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THE TRANSFORMATION OF SOUTH AFRICAN PRIVATE LAW AFTER TWENTY YEARS OF DEMOCRACY

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ABSTRACT

In *The Transformation of South African Private Law after Ten Years of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447 (2006), I evaluated the role of private law in consolidating South Africa's constitutional democracy. There, I traced the negative effects of apartheid from public law to private law, and then to the law of delict, South Africa's counterpart to tort law. I demonstrated that the law of delict failed to develop under apartheid and that the values animating the law of delict under apartheid were inconsistent with the values and aspirations of South Africa's democratic transformation. By the end of its first decade, South Africa had made considerable progress developing the private law, but there was still much work to be done in developing the law of delict, and especially contract law.

This article evaluates South Africa's second decade of constitutional democracy. While South Africa continues to make democratic gains, it also faces serious problems with race, gender and wealth inequality. This article reviews South Africa's democratic achievements and challenges over the last twenty years. It provides a brief overview of private law under apartheid before addressing a number of post-apartheid democracy-reinforcing changes to the private law. It then analyzes the historically conservative common law of contracts and a recent case that progressively develops the law of contracts and delict. Next, it turns to the Consumer Act of 2008, which has important implications for both contract law and delict. The Act is analyzed in light of two contrasting dramatic helicopter crashes: one that occurred before the Act came into effect, and one after. While there has been considerable progress, there is still a need for improvement. More can be done to align the private law with the Constitution's values, to confront persistent inequality, and promote freedom, dignity, and access to justice. Such breakthroughs would also deepen and stabilize South Africa's democracy by bringing democratic principles and values into the everyday lives of those affected by the private law.

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I. INTRODUCTION

In 2005, I evaluated the role of private law in consolidating democracy in South Africa.[1] I traced the cancerous effects of apartheid from the public law to the private law, and then specifically to the law of delict, South Africa's counterpart to tort law.[2] I demonstrated that the law of delict failed to develop under apartheid and "that a number of progressive developments that took place in the United States during this period did not occur in South Africa."[3] These progressive developments generally made it easier for average Americans—particularly consumers and employees—to have access to civil justice.[4] I argued further that "the values that animated the law of delict under apartheid [were] inconsistent with the values, goals, and aspirations of the democratic transformation of South Africa."[5]

The South African Interim and final Constitutions created a number of mechanisms to help bring the private law in line with the values of a transforming constitutional democracy.[6] I concluded in my previous work

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[1] *See* Christopher J. Roederer, *The Transformation of South African Private Law After Ten Years of Democracy*, 37 COLUM. HUM. RTS. L. REV. 447 (2005) [hereinafter Roederer, *Ten Years*].

[2] *Id*.

[3] *Id.* 453. *See also* Christopher J. Roederer, *Democracy and Tort Law in America: The Counter-Revolution*, 110 W. Va. L. Rev. 647 (2007-2008) [hereinafter Roederer, *Counter-Revolution*].

[4] *See generally* Roederer, *Counter-Revolution*.

[5] Roederer, *Ten Years* note 1at 453.

[6] *See* Christopher J. Roederer, *Post-Matrix Legal Reasoning: Horizontality and the Rule of Values in South African Law*, 19 S. AFR. J. HUM. RTS. 57, 69 (2003). Namely,

that the democratic "transformation of South Africa helped propel the transformation of delict," and this in turn helped to further consolidate South Africa's democracy.[7] Nevertheless, at the end of the first decade of South African democracy, there was still much work to be done in the private law, not only in the law of delict, but also, and particularly, in the law of contracts. This article explores the evolution of South Africa's democracy and private law during its second decade of constitutional democracy.

As in the United States, there is no guarantee that all the social forces will come together to strengthen and reinforce democratic values and principles over time. While South Africa continues to make democratic gains, the country has also faced setbacks. South Africa continues to face serious problems with race, gender, and wealth inequality at all levels of

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sections 8 and 36 of the Constitution provide such mechanisms. Section 8(2) allows for rights in the Bill of Rights to be directly binding on persons in their relations with one another. It provides, "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." Section 8(3) further directs a court to give effect to such a right by either developing the common law or limiting the common law. It provides,

> a. in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and b. may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Section 39(2) allows a court to interpret and develop all law, including the private law, to bring it into conformity with the Bill of Rights. It provides: "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[7] Roederer, *Ten Years* note 1at 453.

society, including in the courts and the legal profession.[8] Other setbacks include issues with police conduct[9] and serious political scandals,[10] such as the revival of the apartheid Key Points Act to shield scrutiny over lavish improvements to President Jacob Zuma's Nkandla homestead.[11] Similarly, the controversial and scandalous Protection of State Information Bill is still in limbo.[12] Finally, voter turnout is down[13] and South Africa's economic

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[8] Thandiwe Matthews, *Of Rainbows and Pots of Gold: Transformation of the Law, Society and the Legal profession in South Africa*, Available at: http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Matthews.pdf.

[9] *South African Police Accused of Routinely Torturing Crime Suspects*, THE GUARDIAN, (Feb. 5, 2015, 2:05 PM), http://www.theguardian.com/law/2013/apr/14/south-africa-police-accused-torture-suspects; Moni Basu, Faith Karimi & Nkepile Mabuse, *South Africa Shocked by Police Shootings at Mine*, CNN, (Feb. 5, 2015, 2:05 PM), http://www.cnn.com/2012/08/17/world/africa/south-africa-mine-violence/index.html; Raf Casert, *Badge of Dishonour: Death of Taxi Driver Dragged by Van is Latest High-Profile South African Police Scandal*, NATIONAL POST, (Feb. 5, 2015, 2:05 PM), http://news.nationalpost.com/2013/03/02/badge-of-dishonour-mans-death-after-being-dragged-by-van-is-latest-high-profile-south-african-police-scandal/.

[10] Ranjeni Munusamy, *A New South African Syndrome - Scandal Fatigue*, DAILEY MAVERICK, (Feb. 5, 2015, 2:05 PM), http://www.dailymaverick.co.za/article/2013-01-30-a-new-south-african-syndrome-scandal-fatigue#.VLVhenvl-ac. (finding scandals have become so commonplace that some claim South Africa is suffering from "scandal fatigue").

[11] The Key Points Act outlaws the release of information or photographs of sites that are considered essential to safeguard for national security purposes (e.g. military installations and strategic factories). See, National Key Act 102 of 1980 (as Amended by the Amendment Act 47 of 1985); section 10(2). The Department of Works, citing the Key Points Act, denied a request by an investigative journalism organization for the release of information surrounding the lavish developments of President Zuma's Nkandla homestead at the taxpayer's expense. See, Phillip De Wet, *Nkandlagate: Apartheid law protects Zuma*, MAIL & GAURDIAN, (Feb. 5, 2015, 2:05 PM), http://mg.co.za/article/2012-11-30-00-apartheid-law-protects-zuma; *See also*: Mia Lindeque, *Calls for 'Aparthein-Era' Key Points Act to be Reviewed*, EYE WITNESS NEWS, (Feb. 5, 2015, 2:05 PM), http://ewn.co.za/2014/12/04/National-Key-Points-Acts-of-1980-must-be-reviewed.

[12] See, http://en.rsf.org/afrique-du-sud-president-refuses-to-sign-12-09-2013,45168.html. *President Refuses to Sign Draconian Bill Into Law*, REPORTERS WITHOUT BOARDERS, (Feb. 5, 2015, 2:05 PM), http://en.rsf.org/afrique-du-sud-president-refuses-to-sign-12-09-2013,45168.html (stating that President Zuma refused to sign the Bill into law, and sent it back to Parliament in September of 2013); SABC, *National Assembly Approves Info Bill*, SABC NEWS, (Feb. 5, 2015, 2:05 PM), http://www.sabc.co.za/news/a/8612bb8041cd7c3e8bd9cb5393638296/National-Assembly-

growth, human development growth, and overall happiness rates have disappointed.

While some may view South Africa as limping along the democratic path, it is useful to view South Africa's progress against the backdrop of America's historical struggles with race and democracy before judging the current state of democracy in South Africa. To be specific, it is worth remembering how far the United States had come twenty years after the end of the Civil War in 1865. In the first ten years after the Civil War ended, there was real progress with the passing of the Thirteenth, Fourteenth, and Fifteenth Amendments, which, on the books, gave slaves their freedom and citizenship, and gave all citizensdue process, equal protection, and voting rights.[14]

Additionally, within that same decade, Congress passed a number of Reconstruction Acts including the Ku Klux Klan Act of 1871[15] and the

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approves-Info-Bill-20131211 (finding that the Bill was approved for the third time by the National Assembly in November of 2013); SAPA, *Info Bill must go to CC - Sanef*, MAIL & GUARDIAN, (Feb. 5, 2015, 2:05 PM), http://mg.co.za/article/2014-05-03-info-bill-must-go-to-constitutional-court-sanef. While there have been calls to have the Bill sent to the Constitutional Court, it is unclear what, if anything, is happening with the Bill at present. The South African Protection of State Information Bill was drafted to replace the Protection of State Information Act, 1982 which regulates the classification, protection, and dissemination of state information. Critics of the Bill argue it does not give enough weight to transparency and freedom of expression; it undermines the right to access information; and its criminal provisions do not adequately protect whistleblowers and journalists. See, e.g. http://www.r2k.org.za/2014/09/11/whats-still-wrong-with-the-secrecy-bill/

[13] *See* note 63 below.

[14] Newman, Nathan, & J. J., Gass, A NEW BIRTH OF FREEDOM: THE FORGOTTEN HISTORY OF THE 13TH, 14TH, AND 15TH AMENDMENTS 9-12 (Brennan Center for Justice at NYU School of Law, Vol. 5. 2004).

[15] Ku Klux Klan Act of 1871, 42 U.S.C § 1985 (1871).

Civil Rights Act of 1875.[16] However, the Supreme Court struck down the Civil Rights Act in 1883[17] and it would be almost a hundred years before similar legislation would be passed again in the Civil Rights Act of 1964.[18] While there was a steady increase of African American congressional representatives, peaking at six in 1875,[19] that number dwindled to two by 1885.[20] It was not until 1965, a full century after the Civil War had ended, that the number rose above five, and it took until 1969 for it to rise above ten.[21]

By comparison, South Africa has done well in staying the democratic course during its first twenty years. In addition to early implementation of important public law legislation in the first decade, such as the Promotion of Equality and Unfair Discrimination Act of 2001,[22] numerous democracy-reinforcing gains in the private law have made it easier for South Africans to realize their private law rights to access the courts and to be made whole when they have been injured or harmed. The second decade saw Parliament passing a number of laws that give effect to the Constitution's democratic principles, and case law had taken steps to

[16] Civil Rights Acts of 1875, 42 U.S.C. § 1985.
[17] Civil Rights Cases, 109 U.S. 3 (1883).

