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## Functionalism, Co-operation, Good Faith and the Making of the "Daily- Preventive Justice" in Contract Law Theory and Practice

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FUNCTIONALISM, CO-OPERATION, GOOD FAITH,  
AND THE MAKING OF THE  
“DAILY-PREVENTIVE JUSTICE”  
IN CONTRACT LAW THEORY AND PRACTICE.  
A CONTRIBUTION TO A RATIONAL UNDERSTANDING OF  
GOOD FAITH AND TO ITS FUTURE REASONABLE  
DEVELOPMENTS.  
EVALUATIONS FROM THE SOUTH AFRICAN PERSPECTIVE

LUCA SILIQUINI CINELLI\*

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*“Justice delayed is justice denied”*

William E. Gladstone

[addressing Parliament as Queen Victoria’s Prime Minister, 1868]

*“Legal reasoning is an exercise in constrictive interpretation,  
that our law consists in the best justification of our legal practices as a whole,  
that it consists in the narrative story that makes of these practices the best they can be.”*

Ronald Dworkin

[*Law’s Empire*, 1998, vii]

## I. INTRODUCTION

The thoughts and observations contained in this paper were first presented in a preliminary form at the *Staff Seminar* that I gave at the University of Cape Town (UCT) - Department of Private Law, on Tuesday May 8 2012. The organizers generously offered me a free choice of subject. Such an offer always poses a problem to imaginative people like myself. I finally chose as my subject the role of good faith in contract law theory and practice and then entitled the *Seminar* “*Good Faith & Contracts - Brothers in Arms*”.

The aim of the talk was to briefly describe what I see behind the doctrine of good faith (and, more broadly, behind the general course of the parties’ behavior before and after the conclusion of an agreement), to then explain the need of its protection and future reasonable developments by challenging the limitations of both traditional and current legal approaches to contract law theory and practice. By adopting a comparative *modus investigandi*, it emerged that especially in the area of contract law a new law-finding process is emerging in the European continent and it is leading to

re-conceive the meta-national legislative interventions by challenging the limits of Hobbes's Leviathan.<sup>1</sup>

As asserted, we ought to not take this process for granted because although there are many forms of social organization, contract is the most pervasive and the law of contract still is the most important vehicle to support and supplement private arrangements. However, the point of departure for theorizing about private law is based on experience.<sup>2</sup> Consequently, despite the growing emphasis on the convergence of national legal systems in Europe, conducting research on private law theory and practice requires that imagination and creativity be matched with prudence. Proficiency has to be aligned with what we have learned from history.

The choice of the topic warrants further comment. As will be discussed, the principle of good faith does not play an exact role in South African law. More precisely, even though it has played a crucial role in the development of the Roman law in South Africa, nowadays it has an uncertain role and there is an absence of legislation –except for what concerns the field of

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<sup>1</sup> I refer particularly to the *Principles of European Contract Law* (PECL), the *Draft Common Frame of Reference* (DCFR), and the *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions. A Common European Sales Law to Facilitate Cross-border Transaction in the Single Market* (CESL). Cf., respectively, Lando, Ole – Beale, Hugh (eds.). *Principles of European Contract Law, Parts I and II*. The Hague: Kluwer Law International, 2000; Lando, Ole – Clive, Eric – Prüm, Andre – Zimmermann, Reinhard (eds.). *Principles of European Contract Law, Part III*. The Hague: Kluwer Law International, 2003; von Bar, Christian – Clive, Eric – Schulte-Nölke, Hans et al (eds.). *Principles, Definition and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Outline Edition*. Munich: Sellier, 2009. Also, see Rutgers, J.W. *The DCFR, Public Policy, Mandatory Rules, and the Welfare State*, in Somma, Alessandro (ed.). *The Politics of the Draft Common Frame of Reference*, Alphen aan den Rijn: Kluwer Law International, 2009: 123-128. Regarding the possible creation of a DCFR for Public law, see Jans, Jan H. “Towards a Draft Common Frame of Reference for Public Law?”, in Gormley, Laurence W. – Nic Shuibhne, Niamh (eds.). *From Single Market to Economic Union. Essays in Memory of John A Usber*, Oxford: Oxford Univ. Press, 2012: 356-374. COM(2011) 636 final. Also, cf. *Single Market Act II. Together for New Growth*, COM(2012) 573 final.

<sup>2</sup> Hegel, Georg W.F. *Hegel's Logic: Being Part One of the Encyclopedia of the Philosophical Sciences*, sect. 12, Alderley: Clarendon Press, 3<sup>rd</sup> edn., 1975 (1830), (William Wallace tr.).

labor law— that generally requires adherence to it or to any other similar norm. This is why today it is generally argued that in South African law good faith is just an underlying principle or (according to some legal scholar) an abstract concept and not a rule of law. It cannot be applied by a court as the basis on which to set a contract aside or to refuse its full performance.

As it was for the *Seminar*, this paper calls for a “hard” approach to good faith as a rule of law and not as an underlying principle. In order to justify the above aim and properly discuss the real essence of a contract, different disciplines and approaches will be used. In particular, the analysis will develop through three different fields: (i) the nature of contract; (ii) the morality of contract; (iii) economics & contract (*Microeconomics & Economic Efficiency Theory*). In addition, *Philosophy of Law* and *Ontology* will both play a pivotal role. The suggested roadmap will also be pursued to explain how to feasibly promote, what during the *Seminar*, I defined as the “socially efficient *formulae* of normative thinking”.

Finally, a general clarification has to be made. The different approaches I used in my contribution to explain my point of view are linked to the usual view of every legal scholar, that is: one understands law through its purposes—a notion that we may call *functionalism*,<sup>3</sup> and that is well entrenched in American legal scholarship from the jurisprudence of Oliver Wendell Holmes Jr.<sup>4</sup> to the realist revolt against Christopher Columbus Langdell’s suggestions about the role of public policy and social interests. The functional approach to private Law has an understandable appeal, because, by following directly from the seemingly axiomatic proposition that “*the*

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<sup>3</sup> Weinrib, Ernest J. *The Idea of Private Law*, Oxford: Oxford Univ. Press, 2012: 3.

<sup>4</sup> Who was the most influential American Private Law balancing theorist from 1900 to 1940

*object of law is to serve human needs*”,<sup>5</sup> it specifies aspects of human welfare that should be promoted.

The paper is structured as follows: section II deals with the South African approach to good faith; section III introduces the need for an unconventional understanding of the nature of contract; section IV delves into the morality of contract, whilst section V approaches contract law and practice from the economic perspective. Concluding remarks will be expounded in the sixth section.

## II. THE SOUTH AFRICAN LANDSCAPE

Whilst conducting my doctoral studies I described that the rule connected to the favored “reliance theory” in South African law flows directly from the principle of good faith which has been significant in the development of the Roman law in South Africa.<sup>6</sup> Yet the “good faith galaxy” has an uncertain role in South African law of contract and there is an absence of legislation that generally requires adherence to it or to any other similar norm.<sup>7</sup>

Although the Supreme Court of Appeal has stated that the South African legal system is an equitable one and that contracts are *indicia bonae fidei*, it has also denied that the *exceptio doli generalis* had ever formed a part of modern South African law,<sup>8</sup> and then opted for an indirect application of good faith,

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<sup>5</sup> Calabresi, Guido. “Concerning Cause and the Law of Torts”, 69 *Univ. of Chicago Law Review* (1975): 105.

<sup>6</sup> Siliquini Cinelli, Luca. “Beyond National Paradigms for Understanding Law. The Role of the South African Contract Law in the Europeanization of Contract Law: The Case of the Formation of Contract”, *The Cardozo Electronic Law Bulletin*, (2012): Vol. 18.1, Spring Summer Issue, 1-72.

<sup>7</sup> Subject to the exception as provided for in the field of Labour law. *Sasfin (Pty) Ltd v. Beukes* 1989 (1) SA 1 (A).

<sup>8</sup> *Bank of Lisbon & South Africa Ltd v. De Ornelas* 1988 (3) SA 580 (A). The doctrine of *laesio enormis* has been abolished in 1952 by statute.

as an abstract principle inextricably linked to the role of public policy.<sup>9</sup> This is why today it is generally asserted that in South African law good faith is an abstract concept and not a rule of law and hence it cannot be applied by a court as the basis on which to set a contract aside or to refuse its full performance.<sup>10</sup>

It is similarly improbable that South African courts will recognize or develop a precise duty *in contrahendo* to negotiate or to continue negotiating in good faith because the main principle that is applied is simply that the agreement must not offend public policy or the public interest(s).<sup>11</sup>

As Ngcobo CJ stated whilst delivering the judgment of the South African Constitutional Court's majority in a very interesting case,<sup>12</sup> public policy represents just the legal conviction or general sense of justice of the

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<sup>9</sup> *Eerste Nasionale Bank van Suidelike Afrika Bpk v. Saayman* 1997 (4) SA 302 (HHA). Cf. also *Sasfin (Pty) Ltd v. Benkes* 1989 (1) SA 1 (A).

<sup>10</sup> *Nedcor Bank Ltd v. SDR Investment Holding Co. (Pty) Ltd* 2008 (3) SA 544 (SCA).

<sup>11</sup> In South Africa, private law includes the law of persons (*personereg*), family law (*familiereg*), the law of property (*sakereg*), succession (*erfreg*), delict (*deliktereg*), trusts, estoppel, product liability (*produkte-aanspreeklikheid*) and consumer protection (*verbruikersbeskerming*). Contracts do not have to fall into any particular category in order to be formally and validly recognized. However, certain terms (*i.e.*, *naturalia* terms) are included in any contract belonging to one of the classes of specific contracts recognized by law. More details in Sir Wessels, Johannes Wilhelmus. *The Law of Contract in South Africa*, Vol. I, 2<sup>nd</sup> edn., Durban: Butterworths, 1951; Warden Lee, Robert – Honoré, Tony – Newman, E. – McQuoid-Mason, David Jan (eds.). *The South African Law of Obligations*, Durban: Butterworths, 1978; Joubert, D.J. *General Principles of the Law of Contract*, Cape Town: Juta & Co, 1987; Christie, Richard Hunter. *The Law of Contract in South Africa*, Durban: Butterworths, 1991. Lubbe, Gerard F. – Murray, Christina. *Farlam & Hathaway, Contract. Cases, Materials, Commentary*, 3<sup>rd</sup> edn., Cape Town: Juta & Co, 2009; van der Merwe, Schalk W.J. – van Huyssteen, Louis F. – Reinecke, M.F.B. – Lubbe, Gerard F. *Contract: General Principle*, 4<sup>th</sup> edn., Cape Town: Juta & Co, 2012; Hutchison, Dale – Pretorius, Chris-James (eds.). *The Law of Contract in South Africa*, Cape Town: Oxford Univ. Press Southern Africa, 2010; van Huyssteen, Louis F. – van der Merwe, Schalk W. J. – Maxwell, Catherine J. *Contract Law in South Africa*, Alphen aan den Rijn: Kluwer Law International, 2010; Hutchison, Andrew. "Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?", *SALJ* (2011): 273-293.

