warmelo *Principles of Roman Civil Law* para 19. Roman society was hierarchical in nature. The patricians (*patricii*) were the Roman aristocracy who possessed the most power and riches and constituted the minority of the population. In the early republic, the most important positions were filled by persons from the patrician class. The plebeians (*plebei*) were the underprivileged and poor masses who were subject to the political and economic power exerted by the patricians. See Van Warmelo *Principles of Roman Civil Law* para 19.

<sup>48</sup> D 1 2 2 3 Pomponius, *Manual, Sole Book* states that the law at the beginning of the Roman republic worked "with customs of a sort rather than with legislation" (quoted from Watson *Digest of Justinian*). Also see Van Warmelo *Principles of Roman Civil Law* para 9.

<sup>49</sup> D 1 2 2 3 Pomponius, *Manual, Sole Book*: "Then, after the ejection of the kings, it was established that there be two consuls in whom a statute laid down that the supreme



content and administration of the law.<sup>50</sup> A major grievance of the plebeians was that they wanted the existing law to be made public so that they could have better access to justice.<sup>51</sup> Consequently, one of the results of the struggle of the orders was the law of the Twelve Tables.<sup>52</sup> The law of the Twelve Tables dealt with private, public and sacral law with specific focus on the prescribed procedures.<sup>53</sup> Although it constituted a publication of the existing law rather than new rules,<sup>54</sup> later Romans viewed this law as the source and origin of all Roman law, and in conjunction with the interpretations given to it by the pontiffs (and later the jurists), it comprised the *ius civile*.<sup>55</sup>

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authority should be vested" (quoted from Watson *Digest of Justinian*). Consuls (*consules*) were initially known as preators (*praetores*). Also see Van Warmelo *Principles of Roman Civil Law* para 11.

<sup>50</sup> Mousourakis *Historical Context of Roman Law* 118-119.

<sup>51</sup> Mousourakis *Historical Context of Roman Law* 118-119; Van Warmelo *Principles of Roman Civil Law* para 26.

<sup>52</sup> A history of the introduction of the Law of the Twelve Tables is given in D 1 2 2 4, Pomponius, *Manual, Sole Book*: "... it was decided that there be appointed, on the authority of the people, a commission of ten men by whom were to be studied the laws of the Greek city states and by whom their own city was to be endowed with laws. They wrote out the laws in full on ivory tablets and put the tablets together in front of the *rostra*, to make the laws all the more open to inspection. They were given during that year sovereign rights in the *civitas*, to enable them to correct the laws, if there should be a need for that, and to interpret them without liability to any appeal such as lay from the rest of the magistracy. They themselves discovered a deficiency in that first batch of laws, and accordingly, they added two tablets to the original set. It was from this addition that the laws of the *Twelve Tables* got their name" (quoted from Watson *Digest of Justinian*). Also see Kaser *Roman Private Law* 15; Van Warmelo *Principles of Roman Civil Law* paras 27-29. It is estimated that the Law of the Twelve Tables was introduced between 451 and 449 BC (Van Warmelo *Principles of Roman Civil Law* para 27). No original copy has survived but a modern English compilation can be found in Johnson *et al. Ancient Roman Statutes* doc 8.

<sup>53</sup> Mousourakis *Historical Context of Roman Law* 121. The first three tables dealt with procedural issues, which indicates that procedure was important to the Romans (Du Plessis *Borkowski's Roman Law* 31).

<sup>54</sup> Mousourakis *Historical Context of Roman Law* 121; Van Warmelo *Principles of Roman Civil Law* para 27.

<sup>55</sup> D 1 2 2 6 Pomponius, *Manual, Sole Book*: "Then about the same time actions-at-law whereby people could litigate among themselves were composed out of these statutes [the laws of the *Twelve Tables*]. To prevent the citizenry from initiating litigation any old how, the lawmakers' will was that the actions-at-law be in fixed and solemn terms. This branch of-law has the name *legis actiones*, that is, statutory actions-at-law. And so these three branches of law came into being at almost the same time: once the statute law of the Twelve Tables was passed, the *jus civile* started to emerge from them, and *legis actiones* were put together from the same source. In relation to all these statutes, however, knowledge of their authoritative interpretation and conduct of the actions at law belonged to the College of Priests, one of whom was appointed each year to preside over private matters" (quoted from Watson *Digest of Justinian*). Also see Kaser *Roman Private Law* 18, 31; Van Warmelo *Principles of Roman Civil Law* para 9.

The *ius civile* was strict, rigid and formalistic in nature.<sup>56</sup> Gaius<sup>57</sup> explains as follows:

The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes ... or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word 'vines', had lost his claim, because he ought to have said 'trees', seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general.

As demonstrated by the above example, the formulas of the *legis actiones* (based on specific combinations of spoken words and gestures) had to be followed exactly and any deviation, however slight, would result in the rejection of the claim.<sup>58</sup> More importantly, the *ius civile* only applied where both parties to the dispute were Roman citizens.<sup>59</sup>

As already mentioned, the content and administration of the law was controlled by the patricians as the consuls were appointed from the patrician class. In 367 BC, the *leges Liciniae Sextiae* were passed in terms of which one of the consuls had to be appointed from the plebeian class and this was a further victory for the plebeians in the struggle of the orders.<sup>60</sup> Another consequence of the *leges Liciniae Sextiae* was the creation of the office of the praetor who was later referred to as the urban praetor (*praetor urbanus*).<sup>61</sup>

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<sup>56</sup> Kaser *Roman Private Law* 43; Van Warmelo *Principles of Roman Civil Law* paras 10, 24.

<sup>57</sup> Gaius *Inst* 4 11 (quoted from De Zulueta *Institutes of Gaius Part I*). Also see Gaius *Inst* 4 30, where he states that "the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case" (quoted from De Zulueta *Institutes of Gaius Part I*).

<sup>58</sup> Kaser *Roman Private Law* 43, 392; Van Warmelo *Principles of Roman Civil Law* para 717. For more detail on the *legis actio* procedure see Van Warmelo *Oorsprong van die Romeinse Reg* para 84ff.

<sup>59</sup> In Gaius *Inst* 1 1 it is said that the "law which a people establishes for itself is peculiar to it, and is called *ius civile* (civil law) as being the special law of that *civitas* (State)" (quoted from De Zulueta *Institutes of Gaius Part I*); cf D 1 1 9, Gaius, *Institutes, Book 1*, where it is stated that "law which each nation has set up as a law unto itself is special to that particular *civitas* and is called *jus civile*, civil law, as being that which is proper to the particular civil society (*civitas*)" (quoted from Watson *Digest of Justinian*). Also see Kaser *Roman Private Law* 19, 392; De Zulueta *Institutes of Gaius Part II* 12. However, there were exceptions to this rule, which are discussed in n 73 below.

<sup>60</sup> Mousourakis *Historical Context of Roman Law* 84; Schiller *Roman Law Mechanisms* 402.