[18] Civil Rights Act of 1964, 42 U.S.C. § 2000 (1964). *Working the Common Law Pure*, at 462-463.
[19] Colleen J. Shogan & Jennifer E. Manning, CONG. RESEARCH SERV., 7-5700, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870-2012 1-5 (2012).
[20] *Id.*
[21] *Id.* (This was due in large part to the Voting Rights Act of 1965).
[22] *See e.g.*., Employment Equity Act, Act No. 55 of 1998 (S. Afr.); Promotion of Equality and Unfair Discrimination Act of 2001, Act No. 4 of 2000 (S. Afr.).

progressively develop the common law in light of the spirit, purport, and objects of the Bill of Rights. The Consumer Protection Act 68 of 2008 (the "Consumer Act"), which provides comprehensive consumer protection related to product safety and manufacturers' liability, contract terms, advertising, business practices, and dispute resolution, has been instrumental in the realization of private law rights in South Africa. Additionally, the Seventeenth Amendment, signed into law in 2013, established that the Constitutional Court was the highest court in all matters.[23] In 2014, the Constitutional Court unanimously brought constitutional values to bear on the law of contracts, overturning the Supreme Court of Appeal's ("SCA") failure to consider weighty normative and constitutional concerns in determining the defendant's legal duties.[24]

Section II of this article briefly identifies the role of equality and opportunity in democracy in order to illustrate the importance of private law for South Africa's democratic future.[25] Section III reviews some of South Africa's main democratic achievements over the last twenty years, focusing specifically on economic development and voter turnout.[26] Section IV provides a brief overview of private law under apartheid before reviewing a

[23] Consumer Protection Act 68 of 2008 (S. Afr.). S.Afr. Seventeenth Amendment Act of 2012.

[24] *Loureiro and Others v. Imvula Quality Protection (Pty) Ltd* , 2014 (3) SA 394 (CC) (20 March 2014) (finding a private security firm both delictually and contractually liable for its failure to protect the plaintiffs). *Id.*

[25] *Supra* Part II.

[26] *Supra* Part III.

number of democracy-reinforcing mechanisms such as contingency fees, class action suits, and products liability. The section then focuses on the law of contracts, the area of private law most resistant to democratic changes over the past twenty years,[27] by reviewing the common law of contracts and analyzing a modern progressive case that involves contractual and delictual liability. Section V addresses in more detail the most significant legislative change in the private law since the end of apartheid, namely, the Consumer Act, which came into effect in 2011. This section also demonstrates how the Act has important democracy reinforcing implications for both contract law and delict, some of which are analyzed in light of two contrasting helicopter crash incidents involving spectacular weddings, one from before the introduction of the Act and the other from after. [28] Section VI concludes the article.

II. TRANSITIONING TO A THRIVING DEMOCRACY: THE ROLE OF EQUALITY

Most of the literature that addresses the transition from a totalitarian or authoritarian regime to a "democratic" regime tends to focus on political transformation in the public law and not on economic transformation that can be effectuated by the private law.[29] Even once democracy has been

[27] *Supra* Part IV.

[28] *Supra* Part V.

[29] *See, e.g.* SAMUEL P HUNTINGTON, THE THIRD WAVE: DEMOCRACTIZATION IN THE LATE TWENTIETH CENTURY (1991); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (NEIL J. KRITZ ED., 1995) TRANSTIONAL

established and the focus turns to consolidating democracy,[30] the bulk of the literature predominately addresses public law mechanisms such as the establishment of the rule of law, holding regular and free elections,[31] and constitutional change.[32] South Africa has done very well at transforming its political system; it had amazing turnouts for its first democratic election in 1994[33] and made a smooth transition from its Interim Constitution in 1993 to its final Constitution in 1996.[34] If these changes were sufficient, South Africa should be well on its way to a thriving, consolidated democracy by now, but is it?[35]

I have argued elsewhere that the best revenge for apartheid would be

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JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997); RUTI TEITEL, TRANSITIONAL JUSTICE 5 (2000) [hereinafter TEITEL, JUSTICE]; TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY (2010).

[30] Consolidating democracy consists of stabilizing, deepening and preventing the erosion or breakdown of democracy.

[31] Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2013 (1997) [hereinafter Teitel, *Jurisprudence*]; *See also* TEITEL, JUSTICE note 29 at 5. *See also* Roederer, *Ten Years*, note 1 at 448.

[32] Other public law mechanisms include criminal punishment, the use of truth and reconciliation commissions, and bureaucracy reform. *See, e.g.*., International Center for Transitional Justice, *Our Mission*, ICTJ (Feb. 6, 2015) http://www.ictj.org/aboutus.asp. See also *Supra* Note 2. Teitel reviews the rule of law, criminal justice, and constitutional justice, which she considers to be the three areas that best reflect the law's transformative potential. Teitel never delves into the private law domain.

[33] http://www.idea.int/vt/countryview.cfm?CountryCode=US (finding that voter turnout from those of voting age has significantly diminished since 1994; it was higher in 2014 (at 60.03%) than it was in 2004 (56.77%).

[34] *See, e.g.*, Nur Ibrahim & Tianhao, *Building a Nation* (January 25, 2012) at: http://harvardpolitics.com/covers/constitution/building-a-nation/.

[35] *Cf.* Fracois Venter, *Liberal Democracy: The Unintended Consequence of South African Constitution-Writing Propelled by the Winds of Globalisation*, 26 SAJHR 45, 59-65 (2010) (arguing that South African constitutionalism is under pressure).

for those who were disadvantaged by the regime to be living well today.[36] This is consistent with the aspirations set out in the Constitution's preamble, namely, to "[i]mprove the quality of life of all citizens and free the potential of each person."[37] While economic prosperity and human development are not the same as democracy, they are crucial for democracy to flourish. We expect that when democracy flourishes, so will the economy, creating and distributing more wealth.[38] Even though democracy is not expected to deliver total equality, gross inequality is inconsistent with a thriving democracy. Gross inequality is a problem for democracy when it undermines the ability of people to enjoy political equality and to have fair equality of opportunity.

Political equality is the idea that "[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."[39] According to political philosopher John Rawls, "[t]he fair value of the political liberties ensures that citizens

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[36] Christopher J. Roederer, '*Living Well is the Best Revenge'—If One Can*, 15 SAJHR 75 (1999) (discussing the difficult task of transforming social and economic institutions).

[37] S. Afr. Const. 1996, Pmbl.

[38] Contrary to the complete laissez faire view, recent work by researchers at the International Monetary Fund indicates that "average redistribution, and the associated reduction in inequality, is . . . associated with higher and more durable growth. Jonathan Ostry, Andrew Berg, & Charalambos Tsangarides, REDISTRIBUTION, INEQUALITY, AND GROWTH, IMF STAFF DISCUSSION NOTE 26 (International Monetary Fund 2014) (Analyzing a recent cross country data set across time that includes both before and after tax and transfer inequality).

[39] John Rawls, A THEORY OF JUSTICE 302 (Belknap Press 1971); John Rawls, JUSTICE AS FAIRNESS: A RESTATEMENT 5 (Belknap Press 2001).) The argument in the next three paragraphs draws on my argument in Roederer, *Counter-Revolution* note 1 at 658-660.

similarly gifted and motivated have roughly an equal chance of influencing the government's policy and of attaining positions of authority irrespective of their economic and social class."[40] Equal opportunity is not only important politically, but also socially and economically; it is a fundamental principle undergirding free market democracies.[41] As Rawl's states, "[s]ocial and economic inequalities are to be arranged so that they are . . . attached to offices and positions open to all under conditions of fair equality of opportunity.""[42] This is appealing because it is both fair and efficient. If it works, then one gets out of the economic system in proportion to what one puts in, and since people have an incentive to do their best, there should be more for everyone.

Capitalist markets alone do not provide fair equality of opportunity. People need a number of resources both before they enter the political or economic "market," and after they have begun to participate in those markets. The market is not like a game or sport that merely doles out wins and losses, like taking first place in a race. Rather, the market doles out the very things needed for the next round of competition. Much like a battle in war, winning becomes harder with more casualties and losses, and easier with the infliction of more casualties and the capture of more territory and strategic targets. There is not much sport in starting the race or war where

[40] Rawls, JUSTICE AS FAIRNESS: A RESTATEMENT at 46.
[41] *Id.* at 302-03. (John Rawls call this "fair equality of opportunity").
[42] Rawls, A Theory of Justice 266 (1999 rev'd ed.).

one or one's parents left off,. In order to have fair opportunity, one needs all the basics—health, safety, and education—before one even enters the market.

If we want everyone contributing to the best of their abilities, then inequalities produced by the market need to be harnessed and re-directed to make it possible, and worthwhile, for people to put forth their best efforts. While not all advantages and disadvantages can be erased, the fact that one's parents ended the race at the end of the pack cannot doom their children to the end of the pack. People need basic levels of food, shelter, safety, health and education in order to give them a fair chance to contribute and compete in the market.[43] The same considerations motivate the need for private law mechanisms to address the harms people suffer, and to ensure fairness to consumers and workers in contracts and employment conditions, so that disadvantages do not become crippling and advantages cannot be leveraged beyond what is fair and reasonable.

As noted above, if the transformation of the public law were sufficient to create a thriving democracy, one would expect economic development that lived up to the preamble's aspirations. As we shall see,

[43] There is a considerable amount of literature on the need for redistribution and delivering on socio-economic rights in South Africa. *See*, *e.g.*, Marius Pieterse, *Procedural Relief, Constitutional Citizenship and Socio-economic Rights as Legitimate Expectations* 28 SAJHR 359-79. (2012); Sandra Liebenberg, SOCIO-ECONOMIC RIGHTS. ADJUDICATION UNDER A TRANSFORMATIVE CONSTITUTION (Juta, 2010)); Danie Brand & Christof Heyns, SOCIO-ECOMOMIC RIGHTS IN SOUTH AFRICA (Pretoria University Law Press, 2005).

there is still much work to be done to "improve the quality of life" and to "free the potential of each person" in South Africa. The next section evaluates the impact of South Africa's democratic achievements by reviewing the state of South Africa's economic development, its levels of inequality, and its overall human development, and considers the role that private law can play in further consolidating South Africa's democracy.

III. DEMOCRATIC ACHIEVEMENTS AND CHALLENGES OVER THE LAST TWENTY YEARS

A. Economic Development: Are South Africans Living Well?

Reports on the progress of economic development in South Africa are mixed. A few reports praise South Africa's economic developments and achievements over the last twenty years, particularly the United Nations ("U.N.") report,[44] the Goldman Sachs review,[45] and the South African government's report, *The 20 Year Review*.[46] The U.N. reports that "[a]lthough most developing countries have done well, a large number of countries have done particularly well,… notably Brazil, China, India, Indonesia, South Africa and Turkey."[47] It also notes that these countries,

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[44] U.N.D.P. Human Development Report 2013 The Rise of the South: Human Progress in a Diverse World.

[45] *Two Decades of Freedom: What South Africa is Doing with It, and What Now Needs to be Done (2013) available at* http://www.goldmansachs.com/our-thinking/outlook/colin-coleman-south-africa/20-yrs-of-freedom.pdf.

[46] Department: Planning, Monitoring, and Evaluation, *South Africa Twenty Year Review: 1994-2014*., THE PRESIDENCY REPUBLIC OF SOUTH AFRICA, http://www.thepresidency-dpme.gov.za/news/Pages/20-Year-Review.aspx.