<sup>12</sup> *Barkhuizen v. Napier* 2007 (5) SA 323 (CC). The Constitutional Court is the highest court in South Africa. It has the final say on all matters relating to the Constitution and its decisions are binding on all other courts. However, the intention of the South African Government is to review decisions that are germane to the executive and its exercise of power in terms of national and other legislation that has been the subject of its ruling.

community, the *boni mores* and the values held by the South African community. A notion, he maintained, that also implies to take into account the necessity to do simple justice between individuals in accordance to the concept of *Ubuntu*.<sup>13</sup> A recent judgment delivered by the Kwa-Zulu Natal High Court –and which was confirmed by the Supreme Court of Appeal and then by the Constitutional Court– has made this approach even clearer.<sup>14</sup>

To sum-up, due to the nature of the offer and other factors, such as the primacy given to private autonomy and the absence of a clear concept of *bona fide*, no general theory of pre-contractual liability has developed in South Africa and consequently the general principles of delict have been applied directly or indirectly as a common guideline.<sup>15</sup>

The landscape is so particular, that South African legal scholars generally assert that whether or not reliance damages are available is a question of fact which necessitates “*the establishment of a legitimate expectation on the part of the innocent party that a contract would eventuate*” and that “*there must be fault present in conduct of the recalcitrant party in the making of pre-contractual representation*”. Secondly, they maintain that even though “*the view that a party may negotiate a*

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<sup>13</sup> On the role of fairness in the law of contract see Lubbe, Gerard F. “Taking Fundamental Rights Seriously: the Bill of Rights and its Implications for the Development of Contract Law”, *SALJ* (2004): 395; Hutchison, Dale. *Good faith in the South African law of contract*, in Brownsword, Roger – Hird, Norma J. – Howells, Gerant G. (eds.) *Good Faith in Contract: Concept and Context*, Dartmouth: Ashgate, 1999; Brand, Frederik Daniël Jacobus. “The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution”, *SALJ* (2009): 71; Bhana, Deeskha – Pieterse, Marius. “Towards a Reconciliation of Contract Law and Constitutional Values: Brisley and Afrox Revisited”, *SALJ* (2005): 865.

<sup>14</sup> Judges literally stated that according to South African law, an option to renew a lease on terms to be agreed upon, is unenforceable even if there had been an agreement to negotiate in good faith. Cf. *Everfresh Market Virginia (Pty) Ltd v. Shoprite Cjeckers (Pty) Ltd* 2012 (1) SA 256 (CC).

<sup>15</sup> It is quite common to find in a mixed legal system a particular solution to the problem of wasted pre-contractual. See Hogg, Martin. *Promises and Contract Law. Comparative Perspectives*, Cambridge: Cambridge Univ. Press, 2011: 197.



*contract with impunity, secure in the knowledge that should no binding agreement result, he or she would be free from any liability, is outdated [...] when establishing liability based on a negligent representation the legitimacy of the plaintiff's expectations of a contract will have to be carefully interrogated to avoid an opening of the floodgates of litigation [...] the reliance interest should thus be claimable by a disappointed party to contractual negotiations which are ultimately unsuccessful and in South Africa the most appropriate cause of action toward this end is the law of delict*'.<sup>16</sup>

The landscape just described should not surprise anyone. In a legal system in which consensus is the basis to make agreements as long as it is the central concept in the creation of contractual liability, pre-contractual negotiations in itself do not attract any direct contractual liability –unless the negotiations have reached such a stage that all the requirements for the formation of a contract have been met.

However, the time seems ripe to argue that this approach is insufficient and needs to be critically re-considered. As any comparative investigation may easily demonstrate, in both Civil and Common law jurisdictions, cooperation is considered a significant tool in contract law theory and practice. The formation of a contract is often preceded by lengthy negotiations and most legal systems nowadays accept a general duty of pre-contractual good faith.<sup>17</sup> Even those legal jurisdictions –like Common law systems<sup>18</sup>– where

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<sup>16</sup> Hutchison, Andrew. "Liability for breaking off contractual negotiations?", *SALJ* (2012): 130-131.

<sup>17</sup> In 1861 and 1906 Rudolf von Jhering and Gabriele Fagella demonstrated the importance of having a strong approach to *bona fides* and *culpa in contrahendo*. In particular, Fagella showed the importance of distinguishing three different periods of good faith (the period before any offer has been drafted; the period during which an offer is drafted; the period when the offer has been made). See *Culpa in Contrahendo der Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen*, *Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts*, IV.1; *Dei Periodi Precontrattuali e della loro vera ed esatta costruzione scientifica*, in *Studi Giuridici in Onore di Carlo Fadda*, III, 271. The value of Fagella's theory was recognized by Raymond Saleilles in "De la responsabilité précontractuelle; à propos d'une étude nouvelle sur la matière", *RTD civ.* (1907): 697. The Italian Civil Code of 1942 was the first in Europe to contain a specific provision on pre-contractual good faith (cf. Art. 1337). For a comparative glance on good faith see Beale, Hugh –

there is not a general duty of pre-contractual *bona fides* the ruler uses other “strategies” (*i.e.*, fraud) to protect a party’s interests and rights linked to co-operation.

True, on the other hand, the South African approach has also positive elements that deserve praise. First of all, the application of the Constitution may limit the freedom of withdrawal and good faith, being an underlying “rule”, may very well influence the content of public policy.<sup>19</sup> Secondly, the *South African Law Commission* submitted to government draft legislation on the introduction of fairness and reasonableness as general principles in the law of contract.<sup>20</sup> Finally, as in other legal systems, South African law recognizes the concept of “subjective good faith” as reflected by the doctrine of notice and according to which, for instance, an acquirer of property who knows that the property is the subject matter of a prior sale is obliged to re-transfer the property upon a claim by the prior purchaser.<sup>21</sup>

### III. THE NATURE OF CONTRACT

This part of my analysis will consider and evaluate why *bona fides* plays an essential role in both contract law theory and practice according to contracts’ intrinsic essence.

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Fauvarque-Cosson, Bénédicte – Rutgers, Jacobien – Tallon, Denis – Vogenauer, Stefan. *Cases, Materials and Text on Contract Law*, Oxford-Portland: Hart Publishing, 2010.

<sup>18</sup> Where, by way of an example, there has been some doubt about the enforceability of exclusive negotiation clauses when conducting parallel negotiations. Cf. *Walford v. Miles*, [1992] 2 AC 1998; *Pitt v. PHH Asset Management Ltd* [1994] 1 WLR 327.

<sup>19</sup> *Olitzki Property Holdings v. State Tender Board* 2001 (3) SA at 1247 (SCA); *Transnet Ltd v. Sechaba Photoscan (Pty) Ltd* 2005 (1) SA 299 (SCA).

<sup>20</sup> Cf. *Project 47: Unfair Contract terms and the Rectification of Contracts*.

<sup>21</sup> van Huyssteen, Louis F. – van der Merwe, Schalk W. J. – Maxwell, Catherine J. *supra*, note 11: 58. Also, cf. *Brisley v. Drotsky* 2002 (4) SA I (HHA); *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (HHA); *Napier v. Barhuizen* 2006 (4) SA 1 (SCA).

In *The Concept of Law*, HLA Hart argued, I think successfully, that all “legal norms” are not necessarily “laws”.<sup>22</sup> Only legal norms that are capable of being applied to a succession of fact-institutions may, therefore, be considered as laws (Kelsen would partly agree with this). By way of an example, § 1295 of the Austrian Civil code states that “(1) *Every person is entitled to claim compensation from the wrongdoer for the damage the latter has culpably inflicted upon him; the damage may have been caused by the breach of a contractual duty or independently of any contact. (2) A person who intentionally inflicts damages in a manner contrary to public morals is also liable; however, if the damage was inflicted in the exercise of a right, he is liable only if the exercise of the right evidently had the object of harming the other*”. This is an example of law. But “*given § 1295 of the Austrian Civil code, Luca is liable to pay Matthew Euro 50 in reparative damages for having [...]*”, is a legal norm.

This definition may be associated with John Gardner’s distinction between law and *the law*, which is a distinction, it should be noted, that brings the dangers of the pluralist-setting of governance out of the shadows. While exposing the fallacy in Dworkin’s theory, Gardner suggested that the abstract noun ‘law’ may be used to refer to a practice as well as genre of artefacts.<sup>23</sup> He then noted that the abstract nouns “poetry” and “sculpture” have the same ambiguity, although things are a bit more complicated with law. Sculpture is the practice of producing sculpture but law is not (only) the practice of producing legal norms (law-making). It is the practice, Gardner says, of using legal norms (law-applying), yet its central and most distinctive activity is a combination of the two: the production of legal norms by using legal norms (law-making by law-applying).

But why does law become *the law*? Law is nothing more than an invisible and intangible entity (sublime) that lives in an ideal ontological dimension. It

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<sup>22</sup> 2<sup>nd</sup> edn., Oxford: Oxford Univ. Press, 1994.

<sup>23</sup> *Law as a Leap of Faith*, Oxford: Oxford Univ. Press, 2012: 185.

is, in other words, an “ideal object”. And, as every ideal object (like dreams and numbers), it lives out of space and time because of us. Furthermore, law is something that needs to be continuously represented for practical purposes. And when we represent it, or when, as Burke would say, we try to “capture” it, we create *the* law. In other words, law is the genre to which legal systems and legal norms belong, while *the* law what lawyers and legal officials (*i.e.*, judges) do.

That said, the law is a necessity (*ubi societas, ibi ius*). In its modern sense, as spread by the French Revolution, according to the deliberative essence of constructivist rationalism, the law is an act of will usually identified as a set of rules that evolves artificially with the aim of preventing the emergence of disputes or settling them or, in general, organizing the various forms of social life with its “authority”<sup>24</sup> and “normativity”. In the broadest sense, *the* law organizes the various dimensions of the process of societal interactions and people are expected to respect it. This is why *the* law has two types of content: ‘descriptive’ and ‘prescriptive’. Lastly, *the* law is also a social science because it has to provide for the changing needs of a developing community and is inseparably connected to it. This is the reason why the “modern”<sup>25</sup> paradigm of law perceives it as a balancing act. True, the complex and multifaceted character of *the* law allows for a wide variety of topics whose aim is to usefully describe law’s nature and structure, especially in legal philosophy. However, if this is taken further it may result in general disagreement dictated by the predilections of each particular jurist.

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<sup>24</sup> As Alan Watson remembers, Yahweh directly gave the Ten Commandments to Moses on Mount Sinai, Apollo, through the Oracle of Delphi, provided Lycurgus with the laws of Sparta, Zeus gave the Cretans their laws, and Hermes did the same with the Egyptians through Mneves. In his words, “[t]he significance [...] of these traditions is that the fiction of the gift of god heightens the laws’ authority and makes their acceptance and maintenance easier”. See, *Comparative Law: Law, Reality and Society*, Lake Mary (FL): Vandeplas Publishing, 2010: 41.

<sup>25</sup> That is, since Jhering.

In contrast to the difficulty in defining law, the view of the majority of legal scholars has always been the same: one understands *the* law through its purposes. The notion of “functionalism” is related to the provision what I called “efficient *formulae* of normative thinking” (law in context). Within this perspective, it is usually maintained that the law of contract plays a decisive role because of the contract’s function of providing a legal framework within which people do business by exchanging resources. Contracts are intimately involved in the achievement of society’s values and their special virtues lie in their capacity to increase human satisfaction through exchange.

Yet, as John Rawls aptly put it, the idea *of* co-operation includes the idea of each participant’s rational advantage or good, and the idea of rational advantage specifies what it is that those engaged in co-operation are seeking to advance from the standpoint of their own good. The fact is that all the parties involved in agreements clearly recognize that they cannot achieve what they would like too without the other party’s co-operation.<sup>26</sup> Thus, while analyzing and discussing contract law’s essence, aims, limitations, and future challenges, we should avoid abstract approaches and instead provide an effective description of contracts as systematic realities.