<sup>61</sup> D 1 2 2 27, Pomponius, *Manual, Sole Book*: "And when the consuls were being called away to the wars with neighbouring peoples, and there was no one in the *civitas* empowered to attend to legal business in the city, what was done was that a praetor also was created, called the urban praetor on the ground that he exercised jurisdiction within the city" (quoted from Watson *Digest of Justinian*). Also see Van Warmelo

The urban praetor took over the duties of the consuls in respect of the administration of civil disputes between Roman citizens.<sup>62</sup> He was elected annually and invested with extensive powers (*imperium*)<sup>63</sup> which enabled him to regulate legal proceedings.<sup>64</sup> He would issue his annual edict at the beginning of his office term<sup>65</sup> which set out the rules and procedures that would be followed to resolve private law disputes during his term in office.<sup>66</sup> He also had the right to grant a new remedy during his year in office if he thought it necessary.<sup>67</sup> He further had to ensure that the dispute between the parties was formulated correctly, after which he had to appoint a judge (*iudex*) to adjudicate the dispute.<sup>68</sup> The urban praetor's edict was based upon the existing *ius civile* and consequently contained remedies based on the strict and formal *legis actiones*.<sup>69</sup> These actions are referred to as the *stricti iuris* (strict law) actions.<sup>70</sup>

### 3.1.3 The development of the *ius honorarium* by the peregrine praetor

During the third century BC the number of foreigners (*peregrini*)<sup>71</sup> living in Rome increased dramatically, which resulted in a rise in business transactions between Roman citizens and foreigners.<sup>72</sup> These foreigners

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*Principles of Roman Civil Law* para 14; Schiller *Roman Law Mechanisms* 403. For a detailed discussion on the creation of the praetorship see Brennan *Praetorship* ch 3.

<sup>62</sup> Van Warmelo *Principles of Roman Civil Law* para 30; Schiller *Roman Law Mechanisms* 411.

<sup>63</sup> Van Warmelo *Principles of Roman Civil Law* para 15.

<sup>64</sup> Van Warmelo *Principles of Roman Civil Law* para 30; De Zulueta *Institutes of Gaius Part II* 17.

<sup>65</sup> Gaius *Inst* 1 6, where it is stated that "[t]he right of issuing edicts is possessed by magistrates of the Roman people" (quoted from De Zulueta *Institutes of Gaius Part I*).

<sup>66</sup> D 1 2 2 10, Pomponius, *Manual, Sole Book*: "At the same time, the magistrates also were settling matters of legal right, and in order to let the citizens know and allow for the jurisdiction which each magistrate would be exercising over any given matter, they took to publishing edicts. These edicts, in the case of the praetors, constituted the *ius honorarium* (honorary law): 'honorary' is the term used, because the law in question had come from the high honor of praetorian office" (quoted from Watson *Digest of Justinian*). Also see Van Warmelo *Principles of Roman Civil Law* para 31; De Zulueta *Institutes of Gaius Part II* 18.

<sup>67</sup> Kaser *Roman Private Law* 20.

<sup>68</sup> Van Warmelo *Principles of Roman Civil Law* para 30.

<sup>69</sup> Schermaier "Bona Fides in Roman Contract Law" 72; Van Warmelo *Principles of Roman Civil Law* para 31.

<sup>70</sup> Du Plessis *Borkowski's Roman Law* 256; Kaser *Roman Private Law* 174.

<sup>71</sup> The term *peregrini* refers to freemen (as opposed to slaves) who were not Roman citizens (Roby *Roman Private Law Vol 1* 19).

<sup>72</sup> D 1 2 2 28, Pomponius, *Manual, Sole Book*: "Some years thereafter that single praetor became insufficient, because a great crowd of foreigners had come into the *civitas* as well, and so another praetor was established, who got the name peregrine praetor, because he mainly exercised jurisdiction as between foreigners (*peregrini*)" (quoted from Watson *Digest of Justinian*). Also see Van Warmelo *Principles of Roman Civil Law* para 14; De Zulueta *Institutes of Gaius Part II* 12.

could not institute any of the *legis actiones* because the *ius civile* was available to Roman citizens only.<sup>73</sup> This meant, for the most part, that foreigners residing in Rome could not take part in legal transactions or institute any legal proceedings.<sup>74</sup> To address this situation, an additional praetor, called the peregrine praetor (*praetor peregrinus*) was appointed in 242 BC<sup>75</sup> to administer civil disputes where foreigners were involved.<sup>76</sup> However, where the urban praetor applied the formal and strict *ius civile* between Roman citizens, the same could not prevail in the peregrine praetor's forum.<sup>77</sup> Many of the foreigners in Rome were traders and their disputes resulted from their commercial dealings with each other and with Roman citizens.<sup>78</sup> A more informal and effective procedure was required to deal with these commercial transactions, which were governed by informal

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<sup>73</sup> Du Plessis *Borkowski's Roman Law* 34; Schermaier "Bona Fides in Roman Contract Law" 77; Kaser *Roman Private Law* 32. There were exceptions to this rule. For example, where a person was granted *commercium* (ie the capacity to conclude certain Roman transactions) or *conubium* (the capacity to contract a marriage which was valid under the *ius civile*) (Kaser *Roman Private Law* 31). As a further example, a fiction of Roman citizenship could be attributed to a foreigner, specifically in the case of the *actio furti* (action for theft) and the *actio legis Aquiliae* (action for wrongful damage) (Gaius *Inst* 4 37; Kaser *Roman Private Law* 33).

<sup>74</sup> Mousourakis *Historical Context of Roman Law* 186.

<sup>75</sup> Van Warmelo *Principles of Roman Civil Law* para 14; De Zulueta *Institutes of Gaius Part II* 17. Although most sources cite 242 BC as the year the peregrine praetor was introduced, this remains a contentious issue (see Brennan *Praetorship* 85-89).

<sup>76</sup> D 1 2 2 28, Pomponius, *Manual, Sole Book* (quoted in n 72 above). Also see Du Plessis *Borkowski's Roman Law* 33; Van Warmelo *Principles of Roman Civil Law* para 14; Schiller *Roman Law Mechanisms* 403. The exact jurisdiction of the peregrine praetor is uncertain (Watson *Law of the Ancient Romans* 23-24). First, there is a difference of opinion whether the jurisdictions of the two praetors were based on the status of the parties or convenience (see Bablitz *Actors and Audience* 206 n 4, 210 n 71; Brennan *Praetorship* 85-89, 461-462; Gilbert 1939 *Res Judicatae* 50-58). Secondly, if the first view is preferred there is a difference of opinion whether the peregrine praetor had jurisdiction over disputes between foreigners as well as disputes between Roman citizens and foreigners from the start. Daube argues that initially the peregrine praetor had jurisdiction over disputes between foreigners only, which jurisdiction was later expanded to include disputes between foreigners and citizens (Daube 1951 *Journal of Roman Studies* 66-70 supported by Watson 1962 *Rev Int'lle Droits Ant* 431 n 2). Despite Daube's argument, it is generally accepted that the peregrine praetor's jurisdiction included disputes between foreigners as well as disputes between Roman citizens and foreigners from the start (see Brennan *Praetorship* 133-134; and Schiller *Roman Law Mechanisms* 403 for a summary of the criticisms raised against Daube's view).

<sup>77</sup> Du Plessis *Borkowski's Roman Law* 34.

<sup>78</sup> Du Plessis *Borkowski's Roman Law* 72; Mousourakis *Historical Context of Roman Law* 87-88, 198.

trade usages and customs.<sup>79</sup> Powell<sup>80</sup> explains that the existing Roman law remedies were not accessible or suitable for use by foreigners:

The parties to these old actions had to define the issue between them in a precise form of words, in Latin, and sometimes with oaths invoking the Roman gods. That was all very well for Roman citizens who spoke Latin and who worshipped the Roman gods. But it meant a complete denial of justice to the foreigner whose Latin was non-existent or imperfect and upon whom the Roman religion was not binding.