[47] Human Dev. Report 2013, *The Rise of the South: Human Progress in a Diverse World*, UNITED NATIONS DEVELOPMENT PROGRAMME, 2013, at 1.

including South Africa, have excelled in creating substantial export and import relationships with more than 100 economies.[48]

Other reports, however, are not as positive. Sanlam, a South African financial services group, warns that while a 33% increase in Gross Domestic Product (GDP) per capita in South Africa since 1994 may sound impressive, it is not all that impressive when compared with the 115% GDP increase produced by other developing countries and emerging markets.[49] Sanlam notes, "Brazil, India, Indonesia and Turkey, for example, all fared much better than South Africa."[50] Even more troubling is the fact that South Africa's 33% GDP increase did not benefit all South Africans equally.

South Africa is one of the most unequal countries in the world, with an Income Gini coefficient of 63.1[51] and "an unemployment rate of approximately 40%."[52] The only countries that are more unequal than South Africa are Namibia, with a Gini coefficient of 63.9, Comoros at 64.3, and

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[48] *Id.* at 43.

[49] Jac Laubscher, *Economic Growth in South Africa : a 20-Year Review*, SANLAM, Dec. 4, 2014, http://www.sanlam.co.za/mediacentre/media-category/economic-commentary/Economic%20Growth%20in%20South%20Africa%20-%20a%2020%20Year%20Review.

[50] *Id.*

[51] *See http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index (last visited 8/11/2015)*

[52] *Id.* The Income GINI coefficient "measures the extent to which the distribution of income or consumption expenditure among individuals or households within an economy deviates from a perfectly equal distribution. . . a Gini index of 0 represents perfect equality, while an index of 100 implies perfect inequality.." http://data.worldbank.org/indicator/SI.POV.GINI.

Seychelles at 65.8.[53] Additionally, when considering the respective Human Development Indices (HDI),[54] South Africa manages to make the United States, the most unequal economically-developed country in the world with a Gini coefficient of 40.8, look egalitarian.[55]

Of 187 countries, the United States' HDI ranking in 2013 placed it fifth with a "very high human development title" (after Norway, Australia, Switzerland and the Netherlands), while South Africa ranked 118th.[56] From 1990 to 2012, South Africa's HDI barely improved, moving from a mere .621 to .629.[57] During the same interval, the United States' HDI increased from .878 to .937.[58] Brazil managed to increase their HDI from .590 all the

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[53] *Id.*South Africa is more unequal than countries like Mozambique, Angola, Haiti, and Honduras. Id.

[54] The UN Human Development Report defines Human Development Index (HDI) as "a composite index measuring average achievement in three basic dimensions of human development—a long and healthy life, knowledge and a decent standard of living." Human Dev. Report 2013, at 151. It should be noted that "the HDI does not reflect on inequalities, poverty, human security, empowerment, etc." *see* http://hdr.undp.org/en/content/human-development-index-hdi (providing an explanation of the methods for assessing the HDI's three dimensions of human development).

[55] *Id.* http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index (last visited 8/11/2015)

One must go down as far as 31 in the HDI rankings before one finds another country that is as economically unequal as the United States, and that country is Qatar with a comparable Gini coefficient of 41.1.

[56]*Id*. http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index (last visited 8/11/2015). The U.S. inequality adjusted HDI is 0.755 which puts it below Hungary which was ranked 43 in the world with an HDI of 0.818 and an inequality adjusted HDI of 0.757. Id.

[57] *See* Human Dev. Report 2013, *The Rise of the South: Human Progress in a Diverse World*, UNITED NATIONS DEVELOPMENT PROGRAMME, 2013. Tble 2 at 148-51. Note that it increased to 0.658 in 2013. http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index (last visited 8/11/2015)

[58] *Id.* Note that the U.S. dropped to 0.914 in 2013. http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index (last visited 8/11/2015)

way to .730,[59] and Turkey's HDI increased from .569 to .722.[60] Finally, South Africa's happiness ranking is at 96 out of 156 countries.[61]

B. Impact on Democratic Participation: Voter Turnout at Elections

While democracy cannot be measured by voter turnout alone, participation in elections is one of the most basic and fundamental aspects of democratic participation. Over the last twenty years, South Africa has seen a significant decrease in the percentage of the voting age population (VAP) turnout.[62] In its first democratic elections in 1994, VAP turnout was at 85.53%. In 2014, VAP turnout had dropped to 60.03%.[63]

While it is unrealistic to expect South Africans to be able to sustain the same enthusiasm for elections that existed at the end of apartheid, the fact that nearly 40% of the VAP is not participating in elections is

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[59] *Id.* at 149. Note that it increased further to 0.744 in 2013. . http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index (last visited 8/11/2015)

[60] *Id.* Note that it increased further to 0.759 by 2013. It should be noted that Brazil and Turkey managed to improve their HDI with less inequality than South Africa. Brazil's Gini coefficient was 54.7 while Turkey's was 39.0. See Id. Table 3 at 152. By 2013 they were 54.7 and 40 respectively. http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index (last visited 8/11/2015)

[61] John Helliwell, Richard Layard and Jeffrey Sachs, *World Happiness Report 2013*, SUSTAINABLE DEVELOPMENT SOLUTIONS NETWORK, http://unsdsn.org/wp-content/uploads/2014/02/WorldHappinessReport2013_online.pdf.

[62] *See*, *Supra* Note 29;. *See also*, Collette Schulzherzenberg, *Voter participation in the South African elections of 2014*, INSTITUTE FOR SECURITY STUDIES, 61 Pol'y Brief 2 (August 2014).), http://www.issafrica.org/uploads/PolBrief61_Aug14.pdf.

[63] *Id. See* IDEA, *Voter turnout data for South Africa*, Institute for Democratic and Electoral Assistance, http://www.idea.int/vt/countryview.cfm?CountryCode=ZA. However, VAP turnout in 2014 was higher than the 56.77% VAP turnout in 2004. In the United States, voter turnout was approximately 57.5 percent in the 2012 election. http://bipartisanpolicy.org/library/2012-voter-turnout/

troubling.[64] Perhaps more troubling is that low voter turnout is associated with the inability to close the gap in income inequality.[65] If South Africa is following in the footsteps of the United States,[66] there is persistent low voter turnout among certain minorities and those with less money and less education. [67]

Despite the calls for justice and the numerous small improvements in many areas, large-scale redistribution has not and is not likely to take place. Standing in the way is the public law ideal of a more liberal, or less authoritarian, regime and the fear of slipping into the status of something like Zimbabwe: once a shining example of democratic and economic

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[64] *Id.* at 7.

[65] *See*, Lane Kenworthy & Jonas Pontusson, *Rising Inequality and the Politics of Redistribution in Affluent Countries*, 3 PERSP. ON POL. 449, 459, 462 (2005), https://lanekenworthy.files.wordpress.com/2014/07/2005pop.pdf ("lower turnout offers a potentially compelling explanation for why the American welfare state has been so much less responsive to rising market inequality"). The differences in responsiveness to inequalities roughly tracks voter turnout rates. In other words, the higher the voter turnout, the more redistribution from the rich to the poor, and the lower the voter turnout, the less redistribution from the rich to the poor.

[66] In quality has an even larger impact on other forms of democratic participation in the United States. *See*, *e.g.*., Roederer, *Counter-Revolution*, 669-74 (citing Kay L. Schlozman et al., TASK FORCE ON INEQUALITY & AM. DEMOCRACY, INEQUALITIES OF POLITICAL VOICE (2004), http://www.apsanet.org/imgtest/voicememo.pdf.). As I noted in a previous work,

> [l]ooking across the spectrum of participation, the statistics show that those making over $75,000 per year are between two and six times more likely to participate in politics through campaign work, direct contact, protests, affiliation with political organizations, informal community activities, and campaign contributions than those making under $75,000 per year.

Larry M. Bartels, *Economic Inequality and Political Representation* (2005) (unpublished manuscript,) (on file with Princeton University),).

[67] Roederer, *Counter-Revolution*, at 670. Alexander Keyssar, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 321 (Basic Book, rev. ed. 2001). I have yet to find demographic data on who is registering and turning out to vote in South Africa. It does not appear that South Africa's Independent Electoral Commission distributes that data and it is not clear if it collects the data.

prosperity that has fallen into economic and democratic ruin.[68]

South Africa's ideals, as captured in its Constitution, are egalitarian,[69] but its reality is played out in an arena with deeply-entrenched libertarian ideals that further permeate the global scene in which South Africa operates.[70] As a result, there is no realistic hope that South Africa will become a social democratic state, much less a socialist state. South Africa, however, is not likely to completely abandon its progressive constitutional aspirations. It is doubtful that South Africa will adopt a purely libertarian approach to its public law, and the country has already been retreating from a libertarian approach to its private law. The most that can be realistically expected is for South Africa to continue making incremental steps forward in consolidating democracy. This is where the private law has an important role to play.

C. The Role of Private Law under Apartheid and in Advancing Democratic Principles

While it is obvious how sweeping public law changes can bring about radical democratic transformation, it is less obvious what effect private law can have on democracy. It is also less obvious how the private

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[68] *See, e.g.* http://www.kas.de/upload/dokumente/2010/05/Defying_1.pdf and https://www.newsday.co.zw/2015/06/26/zimbos-turn-to-god-as-economic-hardships-worsen/.

[69] *See, e.g.*, Carl Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146(1998); Christopher J. Roederer, *Race Cards, Academic Debate and Progressive Scholarship: What is a Liberal Anyway?*, 118 S. AFR. L.J. 708 (2001) (where I argue not only is the social democratic interpretation a viable competing interpretation, it is the 'best' interpretation).

[70] *See*, Alfred Crockell, *The Hegemony of Contract*, 115 S. AFR. L.J. 286 (1998).

law perpetuated the inequities and injustices of apartheid and how changes can help reinforce democracy. Nonetheless, the injustices of the past were not confined to the public sphere but penetrated into most every aspect of the private sphere. Further, the legacies of those injustices continue to exist, in part, because of the way the private law is organized.[71]

If the problem with apartheid was its authoritarian nature, then it is reasonable to propose liberalization as the solution. Liberalization is about less government ownership of businesses, less government regulation of businesses, less government regulation of people's private lives, and more freedom for businesses and individuals to contract into the relations and obligations of their choosing. [72] If liberalization were the goal, however, then it would appear that South Africa's private law was not in need of significant transformation in 1994. For instance, under apartheid, contract law and delict were already libertarian.[73]

South Africa's constitutional revolution embodies values that significantly outstretch liberal democratic values. The Constitution's values as stated in its Founding provisions include:

> a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

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[71]Roederer, *Ten Years*, note 1at 450

[72] *Id.*

[73] *Id.* I will defend this view further below. Infra notes 80–91. See also Roederer, *Ten Years* note 1 at 464-468.

b) Non-racialism and non-sexism. "[74]

As I have noted elsewhere, "the Constitution mandates that every development of the private common law 'promote the spirit, purport, and objects of the Bill of Rights.'" [75] In addition to provisions that grant rights to health, education, and welfare,[76] the Constitution also provides that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right."[77] This open-ended provision allows the courts to determine that, in addition to state actors, the Constitution's provisions bind individuals and corporations. These extensive rights cover not only traditional political and civil rights, but also socio-economic and cultural rights that range from labor rights to language rights.[78] Since 2001, the courts of South Africa have had an obligation to harmonize the common law in accordance with constitutional values.[79]

The private common law of South Africa did not need to be directly

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[74]S. AFR. CONST.., Act of 1996§ 1.