The foregoing should be investigated (and eventually criticized) by also remembering that every contract has an “impersonal” and a “personal” dimension. There is a correlative relationship between each party’s position in a contract and this is namely its “impersonal” dimension (a seller, a buyer). Nonetheless, at the same time every contract is shaped by a “personal” dimension because human personality describes a party’s

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<sup>26</sup>Rawls sees “justice” as a synonymous of “equality”. This line of thinking is rooted in the suggestions of Hobbes, Locke, Rousseau, and Kant who were the creators of the so-called “contractarian approach” to socio-legal theory. This view has greatly influenced political philosophy since the making of Rawls’ 1958 paper (“*Justice as Fairness*”) and which preceded his definitive statement in his “*A Theory of Justice*”. For a compelling introduction on this topic, see Amartya, Sen. *The Idea of Justice*, Cambridge (MA): Harvard Univ. Press, 2011.

capacity to pursue his own interests and so provides elements about each party's view. Finally, for present purposes, it is worth noticing that both in South Africa and the EU<sup>27</sup> the law of contract is strongly connected to a critical attitude which exposes it to social, cultural, political, economic, and other impetuous influences.

Contracts' double dimension should make it clear that: (i) the notion "good faith" implies that a party has to take into account the other party's interests and rights;<sup>28</sup> (ii) even within contract law's framework, "justice", as will be discussed below, is a much wider conception than "law" and may therefore apply wherever there is a "code" of rules, legal or non-legal. As a consequence, conducting research on the so-called "access to justice" in contract law theory and practice should start by arguing that as lawyers it is our duty to improve the methods by which the contractants can obtain, what during the *Seminar*, I labeled "daily-preventive justice" (DPJ). A type of justice whose notion implies that the contractants may see their rights and interests effectively protected by the contract itself on the one hand, and its correct execution on the other hand, and hence without bringing proceedings before a court.

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<sup>27</sup> Which, on the one hand, are two realities that share important elements (*e.g.*, legal pluralism, financial crisis, future common challenges, *etc.*), whereas, on the other hand, the former has an extremely progressive Constitution – a result that the EU has been unable to formally achieve (even though the European Commission says that the EU's Constitution are its Treaties).

<sup>28</sup> Bianca, Massimo C. *Il Contratto*, Milan: Giuffr  Editore, 1987. Which is the reason why even though in France and Germany the starting point was that there was no duty to disclose facts that the other party did not know, it is now clearly established that keeping silent (non-disclosure) about certain matters, circumstances, and/or facts of which a party knows that the other one is ignorant, may in some cases amount to fraud (which requires an intention to deceive the other party). In Italy, similar provisions are provided in Articles 1337, 1338, 1439 and 1440 Civil code). Contrarily, in English law only the (positive) making of a false representation of fact amounts to fraud. More details in Beale, Hugh – Fauvarque-Cosson, B n dicte – Rutgers, Jacobien – Tallon, Denis – Vogenauer, Stefan. *Cases, Materials and Text on Contract Law*, Oxford-Portland: Hart Publishing, 2010: 434.

Yet this last observation warrants further comments. Dennis Lloyd started his analysis on “*the idea of law*” remembering that “*In the pantheon Mesopotamia two deities were singled out for special reverences. These were Anu, the god of the sky, and Enlil, the god of the storm [...] the sky god issued decrees which commanded obedience by the very fact of having emanated from the supreme divinity*” but “*the power of the storm was invoked, the power of compulsion, the god of coercion, who executes the sentences of gods and leads them in war*”.<sup>29</sup> Literally, he points out that the myths of Anu and Enlil reveal the deep human need for order and the concomitant belief that such order demands the combination of two essential elements: authority and coercion. As Lord Bingham recently asserted whilst giving his explanation of “the rule of law” – only “*in Utopia [...] civil disputes would never arise: the citizens would live together in amity, and harmonization would reign. But we live in a sub-utopian world, in which differences do arise, and it would be false to suppose that they only arise when there is dishonesty, sharp practice, malice, greed or obstinacy on one side or the other*”.<sup>30</sup> In other words, all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of laws publicly made, taking effect in the future and publicly administered in the courts – that is one of the multiple meanings of the “rule of law”. This is basically the reason why people can also rely on alternative dispute resolution mechanisms (*i.e.*, mediation, conciliation, and arbitration).

Nonetheless, I perceive the need to go beyond this approach by also calling for a major update of high level normative arrangements and theories on this topic. In particular, my suggestion is that private law legal scholars should ask themselves whether, and if so how, is it possible to feasibly achieve the DPJ stage within contract law’s framework. We will see that *bona*

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<sup>29</sup> *The Idea of Law*, London: Penguin Books, 1964: 26.

<sup>30</sup> *The Rule of Law*, London: Penguin Law, 2010: 85. Bingham’s utopic dimension was partly anticipated by Bernard Mandeville’s *The Fable of The Bees: or, Private Vices, Public Benefits*, London: Penguin Classic, 1989 (1705).

*fides* (and the general course of the parties' behavior before and after the conclusion of an agreement) is a fundamental part of the answer. But before going any further, it is necessary to describe the evolution of the notion of the term "justice" from Plato to date, in order to understand how and why we have come to associate it with "equality" only under the influence of democratic-fraternal theories.

Some commentators may conceive such an enquiry to be unnecessary. Their claim would be fascinating given that much literature is dedicated to the meaning of this timeworn term. Yet this is not surprising for many reasons: (i) *in medias res*, concepts that appear to us as the most common are always the most difficult to describe; (ii) the concept of "justice" and our perception of it evolves; while we have come to associate it with "equality" under the direct influence of Jeremy Bentham and Jean-Jacques Rousseau, for millennia it held a different meaning; (iii) any analysis as to what is "just" and "unjust" demands a clear articulation and reasoned scrutiny; (iv) as Matthew H. Kramer persuasively suggested, "[a]nyone seeking to gain a clear understanding of the relationships between law, justice, and morality must attend to numerous distinction with each of those phenomena,"<sup>31</sup> with this distinction being an uneasy task; (v) there is a clear difference between procedural justice and justice *tout court*.

Nonetheless, given that the point of departure for theorizing about private law is based on experience, any discourse on good faith should also be focused on the implications of the current meaning of the term justice as well as its achievement. As John Gardner writes, "*It is essential to the nature of law that all legal systems/orders have law-applying officials who make legal rulings.*"<sup>32</sup> Consequently, access to justice and the enforceability of private law rules are

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<sup>31</sup> *In Defense of Legal Positivism. Law Without Trimmings*, Oxford: Oxford Univ. Press, 2007: 21.

<sup>32</sup> *Supra*, note 23: 74.



central issues in the promotion or denial of good faith as a “rule of law”. This is the reason why, as lawyers, we are called upon to investigate whether the theoretical concept and practical application of “justice” is better promoted and protected with the a “hard” or “soft” approach to good faith. Indeed, contractual rights are not self-applicable; they are acquired politically in the form of laws that guarantee them. The discourse on contractual rights is thus a legal discourse.

To truly understand the meaning of the term justice, it is necessary to bear in mind that justice is a much broader concept than law. Its wider scope is due to the unavoidable circumstance that socio-legal scholars face when answering the question, “*How are we to decide whether the actual rules are themselves just?*”. Ronald Dworkin summarizes this effectively when he claims that “[l]aw is also different from justice. Justice is a matter of the correct or best theory of moral and political rights, and anyone’s conception of justice is his theory, imposed by his own personal conviction, of what these rights actually are. Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past.”

Difficulties thus emerge as we attempt to conduct such an investigation. These arise because, a priori, it is hard to deny that our positions and predicaments can affect our general attitude and political beliefs about social differences and asymmetries. Long ago, Aristotle understood that for those who sit in judgment, “*love, hate or persona interest is often involved, so that they are no longer capable of discerning the truth adequately, their judgment being obscured by their own pleasure or pain.*”<sup>33</sup> In Shakespeare’s play *King John*, Philip the Bastard observes this truth quite clearly when saying, “*Well, whiles I am a beggar / I will rail / And say there is no sin but to be rich / And being rich, my virtue then shall be /*

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<sup>33</sup> *The Art of Rhetoric*, Book 1, (John Henry Freese tr.), Cambridge, (MA): Harvard Univ. Press, 1975: 1.7.

*To say there is no vice but beggary.*<sup>34</sup> Similarly, the economist Amartya Sen, who moved away from classical utilitarianism after many years, though without completely rejecting it, aptly recognized that “*if we take self-scrutiny very seriously, it is possible that we may be hard-minded enough to seek more consistency in our general evaluative judgments.*”<sup>35</sup> As Thomas Scanlon rightly pointed out, “*Thinking about right and wrong is, at the most basic level, thinking about what could be justified to others on grounds that they, if appropriately motivated, could not reasonably reject.*”<sup>36</sup> In other words, life’s experiences, as Albie Sachs Justice suggested, affect legal reasoning in unexpected ways. This is the reason why, according to Judge Richard L Nygaard, any judicial decision must not be “ghost-written” by the counsel and must show that the judge “*actively wrestled with [the parties’] claims and arguments and made a scholarly decision based on his or her own reason and logic.*”<sup>37</sup> Yet these unavoidable circumstances are extremely dangerous because they may lead to a shift from the rule of law to the so-called “rule of men.” Tamanaha recognized this when saying “[i]f judges only consult their own subjective view to fill in the content of the rights, the system would be no longer the rule of law, but the rule of the men or women who happen to be the judges.”<sup>38</sup>

To summarize, we may say that, since the eruption of modern political and legal thought, the term “justice” mainly denotes the notion of equality. However, it seems reasonable to argue that, within this perspective, justice is little more than the idea of rational order and coherence, and therefore it operates also as a principle of procedure and not only of substance. The values that we choose to affirm are a matter of choice, and sometimes this

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<sup>34</sup> Written around 1590 and published in 1623. Cf. 2.1.592.

<sup>35</sup> *The Idea of Justice*, Cambridge (MA): Harvard Univ. Press, 2011: 196.

<sup>36</sup> *What We Owe to Each Other*, Cambridge (MA): Belknap Press of Harvard Univ. Press, 1998: 5

<sup>37</sup> Cf. *Bright vs. Westmoreland County* 380 F 3<sup>rd</sup> 729 (2004) – US Court of Appeals, Third Circuit.

<sup>38</sup> *On the Rule of Law. History, Politics, Theory*. Cambridge Univ. Press, 2004: 105.

choice is an inevitable and logical necessity, or in other words, one decides to follow the necessity felt within. Therefore, we cannot say whether our choice is entirely free. Considering, as Hume suggested, that it is not reason but passion that imposes our moral criteria, even if the scale of social values cannot be logically demonstrated, explained, and “justified,” we sometimes have to accept it because we cannot do otherwise. Among legal scholars, there is a general consensus that there should be rules outlining how people should be treated in given cases. These rules should be general in character. Finally, there is a need for an impartial application of these rules (Hayek’s notion of ‘legal liberty’ and ‘purpose-free rules of just conduct’ is essential here: according to Hayek, the rule of law promotes ‘liberty’ by allowing individuals (or, ‘players’) to know in advance the (abstract) rules (of just conduct) which regulate (without arbitrary distinctions) their activity).