This resulted in the development of the formulary (*per formulam*) procedure<sup>81</sup> by the peregrine praetor.<sup>82</sup> The formulary procedure was characterised by "its simplicity, economy, and adaptability".<sup>83</sup> As in the *legis actiones* procedure, the parties had to formulate their claim before the praetor, who appointed a judge once he was satisfied with the formula.<sup>84</sup> However, while the formulas of the *legis actiones* consisted of spoken words and gestures that had to be followed exactly, the formulary procedure required that the dispute between the parties be reduced to writing, which meant that the parties did not need to follow formal words and rituals in setting out their claims.<sup>85</sup> Through this flexibility, the peregrine praetor obtained a large discretion to influence the law.<sup>86</sup> This influence was indirect, as the praetor had no legislative powers and could not introduce new legal rights.<sup>87</sup> However, the praetor was responsible for setting out the legal procedures for the administration of justice in his edict, and as a result, he had the power to introduce new remedies.<sup>88</sup> The new body of rules that emerged from the peregrine praetor's

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<sup>79</sup> Powell 1956 *CLP* 19. Also see Du Plessis *Borkowski's Roman Law* 72; Schermaier "Bona Fides in Roman Contract Law" 73.

<sup>80</sup> Powell 1956 *CLP* 19.

<sup>81</sup> The introduction date of the formulary procedure is uncertain (Nicholas *Introduction to Roman Law* 20). However, Birks 1969 *Irish Jurist* 357 proposes that the formulary procedure predates the introduction of the peregrine praetor in 242 BC (see further n 82 below).

<sup>82</sup> Du Plessis *Borkowski's Roman Law* 34; Kaser *Roman Private Law* 19, 395; Van Warmelo *Principles of Roman Civil Law* para 726; De Zulueta *Institutes of Gaius Part II* 252-253. Birks 1969 *Irish Jurist* 357 proposes that the formulary procedure was developed by the urban praetor. Again, this is a contentious issue (see Brennan *Praetorship* 134-135; Schiller *Roman Law Mechanisms* 405).

<sup>83</sup> Nicholas *Introduction to Roman Law* 20. See Kaser *Roman Private Law* 401ff for a discussion on how the formulary procedure worked. See further Schulz *Roman Legal Science* 50-51 on the flexibility of the formulary procedure.

<sup>84</sup> Van Warmelo *Oorsprong van die Romeinse Reg* para 92.

<sup>85</sup> Du Plessis *Borkowski's Roman Law* 34; Van Warmelo *Principles of Roman Civil Law* para 727. For a detailed discussion of how the formulary procedure worked in practice see Van Warmelo *Principles of Roman Civil Law* para 728ff.

<sup>86</sup> Du Plessis *Borkowski's Roman Law* 34; Van Warmelo *Principles of Roman Civil Law* para 727.

<sup>87</sup> Mousourakis *Historical Context of Roman Law* 185, 199.

<sup>88</sup> Schermaier "Bona Fides in Roman Contract Law" 74; Schulz *Roman Legal Science* 50.

edict became known as the *ius honorarium* or *ius praetorium*.<sup>89</sup> These rules took account of the customs which governed commercial dealings with foreigners,<sup>90</sup> were "based largely on common sense, expediency and fairness", and became known as the *ius gentium*.<sup>91</sup>

It is possible that the *bonae fidei iudiciae* (*bona fide* actions) were introduced<sup>92</sup> in the peregrine praetor's edict.<sup>93</sup> The most well-known *bonae fidei* contracts are the consensual contracts, namely sale (*emptio venditio*), letting and hiring (*locatio conductio*), mandate (*mandatum*) and partnership (*societas*).<sup>94</sup> These contracts required no formalities and their validity was based on the agreement (*consensus*) between the parties.<sup>95</sup> The *formulae* of the *bona fide* actions included a clause at the end of the formula instructing the judge to decide the case according to what the defendant ought to do or give "*ex fide bona*" (in good faith).<sup>96</sup> Hence the judge had to decide the case

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<sup>89</sup> D 1 1 7 1, Papinian, *Definitions*, Book 2: "Praetorian law (*jus praetorium*) is that which in the public interest the praetors have introduced in aid or supplementation or correction of the *jus civile*. This is also called honorary law (*jus honorarium*), being so named for the high office (*honos*) of the praetors" (quoted from Watson *Digest of Justinian*); D 1 2 2 10, Pomponius, *Manual*, *Sole Book* (quoted in n 66 above). See further Mousourakis *Historical Context of Roman Law* 187. For a contrary view see Watson *Law Making* 64ff, who argues that the *ius honorarium* mainly derived from the urban praetor's edict.

<sup>90</sup> Berger *Encyclopedic Dictionary of Roman Law* 528 sv "*Ius gentium*".

<sup>91</sup> Mousourakis *Historical Context of Roman Law* 186. Also see Kaser *Roman Private Law* 32; Van Warmelo *Principles of Roman Civil Law* paras 25, 82.

<sup>92</sup> There is uncertainty as to when the *bona fide iudiciae* emerged (see a summary of the various arguments in Schermaier "*Bona Fides in Roman Contract Law*" 71-72).

<sup>93</sup> Schermaier and Dedek "*Bona Fides*" 1155; Kaser *Roman Private Law* 19; De Zulueta *Institutes of Gaius Part II* 253, 167. This is a departure from Schermaier's earlier view (see Schermaier "*Bona Fides in Roman Contract Law*" 77). Other scholars argue that the *bonae fidei iudiciae* is the work of the urban praetor (Watson 1984 *LHR* 10ff; Schiller *Roman Law Mechanisms* 422). This remains a contentious issue (Schiller *Roman Law Mechanisms* 527-530). The answer to this question is not vital to the arguments contained in this article as it is generally accepted that the development of the *ius honorarium* was in part due to the expansion of Rome, the influx of foreigners into the city and the subsequent increase in foreign trade (Mousourakis *Historical Context of Roman Law* 181; Van Warmelo *Principles of Roman Civil Law* para 25).

<sup>94</sup> Gaius *Inst* 3 135: "Obligations are created by consent in sale, hire, partnership, and mandate" (quoted from De Zulueta *Institutes of Gaius Part I*); cf Just *Inst* 3 22: "Consensual obligations arise in sales (*emptio venditio*), letting and hirings (*locatio conductio*), partnerships (*societas*) and mandates (*mandata*)" (quoted from Thomas *Institutes of Justinian*).

<sup>95</sup> Gaius *Inst* 3 136: "The reason why we say that in these cases the obligations are contracted by consent is that no formality whether of words or writing is required, but it is enough that the persons dealing have consented" (quoted from De Zulueta *Institutes of Gaius Part I*). Also see Van Warmelo *Principles of Roman Civil Law* para 441.