[75] Roederer, *Ten Years*, note 1 at 452. S. AFR. CONST., 1996; Act 108 of 1996 § 39(2) (S. Afr.) ("When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."); Act 108 of 1996 (S. Afr.).

[76] See S. Afr. Const., 1996; Act 108 of 1996 § §26, 27 and 29.

[77] Roederer, *Ten Years*, note 1 at 452. S. AFR. CONST., 1998; Act 108 of 1996 §8(2) (S. Afr.).

[78] Other rights include substantive equality rights, environmental rights, and the right to food, water, shelter, medical attention, education, and culture.

[79] *The CC in Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) at 954A (S. Afr.) (holding that "[Where] the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation.")

poisoned by apartheid in order to exacerbate apartheid's injustices. On its face, the libertarian private law was neutral.[80] On the surface, it followed the values of liberalism, democracy, and the rule of law. Freedom of contract was treated as more important than social responsibility. For those who were relatively well off and equally situated this system made sense. Because they were already free and equal, the system worked for them. However, for those less equal, those born into disadvantage, this system compounded their disadvantage. While the private law system presumed their freedom and equality, the public law political system guaranteed that they would be neither free, nor equal. The system also compounded the advantages of those who were privileged as it allowed them to freely take advantage of employees and consumers through the law of contract, employment and labor law.[81]

Employment and labor law under apartheid provides a stark example.[82] Black workers were excluded from the definition of "employee" under section 1 of the Labour Relations Act 28 of 1956.[83] This meant that

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[80] *See* Roederer, *Ten Years*, note 1 at 464 ("Individuals were presumed to be free and equal, and able to determine their own legal relationships under the state-enforced law of contracts.")

[81] Roederer, *Ten Years* note 1 at 465-466. Private law under apartheid was similar to classic libertarian contract law and the law of torts in the United States before the 1960s. This was the age of buyer beware, assumption of risk, and contributory fault in the United States.

[82] *See* Roederer, *Ten Years*, note 1 at 466.; David Woolfrey, *The Application of International Labour Norms to South African Law*, 12 SAYIL 135, 140 (1986-1987);*See also*, Martin Brassey, *Employment and Labour Law*, CAPE TOWN JUTA 36-42 (1998).

[83] Formerly known as the Conciliation Act 28 of 1956.

the informal unions of black workers could not be legally registered and any informal collective agreement they may have arranged with an employer was not enforceable under the act.[84] As noted by Elizabeth Landis, it was unlawful for Black Africans to strike, and the punishment under the Native Labour (Settlement of Disputes) Act was 500 pounds or three years' imprisonment or both.[85] As she further observed, it was a criminal offense for Africans to quit or fail to carry out an employment contract, or even to "to refuse to obey any lawful command, or to use any abusive or insulting language toward anyone in authority over him."[86] As I observed in a previous work, "[t]he systematic racial discrimination in the workplace was further entrenched by the absence of legislation providing for fair discipline and dismissal of workers . . . [and] the influx control [laws] and residential segregation laws placed black workers at an even further disadvantage in the labor market."[87]

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[84] Mpfariseni Budeli, *Worker's Right to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective* (15-2) FUNDAMINA 59, 67-68 (2009).

[85] *See* Elizabeth S. Landis, *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*, 71 Yale L. J. 437, 440 (1962). Citing the Native Labour (Settlement of Disputes) Act No. 48 of 1953, § 18 (2), superseded by Act No. 59 of 1955, § 1. 1952.

[86] Ibid at 4437-438. Citing The Native Labour Regulation Act No. 15 of 1911, as amended by Native Laws Amendment Act, Act No. 54 of 1952 (punishment of a fine of two pounds or imprisonment for two months with or without hard labor).

[87] Roederer, *Ten Years*, note 1 at 466. On the dismissal of workers, see, e.g. Marylyn Christianson, *Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years*, 25 INDUS. L.J. 879, 879-80 (2004). The Group Areas Act 41 of 1950 required that different racial groups live in separate residential and business areas in urban areas. Nonwhites were required to live on the outskirts of cities and needed to carry pass books to justify their presence in white areas, including their place of employment.

All the while, contract law purported to treat everyone as equals—free to contract in, and contract away, what few rights they had. During this period the the courts did not utilize "such concepts as good faith and unconscionability in contracts and they [were] . . . conservative when it came to expanding tort or delictual liability."[88] They did not create "mechanisms that ma[d]e it more affordable to sue in delict or to make it easier to prove a claim in delict."[89] This benefited those with "access to information, power, and the ability to cover any losses they may suffer."[90] As I noted in my previous work:

> [W]hen one lives in a society that includes separate and radically unequal opportunities based on apartheid legislation covering education, what jobs one can and cannot take, where one can live, what services one gets, etc., the freedom that is exalted in the private sphere is a ruse. It simply acts as a secondary source of further inequality.[91]

During South Africa's apartheid years, the United States adopted a number of reforms in contract and tort law that mitigated some of the inequities that existed in the civil justice system of the United States. Contract law in the United States moved from the classical contract model

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[88] Roederer, *Ten Years*, note 1 at 467.
[89] Roederer, *Ten Years*, note 1 at 467.
[90] Roederer, *Ten Years*, note 1 at 467.
[91] Roederer, *Ten Years*, note 1 at 467-468. *See* Elizabeth S. Landis, *South African Apartheid Legislation I: Fundamental Structure*,71YALE L.J. 1 (1961) and *South African Apartheid Legislation II: Extension, Enforcement and Perpetuation*, 71 YALE L. J. 437 (1962) for detailed elaboration of apartheid laws classifying South Africans along racial lines, restricting their rights to own land, segregating cities by race, prohibiting intermarriage and sexual relations, segregating education, amenities, and services and jobs as well as requiring black South Africans to carry pass books.

to a modern model, and consumer protection laws came in to protect those who were not as free and equal as the businesses they were contracting with.[92] Most relevant here is that during this era, the United States allowed for inequity-mitigating mechanisms such as contingency fees, class action lawsuits, and punitive damages and further developed the doctrines of strict liability, products liability, and *res ipsa loquitur*. South Africa did not develop any of these mechanisms during the apartheid era but has since made slow but considerable progress.

IV. DEMOCRACY REINFORCING CHANGES TO THE PRIVATE LAW[93]

A. Contingency Fees

Contingency fees provide a mechanism for plaintiffs without the adequate resources to pay for legal fees up front to obtain access to justice. Without them, many low income plaintiffs are denied access to justice.[94] However, under apartheid, and like in England, there was a common law prohibition on contingency fees, and the losing party not only had to pay his or her own legal fees, but those of the opposing party.[95] Three years into

[92] In 1962, President Kennedy ushered in the modern era in consumer protection law in the United States with his call for legislation supporting four basic consumer rights: the right to safety, to be informed, to choose, and to be heard. See http://www.presidency.ucsb.edu/ws/?pid=9108. A slew of reform based laws soon followed, such as: the National Traffic and Motor Vehicle Safety Act of 1966; the 1968 Truth in Lending Act; the 1970 Fair Credit Reporting Act, the 1975 Fair Credit Billing Act, and the 1978 Fair Debt Collection Practices Act.

[93] This section draws on *Roederer, Ten Years*, note 1 at 484-496.

[94] Roederer, *Ten Years*, note 1 at 493.

[95] Roederer, *Ten Years*, note 1 at 494. Justice Dunstan Mlambo, *The Reform of the Costs*

South Africa's democracy, however, Parliament passed the Contingency Fees Act 66 of 1997.[96] The Act now allows for contingency fees in almost every area of the law except family law and criminal law.[97] This has significantly helped indigent South Africans access the justice system.[98]

B. Class Actions

Under apartheid, there were no mechanisms for class action lawsuits. As a result, numerous, relatively small harms inflicted upon significant numbers of people went un-redressed. As I have noted elsewhere, "[i]n 1998, the South African Law Commission [recommended] legislation allowing for class actions and public interest actions in addition to those that are allowed under the Constitution for Bill of Rights matters."[99] In 2000, the Promotion of Equality and Prevention of Unfair Discrimination Act authorized class actions for claims related to unfair

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Regime in South Africa: *Part 2*. ADVOCATE 22 (August, 2012). Available at: See, http://www.sabar.co.za/law-journals/2012/august/2012-august-vol025-no2-pp22-33.pdf. Note, that the general rule that the losing party must pay the opposing side's fees still exists, although it has been limited in many cases at the discretion of the court, and as Justice Mlambo states, it """"has reached its sell by date." *Id.* at 30. See also Jonathan Klaaren, *The Cost of Justice: Briefing Paper for Public Positions Theme Event*, 24 March 2014. WISER, HISTORY WORKSHOP & WITS POLITICAL STUDIES DEPARTMENT. Available at http://wiser.wits.ac.za/system/files/documents/Klaaren%20-%20Cost%20of%20Justice%20-%20%202014.pdf (noting the continuing problem of the high cost of accessing justice in South Africa).

[96] Contingency Fees Act 66 of 1997. (S. Afr.). Roederer, *Ten Years*, note 1at 494. *Id.* at § 1(v).

[97] Roederer, *Ten Years*, note 1at 494. *Id.* at § 1(v).

[98] *Id.* at § 3(b)(ii) The Act does not remove the loser pay requirement.. While the contingency fee will make it more affordable to bring a claim with solid merit, if the case is uncertain then a lawyer who takes the case risks remaining uncompensated.

[99] Roederer, *Ten Years*, note 1 at 485. S. AFR. LAW COMM'N, THE RECOGNITION OF CLASS ACTIONS AND PUBLIC INTEREST ACTIONS IN SOUTH AFRICA ch. 1 § 2.1, 32 (1998)), *available at* http://www.justice.gov.za/salrc/reports/r_prj88_classact_1998aug.pdf.

discrimination, hate speech, and harassment.[100] The act, however, did not provide similar authorization for the broader scope of rights encompassed in the Bill of Rights. Although the Law Commission's recommendations for normal class actions never materialized, Parliament opened the door in the Companies Act, No. 71 of 2008 in Section 157(1), which provides:

> When, in terms of this Act, an application can be made to, or matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person . . . (b) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interests of its members; or (c) acting in the public interest, with leave of the court.[101]

While Parliament had not delineated the parameters of class actions, the SCA took up the mantle in 2013.[102] In *Trustees for the Time Being of the Children's Resource Centre Trust and others v Pioneer Food*, the SCA held that the recognition of class actions should not be limited to constitutional claims but should be recognized in any other case where that would be the most appropriate means of litigating the class members' claims.[103] As the Court noted, "it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but

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[100] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 20.