The foregoing suggestions are evidently related to the significant role that “equality” plays within justice discourse at the moment of writing, and in particular to the circumstance that, as a historical fact, we have come to associate “justice” to “equality” only because of Jeremy Bentham’s and Jean-Jacques Rousseau’s accounts. For millennia it has had a completely different meaning. In this sense, it is quite interesting to note that above the entrance to the Supreme Court of the United States four words are caved: “*Equal justice under law*”.<sup>39</sup>

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<sup>39</sup> The US is not alone in the list of the legal systems according to which the modern meaning of ‘justice’ involves ‘equality’. Several governments around the world spend more effort helping members of certain racial or ethnic groups realize their ambitions than they do others. In doing so, they take certain factors (including race, color, religion, sex, national origin) into consideration in order to benefit an under-represented group in areas of employment, education, and business. In some countries, the policy only applies to areas under direct state control, such as public-works contracts or admission into public universities and public sector jobs. In others, like South Africa, it also applies within the private sector: private firms are obliged to take account of the race of their employees, and contractors. Although equality and diversity should always be protected and promoted as the two most significant expressions of human dignity, it is time for a thoroughgoing investigation into the ‘affirmative action’ theory. A deeper look at

Although many examples could be made of the way the spirit of equity was invoked by Roman law to enable the law to be developed in a more just and humane manner than was permissible within its strict letter, it is generally argued that it was Jeremy Bentham (who is widely regarded as the greatest and most influential figure in Anglo-American jurisprudence and leader of the *Philosophical Radicals*) that specifically interpreted “justice” as “equality” in the modern sense. According to Bentham, “formal justice” requires equality of treatment in accordance with the classifications laid down by the rules – even if it tells us nothing about how people should or should not be classified and then treated.

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affirmative action policies reveals three flaws: First, *(i)* in the short term, they imply the sacrifice of important elements that any system of government and governance should take into account (*i.e.*, quality); *(ii)* in the long term, it runs the risk of creating an upside-down situation (as with South Africa’s so-called ‘anti-apartheid’); *(iii)* given that some inequality is needed to propel growth while inequality is closely linked to low growth, mass redistribution may, under certain conditions, affect economic growth. The second flaw lies at the core of *Schuette v. Coalition to Defend Affirmative Actions*, a case heard by the US Supreme Court on 15 October 2013. The case was about racial preferences and whether state constitutional amendments banning affirmative actions (which are in eight state constitutions) violated the federal constitutional right to the equal protection of the laws (as the federal appellate court of Michigan ruled). Finally, too often racial-empowerment schemes are used to benefit political party-linked people, not redress previous injustices. This is why justice and equality lie at the center of some of the most heated controversies in contemporary society (recent debates about the American health care system are just the tip of the iceberg). In this sense, it would be pertinent to rediscover the significance of Hayek’s three notions of ‘social legislation’ in his *Law, Legislation and Liberty*, London: Routledge, [1973, 1976, 1979] 2013: 133-35. Regarding the last flaw, see *The Economist’s* editorial ‘Inequality v growth. Up to a point, redistributing income to fight inequality can lift growth’ (*italics in original*), 1 March 2014. Finally, it is no trivial matter that even Hayek, warned of the apparent violence that has been done (and will be done) to language and justice discourse while bringing the ideal of ‘social justice’ toward new limits, such as that of the ‘global justice’. The truth is that the doctrine aimed at creating the ‘a-spatial’, unlimited, and unbounded global order has instrumentally manipulated both the political and juridical meanings of ‘equality’ of the community of the people of a given territory (today we would call them ‘citizens’) and of their collective differentiation from other groups in Schmittian terms.

Bentham was a committed observer of society<sup>40</sup> and is seen as the first modern legal positivist – even though the word ‘positivism’, in its modern dimension, was first used by Auguste Comte. According to Bentham, when two men’s interests clash, the best resolution is that which produces the greatest total happiness – regardless of which man enjoys it or how it is shared by them. Bentham (along with all *The Utilitarians*) – who rejected natural law – believed that the behavior of mankind is dominated by the influence of pain and pleasure and that, by increasing the latter and diminishing the former, human happiness increased. Utility is no more than what serves to increase human happiness and satisfaction, the sum of which is to be assessed by calculating the stock of pleasure and pain which results from a particular course of action. The test of utility was conducted mathematically by assuming that each man’s happiness was equal in value of that of the next man. Bentham was writing at a time of tremendous progress, so it is understandable why his ideas in favor of utility were based mainly on the conviction that human reason could find no other rational justification for preferring one course of action over another, other than pursuing “utility”.

In addition, Bentham had clear views on the role of law regarding the subordinate ends of government and based his whole philosophy on two principles: (i) the association principle; and (ii) the greatest-happiness principle. He believed that determinism is important in psychology and maintained that what is good is pleasure or happiness, and what is bad is pain. This line of thinking had been advocated by Francis Hutcheson as early as 1725, and then by James Mill. Bentham’s merit consists of making a vigorous application of it while trying to solve practical problems. He claimed that criminal law is a method of making the interests of the

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<sup>40</sup>Bentham elaborated on the Panopticon theory (1791) two centuries before George Orwell’s *Big Brother* in 1984 (published in 1949).

individual coincide with those of the community, whereas civil law has four aims: substance, abundance, security, and equality. It is no surprise that Bentham did not mention “liberty”, because his ideal was “security”, not “liberty”, like that of Epicurus. He then moved to Radicalism and his refusal to believe without rational grounds finally led him to reject religion, including belief in God.

John Stuart Mill, who became an important figure in liberal political philosophy, continued to promote an impressive rational concept of utility. Such a tendency, as Hayek notes, led him to overlap the concept of ‘social justice’ with ‘distributive justice’ and earned him criticism on both sides of the Atlantic.<sup>41</sup> A century later, Chester Irving Barnard, who was an American business executive, public administrator, and author of pioneering

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<sup>41</sup>In particular, Hayek writes that Mill’s notion of social justice ‘*leads straight to full-fledged socialism*’, which is a doctrine that Hayek disliked given that it is, in his words, ‘the most influential and respectable form of constructivism to stand for all its various forms’. Indeed, Hayek maintains, in Mill’s statement ‘*the demand for “social justice” is addressed not to the individual but to society – yet society [...] is incapable of acting for a specific purpose, and the demand for “social justice” therefore becomes a demand that the members of society should organize themselves in a manner which makes it possible to assign particular shares of the product of society to the different individuals or groups*’. It should not be forgotten that Hayek did not believe in the modern dimension of the doctrine of social justice. In his words, ‘*the prevailing belief in “social justice” is at present probably the gravest threat to most other values of a free society. [...] It seems to be widely believed that “social justice” is just a new moral value which we must add to those that were recognized in the past, and that it can be fitted within the existing framework of moral rules. What is not sufficiently recognized is that in order to give this phrase meaning a complete change of the whole character of the social order will have to be effected, and that some of the values which are used to govern it will have to be sacrificed [...]. I believe that “social justice” will ultimately be recognized as a will-o’-the-wisp which has lured men to abandon many of the values which in the past have inspired the development of civilization. [...] Unfortunately, this vague desire [...] not only is bound to be disappointed this would be sad enough. But, like most attempts to pursue an unattainable goal, the striving for it will also produce highly undesirable consequences [...]*’. *Law, Legislation and Liberty*, supra, note 39, respectively 228, 217 and 229-31.

According to Russell, Mill ‘*[...] offers an argument which is so fallacious that it is hard to understand how he can have thought it valid. He says: Pleasure is the only thing desired; therefore pleasure is the only thing desirable. He argues that the only things visible are things seen, the only things audible are things heard, and similarly the only things desirable are things desired. He does not notice that a thing is “visible” if it can be seen, but “desirable” if it ought to be desired. Thus “desirable” is a word presupposing an ethical theory; we cannot infer what is desirable from what is desired*’. *History of Western Philosophy*, London: Routledge, [1946] 2004: 702.

works in management theory and organizational studies, clarified this approach by suggesting that “[...] *exchange is the distributive factor; coordination is the creative factor. We are now giving attention to the distributive factor. If we for the moment limit ourselves to industrial organizations, in all of them the rule must be that you give, so far as possible, what is less valuable to you but more valuable to the receiver; and you receive what is more valuable to you and less valuable to the giver*”. Barnard was referring particularly to the development of the US public sector. Nonetheless, his studies show their real value only when applied to the private sector (as with Sun Tzu’s teachings, which were intended as powerful weapons to defeat the enemy, but today are used more in business schools than military academies).

All these doctrines have precise limits. In particular, they automatically involve two questions: “Does each man constantly pursue his own happiness?” and “Is general happiness the right goal of human action?”. Answering these questions would inevitably imply an analysis on the ethical part of the utilitarian approach and the doctrines that used it as a starting point. Also, as demonstrated by Hayek, “[t]he trouble with the whole utilitarian approach is that, as a theory professing to account for a phenomenon which consists of a body of rules, it completely eliminates the factor which makes rules necessary, namely our ignorance”.<sup>42</sup> Such a fallacy, is also present in the constructivist rationalism, which is rooted into anthropomorphic modes of thinking and received the most complete expression with Descartes (which was spread throughout the Western legal tradition by the French Revolution and the modern, “intentional” dimension of the Civil legal tradition it created).

Unfortunately, the purview of our inquiry does not allow for such an investigation. It suffices to say that this kind of ethic is usually aimed at claiming that our desires and actions are good if they promote general happiness. Hence, it is possible to assert, this ethic is not only democratic

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<sup>42</sup>*Law, Legislation and Liberty, supra*, note 39: 187.

and anti-romantic (thus Democrats are likely to accept it), but it is completely different from the ethic of Nietzsche, who said that only a minority of the human race have ethical importance.

Notwithstanding these doctrines' limitations, they all had an impact on the development of microeconomics and continue to draw interest. Daniel McFadden, for instance, wryly termed *homo economicus* "a rare species" while arguing for a "new science of pleasure".<sup>43</sup> In this sense, he first pointed out that economics should draw much more heavily on such fields as psychology, neuroscience, and anthropology, and then asked economists to accept that evidence from other disciplines does not just explain those bits of behavior that do not fit the standard models. Rather, economists consider anomalous to be the norm.

Greek philosophers (including Plato and Aristotle) had a different concept of justice. They thought that each thing or person had its or his proper sphere, and to overstep this was unjust. Some men, by virtue of their character or aptitudes, have a wider sphere and there is no injustice in this. In a way, this line of reasoning was anticipated by Anaximander, who was one of the philosophers of the Milesian School with Thales and Anaximenes, who believed there was a certain proportion of fire, earth, and water in the world. He argued that each element perpetually attempts to enlarge its empire but an unknown kind of 'natural law' perpetually redresses the balance.

In the *Republic*,<sup>44</sup> justice, where it is almost synonymous with "law", is concerned mainly with property rights, which have nothing to do with equality. Thrasymachus<sup>45</sup> tells us that justice is 'nothing else than the interest

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<sup>43</sup> 'The New Science of Pleasure', 2 *NBER*, Working Paper No. 18687/13

<sup>44</sup> Plato's most important dialogue, written in around 380 BC, it is worth noting that Plato's philosophy was influenced by the Spartan culture.

<sup>45</sup> Who, like almost all the characters in Plato's dialogues, was a real person.



of the stronger'. Yet it seems that this definition is soon abandoned as inadequate, and that Plato's ultimate definition of justice consists of every man doing his job (*i.e.*, the debtor has to pay his debts). This is how the political order may be protected within society's boundaries. As a consequence, Plato maintains that it is absolutely possible (and essential) to have inequalities of power and privilege in a just society.