<sup>96</sup> Du Plessis *Borkowski's Roman Law* 263; Kaser *Roman Private Law* 174; Van Warmelo *Principles of Roman Civil Law* para 441.

on the basis of the principle of good faith.<sup>97</sup> Gaius<sup>98</sup> explains that "the *iudex* appears to be allowed complete discretion in assessing, on the bases of justice and equity, how much ought to be made good to the plaintiff". In this context, good faith referred to honesty and fairness,<sup>99</sup> which in turn denoted an objective and ethical standard of behaviour that was expected from the parties.<sup>100</sup>

It can thus be concluded that good faith played an important role in addressing the changing political, social and economic environment in Rome. The Romans showed an exceptional ability to deal with the changing environment by developing a separate flexible and fair legal system to govern legal transactions between Romans and foreigners. As will be seen below, it did not take long before these flexible procedures and normative principles were incorporated into the existing *ius civile*.<sup>101</sup>

### **3.2 The role of ubuntu in addressing legal pluralism in South Africa**

The South African story of legal pluralism is still in the making and relatively new compared to the Roman one. South Africa is characterised by a multicultural and multiracial society in which different legal systems have been observed over a long period of time.<sup>102</sup> However, these different legal systems did not always have equal status under the official law. It is peculiar, but due to the South African history of colonialism and apartheid, that the term "common law" in South African law refers to the system of law based on Roman-Dutch and English law that was imported to South Africa under colonial rule and which was developed by legislation and legal precedents over time.<sup>103</sup> As such, the term "common law" does not include the indigenous legal systems collectively referred to as customary law, which are

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<sup>97</sup> Mousourakis *Historical Context of Roman Law* 21; Schermaier "Bona Fides in Roman Contract Law" 77; Van Warmelo *Principles of Roman Civil Law* para 441.

<sup>98</sup> Gaius *Inst* 4 61 (quoted from De Zulueta *Institutes of Gaius Part I*).

<sup>99</sup> Berger *Encyclopedic Dictionary of Roman Law* 374 sv "Bona Fides".

<sup>100</sup> Gaius *Inst* 3 137: "Further, in these contracts [consensual contracts] the parties are reciprocally liable for what each is bound in fairness and equity to perform for the other..." (quoted from De Zulueta *Institutes of Gaius Part I*); D 16 3 31*pr* where it is stated that "[t]he good faith that is required in contracts calls for level dealing in the highest degree" (quoted from Watson *Digest of Justinian*). See further Földi 2014 *Fundamina* 318 n 37; Van Warmelo *Principles of Roman Civil Law* para 394.

<sup>101</sup> See the discussion in para 4.1 below.

<sup>102</sup> Bekker, Rautenbach and Tshivhase "Nature of African Customary Law" 19.

<sup>103</sup> Bennett *Customary Law* 35 n 2.

followed by the majority of the population who are regarded as the indigenous peoples of South Africa.<sup>104</sup>

Before the adoption of the Constitution, customary laws in South Africa were treated as inferior to the common law.<sup>105</sup> Where customary laws were recognised they were usually subject to a repugnancy clause. This meant that customary laws were applied as far as they were not repugnant to the principles and public policy of natural justice,<sup>106</sup> which in turn were shaped by common law ideals.<sup>107</sup> Bennet<sup>108</sup> argues that this resulted in the common law influencing the customary law, but no such influence was exercised by customary law on the common law in return. This situation was compounded by the conservative legal culture that was prevalent under apartheid, and which Keep and Midgley<sup>109</sup> describe as "conservative and positivist, with judicial deference to the executive and to parliamentary sovereignty; formalistic, technical and authoritarian; and 'of reasoned argument' and justification".

With the abolition of apartheid and the advent of the new constitutional order, customary law was finally recognised as a separate legal system with the same status as that of common law.<sup>110</sup> However, this does not mean that customary law is treated like common law. Rautenbach<sup>111</sup> refers to a number of examples to conclude that where common law and customary law are harmonised, such harmonisation takes place "within a framework of Western values". In addition, customary law is seen through the lens of common law rules and values, but the common law is rarely assessed from the viewpoint of customary rules and values. Keep and Midgley<sup>112</sup> refer to this dichotomy as a failure to develop a legal culture that reflects customary values. They

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<sup>104</sup> Rautenbach "Phenomenon of Legal Pluralism" 12 n 52. This is the preferred term although the term "indigenous law" has also been used (Bennett *Customary Law* 34 n 2).

<sup>105</sup> Bekker, Rautenbach and Tshivhase "Nature of African Customary Law" 19.

<sup>106</sup> Bennett 2011 *PELJ* 30 referring to s 1(1) of the current *Law of Evidence Amendment Act* 45 of 1988 and s 11(1) of the partly repealed *Black Administration Act* 38 of 1927. Also see Thomas 2008 *Fundamina* 141, referring to older statutes in this respect.

<sup>107</sup> Bekker, Rautenbach and Tshivhase "Nature of African Customary Law" 19.

<sup>108</sup> Bennett 2011 *PELJ* 30. Also see Bennett, Munro and Jacobs *Ubuntu* 5.

<sup>109</sup> Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 29. Also see Van der Walt 2006 *Fundamina* 17-29; Klare 1998 *SAJHR* 168-172.

<sup>110</sup> Sections 39(3) and 211(3) of the Constitution; *Gumede v The President of the Republic of South Africa* 2009 3 SA 152 (CC) para 22, in which the Court confirmed that the customary law "lives side by side with the common law and legislation".

<sup>111</sup> Rautenbach "Phenomenon of Legal Pluralism" 13.

<sup>112</sup> Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 48 as supported by Himonga, Taylor and Pope 2013 *PELJ* 370.



further argue that a cohesive and plural legal culture is necessary in order to legitimise the new legal system in South Africa.<sup>113</sup>

The South African common law of contract follows a similar pattern. The classical model of contract law based on freedom and sanctity of contract<sup>114</sup> has been followed for a long time.<sup>115</sup> Freedom of contract entails that the parties can decide whether, with whom and on what terms to contract, which finds expression through consensus.<sup>116</sup> This leads to the principle of the sanctity of contract, which refers to the idea that where a contract was entered into freely and where the terms thereof are not contrary to public policy it should be enforced.<sup>117</sup> As explained by Adams and Brownsword:<sup>118</sup>

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.

Accordingly, it promotes an individualistic approach to contracts that is based on the philosophies of individualism and economic liberalism<sup>119</sup> which were imported from English law during the nineteenth century.<sup>120</sup>

The classical approach to contract law assumes that the contracting parties are in an equal bargaining position and therefore promotes formal equality.<sup>121</sup> As Hawthorne explains:

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<sup>113</sup> Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 48 as supported by Himonga, Taylor and Pope 2013 *PELJ* 370; Rautenbach "Exploring the Contribution of *Ubuntu*" 309. Also see the Preamble of the Constitution, where it is stated that "South Africa belongs to all who live in it, united in our diversity". Also see Bennett, Munro and Jacobs *Ubuntu* 1.

<sup>114</sup> Zimmerman "Good Faith and Equity" 551, referring to the famous quote by Sir Jessel MR in the English case of *Printing and Numerical Registering Company v Sampson* 1875 LR 19 Eq 462 465: "[I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice".

<sup>115</sup> The South African Supreme Court of Appeal has also referred with approval to the quote in n 114 above (see eg *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9).

<sup>116</sup> Hutchison "Nature and Basis of Contract" 24; Bhana and Pieterse 2005 *SALJ* 867.

<sup>117</sup> Hutchison "Nature and Basis of Contract" 24; Bhana and Pieterse 2005 *SALJ* 867; Zimmerman *Law of Obligations* 576-577.

<sup>118</sup> Adams and Brownsword *Key Issues in Contract* as quoted by Hawthorne 2012 *THRHR* 348 n 11.

<sup>119</sup> Hutchison "Nature and Basis of Contract" 24; Hawthorne 2006 *Fundamina* 76; Zimmerman *Law of Obligations* 577.

<sup>120</sup> Thomas 2008 *Fundamina* 137.

<sup>121</sup> Hutchison "Nature and Basis of Contract" 23-24; Bhana and Pieterse 2005 *SALJ* 867.