[101] Companies Act, No. 71 of 2008, § 157(1)

[102] *Trustees for the Time Being of the Children's Resource Centre Trust* and others *v Pioneer Food* (Pty) Ltd 2013 (2) SA 213 (SCA) (S. Afr.) (class action brought by NGOs that work with children, the poor and the disadvantaged against bread producers for price fixing practices).

[103] *Id*.

to deny it in equally appropriate circumstances."[104]

C. Manufacturers' Liability (From Res Ipsa Loquitur to Strict Liability)

During the first decade of South African democracy, neither the courts nor the legislature were willing to impose strict liability on manufacturers for product failures. In *Wagener v Pharmacare Ltd, Cuttings v Pharmacare Ltd*, the SCA declined to impose strict liability on a pharmaceutical manufacturer for an anesthetic injection that left the plaintiff with paralysis of the right arm.[105]

While the Court recognized that the right to bodily integrity[106] was "both constitutionally entrenched and protected by the common law," the Court declined to impose strict liability,[107] indicating that it would be more appropriate for the legislature to take that step, and in the meantime, the Court could simply take a more liberal approach to the doctrine of *res ipsa loquitur,* by invoking the doctrine more often and shifting the onus onto the defendant to rebut the presumption of negligence.[108] The legislature finally took action with the Consumer Act of 2008, which came into effect in

[104] *Id.* at 217-21. The court then laid down the requirements for certifying such an action.

[105] *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 7 BCLR 710 (SCA) (S. Afr.); 2003 2 all SA 167 (SCA); 2003 4 SA 285 (SCA).The injury-causing surgery, in which the manufacturer's anesthetic injection was used, also left the plaintiff with necrosis of the tissues and nerves underlying the site of the operation. See also Roederer, *Ten Years*, note 1 at 490 for a treatment of the case.

[106] *Id.* at 710-11, CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996, Ch. 2, sec. 12(2).

[107] *Id.* at 710-11.

[108] *Id.* at paras. 14 & 19-21.

2011.[109] The law introduced strict product liability on the manufacturer for the entire supply chain in the event of unsafe goods, product failure, or inadequate warnings.[110]

D. The Common Law of Contracts

As noted, the law of contracts was very slow to change after the end of apartheid. As late as 2002, the SCA still refused to develop contract law to bring it in line with constitutional values.[111] In both *Brisley v. Drotsky*[112] and *Afrox Health Care Bpk v. Strydom*,[113] the SCA refused to develop the law to include a good faith defense to contract law. The Court in *Brisley* determined that there was "no general equitable discretion enabling a court to refuse to enforce a non-variation clause, or indeed any other contractual provision, merely on the grounds of it being unreasonable, unconscionable or against good faith."[114] The Court in *Afrox* similarly rejected the argument

[109] Consumer Protection Act 68 of 2008.

[110] Consumer Protection Act 68 of 2008 section 61. As the Act states in part:

> (1) Except to the extent contemplated in subsection (4), the producer or importer, distributor or retailer of any goods is liable for any harm, as described in subsection (5), caused wholly or partly as a consequence of—(a) supplying any unsafe goods; (b) a product failure, defect or hazard in any goods; or (c) inadequate instructions or warnings provided to the consumer pertaining to any hazard arising from or associated with the use of any goods irrespective of whether the harm resulted from any negligence on the part of the producer, importer, distributor or retailer, as the case may be.

[111] *See, e.g.*., Gerhard Lubbe, *Taking Fundamental Rights Seriously: The Bill of Rights and Its Implications for the Development of Contract Law*, 121 SALJ 395 (2004)).

[112] *Brisley v. Drotsky* 2002 (4) SA 1 (SCA) (S. Afr.).

[113] *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA) (S. Afr.)

[114] *Id.* at 397 (citing *Brisley*, at 121).

to apply a good faith defense to an exemption of liability provision.[115] In *Afrox*, however, the Court left the door open for claims involving "extreme unfairness" which would render a contract unenforceable under public policy.[116]

At last, in 2014, one finds the Constitutional Court injecting constitutional values into the law of contracts. In *Loureiro and Others v Imvula Quality Protection (Pty) Ltd.*, a unanimous Constitutional Court overturned the SCA to find a private security firm both contractually and delictually liable for the actions of its employee in failing to properly guard the plaintiff and their property.[117] In *Loureiro*, the respondent's security guard allowed criminals, who were impersonating police officers, onto the petitioner's property.[118] The High Court of South Africa found the company liable to Mr. Loureiro in contract and to Mrs. Loureiro and her two sons in delict.[119] It found that the security company was negligent because a reasonable security company would have foreseen the possibility of criminals attempting to gain entry through the use of disguises.[120] The High Court determined that there were reasonable steps the respondents could

[115] *Id*.
[116] *Lubbe*, at 398-99 (citing *Afrox*, at 34).
[117] *Loureiro and Others v. Imvula Quality Protection (Pty) Ltd*, 2014 (3) SA 394 (CC) (2014) (S. Afr.).
[118] *Id.* at para. 15.
[119] *Id.* at para. 20.
[120] *Id.* at para. 18.

have taken to guard against this risk[121] and that both the company and the guard on duty failed to take them.[122] The High Court further held that the employer was vicariously liable for the actions of the employee.[123]

The issue on appeal to the SCA focused on how to construe an amendment stipulating that no one, other than immediate family and a relieving guard, was to be allowed past the gate without the authorization of either Mr. or Mrs. Loureiro.[124] The question was whether to read the amendment to impose strict liability or a reasonableness standard.[125] The SCA held that, given the contract as a whole, the clause should be read to contain an implied reasonableness standard.[126] The SCA further found that the amendment implied an exception for the police to be allowed entry on the grounds that allowing police entry was required by law.[127] Therefore, the SCA overturned the High Court and held that the contract had not been breached because it was not unreasonable for the guard to have believed

[121] *Id.* at para. 18-19.The security company failed to provide special surveillance and management of the only point of access, to check the intercom which was the only means of communication from the guardhouse to the home, to give its employee clear instructions, and to provide the employee a reliable means to contact his employer. The security guard failed to take reasonable and appropriate steps to prevent the anticipated harm when he opened the gate without verifying the identity card of the imposters, made no inquires of the imposters, and did not attempt to contact the main house for information or permission. *Id.*

[122] *Id.* at para. 18.

[123] *Id.* at para. 19.

[124] *Id.* at paras. 21-22, para 12.

[125] *Id*. at para. 21. See also para. 27 for the dissent's view that the clause was not qualified by a reasonableness standard.

[126] *Id.* at para. 21.

[127] *Id.* at para. 22.

that the imposters were police officers.[128] On the delict claim, the SCA held that the guard had not acted negligently or wrongfully since he acted in good faith in letting the police officers in.[129]

Prior to the August 2013 implementation of the 17th Amendment, which expanded the Constitutional Court's jurisdiction to cases raising a matter "of general public importance," the Constitutional Court would not have jurisdiction to hear the *Loureiro* case without the presence of a constitutional issue.[130] Petitioners argued that there was both a constitutional issue[131] and that the 17th Amendment was applicable.[132] Although the 17th Amendment came into effect after petitioners' application to the Court, the Court applied the amendment retroactively on the basis that it was procedural and did not affect a party's substantive rights.[133]

Given the public role security companies play in giving effect to fundamental rights, the Court found that it was in the interest of justice, and

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[128] *Id.* at para. 23.

[129] *Id.* at para. 24.

[130] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) 954A (S. Afr.) (what counted as a constitutional issue, was broadly interpreted by the CC).

[131] The applicants argued that there was a constitutional issue regarding the extent to which common law actions in contract and delict give effect to the rights to security of the person, privacy, and property. *Id.* at para. 31

[132] *Id.* at para. 31. Before the 17th Amendment, the CC was the highest court of appeals in constitutional matters, but the SCA was the highest court in all other matters. There was, therefore, some controversy over whether the CC was the highest court of appeals in cases where the courts developed the common law in light of the spirit, purport, and objects of the Bill of Rights under section 39 of the Constitution. This controversy has now been settled courtesy of the 17th Amendment declaring the Constitutional Court as the "highest court in all matters."

[133] *Id.* at para. 31.

for the benefit of the public, to determine the correct approach for security companies' liability.[134] To decide the issue of wrongfulness, the Court looked to the "norms and values of society, embodied in the Constitution."[135] The Court held that the amended clause imposing an obligation not to admit anyone on the grounds without prior authorization was not a matter of the guard's reasonable discretion but rather a strict obligation.[136] While a reasonableness standard is often appropriate for positive obligations, the Court noted that negative obligations (i.e., not to do x or y) are more appropriately read as imposing strict liability.[137] In light of previous breaches by security guards granting the petitioner's brother unauthorized access, the Court found that the reasonableness standard was not appropriate.[138]

The finding of wrongfulness was bolstered by public policy and the constitutional rights to safety and security as to both person and property.[139]

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[134] *Id.* at para. 37.

[135] The CC spent little time on constitutional considerations. *Id.* The first paragraph of the majority opinion talked about the founding values of the Constitution, a few very relevant rights, the preamble, and the duties of the police. There were neither claims that constitutional rights were binding on the private security firm under section 8(2) of the Constitution, nor that the law should be developed in light of the spirit, purport, and objects of the Bill of Rights under section 39(2). Para 35. See Christopher J. Roederer, *Working the Common Law Pure: Developing the South African Law of Delict (Torts) in Light of the Spirit, Purport and Objects of the South African Constitution's Bill of Rights*, 26(2) INT'L. & COMP. L. (2009) 427-503 (where I describe four mechanisms available for bringing the common law in line with the Constitution.) [hereinafter Roederer, *Working the Common Law Pure*.]

[136] *Carmichel* at para. 45.

[137] *Id.* at para. 45.

[138] *Id.* at para. 43, 45.

[139] *Id.* at para. 56.

The Court held that the proper focus of a wrongfulness inquiry was not the guard's state of mind[140] but rather whether the "policy and legal convictions of the community, constitutionally understood, regard[ed] [the conduct as] acceptable."[141] Additionally, given that private security companies have assumed the role of crime prevention for remuneration,[142] there is great public interest in their successfully carrying out their functions.[143] Therefore, there is an important public interest in not insulating them from delictual liability or diminishing their incentive to prevent harm.[144] The Court acknowledged that if the guard had allowed actual police officers in, it would not have been wrongful,[145] but the imposters were not actual police officers and the Court reasoned that the community expects security guards not to permit imposters onto grounds they are hired to safeguard.[146]

This finding of wrongfulness left open the question of negligence. The Court adopted the classic test of negligence from *Kruger v Coetzee*.[147] As the Court stated,

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[140] *Id.* at para. 53

[141] *Id.* at para. 53.

[142] *Id.* at para. 2-4. The Court began its opinion noting the very high levels of crime in South Africa. After doing so, it noted that private security is one of the largest growing businesses in South Africa and that security companies have taken over many of the security and crime control functions that the police at one time exclusively controlled.

[143] *Id.* at para. 56.

[144] *Id.* at para. 56.

[145] *Id.* at para. 54.

[146] *Id.* at para. 55.

[147] *MEC for Education: Mpumalanga v Skhosana* 1966 (2) SA 428 (A) at 430 E-F. (S. Afr.).