The perspective should be interpreted by remembering that Plato's utopia was the most significant philosophical thought until it was replaced by Aristotle's metaphysics in the medieval Church, whereas during and after the Renaissance,<sup>46</sup> he reverted to being identified as a "key philosopher". At that time, people began to value political freedom and it was to Plutarch that they turned above all others. The substitution of Plato for the scholastic of Aristotle was mostly hastened by contact with Byzantine scholarship and the fact that both Cosimo and Lorenzo de' Medici were inspired by him. Besides, Plutarch's *Life of Lycurgus* played a large part in framing the doctrines of Rousseau, Nietzsche, and National Socialism. Even this aspect might be interpreted as evidence of Plato's influence. It is also indubitable that Plato influenced the English and French liberals of the eighteenth century, as well as the founders of the US and the Romantic Movement in Germany. After that, Plato's influence began to play a less important role, even though Locke's theory of knowledge is based on his perspective.

In particular, from Locke's liberal perspective, liberty depends upon the necessity of pursuing true happiness and upon the government of passion. His theory was mainly based on the opinion that, in the long run, private and public interests are identical, so where there is no property, there is no justice. It is clear that Locke's view is anthropologically rooted in that of

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<sup>46</sup>Which was not a period of great achievement in philosophy even though it broke down the rigid scholastic system.

Epicurus.<sup>47</sup> Indeed, both Epicurus and Locke's accounts are primarily shaped to secure tranquility because, to them, justice primarily consists of acting so as to never have cause to fear other men's resentment.

Given the above discussion, it should be now clear that the first step that is required in order to give an accurate and useful answer to the question posed above about contracts' nature is to understand that co-operation –and hence good faith– is (i) the key-source of an effective DPJ, and that (ii) it is directly linked to the soul of every contract.

As said, a contract has the function to provide a legal framework within which people do business by exchanging resources. Hence, a contract is nothing more than a “neutral field” or a “truce” between two “litigants” in competition: every day people need each other to make exchanges because of the scarcity of the resources and services: a contract is an agreement (*pacta*) for reaching these purposes.<sup>48</sup> In doing so, contracts are intimately involved in the achievement of society's values and their special virtues lie precisely in their capacity to increase human satisfaction through exchange by also pursuing private and public interests at the same time. This is basically the reason why: (i) the contractants are legally required to agree on all what is written in the contract; (ii) as a consequence, by signing the contract, the parties give birth to a “common intention” (which is, figuratively, the neutral field on which the contract is adjusted); (iii) the agreement collapses precisely when the parties no longer rely on the common will expressed in the contract (a situation which occurs before or whilst executing the contract);<sup>49</sup> (iv) the primary rule in contracts'

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<sup>47</sup>Who was the founder of one of the two great new schools of the Hellenistic period (the other was Stoicism, founded by Zeno).

<sup>48</sup> Monateri, Pier Giuseppe (ed.). *Manuale del Nuovo Contratto*, Bologna: Zanichelli, 2008.

<sup>49</sup> All legal systems rely on a number of long established and widely accepted interpretative precepts if the wording of a contractual clause is ambiguous. Among them, it is widely agreed that priority should be given to the relevant circumstances or the

interpretation is that, even in cases of ambiguous wording, legal effect must be given to it (a principle which is generally called “conservation of the contract”; cf. Art. 1367 Italian Civil code and Art. 5:106 PECL).

To sum-up, given the current meaning of the term “justice”, this paper suggests that a feasible achievement of the DPJ within contract law theory and practice requires, first, to understand how and why the soul of every contract is co-operation and, second, that the soul of co-operating is *bona fides*.<sup>50</sup>

#### IV. THE MORALITY OF CONTRACT

Having described the nature of contract, it would be prudent to now analyze its morality. Some may argue that morality and law should not be overlapped. Austin, for instance, explained why such a connection should not be made. According to him,<sup>51</sup> *the* law has nothing to do with justice or morality because it is a command of political superiors ultimately backed up by the threat of a “sanction” in case of disobedience. In every society, Austin continued, there is one body or person whose sovereignty is unique.

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aforementioned common intention of the parties. As Robert Joseph Pothier claimed, “one should, in contracts, seek what was the common intention of the parties, rather than the grammatical sense of the terms”, in *Traité de Obligations*, in *Oeuvres de Pothier*, 1861: 91. Cf. Art. 1156 French Civil Code; Art. 1362 Italian Civil Code; Art. 1382 Spanish Civil Code; BGB § 133; PECL Art. 5:101, 5:102, 5:105, and DCFR Art. II-8:101-2.

<sup>50</sup> Art. 1321 of the Italian Civil Code offers a definition of what is a contract, which could help the reader in understanding my arguments. It states that a contract is an agreement (“*accordo*”) between two or more parties for the purpose of creating, providing for or extinguishing amongst themselves a legal patrimonial relation.

<sup>51</sup> Austin was a follower of Bentham, and developed a doctrine that persisted through ages probably because it was diametrically opposed to the school of thought which derives from Plato and Aristotle for present purposes, it is important to remember that he borrowed several suggestions from Bodin’s account, which ultimately derives from the imperial Rome.

This body or (person), habitually obeys no-one, and is obeyed by the bulk of the population.<sup>52</sup>

Neil MacCormick has led this doctrine to a new level of analysis. Whilst providing his “institutional theory of law” aimed to detach “law” conceptually from “state”, he focuses his efforts on two important questions: (i) what is special about the law that is state-law; (ii) how is it possible that states as political entities can be effectively confined within (*the?*) law. MacCormick’s basic idea is that norms belong within normative orders, of which some are, and some are not, institutional in character. More precisely, he writes that law is a principal example of institutional normative order, whereas morality is a non-institutional order, and politics is an institutional but not normative order.

Hence, it may be concluded, that we should not associate “law” to “morality” and talk of a substantive “morality of contracts”. Yet, what is correctly asserted by MacCormick allows us to argue that a link between “law” and “morality” exists. In particular, it is possible to suggest that we call “law” what our morality suggests and that the only difference between the two of them is that the former has been provided with an institutional character to be formally legitimized. A difference which does not prohibit us from discussing and investigating the substantive “morality of *the* law” – whatever it may be. This is the reason why Hart’s attempt to keep law and morality apart has been criticized by many American lawyers. What was argued by Judge Benavides at the US Court of Appeals, whilst referring to Calvin Burdine’s case, and by Chief Justice of Alabama Roy Moore is just an example.<sup>53</sup>

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<sup>52</sup> *The Province of Jurisprudence Determined*, Nabu Press, [1832] 2010.

<sup>53</sup> Whilst referring to Calvin Burdine’s lawyer, who had been found asleep during the process in which his client received the death penalty, Judge Benavides said that “*it shocks the conscience that a defendant could be sentenced to death under those circumstance*”. Cf. *Burdine v.*

That said, the investigation I am hereby proposing further requires an explanation as to why Charles Fried's account on contract law deserves criticism. In his "*Contract as Promise*" he argues that it is possible to locate the underlying essence of contracts in the morality of promising. He then repudiates the idea that "*contractual standards are ineluctably collective in origin and thus readily turned to collective ends*".<sup>54</sup> By using these words, Fried basically stands up against the reduction of contract law to social policies such as wealth maximization and economic efficiency –a theory that I will instead use in the next part of my analysis. In other words, he basically relies on Kant's assumption and claims that the idea of contract, as promise, expresses the liberal notion of the substantive right –with an evident aversion to the pursuing of collective interests and to economic analysis in general.

Although compelling, and in some aspect fascinating, Fried's account fails to make contract law intelligible and predictable in its own terms.<sup>55</sup> This is the reason why, for present purposes, it is more useful to refer to Jeremy Bentham's clear views on the role of law in respect of the subordinates ends of government, and on the role of *the* law of contract as a magnificent tool to support and supplement private arrangements. He generally opposed compulsory redistribution of wealth because this leads to disappointed expectations and specified that the law of contract is a particular tool to use in order to protect particular social values linked to the increase of human satisfaction through exchange.<sup>56</sup>

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*Johnson* 231 F 3d 950 (2000), US Court of Appeals, Fifth Circuit. Roy Moore based his campaign on a commitment "*to restore the moral foundation of law*".

<sup>54</sup> Cambridge (MA): Harvard Univ. Press, 1981: 5.

<sup>55</sup> In the same vein, see Peter Benson's "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory", *10 Cardozo Law Review*, (1989).

<sup>56</sup> *Works*, 1859, I: 331.

What I see behind these words is that every contract represents not only a matter of balancing opposite private interests, but also a matter of balancing private and public interests together. In other words, through contracts we have to provide a *useful and efficient legal system of exchange and justice*. This is the morality of contract. Consequently, it follows that *the* law of contract is extremely important for at least three reasons: (i) it is the law relating to the formation, performance and discharge of contractual obligations; (ii) it is the core area of private Law; (iii) it is the one closest to the market. Its role is to enhance the institution of contract by making it more stable and reliable whilst increasing its pervasiveness and its efficiency. This is the reason why contract law's evolution must be seen in light of the expansion and internationalization of trade and economics by also analyzing the emergence of new categories of contracts –such as consumer contracts– together with the setting of new standards of social justice in the private sector.<sup>57</sup>

These suggestions were first made by John Locke and by Oliver Wendell Holmes Jr. What may be added is that two requirements have to be at least respected and promoted to achieve an effective system of exchange:

1. the recognition (and protection) of property rights (Plato and Locke would agree with that);

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<sup>57</sup> In the area of contract law, transformations have been occurring for decades, leading to the phenomenon that codified law is highly divergent from the reality of contemporary contract practice after the codification stage. Nowadays, in the globalization era, the functions of contract law have been subjected to an irreversible paradigm shift and there are several factors to which the internationalization process in the field of contract law is connected, such as the growth of trade and the rising of the so-called “mass-contracts”.

2. the recognition (and protection) of the right to make these rights circulate (because “rights” on things circulate, not “things” themselves).

Yet talking of property rights requires a few words on the impact of the *numerus clausus* theory on the making and developing of the Western Legal Tradition.<sup>58</sup> Unfortunately, the scope of this contribution does not allow sufficient space to address this crucial issue thoroughly. It will therefore suffice to highlight that, as Francesco Mezzanotte remarked, the *numerous clausus* theory may indeed *be regarded as one of the fundamental hinges of the “classic” Law of Property, limiting contractual autonomy in the definition of the relevant and admissible classes of property schemes. [...] while contract law allows individuals to freely shape legally enforceable promises according to their needs, property law is confined in a closed set of defined forms, providing property-type protection only for those interests explicitly recognized and disciplined by the Legislator*.<sup>59</sup>

Furthermore, the above mentioned p. 2 should be stressed from an ontological perspective as well. According to *Ontology*, as lawyers we mainly work with the so-called “social objects”. Objects that exist in our society only because we think they do so and that have shapes and functions we want to give them (*e.g.*, a pen, a knife, a country, Wall Street, an obligation, a contract, *etc.*).<sup>60</sup> Even though some socio-legal scholars do not believe in the

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<sup>58</sup> The creation and development of which is well described by Berman, Harold J. *Law and Revolution I*, Cambridge (MA): Harvard Univ. Press, 1983; *Law and Revolution II*, Cambridge (MA): Harvard Univ. Press, 2003.

<sup>59</sup> “The Interrelation Between Intellectual Property License and the Doctrine of Numerus Clausus. A Comparative Legal and Economic Analysis”, *Comparative Law Review*, (2012): Vol. 3, n. 2, Fall Issue. The Author was particularly referring to intellectual property rights.