Both classical contract law and the classical conception of the rule of law have as their point of departure that inequality between individuals is the result of natural differences and capabilities and that no legal system could be held accountable for recognising the formal equality of individuals.<sup>122</sup>

Hawthorne<sup>123</sup> further explains that it "does not take into account the discrepancies in resources such as ownership, wealth and knowledge, which sustain inequality between the parties to a contract." Consequently, the classical model of contract law is not concerned with the respective bargaining position of the parties or the resulting unfairness of the bargain.<sup>124</sup> In other words, the socio-economic circumstances of the contracting parties are not considered, and there is no duty on the courts to be concerned with the promotion of substantive equality and social justice.<sup>125</sup>

According to the classical liberal approach, good faith requires that a court should give effect to that which is agreed between the parties,<sup>126</sup> which will ensure commercial and legal certainty. In turn, this forms the basis of a formalistic approach to contracts, as the courts need concern themselves only with the formal validity and enforceability of the contract as the substance of the contract has been agreed upon between the parties and must be honoured.<sup>127</sup> Consequently, it is argued that substantive fairness should not be a ground for setting aside a contract.<sup>128</sup>

This model has been the target of increasing attack but with varying measures of success. Some of the reasons given for these attacks are "rampant inflation, monopolistic practices giving rise to unequal bargaining power, and the large-scale use of standard form contracts".<sup>129</sup> However, these attacks reflect greater changes in the political, economic and social environment. The industrial age created great discrepancies in economic power that resulted in the exploitation of vulnerable individuals and groups.<sup>130</sup> In South Africa this was further compounded by apartheid, which created further political, economic and social inequality.<sup>131</sup> These inequalities are sustained in part by the existing value system underlying the law of contract, because the redistribution of property takes place largely within this

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<sup>122</sup> Hawthorne 2008 *SAPL* 79.

<sup>123</sup> Hawthorne 1995 *THRHR* 166.

<sup>124</sup> Hawthorne 1995 *THRHR* 165-166.

<sup>125</sup> Hutchison "Nature and Basis of Contract" 24-25; Hawthorne 2006 *Fundamina* 76; Zimmerman *Law of Obligations* 577.

<sup>126</sup> Bhana and Pieterse 2005 *SALJ* 867.

<sup>127</sup> Bhana and Pieterse 2005 *SALJ* 867. See further Hawthorne 2006 *Fundamina* 76.

<sup>128</sup> Cf the discussion at n 30 above.

<sup>129</sup> Zimmerman "Good Faith and Equity" 575.

<sup>130</sup> Hawthorne 2008 *SAPL* 80

<sup>131</sup> Hawthorne 2008 *SAPL* 80.

sphere.<sup>132</sup> Consequently, the reliance on the common law ideals of freedom and sanctity of contract in conjunction with the formalistic and positivistic approach by the courts has the effect of sustaining and promoting these inequalities.<sup>133</sup> This view can be identified in Justice Yacoob's minority judgment in *Everfresh Market Virginia v Shoprite Checkers*, as discussed above.<sup>134</sup>

In Roman law the introduction of the flexible principle of good faith was necessary to deal with the influx of foreigners into Rome, who had limited access to justice under the Roman *ius civile*. It was argued that it is possible that good faith was introduced by the peregrine praetor to deal with the increasing number of foreign traders who played an increasingly important role in the Roman economy and development. The situation in South Africa is different, but similar themes may be identified. In the colonial period the majority of the indigenous people were refused entry into the South African economy. With the introduction of the Constitution, everyone was granted equal right of access to the economy, but the indigenous people are expected to do so in terms of existing laws that are based on common law values that sustain and propound the existing inequalities. The incorporation of customary values (in particular the concept of *ubuntu*)<sup>135</sup> into the common law of contract might prove valuable in addressing these inequalities and the move towards a more egalitarian society and a "cohesive, plural, South African legal culture".<sup>136</sup> It is therefore not surprising that the Constitutional Court showed an intention to do exactly this in *Everfresh Market Virginia v Shoprite Checkers*.

## **4 The use of open norms to supplement and correct the existing law**

### **4.1 The role of good faith in correcting and supplementing the existing *ius civile***

Initially, Roman citizens did not enjoy the advantages of the flexible formulary procedure that incorporated the principles of good faith and equity.<sup>137</sup> As was

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<sup>132</sup> Louw 2013 *PELJ* 47 speaks of "contracts as [a] private law mechanism for the ordering of our social and economic relations". See further Davis and Klare 2010 *SAJHR* 411.

<sup>133</sup> Hawthorne 2006 *Fundamina* 75-79 as supported by Louw 2013 *PELJ* 58. See also Davis and Klare 2010 *SAJHR* 411.

<sup>134</sup> Cf the discussion at n 28 above.

<sup>135</sup> Louw 2013 *PELJ* 47.

<sup>136</sup> Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 30. Also see Louw 2013 *PELJ* 47.

<sup>137</sup> Du Plessis *Barkowski's Roman Law* 34.

seen earlier, the urban praetor's edict was based upon the existing *ius civile* and consequently contained remedies based on the strict and formal *legis actiones*.<sup>138</sup> However, it was not long before the new flexible formulary procedure was adopted by the urban praetor and incorporated into the *ius civile*.<sup>139</sup> Around 150 BC<sup>140</sup> the *lex Aebutia* was passed, in terms of which the formulary procedure was made available to Roman citizens.<sup>141</sup> With the introduction of the flexible formulary procedure and the power to introduce new remedies,<sup>142</sup> the urban praetor was granted an opportunity to incorporate the *ius honorarium* into the existing Roman *ius civile*.<sup>143</sup> Van Warmelo<sup>144</sup> argues that as time passed the urban praetor exercised this discretion where it was necessary to address the changing needs of society and that he looked to the *ius gentium* for guidance in making these changes. This meant that the urban praetor introduced remedies where the *ius civile* did not provide any or refused remedies where the *ius civile* would normally provide relief.<sup>145</sup> The urban praetor exercised this discretion in accordance with what he considered to be right and equitable.<sup>146</sup> Therefore, the new remedies introduced by the urban praetor were less concerned with the formal and rigid requirements of the traditional *ius civile* and aimed instead at achieving fairness and justice between the parties. As with that of the peregrine praetor,

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<sup>138</sup> Cf the discussion at n 69 above.

<sup>139</sup> Du Plessis *Barkowski's Roman Law* 34; Van Warmelo *Principles of Roman Civil Law* para 726; De Zulueta *Institutes of Gaius Part II* 253.

<sup>140</sup> The exact date of the *lex Aebutia* is uncertain (Schermaier "Bona Fides in Roman Contract Law" 72 n 72; Schiller *Roman Law Mechanisms* 405; De Zulueta *Institutes of Gaius Part II* 250-251).

<sup>141</sup> Du Plessis *Barkowski's Roman Law* 35; Mousourakis *Historical Context of Roman Law* 199; Van Warmelo *Principles of Roman Civil Law* para 726. As stated by Gaius in *Inst* 4 30: "But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case. Consequently by the L. Aebutia and the two L. Iuliae they were abolished, and litigation by means of adapted pleadings, that is by formula, was established" (quoted from De Zulueta *Institutes of Gaius Para I*). Van Warmelo *Oorsprong van die Romeinse Reg* para 92 and Birks 1969 *Irish Jurist* 357 argue that the formulary procedure was already used in cases between Roman citizens prior to the enactment of the *lex Aebutia*. Also see Schiller *Roman Law Mechanisms* 406 for a summary of the different arguments regarding the role of the *lex Aebutia* and Kaser *Roman Private Law* 395 for a different theory in respect thereof.