> The questions in this case are whether (i) a reasonable person in the position of [the security guard] would have foreseen the reasonable possibility of his conduct injuring another's person or property and causing loss; (ii) a reasonable person in the position of [the security guard] would have taken reasonable steps to guard against that loss; and (iii) [the security guard] failed to take those steps.[148]

The Court further determined that it was foreseeable that criminals might try to impersonate police officers in order to gain entry to the premises, and that loss would result.[149] The Court noted that the extent of the risk of harm and the gravity of the consequences were high while the burden of eliminating that risk was slight.[150] When the imposters pulled up in an unmarked car with a blue flashing light, wearing disguises, all they did was quickly flash an identity card and demand entry.[151] The Court held that a reasonable person in the position of the guard would have checked the identity card and ensured that the those seeking entry were making a lawful demand before allowing them in.[152] Failing that, the guard should have contacted the main house or his employer.[153] As the Court concluded, "[w]hen one is tasked with protecting a property against intruders, it is simply not reasonable to open a door for a stranger without adequately

[148] *Id.* at para. 58.
[149] *Id.* at para. 61.
[150] *Id.* at para. 63.
[151] *Id.* at para. 60.
[152] *Id.* at para. 61,
[153] *Id.* at para. 63.

verifying who that person is or what he or she wants."[154]

V. STATUTORY CHANGES IN CONSUMER PROTECTION LAW

In this section, after a general review of recent changes to consumer protection law under the Consumer Act, I apply certain provisions of the Act to two different helicopter crashes involving wedding parties: one that took place prior to the Act's implementation and one after. I also draw on a recent High Court case that, even without the aid of the new legislation, is pro-consumer and consistent with an analysis under the Act. The review is somewhat speculative because there has been no case law interpreting the relevant provisions of the Act. Nevertheless, the cases illustrate the potential impact of the Act on fair contractual terms, notice, and access to justice for those covered by the provisions of the Act.

At the end of the first decade of constitutional democracy, "[t]he …body of consumer law in South Africa [was] fragmented, outdated, and predicated on principles that [were] not applicable in a democratic and developing society."[155] It was not until the Department of Trade and Industry commissioned a Consumer Law Benchmark study in 2004 that serious work in the area of consumer law began to take shape.[156] In the

[154] *Id.* at para. 63. This was particularly so in this case, given that the guard was experienced, with Grade A qualifications. *Id.* at para. 64.

[155] Roederer, *Ten Years*, note 1 at 496.

[156] Botha & Kunene Advisors, *Consumer Law Benchmark Study*, DEPT. OF TRADE & INDUSTRY (May, 2004), The Department of Trade and Industry references the study in its

same year, the Department published its Draft Green Paper on the Consumer Policy Framework, which identified numerous consumer protection needs.[157] As I noted in my previous work at the end of the first decade of democracy,,

> While South Africa d[id] have safety standards regarding medicines, foodstuffs and electrical goods, there [were] other types of manufactured goods, such as children's clothing, to which no safety standards appl[ied]. Furthermore, consumers d[id] not have some of the most basic rights, such as a right to fair contract terms and fair and transparent adverting and marketing. [158]

This changed significantly with the introduction of the Consumer Act in 2011.

While the full range of changes brought about by the Consumer Act

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Green paper and notes:

> A recent study conducted by the dti to benchmark the current status of South African general consumer laws against international regulatory frameworks, revealed that many countries are moving towards comprehensive legislation for consumer protection. Many regions, including Africa, Latin America and the Caribbean, Asia and the Pacific have developed comprehensive consumer laws that outline upfront the right of consumers. The majority of these laws are informed by the UN resolution on Guidelines for consumer protection and Consumers' International proposed model laws for the different regions. South Africa lags behind most developing nations such as Argentina, Brazil, Chile, Botswana, Uganda, Malawi etc. who have already adopted a rights-based comprehensive approach to consumer protection.

Department of Trade and Industry Draft Green Paper on the Consumer Policy Framework [hereinafter Green Paper], 2004, Bill 26774, 24 (GG) (S. Afr.)

[157] Department of Trade and Industry Draft Green Paper on the Consumer Policy Framework [hereinafter Green Paper], 2004, Bill 26774, 31-32 (GG) (S. Afr.). *Id.* at 25-41. (They included: non-misleading marketing and selling practices; adequate disclosure of information; fair contract terms; safe products and a better product liability regime; guarantees and warranties for product quality and aftercare; respect for their privacy; better access to tribunals for redress (including alternative dispute resolution mechanisms); and awareness; and education).

[158] Roederer, *Ten Years*, note 1 at 496. *Id.* at 31,24.

are beyond the scope of this paper, I have already noted the changes to manufacturers' liability[159] and the pages that follow address changes to the law regarding clauses that attempt to waive or limit the liability of contracting parties. However, it is first worth listing the numerous purposes of the Act as found in section 3, namely:

> … to promote and advance the social and economic welfare of consumers in South Africa by- (a) establishing a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally; (b) reducing and ameliorating any disadvantages experienced in accessing any supply of goods or services by [particularly vulnerable] consumers . . .; (c) promoting fair business practices; (d) protecting consumers from- (i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (ii) deceptive, misleading, unfair or fraudulent conduct; (e) improving consumer awareness and information and encouraging responsible and informed consumer choice and behaviour; (f) promoting consumer confidence, empowerment, and the development of a culture of consumer responsibility, through individual and group education, vigilance, advocacy and activism; (g) providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions; and (h) providing for an accessible, consistent, harmonised, effective and efficient system of redress for consumers.[160]

A. Wedding Crashes: Applying the Consumer Protection Act to Some Recent Cases

Two incidents of helicopter crashes that implicate both contract law and delict provide worthy examples to illustrate how far South Africa had

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[159] Supra, Section IV C, *Manufacturers' liability (From Res Ipsa Loquitor to Strict Liability)*.

[160] Consumer Protection Act 68 of 2008 (S. Afr.).

come in 2004 and how much further it had come by 2014.[161] The factual scenarios are remarkably similar. Both involved dream weddings in beautiful natural venues in South Africa, one at Devil's Peak in the Drakensberg Mountains[162] and the other in the Pietermaritzburg Botanical Gardens.[163] In both incidents, the wedding parties chartered helicopters to bring members of the wedding party to the venue; the helicopters crashed.[164]

According to an IOL News report on the 2004 crash, the helicopter carried the bride, a bridesmaid and her husband, and a photographer.[165] All went wrong when the pilot flew the helicopter into a cable, which snapped and then got caught up in the rotor blades.[166] The report states that "the helicopter began spinning and careered straight down the gorge at high speed. Then, through some absolute miracle, they spotted a piece of flat land at the bottom of the gorge and the pilot managed to lift the helicopter almost horizontally to crash land it in the field."[167] The bride reportedly

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[161] These two examples are based on actual incidents, one that took place in 2004, and the other in 2013.

[162] Barbara Cole, *Bruised bride weds groom after chopper crash*, IOL NEWS, November 4, 2004, http://www.iol.co.za/news/south-africa/bruised-bride-weds-groom-after-chopper-crash-1.226061#.VDftJ00tDGI

[163] Jeff Wicks, *Groom survives wedding crash*, IOL News, March 24, 2013, http://www.iol.co.za/news/south-africa/kwazulu-natal/groom-survives-wedding-crash-1.1490718#.VDfsok0tDGJ

[164]Though the original wedding plans were ruined, and a few people suffered significant injuries, the good news is that no one died and both weddings eventually went forward.

[165] *Id.*

[166] *Id*.

[167] *Id.*

believed that she was going to die, and the helicopter pilots were cited as saying that if it were not for the safety provisions of this specific type of helicopter, everyone would have perished.[168]

Fast-forward nearly a decade and you have the scene of a bride in a horse-drawn carriage, along with over 300 guests awaiting the grand entrance of the groom.[169] As they were waiting, the guests saw the helicopter carrying the groom, his parents, and the bride's brother crash on the road near the gardens.[170] A bystander was reported as saying,

> I was watching the chopper as it flew over the city. Then it descended and started to bank. It sounded like the engine had gone off and it started to spin. It looked as if the pilot was trying to put it down in the middle of a large traffic circle. There was a loud metallic thump as it hit the road. Then it was flung into the fence. When the dust had settled, I ran over and the pilot was lying on the floor. The four passengers were still strapped into their seats.[171]

Normally, one might expect a range of delict claims to arise out of these two crashes, from damage to property, personal injuries, pain and suffering, perhaps loss of earnings, and even psychological harm. All of these could be claimed under South African law, even just before the end of apartheid, if the defendants were negligent and their negligence wrongfully

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[168] *Id.*

[169] Jeff Wicks, *Groom survives wedding crash*, IOL News, March 24, 2013, http://www.iol.co.za/news/south-africa/kwazulu-natal/groom-survives-wedding-crash-1.1490718#.VDfsok0tDGJ.

[170] *Id.*

[171] *Id.*

caused the above-mentioned harms to the victims.[172] Assuming both negligence[173] and causation, these crashes appear to present rather straightforward delict cases. The only hurdle is a standard clause on the back of the ticket purchased for these flights that tells the passenger that the carrier is not liable for any kind of damage to the passenger caused by the act, omission, neglect, gross neglect, or default of the carrier(s), their servants, or agents.[174] If this clause is a valid waiver of liability, then the harm caused was not wrongful because the victim consented.

As noted, until very recently, South African law followed the classical libertarian model of contract law.[175] The recent High Court case of *Naidoo v Birchwood Hotel*,[176] however, illustrates that South Africa is

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[172] See, e.g. JONATHAN BURCHELL, PRINCIPLES OF DELICT (1993).

[173] Note that I am not claiming that the helicopter companies in question, nor the pilots, acted negligently. To my knowledge, negligence has not been clearly established in either crash.

[174] This example of the language found in a standard form exemption clause comes from the back of the ticket purchased by the wedding party involved in the 2013 crash, which reads:

> Carriage is only accepted at the passengers risk and upon the specific condition that the Carrier/s their servant and agents shall be under no liability for any damage by air or in connection with the auxiliary services incidental to the carriage by air or whether or not caused or occasioned by the act, omission, neglect, gross neglect or omission or default of the Carriers/s their servant or agents. The passenger hereby indemnifies the Carriers/s against any claim for compensation for any damage, loss or injury whether sustained on board the aircraft or in the course of an of the operation of flight embarking or disembarking caused directly or indirectly to him or his belongings which indemnity shall extend to the passenger's dependents, estate or any person whomsoever.(scanned copy of ticket on file with author).

[175] *See, e.g.*, Alfred Crockell, *The Hegemony of Contract*, 115 S. AFR. L.J. 286, 287-91, 301 (1998).

[176] *Naidoo v. Birchwood Hotel* 2012 (6) SA 170 (GSJ) (S. Afr.) (rejecting the application of a waiver of liability clause for a hotel guest who was injured when a

moving away from this classical model. Additionally, this area of the law has changed considerably under the Consumer Act. Although it is still unclear how the courts will interpret the Act,[177] the provisions of the Act and the recent case law make it unlikely that the exemption clause on the back of the ticket would be enforced today; this would not have been true for the wedding party in 2004.