<sup>60</sup> I described the utility of having an ontological approach to law during the aforementioned *Workshop on The Use of Comparative Law in Postgraduate Research* hosted by the *British Association of Comparative Law* at the University of Nottingham in July 2011. More details in Ferrari, Maurizio. *Documentalità. Perché È Necessario Lasciare Tracce*, Rome-Bari: Laterza, 2009; Austin, John Langshaw. *How We Do Things With Words*, 2<sup>nd</sup> edn.,

extra value of this line of reasoning, I strongly believe in its relevance and utility because it makes it possible to write down proper norms in accordance with our society's needs. We should start to conceive that every single norm and every single rule in contracts, in legislation and in judgments is a *social object* that can have the precise shapes and functions that we want to give to it.

As a next step, let me consider another line of legal reasoning that takes the precise and technical form of saying that as a comparatist who works with different legal jurisdictions, I started asking some years ago myself whether or not it is possible to find an unanimous definition of “justice” that is suitable for all the legal systems and businesses randomly involved. It is hard to deny that such a question might be defined as “utopic” because of what was previously argued about how our personal positions and predicaments affect our general attitude and socio-political beliefs. This is why, whilst trying to answer it, socio-legal scholars face considerable difficulties.

Starting from this awareness, whilst striving for an answer, I found an illuminating suggestion in what has been argued by Epicurus, whose main idea was that justice consists in acting so as not to have occasion to fear other men's resentment (it is reasonable to assume that Savigny would not agree with that, as he argued that law should not be extended to human sentiment).<sup>61</sup> In other words, justice depends on the capacity to make men

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Cambridge (MA): Harvard Univ. Press, 1975; Van Orman Quine, William. *Word and Object*, 1<sup>st</sup> edn., Cambridge (MA): MIT Press, 1964.

<sup>61</sup> Which is the reason why the German BGB does not provide for liability for so-called moral or non-patrimonial damages. Fortunately, case law has subsequently recognized a right to privacy and other personal/moral rights. In France, Epicurus' doctrine instead represents the origins of the theory of the “abuse of rights” (Cf. Articles 1382-1383 French Civil Code), which may be easily found in well-established case law on the abuse of freedom in France (“*abus des libertés*”) which is itself inspired by the *Declaration of the rights of Man and the Citizen 1789*. By stating that “[f]reedom means to be able to do all that does



neither to harm others nor be harmed by them (obviously this concept must be linked to what concerns the contents and operation of a contract).<sup>62</sup> Within contract law theory and practice, such a type of DPJ is achieved when a party does not need to bring proceedings before a court in order to benefit from the effective protection of his/her rights and interests. A result which is only achievable when *the* law expressed in the contract offers a fruitful and ontologically tangible protection of them.

Once this view has been accepted, it becomes possible to assert that, given the business of the legislator to produce harmony between private and public interests, the making of the DPJ is nothing more than a matter of using scarce resources and services in a legal and efficient way in order to let private and public interests meet when possible. This is the *socially efficient* formulae of normative thinking which I elaborated during the *Seminar*. A formulae, it may be added, according to which any analysis of law should be linked to the analysis of the social situation to which it applies (law in context).<sup>63</sup>

As mentioned, these observations were partly made by Locke, who claimed that private and public interests are identical in the long run<sup>64</sup>, and by Oliver Wendell Holmes Jr., who argued that “*whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative*

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*not harm other*”, its Art. 4 provides a negative definition of a freedom which has allowed the French Court of Cassation to limit not only fundamental liberties, but also the exercise of subjective rights. The same approach is followed in Italy (cf. Art. 833 Italian Civil code).

<sup>62</sup> *Letter to Menoecus, Principal Doctrines*. This perspective shows its utility with a case-by-case approach only.

<sup>63</sup> Schiff, David N. “Socio-legal Theory: Social Structure and Law”, *The Modern Law Review* (1976) 39.3: 287-310. The concept of a constitutional balancing activity between private law’s internal conflicts was “invented” by Joseph Esser, a follower and critic of Phillip Heck. See *Principles and Norms in Judicial Law Making*, 1956; Id. *Pre-understanding and Choice of Method in Legal Interpretation: Principles of Rationality in the Judicial Decision*, 1970.

<sup>64</sup> *Essay Concerning Human Understanding* and *Treatises on Government*, both published in 1690.

*questions*”.<sup>65</sup> Fifteen years later he continued along this path by saying that “*All rights [...] are limited by the neighborhood of principles of policy, which are other than those on which the particular right is founded*”.<sup>66</sup> Both these suggestions should be taken into account while drafting contract law rules and terms. Legal scholars should also critically analyze how legislators provide a balance between private interests and then of private and public interests together by describing what are the social, moral and economic effects of legal rules and of their interpretation. As lawyers our job is to observe, to analyze and to inform (also future) legislators. According to the *functional approach*, the task for legal scholars is indeed “*to specify the goals relevant to the incidents regulated by a particular branch of private law, to indicate how different goals are to be balanced, to assess the success of current legal doctrine in achieving the specified goals and to recommend changes that might improve that success*”.<sup>67</sup>

In keeping with these delicate duties, this paper argues that within contract law theory and practice the protection and the improvement of business on the one hand, and of public interests on the other hand, is primarily bound to the development of four legal principles (which should be analyzed along with the protection of “weaker party”):

1. legality (a principle which is linked to consensus, “*pactum*” and formalities);
2. certainty;
3. possibility;
4. *bona fides* (pre and post-contractual).

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<sup>65</sup> “Privilege, Malice and Intent”. *Harvard Law Rev.*, (1894) 8: 1.

<sup>66</sup> Cf. *Hudson Country Water vs. McCarter* 209 US 349 (1909) 305. However, it is well-known that in its history the US Supreme Court has never actually tried to balance private and public interests.

<sup>67</sup> Weinrib, Ernest J., *supra*, note 3: 40.

True, the making of the DPJ requires more than just the development of these four legal principles. For example, it also requires the improvement of the ability to conceive and then writing down proper and efficient rules in contracts. A result which may be achieved only if contract law's rules are *a priori* stated in a clear way. Law's content, as Anthony Murray Gleeson CJ of Australia claimed, must be accessible and so far as possible, intelligible, clear, and predictable.<sup>68</sup> Why must it? The reason is self-evident: if we would like to claim the rights which the civil law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights and obligations are. The successful conduct of trade, investment, and business needs such an achievement. Practically speaking, as Lord Mansfield CJ aptly put it, "*the daily negotiations and property of merchants ought not to depend on subtleties and niceties, but upon rules easily learned and easily retained because they are dictates of common sense drawn from the truth of the case*".<sup>69</sup>

So the question arises: how well is this rule observed today? In continental Europe (*e.g.*, Italy, Germany, France, and the Netherlands) much of *the* law is found on (most of the time) carefully drafted "codes", whereas in many common law countries considerable efforts have been made in order to make clear, succinct and intelligible legislation. In the United Kingdom, the answer varies according to the source of the particular law under discussion: statute law, common law made by judges (that can be overridden by statute) and European law.

Unfortunately, legal "rules" in legislation, judgments, and contracts are written in an inappropriate legal style and unsatisfactory language most of the time. As lawyers, we can solve this problem by: (i) thinking more critically; (ii) improving our sensibility and experience with an interdisciplinary approach. And we have to do this because an improvement

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<sup>68</sup> *Courts and the Rule of Law*, Melbourne: Melbourne Univ. Publishing, November 2001.

<sup>69</sup> *Hamilton v. Mendes* (1761) 2 Burr 1198, 1214. Lord Mansfield generally regarded as the father of English Commercial law.

of our legal sensibility would lead to more legal rules being easy to interpret and make.<sup>70</sup>

Regarding the essence of private law, it is important to note that the majority of private law scholars assert that it has *internal intelligibility* and that the standpoint for identifying its terms, references, and aims is internal to its galaxy. It is commonly argued that private law is a “self-understanding enterprise”<sup>71</sup> that has an internal coherence. The idea of coherence suggests a further aspect of internal intelligibility. Personally, I do not completely agree with this view. It is correct to say that a system of legal rules must be coherent. Coherence is a fundamental aspect of the justificatory process of every science and discipline, and an incoherent private law would be extremely useless and, more importantly, dangerous. The notion of “coherence” implies a certain degree of integration between the elements of a unified structure/system. This is basically the reason why the whole has greater significance than the sum of its parts. Nonetheless, I also think that this approach shows its intrinsic limits while underestimating that the notion of “coherence” inevitably implies a mode of intelligibility that is completely and inescapably internal that has no external referents. Contrarily, being a legal humanist means being capable of thinking critically by improving the sensibility and experience with an inter-disciplinary approach to law.

Furthermore, the fragmentation of substantive and procedural rules that characterizes LP has increased our perception of the fragmentation of private law sources. As a result, the idea and perception of private law as a coherent and unitary system has been significantly disturbed and challenged. Private law has become a building ground where there are several architects, located at the intra-/trans-/supra-/super- national level.

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<sup>70</sup> A circumstance that, in the long run, will also help the sovereign to achieve public interests.

<sup>71</sup> Weinrib, Ernest J. *supra*, note 3: 14.

The *teleological* interpretation<sup>72</sup> process, aimed to interpret legislative provisions in the light of the purposes and socio-legal values that they are intended to achieve and promote, represents a clear proof of what I am hereby arguing.<sup>73</sup> Yet the promoters of this *modus interpretandi* seem to forget that (the) law is a *science*, not an *art*. Like every science (*e.g.*, mathematics, physics, chemistry, philosophy, theology, politics, *etc.*) (the) law is conceived, shaped, and expressed in a determined and accurate language formed by precise terms, locutions, and sentences. An artificial, symbolic, and formalistic language that must be first understood, and then respected.

These observations show their utility especially in the legislation-drafting process. Indeed, it is better for those who draft legislation to define exactly what they mean by the terms they use, so as to avoid any possibility of misunderstanding or judicial misrepresentation. This point would appear even clearer and more understandable if we bear in mind the inescapable link between legal rules and principles. Credit for focusing on this connection is generally given to Matthias E. Storme, according to whom “*identifying principles is an important task for legal scholars because rules do not apply absolutely but under certain conditions [...] they spell out the conditions under which a*

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<sup>72</sup> The term “interpretation” indicates the process by which the meanings of a legal source are determined. Hence the purpose of interpretation of a legal rule (wherever it lies) is to ascertain the intention of the sovereign who drafted it and, consequently, the purpose of interpretation of a contract is to ascertain the common intention of the contractans.

<sup>73</sup> Shakespeare’s *The Merchant of Venice* (written between 1596 and 1598, during a time of religious controversy in England, and against the dark background of the Spanish Inquisition) represents a very appropriate example of, on the one hand, how important it is to have well written legal rules (or contractual clauses) by also showing, on the other hand, the difference which exists between a *teleological* and a *literal* or *authentic* interpretation of them. The whole play persuasively shows the importance of interpretation and hence of drafting clear legal rules in any contract: if Antonio pays back the money on time, he then wins the merry sport and Shylock will act like a Christian by taking no interest on the loan; but if Antonio fails to pay it back on time, Antonio himself will be made to act like a Jew and this would be a transformation of Antonio into Shylock’s double.

*principle prevails over another*".<sup>74</sup> As a consequence, the need for interpretation of contracts usually arises where the language or symbols used by parties to express their agreement are vague. This basically means that, given every judge's legal duty under the laws of his/her state (or any other geo and socio-political, legal, ontological, and economic "sovereign" entity in the stateless era) to apply them mainly according to their letter, the courts' job would everyday become more difficult and slower if judges only work with imprecise and nebulous norms.<sup>75</sup> Cicero and the Romans noticed this whilst asserting that: "*obscura explanare interpretando*" and "*in claris non fit interpretatio*".<sup>76</sup> Centuries later Blaise Pascal rightly added that "*words differently arranged have a different meaning, and meanings differently arranged have different effects*",<sup>77</sup> and then Ludwig Wittgenstein asserted that "[...] *what can be said at all can be said clearly; and whereof one cannot speak thereof one must be silent*".<sup>78</sup> Four suggestions that, unfortunately, in contract law theory and practice, do not have the value they would instead deserve.