<sup>142</sup> Cf the discussion at n 67 above.

<sup>143</sup> Van Warmelo *Principles of Roman Civil Law* para 727; De Zulueta *Institutes of Gaius Part II* 18-19. See also the discussion of Schiller *Roman Law Mechanisms* 424-425 on the nature of the *ius honorarium* of the urban praetor.

<sup>144</sup> Van Warmelo *Principles of Roman Civil Law* para 33.

<sup>145</sup> Kaser *Roman Private Law* 19; Van Warmelo *Principles of Roman Civil Law* paras 33, 731; De Zulueta *Institutes of Gaius Part II* 253.

<sup>146</sup> Mousourakis *Historical Context of Roman Law* 199; Van Warmelo *Principles of Roman Civil Law* para 33.

the body of rules developed by the urban praetor was also referred to as the *ius honorarium*.<sup>147</sup>

A good example of such a supplementation or correction of the *ius civile* is the case of a contract induced by fraud.<sup>148</sup> Initially, a *stricti iuris* contract induced by fraud was valid and binding as long as the formal procedures were followed.<sup>149</sup> However, fraud was actionable in *bonae fidei* contracts.<sup>150</sup> The discrepancy between *bonae fidei* and *stricti iuris* contracts was addressed with the introduction of the defence of fraud (*exceptio doli*) for the *stricti iuris* contracts in 66 BC.<sup>151</sup> Initially, the *exceptio doli* was limited to fraudulent behaviour<sup>152</sup> but as time passed the insertion of this defence into the formula "provided the judge with the same far-ranging discretion that he already had in *bonae fidei iudicia*."<sup>153</sup> Gaius<sup>154</sup> illustrates this defence with the following example:

Next we have to consider exceptions. These have been provided for the protection of defendants, since it is often the case that, though a man is liable at civil law, his condemnation in an action would be inequitable. Thus, if I have taken a stipulatory promise from you of a sum of money, on the understanding that I will advance you the amount on loan, and then I do not advance it, it is undeniable that an action lies against you for the money; for you are legally liable to pay it, being bound by the stipulation; but, because it is inequitable that you should be condemned on this account, it is settled that you must be protected by an *exceptio doli mali*.

By introducing these new remedies, the urban praetor (like the peregrine praetor)<sup>155</sup> was creating new legal rights despite his lack of legislative power.<sup>156</sup> While his influence was indirect, it was not small:

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<sup>147</sup> Van Warmelo *Principles of Roman Civil Law* para 33.

<sup>148</sup> For further examples see Van Warmelo *Principles of Roman Civil Law* paras 731-732; Schiller *Roman Law Mechanisms* 423-427.

<sup>149</sup> Van Warmelo *Principles of Roman Civil Law* para 424. Early Roman law agreements were usually concluded by the formal legal act of stipulation (*stipulatio* or *sponsio*), which is discussed in more detail in Du Plessis 2019 *PELJ* 12-13.

<sup>150</sup> Watson *Law of the Ancient Romans* 60.

<sup>151</sup> Zimmerman *Law of Obligations* 663-664; Watson *Law of the Ancient Romans* 60. For a detailed discussion of the introduction and development of the *exceptio doli* see Zimmerman *Law of Obligations* 663ff; Van Warmelo *Principles of Roman Civil Law* paras 698-704.

<sup>152</sup> Zimmerman *Law of Obligations* 665.

<sup>153</sup> Zimmerman *Law of Obligations* 667. Also see Kaser *Roman Private Law* 176.

<sup>154</sup> Gaius *Inst* 4 115-116a (quoted from De Zulueta *Institutes of Gaius Part 1*).

<sup>155</sup> Cf the discussion at n 86 above.

<sup>156</sup> Kaser *Roman Private Law* 19; Van Warmelo *Principles of Roman Civil Law* para 34.

In this way he managed to change the whole character of Roman law. For all practical purposes he created a vast branch of law which extended and corrected the existing law, and filled in gaps in it.<sup>157</sup>

It could be asked how any praetor could have a vast influence on the existing law where he was appointed for one year only and his edict was valid during his term of office only.<sup>158</sup> Van Warmelo<sup>159</sup> explains that as the remedies contained in the edict were introduced to address the needs of the community, a practice developed whereby the newly appointed praetor would incorporate his predecessor's edict into his new edict, subject to the changes he regarded as necessary. This resulted in the new praetor's edict looking similar to that of his predecessor, and so the edicts looked more similar from one year to the next.<sup>160</sup>

A further result of these developments was that the flexible formulary procedure was preferred over the rigid and formal *legis actio* procedure, and gradually the *legis actiones* were replaced by the formulary procedure.<sup>161</sup> Finally, in 17 BC the *leges Iuliae iudiciorum publicorum et privatorum* was passed, which abolished the *legis actio* procedure<sup>162</sup> except for certain cases.<sup>163</sup> As the years passed, the edicts of the urban and peregrine praetor became more similar in content.<sup>164</sup> This explains why many years later the Digest describes the *ius honorarium* as "that which in the public interest the praetors have introduced in aid or supplementation or correction of the *ius*

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<sup>157</sup> Van Warmelo *Principles of Roman Civil Law* para 33.

<sup>158</sup> Van Warmelo *Principles of Roman Civil Law* para 34.

<sup>159</sup> Van Warmelo *Principles of Roman Civil Law* para 34. See also Kaser *Roman Private Law* 20.

<sup>160</sup> Van Warmelo *Principles of Roman Civil Law* para 34.

<sup>161</sup> Gaius *Inst* 4 30: "But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case. Consequently by the *L. Aebutia* and the two *Ll. Iuliae* they were abolished, and litigation by means of adapted pleadings, that is by *formulae*, was established" (quoted from De Zulueta *Institutes of Gaius Part 1*).

<sup>162</sup> Gaius *Inst* 4 30 (quoted in n 161 above). Also see Du Plessis *Barkowski's Roman Law* 72; Kaser *Roman Private Law* 396; Van Warmelo *Principles of Roman Civil Law* para 726.

<sup>163</sup> The exceptions were cases falling under the jurisdiction of the centumviral court and cases involving *damnum infectum* (a threat of damage to another's property). Gaius *Inst* 4 31: "In two cases only may one proceed by *legis actio*, namely for *damnum infectum* and where the trial is to be before the centumviral court" (quoted from De Zulueta *Institutes of Gaius Part 1*).

<sup>164</sup> Du Plessis *Barkowski's Roman Law* 34. Schermaier "Bona Fides in Roman Contract Law" 67 n 21 explains that the *bona fide* actions were eventually regarded as part of the *ius civile*.

*civile*.<sup>165</sup> Van Warmelo<sup>166</sup> points out that as a result of these developments, the entire Roman law became more flexible and fair and he argues that this created a place for the application of *aequitas* (fairness) in Roman law. The concept of *aequitas* is discussed in more detail in the next article.<sup>167</sup>

## **4.2 The role of ubuntu in developing the South African common law of contract**

### *4.2.1 The introduction of ubuntu into law*

In the light of the subordinate role of customary laws and values in South African history, it was indeed a historical event<sup>168</sup> when the concept of *ubuntu* was included in the post-amble of the *Constitution of the Republic of South Africa* 200 of 1993 (hereafter the Interim Constitution) under the heading "National unity and reconciliation":

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.<sup>169</sup>

From this provision, it is clear that *ubuntu* was introduced into the official law as a restorative tool that could be used to correct the injustices of the past. Although the legal role of *ubuntu* has evolved since then and much has been written about this evolution, the link between *ubuntu* and restorative justice runs deep in *ubuntu* jurisprudence across various areas of law.<sup>170</sup> As this article deals with the emerging role of *ubuntu* in the common law of contract, the focus will be on the parts of this evolution that shed light upon this specific role.