In order for a court to uphold the exemption clause under the Consumer Act, the court would need, at a minimum, to find (1) that there was no gross negligence; (2) that the clause was brought to the attention of the client "in a conspicuous manner before entering into the transaction, and with adequate opportunity to receive and comprehend the provision or notice"; and (3) that the client "assented to that provision or notice *by signing or initialling* the provision or otherwise *acting in a manner consistent with* acknowledgement of the notice, awareness of the risk, and acceptance of the provision."[178] An additional argument can be made under other provisions of the Act that the exemption clause is unenforceable. The

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negligently maintained gate fell on him because a security guard negligently tried to force the gate open). (See below for a full treatment of the case). *Supra*, note 164.

[177] *See, e.g.*, *Afrox Healthcare Bpk v Strydom* 2002 6 (SA) 21 (SCA) (S. Afr.) (upholding a waiver of liability for negligence); *Barkhuizen v Napier* 2007 5 (SA) 323 (CC) (S. Afr.) (upholding a contract clause which barred claims made after 90 days). Although Section 4 of the Act requires a liberal, pro-consumer approach to interpreting the provisions of the Act, South Africa's judiciary has a record of being conservative in this area. I have not been able to find a case that addresses any of the relevant sections of the Consumer Protection Act.

[178] Consumer Protection Act 68 of 2008 (S. Afr).

analysis in *Naidoo* further bolsters this argument.[179]

The above points and considerations will be explained in detail below. First, I briefly outline the law on exemption clauses (or waiver of liability clauses) as it existed before the Consumer Act; second, I discuss how *Naidoo* creatively interprets and applies the pre-Consumer Act law; and finally, I analyze how the provisions of the Consumer Act have impacted the law.

Courts have regularly upheld exemption clauses in contracts, even in cases involving adhesion contracts when the fine print is not read.[180] Although the SCA in *Afrox* accepted the idea that a contract provision may be unenforceable if it is "surprising or unexpected," it held that because exemption clauses are the rule and not the exception in South Africa, they are not surprising.[181] In cases of fraud or duress, the clause would not be enforceable and the contract could be rescinded.[182] Additionally, conduct

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[179] 2012 (6) SA 170 (GSJ) (S. Afr.).

[180] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 470 et seq. (S. Afr.) (Note that if the term undermines the essence of the contract, then that term should be brought to the attention of the party); *Mercurius Motors v Lopez* 2008 (3) SA 572 (SCA) (S. Afr.) (case involving an exemption clause from liability for the theft of plaintiff's car from the defendants repair shop – exempted from reasonable care in safekeeping the property).

[181] *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA) (S. Afr.) at para. 34-6.36.*Afrox* involved the negligent conduct of a nurse at the defendant's hospital. The patient/plaintiff had signed a document when being admitted to the hospital that included an exemption clause. The SCA upheld the clause that exempted the defendant from liability. However, the Consumer Protection Act no 68 of 2008 severely undermines the precedential authority of this case.; *See also*, D McQuid-Mason, *Hospital exclusion clauses limiting liability for medical malpractice resulting in death or physical or psychological injury: What is the effect of the Consumer Protection Act?*, 5 S. AFR. J *BL*. BIOETHICS AND LAW 2, 65-68 (2012).

[182] *Nw. Provincial Gov. & Another v. Tswaing Consulting CC & Others* 2007 (4) SA

considered contrary to public policy, such as an intentional breach, intentional conduct, and fraudulent misrepresentation, could not be excluded through exemption clauses.[183]

Nevertheless, exclusion of liability for breach of contract, with the exception of non-performance, was not considered contrary to public policy,[184] and neither, as a general rule, was the exclusion of negligence.[185] Until recently, even liability for gross negligence could be waived.[186] Section 51(1)(c)(i) of the Consumer Act does not allow for the waiver of liability for gross negligence, although it leaves open the question of whether one can exclude liability for the negligent causing of death.[187] The general rule is that exemption clauses should be construed restrictively and that the terms should be unambiguous and clear.[188] If a clause is ambiguous, then the clause is interpreted against the person relying on the clause.[189]

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452 (SCA).) (S. Afr.).

[183] *Wells v South African Alumenite Company* 1927 AD 69; *Goodman Brothers* (*Pty) ltd v Rennies Group Ltd* 1997 (4) SA 91 (W).) (S. Afr.).

[184] *Elgin Brown & Hammer (Pty) Ltd v Indus. Machine Suppliers (Pty) Ltd.* 1993 (3) SA 424 (A).) (S. Afr.).

[185] *Drifters Adventure Tours CC v Hircock* 2007 (1) SA 133 (SCA) at 88 G-H. (S. Afr.).

[186] *Masstorres (Pty) Ltd v Murray & Roberts Constr. (Pty) Ltd* 2008 (6) SA 654 (SCA) (S. Afr.); *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) para. 35, (S. Afr.) (the court remarked that liability for gross negligence (medical) could possibly be excluded.).

[187] *Johannesburg Country Club v Stott & Another* 2004 (5) SA 511 (SCA) para. 12. (S. Afr.).

[188] *Afrox,* para 9; *Drifters Adventure Tours CC v Hircock* 2007 (2) SA 83 (SCA) 87E. (S. Afr.).

[189] *Walker v. Redhouse* 2007 (3) SA 514 para 13 (S. Afr.) (upholding a clause that excluded liability for "any loss or damage . . . sustained as a result of . . . injury to my person . . . in the course of my horse-riding about the property of Walkersons" in a case where a horse bolted, causing injuries to the rider/plaintiff).

In *Naidoo*, the High Court refused to enforce an exemption clause because of public policy considerations of justice and fairness based on the values of the Constitution.[190] The plaintiff in *Naidoo* was injured while exiting the defendant's hotel when a negligently-maintained gate fell on him after a security guard tried to force the gate open.[191] There was a disclaimer of liability on the back of the hotel guest registration card, and although the plaintiff was aware of such disclaimers in general, he claimed not to have read the one on the back of this particular card.[192] The bottom of the front of the card he signed stated, "[p]lease read terms and conditions on reverse!"[193] Clause 5 of 7 on the back read, in pertinent part,

> [t]he guest hereby agrees on behalf of himself and the members of his party that it is a condition of his/her occupation of the Hotel that the Hotel shall not be responsible for any injury to, or death of, any person . . . caused or arising from the negligence (gross or otherwise) or wrongful acts of any person in the employment of the Hotel.[194]

The Court applied the general rule regarding strict construction of exemption clauses in favor of the consumer. Nevertheless, the Court found that the notice on the front of the registration card was clearly visible, and the exemption clause on the back was straightforward in absolving the

[190] *Naidoo v. Birchwood Hotel* 2012 (6) SA 170 (GSJ) (S. Afr.).
[191] *Id.* at 170, para 2.
[192] *Id.* at 177-178, paras 34, 38.
[193] *Id.* at 178, para 36.
[194] *Id.* at 178, para 37.

defendant from liability.[195] The Court further acknowledged that even if the plaintiff did not read the disclaimer, the plaintiff conceded that he should have been reasonably aware of the disclaimer and its contents.[196]

The *Naidoo* court still found for the plaintiff. The Court distinguished the two leading SCA cases of *Durban's Water Wonderland*[197] and *Afrox* on two grounds: (1) the facts of each case arose prior to the Constitution[198] and (2) the activities in those cases—amusement park rides and surgical operations—are inherently risky while being a guest in a hotel is not.[199] The Court also distinguished the Constitutional Court's 2007 decision in *Barkhuizen v. Napier,* which upheld a contract clause that barred plaintiff's claims made after ninety days,[200] because there was "scant" evidence in that case.[201]

The Court did, however, apply *Barkhuizen*'s analysis to determine whether a contractual provision was contrary to public policy and therefore invalid.[202] The test laid down in *Barkhuizen* asks whether the clause afforded a party a reasonable and fair opportunity to approach a court.

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[195] *Id.* A court would also likely find the ticket's notice and disclaimer in the helicopter case to be equally clear and straightforward.

[196] *Id.* at 179, para 42 *Naidoo.* This fact is distinguishable. The plaintiff in Naidoo was a driver who had considerable exposure to Hotels and their disclaimers of liability.

[197] *Id.* at 180, para 45.

[198] *Id.* It is not clear that this distinction would be convincing to other courts, given that *Afrox* addressed the constitutional public policy considerations and still held that contractual autonomy was paramount.

[199] *Id.* Of course, this second point does not aid in the case of helicopter ride.

[200] *Naidoo* at 180, para 45. *Barkhuizen v. Napier* 2007 (5) SA 323 (CC).) (S. Afr.).

[201] *Naidoo* at 181, para 49.

[202] *Id.* at 182, para 52.

Barkhuizen held that a clause could either be inherently unreasonable, and thus invalid on its face, or unreasonable as applied in a given set of circumstances, and thus unenforceable.[203] *Naidoo* quoted from *Barkhuizen* that: "[p]ublic policy imports the notions of fairness, justice and reasonableness and would preclude the enforcement of a contractual term if its enforcement would result in an injustice."[204]

The *Naidoo* court did not rest its decision on any given provision in the Bill of Rights but rather looked at the legal principle of public policy in light of the new constitution.[205] *Naidoo* referred to the SCA's observation in *Brisley* that:

> it was not difficult to envisage a case where certain contracts offend against the new social compact that the Constitution embodies. Decisions that proclaim that limits of contractual sanctity lie at the borders of public policy would receive enhanced force and clarity in the light of the Constitution and the values embodied in the Bill of Rights.[206]

The court in *Naidoo* further drew on the Constitutional Court's decision in *Barkhuizen*, quoting Ngcobo J for the proposition that:

> [P]ublic policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was

[203] *Barkhuizen v. Napier* 2007 (5) SA 323 (CC).) (S. Afr.).

[204] *Barkhuizen*, at para. 73. *Naidoo* para 53.

[205] *Naidoo* relied on the constitutionally inspired view of public policy adopted by the Constitutional Court in *Barkhuizen*. *Naidoo* at para 47. *Barkhuizen* actually referred directly to section 34 of the Constitution which guarantees the right of access to court, namely, "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." *Barkhuizen* at para 5.

[206] *Naidoo* at para 46 citing *Brisley v Drotsky* 2002(4) SA 1 (SCA) at para 92.

> once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now rooted in the values of our Constitution and the values that underlie it…human dignity, equality and freedom…as given expression by the provisions of the Bill of Rights…Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.[207]

With respect to the issue of access to the courts for judicial redress, *Naidoo* noted that the Constitutional Court in *Barkhuizen* "gave a clear indication that a term in a contract that seeks to deprive a party of judicial redress is prima facie contrary to public policy and is inimical to the values enshrined in our Constitution, even if freely and voluntarily entered into by consenting parties."[208] Although the court in *Naidoo* did not hold that such clauses are inherently unreasonable,[209] it did hold that the clause it was examining should not be upheld because it unfairly and unjustly limited the plaintiff's right to a judicial remedy. The Court stated:

> [a] guest in a hotel does not take his life in his hands when he exits through the hotel gates. To deny him judicial redress for injuries he suffered in doing so, which came about as a result of the negligent conduct of the hotel, offends against notions of justice and fairness.[210]

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[207] *Naidoo* at para 47 quoting *Barkhuizen v Napier* para 28 – 29.