To conclude, the lesson is that, on the one hand, the nature of contracts reveals why *bona fides* should be conceived as a "rule of law", and not as an

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<sup>74</sup> "The foundations of Private law in a Multi-level Structure: Balancing, Distribution of Lawmaking Power and Other Constitutional Issues", in Brownsword, Roger – Micklitz, Hans-W. – Niglia, Leone – Weatherill, Stephen (eds.). *The Foundations of European Private Law*, Oxford-Portland: Hart Publishing, 2011: 382.

<sup>75</sup> Roman law's perspective on this point should not be taken for granted. Roman law was the most innovative and the most copied system in the West and its law of contract was the most original part of it. Cf. also the Latin principles: (i) "*pacta sunt servanda*" – which holds that agreements freely and seriously entered into must be honoured and enforced (rights and duties); (ii) "*juris novit curia*" and "*da mihi factum, dabo tibi ius*" – which briefly mean that clear agreements and facts help judges in doing their job; (iii) "*ad poenitendum properat cito qui indicat*" – which implies that every judge has to consider what he or she thinks justice requires, and then has to decide accordingly (otherwise he or she will regret his or her approach). With regard to this last principle, in 1790 Lord Mansfield CJ advised a Colonial Governor by saying "*Consider what you think justice requires, and decide accordingly. But never give your reasons; for your judgment will probably be right, but your reasons will certainly be wrong.*"

<sup>76</sup> *Brutus*, 152.

<sup>77</sup> *Pensées*, 22, 1670 (W.F. Trotter, trans. 2011).

<sup>78</sup> *Tractatus Logico-philosophicus*, preface, in *Schriften*, Vol. I, Frankfurt, 1960 (1921).

underlying soft principle. Their morality instead explains why, as lawyers, it is also our duty to provide the sovereign with clear and useful insights concerning the aims of *bona fides* in order to avoid chaos and confusion within contract law theory and practice. As a consequence of the foregoing, we are also required to incentivize both private and public actors to promote the using of a clear wording in legislation and in contracts of good faith dispositions. Otherwise, they will inevitably waste their resources by considering secondary or tertiary principles or precepts to understand the contractants' intention.

## V. ECONOMICS & CONTRACT:

### MICROECONOMICS & ECONOMIC EFFICIENCY THEORY

The significance of the last section of this study is given by the circumstance that the most prominent contemporary manifestation of *functionalism* is the economic approach, which has so far produced complex and sophisticated analyses of the private law theory and practice.

I already mentioned that, as John Rawls puts it, the *idea of co-operation* implies the idea of each participant's rational advantage, and the idea of rational advantage specifies what it is that those engaged in co-operation are seeking to advance from the standpoint of their own good. As outlined, in the law of contract this implies that the parties are perfectly aware that they cannot achieve what they would like too without the co-operation of others. And this is true also from an economic point of view.

Starting from this awareness, during the *Seminar*, I divided the third and final step of my analysis into two secondary fields by using: (i) *Microeconomics*; and (ii) *Economic Efficiency Theory*. The former has been useful to investigate how to pursue private interests within contract law theory and practice, whereas the latter has been dedicated to the pursuing of public interests. Yet

it might be suggested that other economic indicators that are commonly used for judging the health of an economic system would have been probably important for my analysis, such as: (i) the gross domestic product (GDP) per head;<sup>79</sup> (ii) the rate of inflation; (iii) “elasticity”, which measures the responsiveness of one variable to changes in another.<sup>80</sup> Unfortunately, there was not enough time to describe them properly. Furthermore such statistics are often subject to huge revisions in the months after they are first published cause embarrassing difficulties for the economic policymakers who constantly rely on them. Thus, by keeping in mind the moral consequences of economic growth,<sup>81</sup> I preferred to concentrate my efforts on the two economic fields mentioned above.

*Microeconomics* –“μικρό” (small) plus “οικονομία” (economics)– is a discipline which studies the behavior of individual market players. In other words, *Microeconomics* analyzes the individual pieces (as actors and elements) that together make an economy. In contrast with *Macroeconomics*,<sup>82</sup> this discipline considers issues as to how households reach their decisions or whether privatization improves efficiency, whether a particular market has enough completion in it. *Microeconomics* makes certain simplifying assumptions, for instance that individuals respond to incentives and make

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<sup>79</sup> The GDP measures the total value of output in an economic territory. Although since its creation during America’s Depression, several improvements have been adopted, the GDP is still far from perfect. In this sense, to understand why the US has changed the way to measure it, and why in the short term the ‘new GDP’ makes international comparison more difficult, see *The Economist’s* editorial “Boundary Problems. America has changed the way it measure GDP”, 3 August 2013.

<sup>80</sup> There are two main types of elasticity: (i) “*price elasticity*”, which measures the quantity of supply of a good, or demand for it and that changes if its price changes: if the percentage change in quantity is more than the percentage change in price, the good is price elastic; (ii) “*income elasticity*” of demand, which is aimed to measure how the quantity demanded changes when income increases.

<sup>81</sup> Friedman, Benjamin M. *The Moral Consequences of Economic Growth*, New York: (NY) Vintage Books, 2005.

<sup>82</sup> That is the study of economy-wide phenomena like “growth”, “inflation” and “unemployment”.



rational choices given all the available information at a given time. This allows a comparison of costs and benefits.

Despite its evident limitations, *Economic Analysis of Law* (EAL) has become one of the most influential scholarly methodologies in American socio-legal thought. As it is known, Jeremy Bentham, John Stuart Mill, and all *The Utilitarians* had an impetuous impact in the development of *Microeconomics*. They used the concept of “utility” to argue that human reason could find no other rational justification for preferring one course to another.<sup>83</sup> Yet the origins of the modern economic approach to law can be traced back to Ronald Coase’s studies, and to Gary Backer, Guido Calabresi, and Richard Posner’s subsequent developments.<sup>84</sup>

EAL develops the perspective that contractual parties engage in mutually beneficially exchanges that are per se inefficient in nature. Contracts, within this perspective, provide the ontological framework needed for such a transfer. This evidently implies the idea of co-operation to which this paper refers too. As a consequence, it is possible that at some point the social benefits provided by the contract do not justify the costs of performance. This situation may lead, according to EAL, to the possibility of optimal breach (*e.g.*, specific performance, damages, *etc.*).

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<sup>83</sup> Also, Roscoe Pound’s sociological account would be useful for our analysis. By working on von Jhering’s suggestions, Pound has become a leading proponent of sociological approaches to the study of law. He explained that every man’s social and economic life is nothing more than a form of “social engineering”, and then argued that every society has a pattern of culture which determines its various ideologies. More precisely, he interpreted the “legal process” as a form of social control whereby all the conflicting interests in society are scrutinized, compared and finally accepted or rejected. He also criticized the new generation of “*social Utilitarians*” by arguing that it has underestimated the difficulty of the task. See *An Introduction to the Philosophy of Law*, New Haven (CT): Yale Univ. Press; Revised edn., 1959; Lloyd, Dennis. *supra*, note 29: 211.

<sup>84</sup> Respectively, “The Problem of Social Cost”, (1960) 3 *Journal of Law and Economics*: 1; “Crime and Punishment: AN Economic Approach”, (1968) 76 *Journal of Political Economy*: 169; *The Costs of Accidents*, New Haven (CT): Yale Univ. Press, 1970; *Economic Analysis of Law*, London Little Brown, 2007.

The relevance of this discipline for present purposes is given by the fact that perceptions do not always keep up with reality and sometimes people lack an accurate basis for comparing their incomes or living standards to what others have. If one would like to shape Bentham's account within the modern EAL's framework,<sup>85</sup> he/she might then suggest that having the other's party collaboration is the best way by which a party may pursue his/her interests by also optimizing his/her resources.<sup>86</sup>

The foregoing should be investigated together with another important circumstance, that is, the protection of the "consumer" as contract law's weaker party. A protection which implies that the sovereign must also: (i) establish mandatory rules which impose "constitutional" values like non-discrimination; (ii) guarantee a free –or at least an easy– access to justice for those who cannot afford it (poor and/or uneducated persons).

The achievement of these results is clearly linked to an effective and reasonable prevention from the prevarication of the richest/strongest party over the weakest one. Hence, it is inevitably related to the impact that "Standard Forms Contracts" (SFCs) has had in contract law theory and practice, and to their role in the promotion of the so-called "distributive justice".<sup>87</sup> The creation and implementation of SFCs indeed represent a new phase in trade.

SFCs may be defined as contracts already drafted for a number of transactions concerning particular products or services and accepted by the

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<sup>85</sup> Kovač, Mitja. *Comparative Contract Law and Economics*, Cheltenham: Edward Elgar Pub., 2011.

<sup>86</sup> It is reasonable to assume that certain legal scholars will not agree with this perspective on the basis that, sometime, disclosure of information prior to contract formation may be more "expansive" than pre-contractual liability in the context of the breach efficient theory.

<sup>87</sup> It is beyond the scope of this contribution to address the 'consumer-galaxy' properly, and hence to explain why Consumer law is witnessing worldwide a shift from the original conception of the consumer as the 'weaker party' to a new conception of him/her as the 'stronger party'.

other party in whole without conducting any kind of negotiation.<sup>88</sup> Their aim is to provide a given framework of the parties' rights and duties by including clauses that govern non-payment, exclusion and limitation of liability, penalty clauses,<sup>89</sup> clause on governing law and arbitration as alternative dispute resolution mechanisms,<sup>90</sup> *etc.* Their intrinsic complicated essence requires an explanation of the evolution of modern contract law theory. Economists of the 18<sup>th</sup> and 19<sup>th</sup> centuries<sup>91</sup> argued that the freedom to bargain (whose principle is considered as a product of the school of natural law) is indispensable to further economic development. In the same vein, sociologists as Max Weber<sup>92</sup> and Émile Durkheim thought of contracts as voluntary and self-reliant relationships between individuals which are strongly supported by their discretion to shape contractual (and hence fraternal) relations independently.

These ideas were an evident rejection of constraints established in feudal times and were based on the (partly wrong) assumptions that: (i) individuals know best what is good for them; (ii) there is not a “weaker” party; (iii) there is no reason to support any form of “distributive justice”; (iv) the influence

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<sup>88</sup> Šulija, Gintautas. *Standard Contract Terms in Cross-Border Business Transactions. A Comparative Study from the Perspective of European Union Law*, Peter Lang GmbH, Frankfurt am Main: Internationaler Verlag der Wissenschaften, 2011: 25-69; Leible, Stefan. *Fundamental Freedoms and European Contract Law*, in Grundmann, Stefan (ed.). *Constitutional Values and European Contract Law*, Alphen aan den Rijn: Kluwer Law International, 2008: 63-84.

<sup>89</sup> For the South African landscape, cf. the *Conventional Penalties Act* 15 of 1962 which is usually interpreted narrowly by the courts. When a party makes a claim for the enforcement of a penalty clause resulting from a breach of contract, the court may reduce it insofar as it is out of proportion to the prejudice suffered by the claimant as a result of the breach of contract (by also considering non-proprietary interests).