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<sup>165</sup> D 1 1 7 1, Papinian, *Definitions, Book 2* (quoted from Watson *Digest of Justinian*). In addition, Marcian is quoted in D 1 1 8, *Institutes, Book 1* as stating that "the *jus honorarium* itself is the living voice of the *jus civile*" (quoted from Watson *Digest of Justinian*). Also see Schermaier "Bona Fides in Roman Contract Law" 65.

<sup>166</sup> Van Warmelo *Oorsprong van die Romeinse Reg* para 26.

<sup>167</sup> See Du Plessis 2019 *PELJ* 6-10.

<sup>168</sup> Himonga, Taylor and Pope 2013 *PELJ* 371.

<sup>169</sup> My emphasis.

<sup>170</sup> Himonga, Taylor and Pope 2013 *PELJ* 394-408. Also see Bennett, Munro and Jacobs *Ubuntu 1*; Rautenbach 2015 *AJICL* 279, 294-295.

#### 4.2.2 *uBuntu as an underlying constitutional value*

After the inclusion of *ubuntu* in the Interim Constitution, the first reference to *ubuntu* in South African jurisprudence was in *S v Makwanyane*, which deals with the constitutionality of the death penalty.<sup>171</sup> Himonga *et al.*<sup>172</sup> argue that the developments of *ubuntu* in later jurisprudence can be traced back to the remarks in this judgment and therefore it is the best place to start the discussion. The Court referred to the post-amble of the Interim Constitution and the idea that the Interim Constitution should be interpreted according to the specific historical background of South Africa and in line with the ideals of *ubuntu*.<sup>173</sup> Himonga *et al.*<sup>174</sup> further contend that the remarks by Justices Madala and Mokgoro indicate that they view *ubuntu* as a constitutional value that should be used in the interpretation of the Bill of Rights. Specifically, Justice Madala<sup>175</sup> stated that *ubuntu* "permeates the [Interim] Constitution generally and more particularly chap 3, which embodies the entrenched fundamental human rights." Justice Mokgoro<sup>176</sup> held that under the new constitutional order legislative interpretation would be "radically" different from that under apartheid. She argued that post-apartheid legislative interpretation must be value-based and she envisaged that *ubuntu* could play an important role in this task:

In interpreting the Bill of Fundamental Rights and Freedoms, as already mentioned, an all-inclusive value system, or common values in South Africa, can form a basis upon which to develop a South African human rights jurisprudence. Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of *ubuntu* – a notion now coming to be generally articulated in this country.<sup>177</sup>

Justice Mokgoro thus regards *ubuntu* as a shared value that could be used to develop a new legal culture that incorporates a normative approach to constitutional interpretation.<sup>178</sup> In other words, *ubuntu* as an underlying

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<sup>171</sup> *S v Makwanyane* 1995 3 SA 391 (CC) (hereafter *S v Makwanyane*).

<sup>172</sup> Himonga, Taylor and Pope 2013 *PELJ* 376.

<sup>173</sup> Especially *S v Makwanyane* para 263 (Justice Mahomed), but also paras 130-131 (Justice Chaskalson); 223-227 (Justice Langa); 237 (Justice Madala); 307-308 (Justice Mokgoro); 374 n 231 (Justice Sachs).

<sup>174</sup> Himonga, Taylor and Pope 2013 *PELJ* 377-378.

<sup>175</sup> *S v Makwanyane* para 237.

<sup>176</sup> *S v Makwanyane* para 301. Her description of legislative interpretation under apartheid coincides with that discussed earlier at n 109 above: "In that legal order, due to the sovereignty of Parliament, the supremacy of legislation and the absence of judicial review of parliamentary statutes, courts engaged in simple statutory interpretation, giving effect to the clear and unambiguous language of the legislative text, no matter how unjust the legislative provision."

<sup>177</sup> *S v Makwanyane* para 302.

<sup>178</sup> Keep and Midgley "Emerging Role of *Ubuntu-Botho*" 34.



constitutional value should be used as an open norm in constitutional interpretation with the object of promoting justice.<sup>179</sup>

Although *ubuntu* is not mentioned in the final Constitution, it has remained part of South Africa's constitutional jurisprudence, as is evidenced by a number of Constitutional Court judgments.<sup>180</sup> For the purposes of this section, it is necessary to mention *Port Elizabeth Municipality v Various Occupiers*, in which Justice Sachs confirmed the status of *ubuntu* as an underlying value in the final Constitution.<sup>181</sup>

#### 4.2.3 *uBuntu's role in the development of the common law of contract: transformative constitutionalism*

The term "transformative constitutionalism" was coined by Klare<sup>182</sup> in his seminal article entitled "Legal Culture and Transformative Constitutionalism". Supporting Justice Mokgoro's view that a constitutional interpretation would require a value-based approach, he argued that the Constitution requires an interpretation that takes into account the relevant historical and political context of South Africa. He further argued that there is a movement away from liberalism toward a social democracy or what he calls "an 'empowered' model of democracy".<sup>183</sup> He defined "transformative constitutionalism" as follows:

[A] long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.<sup>184</sup>

He further argued that such an interpretation would not undermine the principles of legal constraint and the rule of law as they would be

practices of constitutional interpretation that acknowledge and fulfil the duty of interpretive fidelity and yet that are engaged with and committed to

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<sup>179</sup> Himonga, Taylor and Pope 2013 *PELJ* 389 referred to with approval by Rautenbach 2015 *AJICL* 291. Also see Rautenbach "Exploring the Contribution of *Ubuntu*" 294. Bennett, Munro and Jacobs *Ubuntu* 61 describes *ubuntu* as a "metanorm" which is similar in meaning to an open norm (cf the discussion in n 38 above).

<sup>180</sup> For a collection of extracts from some of these judgments see Cornell and Muvangua *uBuntu and the Law*.

<sup>181</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37 (hereafter *Port Elizabeth Municipality v Various Occupiers*).

<sup>182</sup> Klare 1998 *SAJHR* 146-188.

<sup>183</sup> Klare 1998 *SAJHR* 152.

<sup>184</sup> Klare 1998 *SAJHR* 150.