[208] *Naidoo* at para 50.

[209] *Naidoo v. Birchwood Hotel* 2012 (6) SA 170 (GSJ) (S. Afr.) The Court claimed that neither this issue, nor the constitutionality of such clauses, were properly raised before the court. In dicta, the Court noted that it did not believe that clauses exempting liability for negligently caused bodily injury or death would pass constitutional muster.

[210] *Naidoo*, at para 53.

As noted above, the Consumer Act has changed many of the rules in this area. Relevant changes include notice requirements, signature or initialing requirements, the categorical invalidity of certain types of exemption clauses, and general provisions that may render certain clauses invalid. These changes are consistent with and reinforce the constitutional values of substantive equality, dignity, and true freedom[211] as opposed to the presumed formal equality and freedom of contract that existed under apartheid.[212] They help protect those who are less equal from being exploited by unfair terms that they may not be aware of, may not fully understand, or may not even explicitly consent to. They further the Constitution's section 34 right to judicial redress by creating and preserving rights that would have been abrogated by the "freedom" of contract.

Section 49(1) of the Act requires that consumers be given notice of certain terms and conditions, particularly exemption clauses:

> Any notice to consumers or provision of a consumer agreement that purports to—(a) limit in any way the risk or liability of the supplier or any other person; . . . must be

[211] Section 1(a) of the South African Constitution lists "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms" as its first set of "Founding Values." The Constitutional Court stated that the founding values have an important place in the Constitution as they both "inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply to be valid.'" United Democratic Movement v The President of the Republic of South Africa (1) SA 495 para 19 (CC, 2003). Furthermore, section 1 of the Constitution is the most entrenched provision. The provision can only be amended by a bill passed by at least 75 percent of the members of the National Assembly and by six provinces from the National Council of Provinces. S. AFR. CONST., 1996; Act 108 of 1996 § 74 (1).

[212] See, e.g. C Albertyn, *Substantive Equality and Transformation in South Africa* 23 SAJHR 253-276(2007).

> drawn to the attention of the consumer in a manner and form that satisfies the formal requirements of subsections (3) to (5).[213]

Subsections 3–5 require that the provision be written in plain language, that it be brought to the consumer's attention in a conspicuous manner before entering into the transaction and with adequate opportunity to receive and comprehend the provision or notice.[214] Subsection 2 further requires that in cases where the

> notice concerns any activity or facility that is subject to any risk . . . (c) *that could result in serious injury or death*, the supplier must specifically draw the fact, nature and potential effect of that risk to the attention of the consumer … and the consumer must have assented to that provision or notice *by signing or initialing* the provision or otherwise *acting in a manner consistent with* acknowledgement of the notice, awareness of the risk and acceptance of the provision.[215]

Section 51(1)(c)(i) forbids making an agreement subject to terms or conditions that "limit or exempt a supplier of goods or services from liability for any loss directly or indirectly attributable to the gross negligence of the supplier or any person acting for or controlled by the supplier."[216] Among other things, Section 51 also forbids a supplier from making a

> transaction or agreement subject to any term or condition if— (a) its general purpose or effect is to— (i) *defeat the purposes and policy of this Act;* . . . (b) it directly or

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[213] Consumer Protection Act 68 of 2008 (S. Afr.).
[214] *Id.*
[215] *Id.*
[216] *Id.* Supplier is defined in the Act as: "a person who markets any goods or services."

> indirectly purports to— (i) *waive or deprive a consumer of a right in terms of this Act;* (ii) *avoid a supplier's obligation or duty in terms of this Act*;[217] (iii) set aside or override the effect of any provision of this Act; or (iv) authorise the supplier to— (aa) do anything that is unlawful in terms of this Act; or (bb) *fail to do anything that is required in terms of this Act*; [218]

Arguably, clauses that exempt liability for negligence violate both subsections (a) and (b) of Section 51. Given that only gross negligence was categorically excluded, however, it may be difficult to convince a judge that clauses that have been upheld under the common law for years as being consistent with public policy are now contrary to public policy under the Act.[219]

The relevant general provisions governing the rights of consumers and the duties of suppliers[220] require the terms and conditions to be fair, reasonable, and just.[221] Article 48(2) provides further that such a term or condition is unfair, unreasonable, or unjust if:

> (a) it is excessively one-sided …; (b) the terms … are so adverse to the consumer as to be inequitable; (c) the

[217] *Id.* Section 22 requires information to be proved in plain language.

[218] *Id.* Among the many purposes of the Act listed in section 3 is (d) protecting consumers from—(i) unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices; and (ii) deceptive, misleading, unfair or fraudulent conduct.

[219] *See, e.g.*, Kevin Hopkins, *The Enforceability of Exemption Clauses: Are They In Line with Constitutional Values?* (June 2007) *De Rebus* 24. Many thought that section 39 of the Constitution would change the way Courts viewed exemption clauses. The *Afrox* case is strong evidence that the South African Judiciary is not easily swayed; D Bhana & M Pieterse, *Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited* (2006) 123 SALJ 865. The *Naidoo* case, is an exception.

[220] Consumer Protection Act 68 of 2008 (S. Afr.) The Act contains numerous provisions that provide rights and duties that are not likely relevant to the helicopter crashes and case law under review in this article.

[221] *Id.* art. 48(1).

> consumer relied upon a false, misleading or deceptive representation…to the detriment of the consumer; or (d) the transaction or agreement was subject to a term or condition, or a notice to a consumer contemplated in section 49(1), and (i) the term, condition or notice is unfair, unreasonable, unjust or unconscionable; or (ii) the fact, nature and effect of that term, condition or notice was not drawn to the attention of the consumer in a manner that satisfied the applicable requirements of section 49.

Assuming that the wedding parties did not sign or initial the waiver and did not act in a way that a court would find indicated acknowledgement of the notice, awareness of the risk, and acceptance of the provision, then the clause should not be enforceable. However, even if a court were to find that such awareness and acceptance existed—like in the case of *Naidoo*—both the court's reasoning in *Naidoo* and the general provisions of the Act indicate that the provision would likely be found unfair, unreasonable, and unjust because it is one-sided, and the terms are likely to be seen so adverse to the consumer as to be inequitable.

VI. CONCLUSION: WHICH WAY FORWARD?

At the end of twenty years, there is considerable evidence of democracy-reinforcing changes to the private law of contracts and delict. By the end of the first decade, there were significant achievements regarding rights and equality-based claims and progress in the law of delict, but there was much work yet to be done. The second decade solidified the Constitutional Court's role in insuring that all laws in South Africa are

interpreted and developed in harmony with the spirit, purport, and objects of South Africa's Bill of Rights and Constitution as a whole. There has also been significant democracy-reinforcing progress in contract law by virtue of both case law and legislation.

Despite these significant developments, one may still be left feeling unsatisfied with the overall inequality and lack of development in South Africa, and with only minor progress in the economic development of the South African people as a whole. There is an expression in South Africa that "[t]he fundamental premise in law is that damage (harm) rests where it falls, that is, each person must bear the damage he suffers." [222] At most, what one should get out of the law of delict is *restitutio ad integrum*—to be put back in the same situation they would have been in but for the delict. Thus, if you were poor or had little earnings before, then you remain poor, and if you were rich before, you remain rich. These principles remain despite the numerous developments making it easier to bring, and win, a claim when one is harmed.

At its base, private law in general, and the law of delict in particular, remain conservative when it comes to distributive justice. It is not surprising that the Constitutional Court judges residing in Johannesburg have sympathy for the plaintiffs in their suit against the security firm in

[222] J. Neethling et al., LAW OF DELICT 3 (J.C. Knoble trans. & ed., 4th ed. 2001) (referencing J.C. Van der Walt & J.R. Midgley, DELICT: PRINCIPLES AND CASES 19 (1997)).

Louriero, and while the wedding cases are somewhat dramatic, they all ended reasonably well for the likely very well-off parties. Everyone likely had insurance, received excellent medical attention, and had relatively minimal disruptions to their careers and enjoyment of life. The courts simply do not consider the economic status of the parties and do not consider redistribution a proper aim of the private law. The notion that distributive justice is not one of the aims of delict is so entrenched that one will find almost no mention of it in either case law or in the academic literature.[223]

Nevertheless, there is always space within the South African legal framework for progressive developments in this direction. In the words of Justice Ngcobo from the Constitutional Court:

> South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed 'to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms'. This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution 'recognises the injustices of our past' and makes a commitment to establishing 'a society based on democratic values, social justice and fundamental rights'. This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human

[223] One notable exception is the work of Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law* 26 SAJHR 403 (2010).

> dignity, the achievement of equality and the advancement of human rights and freedoms. [224]

Article 39(2) of the South African Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."[225] Given the egalitarian and transformative nature of that spirit,[226] and the fact that existing principles have regressive effects,[227] there is hope that more attention will be paid by the courts and commentators to the need to take into consideration the distributive effects of the private law.

While private law reform is no panacea for all that ails South Africa's democracy, it is one very important element in the consolidation of democracy. Private law can exacerbate inequality, diminish dignity, limit freedom, and close off avenues for redress when people are harmed, or it

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[224] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and* Others, 2004 (7) BCLR 687 (CC) at para 73. It should be noted that the list of those that the Constitution's equality provision embraces extends well beyond race and gender. Section 9(3) includes: "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." S. AFR. CONST., 1996; Act 108 of 1996 § 9.

[225] S. AFR. CONST., 1996; Act 108 of 1996 § 39(2).

[226] *See, e.g.*., Roederer, *Working the Common Law Pure*, 427-503; Dennis M. Davis & Karl Klare, *Transformative Constitutionalism and the Common and Customary Law* (2010) 26 SAJHR 403, 411 (Dennis Davis and Karl Klare argue that "'[d]evelopment of the common law' pursuant to section 39 is not about tinkering or consistency – it connotes a long-term project of fashioning common law foundations for a just and egalitarian society.").

[227] *See, e.g.*, Tsachi Keren-Paz, TORTS, EGALITARIANISM AND DISTRIBUTIVE JUSTICE (67-69 (Ashegate, 2007) (arguing that tort law principles of compensation are regressive in that they impose more risks on the poor, undercompensate the poor, result in regressive cross subsidies in liability insurance and ignore the greater impact on the poor due to ignoring diminishing marginal utility)).

can embrace the Constitution's values, confront persistent inequality, and promote freedom, dignity, equality, and access to justice. Doing so not only promotes the values of South Africa's constitutional democracy, as the text itself implores, but it also helps deepen and stabilize South Africa's democracy by bringing those transformative democratic principles and values down from the public law and into the lives of those affected by the private law. The harmonization of the Constitution's democratic values is important, not just symbolically, but also in the way those values translate into private law rights, remedies, and a more accessible justice system that will help make victims whole, restore their dignity, and promote their actual freedom and equality. Although there is more work to be done, the private law of South Africa has been on a steady, if somewhat slow, track to a more harmonious relationship with South Africa's transformative constitutional revolution and towards freeing the potential of its people.Title of your article