<sup>90</sup> In South Africa the law of arbitration is now regulated by the *Arbitration Act* 42 of 1965 which, however, does not apply to common law agreements. It should be remembered that this type of clauses are quite similar to the so-called “valuation clauses”, according to which a third person has to fix the value of a “thing” of a “performance” linked to the contract without any evidence given by the parties. As introduction, see Joubert, W.A. (ed.), *The Law of South Africa*, I, 2<sup>nd</sup> edn., Durban: Butterworths, 2003.

<sup>91</sup> As Adam Smith, David Ricardo, Jeremy Bentham, and John Stuart Mill.

<sup>92</sup> Max Weber conducted a profound analysis into the ways in which authority establishes itself in human society by explaining that authority (*rectius*, the legitimate domination) may take one of three different forms: charismatic, traditional of legal.

of public authorities is minimized so as merely to sustain the stability and enforceability of contractual relations.

The general sentiment changed at the beginning of the 20<sup>th</sup> century. At that time, legal scholars started realizing that only under conditions of perfect competition and without asymmetric information individuals would not exert undue influence over others –which is not the case of the real world. Contract law became thus linked to the idea of the aforementioned “distributive justice” as a device through which (try to) guarantee an efficient allocation of resources. Under the influence of this doctrine, scholars of different social sciences argued that the law of contract should deal not only with ideal situations, but also (and mostly) with situations, where a party is not economically independent, or where he/she is under pressure or simply does not have the necessary information that he/she needs to be sufficiently aware while negotiating and concluding a contract. Within this perspective, contract law lost its prominent role and became a vehicle to achieve moral and social objectives.

This new wind made it possible that the judiciary discovered a new role by starting a complete new epoch of contract law theory defined by some legal scholars as one of the most important and innovative.<sup>93</sup> It is not surprising that the atmosphere where this perspective began to develop was the same which gave support, at the end of the World War II, to the notion of Welfare State.

At the moment of writing, however, the scenario is again changed and the development of contract practice has arrived at an important step: the SCFs.

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<sup>93</sup> By way of an example, case studies from Scandinavian countries show that parties re-negotiate and adjust unfair contract terms during judicial proceedings in court. In doing so, instead of invalidating contracts by following law prescriptions, judges only adjust them by literally entering into the agreement. This approach is quite dangerous because it may lead to arbitrary judicial decisions and hence undermine the stability of contractual relations.

Many types of contracts (*e.g.*, e-commerce, banking, sale, lease, deposit, parking, dry-cleaning) are concluded the world over, without any kind of negotiation and the (weaker) party who signs them has just to accept the terms already established by the other party (in the majority of the cases by quickly clicking an online “accept the terms” button and thus without even reading them through). This phenomenon has been well described by the French doctrine of the so-called “*contract d’abesion*” which is usually used to define form contracts where terms are not intended to be amended by the other party.

If there are precise reasons to show some criticism about these contracts (*i.e.*, the party’s evident limitation of the freedom to negotiate and hence express his/her will), on the other hand it has been noted that they can speed-up and simplify a growing number of business dealings in the light promoted by the so-called “rationalization of business” –which, according to some socio-legal surveys, already in the 1970s was covering more than the 99% of all contracts made in the US.<sup>94</sup> Furthermore, the same scholarship is used to remark that by (non)contracting, both parties can save money and time because standard terms usually do not require any additional legal cost. Finally, some commentators have also claimed that SFCs contribute in improving legal reasoning –broadly understood.

However, although these doctrines may have some appeal, it is my suggestion that especially the European paradigm<sup>95</sup> demonstrates that their benefits should not be overestimated. The financial crisis started in 2008 and

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<sup>94</sup> Slawson, W.D. “Standard Forms Contracts and Democratic Control of Lawmaking Power”, *Harv. L. Rev.*, (1971) 84: 529.

<sup>95</sup> Cf. Directive 93/13/ECC [1993] OJ L95/29; *Office of Fair Trading v. Abbey Nation et al* [2009] UKSC 6; BGH VII ZR 178/08, NJW, 2010, 2789; Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet* [2007] ECR I-I, 11767; Case C-438/05 *The International Transport Workers’ Federation (ITF) & The Finnish Seamen’s Union (FSU) v. Viking Line APB & Oü Viking Line Eesti* [2007] ECR I-107779 OJ C60/16; Case C-484/08 *Caja de Aborros y Monte de Piedad de Madrid v. Asociación de Usurarios de servicio bancarios (Ausbanc)* [2010] ECR I.

the subsequent *Great Recession* demolished many beliefs concerning SFCs' advantages.<sup>96</sup> Only in Utopia, it may be suggested, under conditions of perfect competition and without asymmetric information, individuals would not exert undue influence over other. This is the reason why at the moment of writing significant credit is given to *Behavioral Economics*, whose aim is to study the nature(s) of economic decisions people make in practice by using decision-making models borrowed from psychology.<sup>97</sup>

Thus, especially in the insulated, soft-networked post-national framework, the law of contract should be performative instrument used to find a balance between a (i) *homo oeconomicus*, which is a rational and narrowly self-interested actor who has the ability to make judgments toward his subjectively defined ends by pursuing selfish interests;<sup>98</sup> and a (ii) *homo reciprocans*, the doctrine of which states that human beings are primarily motivated by the desire to be cooperative and improve their environment<sup>99</sup>

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<sup>96</sup> The theory aimed to demonstrate that financial markets are rational is called *Efficient Markets Theory*. It is composed by two different parts: the first one claims that unless the investor has some inside information not available to other investors, he cannot tell if stock prices are too low, too high, or just right; the second one focuses on the circumstance that market imbalances cannot persist for more than a very short time, because as soon as they are discovered, they will be arbitrated away. See Fox, Justin. *The Myth of the Rational Market: A History of Risk, Reward, Delusion on Wall Street*, New York (NY): Harper Business, 2011.

<sup>97</sup> McFadden, Daniel. *supra*, note 43.

<sup>98</sup> This kind of "*homo*" has always been posed at the heart of economy theory. In traditional classic economics and in neo-classical economics it was argued that people act in their own self-interest. Adam Smith assumed that society was made better off by everybody pursuing their selfish interest by using the so-called "invisible hand". In recent years economists have tried to include a broader range of human motivations in their models and so there have been attempts to model altruism and charity. Recently, *Behavioral Economics* and *Neuroeconomics* have drawn the studies of human psychology to explain economic phenomena. See Wolff, Helmut. *Der "homo oeconomicus": eine National-ökonomische Fiktion*, Berlin: Paetel, 1926; Mundelbaum, Maurice. *History, Man, Reason. A Study on XIX Cent. Thought*, Baltimore, 1971; Health, Anthony. "The Rational Model of Man", *European Journal of Sociology* (1974): 15.2.

<sup>99</sup> Dohmen, Thomas – Falk, Armin – Huffman, David – Sunde, Uwe. "Homo reciprocans: survey evidence on prevalence, behavior and success", *IZA Discussion Paper* (2006), n. 2205.

As a logical progression, a pertinent question at this stage should be why the approach I am proposing may also be beneficial for the public sector. The answer is likely to be found by using the so-called *Economic Efficiency Theory* (EET), which studies the use of public resources and services so as to maximize the production and the use of goods and services. In other words, EET (mainly) investigates the impact of laws and regulations on the behavior of private and public actors in terms of their decision and implications for social welfare and its efficiency.

Seeing that the term “efficiency” is meant to measure how a private or public actor is capable to get the most out of the resources involved in a given activity, this contribution suggests that if we try to unite the utilitarian approach described above whilst investigating the nature and morality of contracts, with the standpoint of the legislator, the “justice-making process” refers more to the aggregate of the welfare of the community rather than to the egoistic self-interest. In this sense, the adoption of a *functional modus investigandi* should make it clear that having the other party’s collaboration whilst negotiating and executing (post-contractual *bona fides*) a contract, is also useful for the sovereign because it avoids a waste of public resources in justice management to achieve the results that the parties, by co-operating, have already achieved.

To conclude, a successful modern liberal democracy combines three elements: (i) the state; (ii) the rule of law; (iii) an accountable government. The fact that there are countries capable of achieving this delicate balance is the miracle of modern politics. When this balance is not efficiently achieved, politics loses its challenges, and protests start to take place. In this sense, even though the doctrine of “rule of law” also implies that: (i) all persons and authorities within the state, whether public and private, should be bound by and entitled to the benefits of laws publicly made, taking effect in the future and publicly administered in the courts; and that (ii) there should

be an effective and affordable access to courts based on an efficient model of resolving disputes, without prohibitive cost or inordinate delay, I think that –especially during the West’s worst economic crisis since the World War II– there is an existential need to go beyond this approach.

A need that is evidently linked to the fact that in trying to meet these requirements most legal systems face two potent and enduring obstacles: expense and delay. This also means that they fail to achieve any of the three aims of civil litigation, that is, in Henry Denis Litton Justice’s words, the ‘*just, expeditious and economical*’ disposal of any matter.<sup>100</sup>

## VI. CONCLUSION

As mentioned, the aim of the *Private Law Staff Seminar* at UCT was to briefly describe what I see behind the doctrine of good faith (and, more broadly, behind the general course of the parties’ behavior before and after the conclusion of an agreement), to then explain the need of its protection and future reasonable developments by facing the limitations of traditional legal approaches to contract law theory and practice.

The principle of good faith does not play an exact role in South African law. Even though it has been very influential in the development of the Roman law in South Africa, nowadays it has an uncertain role and there is an absence of legislation that generally requires adherence to it or to any other similar norm.

As suggested during the *Seminar*, the point of departure for theorizing about private law is based on experience. This means that proficiency has to be aligned with what we have learned from history. Hence, conducting research on contract law theory and practice requires that imagination and

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<sup>100</sup> Bingham, Tom. *supra*, note 30: 89.



creativity are matched with prudence. By using a “functionalist approach”, this paper has called for a “hard” approach to good faith as a rule of law and not as an underlying principle. In order to justify the above aim and properly discuss the real essence of a contract, four different disciplines and approaches have been used. In particular, the analysis developed through three different fields: (i) the nature of contract; (ii) the morality of contract; (iii) economics & contract (*Microeconomics & Economic Efficiency Theory*). In addition, *Philosophy of Law* and *Ontology* both played a pivotal role.

The suggested roadmap has been pursued to explain how to feasibly achieve, what during the *Seminar*, I called the “*socially efficient formulae of normative thinking*”. In doing so, the South African approach to good faith was analyzed and it was explained why it is crucial that the contractants negotiating and executing (post-contractual *bona fides*) a contract can assume themselves that trust should exist between them. Also, it has been also clarified why there is an imperative and inescapable need to completely understand that co-operation is directly linked to the soul of every contract and hence of good faith, a term which implies that a party has to take the other party’s interests and rights into account. As discussed, the nature of contracts reveals why good faith should be conceived as a “rule of law” and not as an underlying soft principle. Whereas their morality explains why, as lawyers, it is also our duty to help (also future) legislators to promote clear legal provisions concerning *bona fides* in order to avoid chaos and confusion within contract law theory and practice. A “hard” approach to good faith should therefore be plainly intended to become highly influential in both the legislation and contractual drafting process.

Furthermore, this paper explained why whilst analyzing and interpreting contracts we should avoid abstract and nebulous approaches and instead provide an effective description of them as systematic realities.

Finally, it has been discussed why every contract has an “impersonal” and a “personal” dimension. The main argument has been that there is a correlative relationship between each party’s position into a contract and this is namely its “impersonal” dimension (*i.e.*, a seller and a buyer). At the same time, every contract is shaped by a “personal” dimension because human personality describes a party’s capacity to his/her own interests and so provides elements about each party’s view. The notion of good faith promoted by this contribution is anthropologically rooted in both dimensions.