'establish[ing] a society based on democratic values, social justice and fundamental human rights,' a society that will '[i]mprove the quality of life of all citizens and free the potential of each person.'<sup>185</sup>

Although he accepted that the Constitution aims to protect individual rights and freedoms, he contended that it is also committed to egalitarian social transformation in the private sphere.<sup>186</sup> Therefore, the Constitution should be interpreted in such a way as to achieve egalitarian social transformation in the private sphere,<sup>187</sup> and "to lay the legal foundations of a just, democratic, and egalitarian social order".<sup>188</sup> There are various sections in the Constitution that would support such an interpretation. Specifically, section 1(a) provides that the Republic of South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms".<sup>189</sup> Klare<sup>190</sup> argued that the use of the word "achievement" read with the right to equality as "the full and equal enjoyment of all rights and freedoms"<sup>191</sup> indicates a commitment to substantive equality. Klare further accepted that such a normative interpretation would be informed by the concept of *ubuntu* as part of the underlying value system of the Constitution.<sup>192</sup>

In the context of contract law, Hawthorne<sup>193</sup> refers to section 39(2) of the Constitution, which obliges the court to promote the spirit, purport and objects of the Bill of Rights when developing the common law. She also refers to section 173 of the Constitution, which grants the court an inherent power to develop the common law by taking into account the interests of justice.<sup>194</sup> She argues that these provisions require a purposive interpretation that incorporates the interpretation of open norms like good faith.<sup>195</sup> As such, she argues that good faith should be used as a tool to promote substantive equality between contractual parties in line with the values and aims of the Constitution.<sup>196</sup> In this sense, substantive equality would not refer to formal

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<sup>185</sup> Klare 1998 *SAJHR* 150 quoting from the Preamble of the Constitution. As pointed out by Hawthorne 2008 *SAPL* 78, the rule of law is enshrined as one of the foundational values of the Constitution (referring to s 1(c) of the Constitution).

<sup>186</sup> Klare 1998 *SAJHR* 150-152. Cf Davis and Klare 2010 *SAJHR* 404; Moseneke 2009 *Stell LR* 4.

<sup>187</sup> Klare 1998 *SAJHR* 151.

<sup>188</sup> Davis and Klare 2010 *SAJHR* 412.

<sup>189</sup> S 1(a) of the Constitution.

<sup>190</sup> Klare 1998 *SAJHR* 153-154, esp n 15.

<sup>191</sup> Section 9(2) of the Constitution.

<sup>192</sup> Klare 1998 *SAJHR* 155.

<sup>193</sup> Hawthorne 2003 *THRHR* 117. Also see Louw 2013 *PELJ* 67; Hawthorne 2006 *Fundamina* 83-84.

<sup>194</sup> Hawthorne 2003 *THRHR* 117. Also see Davis and Klare 2010 *SAJHR* 425.

<sup>195</sup> Hawthorne 2003 *THRHR* 117. Also see Lubbe 2004 *SALJ* 407-408, 418.

<sup>196</sup> Hawthorne 2003 *THRHR* 117.

equality before the law only (as promoted by the classical liberal model of contract law and the rule of law), but that the law should also take into account the inequalities in the social and economic position of the parties.<sup>197</sup> Therefore, she argues for a movement away from the classical model of contract law that is based on formal equality, does not take account of substantive fairness between the parties, and thus limits the role of good faith, towards a normative and value-based approach that would allow the courts to take cognisance of the social and economic reality in which the contract is concluded and to interfere with the contractual relationship in order to achieve substantive equality and justice between the parties.<sup>198</sup>

After the status of *ubuntu* as an underlying constitutional value of the final Constitution was confirmed in *Port Elizabeth Municipality v Various Occupiers*,<sup>199</sup> Davis and Klare<sup>200</sup> argued that section 39(2) obliges the courts to "re-imagine all law in the spirit of *ubuntu*". Bennett<sup>201</sup> further explains that *ubuntu* has been and can be used by the courts to "modify the effect of strict application of the law". It is therefore unsurprising that the Constitutional Court in *Everfresh Market Virginia v Shoprite Checkers* stressed that the common law of contract, and especially the concept of good faith, must be informed by the underlying constitutional value of *ubuntu*.<sup>202</sup> Although the Court failed to make any mention of *ubuntu* in *Botha v Rich*, it followed a similar approach. The Court referred to the transformative ideals of the Constitution<sup>203</sup> and the constitutional values of human dignity and equality<sup>204</sup> to develop the principle of good faith into a flexible principle that can be used to temper the rigid application of contract law rules and doctrines where it would lead to injustice.<sup>205</sup> This is similar to the role of good faith in Roman law, which was discussed above. It was shown how the introduction of good faith into Roman law caused subsequent developments in the existing *ius civile*. The urban praetor acquired the right to correct or supplement the formal and rigid *ius civile* in accordance with what was considered fair and

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<sup>197</sup> Hawthorne 2003 *THRHR* 121.

<sup>198</sup> Hawthorne 2003 *THRHR* 117, 121. Also see Hawthorne 2006 *Fundamina* 84. Cf the discussion on the classical model of contract law and the criticisms levied against it in the text at n 114 above.

<sup>199</sup> See again the discussion at n 181 above.

<sup>200</sup> Davis and Klare 2010 *SAJHR* 411.

<sup>201</sup> Bennett, Munro and Jacobs *Ubuntu* 61, 67 and 69.

<sup>202</sup> *Everfresh Market Virginia v Shoprite Checkers* para 71 (majority) and para 23 (minority) (cf the discussion in the text at n 27 above). As pointed out by Bhana and Broeders 2014 *THRHR* 164, although these remarks were *obiter*, they remain important because they were made unanimously.

<sup>203</sup> *Botha v Rich* para 28.

<sup>204</sup> *Botha v Rich* para 40.

<sup>205</sup> *Botha v Rich* para 45.

equitable. In other words, good faith was used as an open norm when interpreting and applying the the *ius civile*. In *Botha v Rich* the Court specifically referred to this historical role of good faith:

To the extent that the rigid application of the principle of reciprocity may in particular circumstances lead to injustice, our law of contract, based as it is on the principle of good faith, contains the necessary flexibility to ensure fairness. In *Tuckers Land Development Corporation* it was pointed out that the concepts of justice, reasonableness and fairness historically constituted good faith in contract.<sup>206</sup>

Therefore, the Court relied on good faith to incorporate a normative and more flexible approach into the law of contract and did so in a way that aligned with the transformative ideals of the Constitution. For this reason it is unfortunate that the Court did not refer to the constitutional value of *ubuntu*. Nevertheless, in the next article I argue that the Court was doing nothing less than developing the principle of good faith in accordance with the underlying constitutional value of *ubuntu*.<sup>207</sup>

## 5 Conclusion

In this article it has been shown how the Romans realised that their existing formal and rigid laws could not address the changing legal needs of the community due to the influx of foreigners (especially foreign traders) into Rome. In reaction to the changing commercial environment, they introduced flexible legal procedures and a more normative approach to these legal transactions to achieve fairness and justice between the contracting parties. This worked so well that the new flexible procedures and normative principles were transferred to the existing formalistic law. Gradually, the existing *ius civile* became subject to a more normative interpretation in the interests of justice through the use of the open norm of good faith. It has been argued that in a similar way, *ubuntu* can be used to address legal pluralism in the South African legal system, and its application as an underlying constitutional value could result in the better use of the open norm of good faith in the common law of contract to address contractual unfairness. In the next article, two further themes are explored to construct an even more contextual legal history of good faith in Roman contract law and then to compare this history with the emerging role of *ubuntu* in the South African common law of contract.

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<sup>206</sup> *Botha v Rich* para 45.

<sup>207</sup> See Du Plessis 2019 *PELJ* 18-19.

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## **List of Abbreviations**

AJICL	African Journal of International Comparative Law
CLP	Current Legal Problems
Fundamina	Fundamina: A Journal of Legal History
LHR	Law and History Review
PELJ	Potchefstroom Electronic Law Journal
Rev Int'le Droits Ant	Revue Internationale des Droits de l'Antiquité

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SAJHR	South African Journal on Human Rights
S Afr J Philos	South African Journal of Philosophy
SALJ	South African Law Journal
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins Hollandse Reg