



The Public/Private Divide in South African Construction Procurement Law: The Suitability of the Private Law of Contract*

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Abstract

The debate regarding the so-called public/private divide in law is a long standing one. Some authors argue that the division is an accurate representation of the law and others are of the view that it should not exist based on various arguments. This article is once again an attempt at determining the use of this divide. It looks at the role of the private law in public procurement in South Africa specifically in order to determine its usefulness and therefore its value in public procurement. The argument is made that the private law unnecessarily complicates and creates many obstacles to the fulfilment of constitutional rights in the field of public procurement law. In a subsequent article, a new form of public procurement law is recommended based on the American relational contract theory. A new relational procurement law is thus suggested in an attempt to remove the obstacles created by the private law of contract and to ensure better compliance with constitutional requirements in public procurement law.

Keywords: public procurement; relational contract theory

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1 INTRODUCTION

The public/private divide has long been debated in public-law circles. This debate arises from the fact that especially in the field of public procurement, the government has increasingly over the last two decades made use of the private sector to perform tasks it is traditionally responsible for such as the provision of telecommunication, gas and other commodities. Although they may be strictly “public goods or services”, private persons or companies perform them in a pressured welfare state. Since the law has been strictly divided between the public and private spheres, public procurement law provides an interesting hybrid since both these play prominent roles in the public procurement process. From the moment a need for goods, services or works is identified by the government, to the advertisement for tenders, evaluation and award of the tender, the public law or more specifically, administrative law applies. However, once a contract between the government and a tenderer is concluded, the private law of contract becomes applicable and regulates the contractual relationship. In this process, various shortcomings and difficulties have arisen. The question then becomes whether the private law should be used for a function which is essentially public. In other words, is the private law of contract as currently used in public procurement suitable for a process regulated, managed, funded and implemented by the public sector?

This article explores a possible answer to this question by suggesting that an entirely new theoretical framework should underpin the law of public procurement in order to not only adequately provide for the needs of role players but to ensure better and clearer rules regarding the public procurement process. An alternative to the divide between the traditionally juxtaposed public and private law is suggested, namely relational procurement law. First, the suitability of private law to construction procurement will be discussed. Second, the question as to whether there is a need for relational theory in South Africa will be explored. Next, what relational theory entails will be established. Lastly, the link between relational theory and the law will be discussed. The conceptual working of the proposed relational procurement law will be explored in a subsequent article.

2 CLASSICAL CONTRACT LAW AND ITS SUITABILITY FOR PUBLIC CONTRACTS¹

Classical contract law can be said to be based on doctrine. The law which regulates classical contracts is presented as a settled body of rules with few exceptions. No baseline or minimum obligation is expected.² A contract is formed based on an intention to contract, *animus contrahendi*, on the part of all parties to the contract.³ It consists of an unequivocal offer and an unequivocal acceptance.⁴ It is further required that the acceptance must correspond exactly or at least materially to the offer.⁵ In addition to this, classical contracts are bound by the agreement evidenced by the rule of *pacta sunt servanda* and evidence of that which the parties agreed to is contained only in the four corners of the contract. In other words, no external evidence may be used as proof of the parties’ obligations or terms of agreement. This is referred to as the parol evidence rule.⁶ When a dispute as to the terms of the contract arises, proof of the facts are determined solely by that which is contained in the written document. Bradfield notes that when a term of the contract is alleged by one party and not by the other, this must be treated as a denial of the terms by the latter party.⁷ It has also been said that classical contracts arise from the idea of individual freedom of contract – contracting for one’s

1 In this section, it is not the focus of this article to discuss the private law of contract at length, but is included for purposes of comparison with relational contract theory in order to illustrate that it is insufficient for the law of public procurement. Therefore, merely a brief exposition of the salient points in the private law of contract are discussed.

2 Feinman “Relational Contract Theory in Context” 2000 *Northwestern Univ LR* 743. Gordon notes that in classical contract law, parties to a contract have no obligations to one another except those created by the coercive rules of the state or those made by themselves. Therefore, any contract analysis must rest on the grounds of consent rather than public policy. See Gordon “MacNeil, Macaulay, and the Discovery of Power and Solidarity in Contract Law” 1985 *Wisconsin LR* 569.

3 Bradfield *Christie’s Law of Contract in South Africa* 7 ed (2016) 37. See also Van Huyssteen, Reinecke and Lubbe *Contract – General Principles* 5 ed (2016) and Kerr *The Principles of the Law of Contract* 6 ed (2002).

4 Bradfield *Christie’s Law of Contract* 40 and 74.

5 Bradfield 75.

6 Bradfield 226.

7 Bradfield 181.

own interests.⁸ Other parties to the contract are thus viewed as threats or simply as a means to achieving individual interests.⁹ There exists the notion that consent to a contract is evidenced by the signature of the party who consents – the *caveat subscriptor* principle.¹⁰

Despite the notion that contracts consist of a collection of express terms stated in a written agreement, the classical law of contract does recognise implied and tacit terms. Bradfield refers to these as terms implied from trade usage or terms implied from the facts.¹¹ When analysing the terms of a contract, he notes that the most convenient method to use is to identify the express terms, determine whether there are any terms implied by law¹² or from trade usage,¹³ and lastly whether there are any tacit terms.¹⁴ Despite recognition of implied and tacit terms in classical contract law, these are limited to those imputed by the law or those derived from the express terms of the contract. Therefore, no outside behaviour of the parties or norms decided on by the parties themselves are considered. The limits of these terms are thus stricter than those in relational contract theory discussed in this article.¹⁵

Campbell and Collins argue that it is not that classical contract law cannot recognise implicit dimensions of contracts, but rather that the techniques or mechanisms used often prove to be inadequate.¹⁶ Wightman¹⁷ notes that in relational contract theory, there exists three kinds of implicit dimensions. First, those which stem from a shared language, knowledge of the social institution of money, currency and a shared “market mentality” which includes many tacit understandings about buying and selling. It also involves understandings about modes of payment, the banking system, expectations of interest and the like. These, he notes, are general implicit dimensions in that they are not specific to any type of contract or transaction. In the second instance, there are those implicit dimensions which emerge over time between parties to a contract and which stem from specific behaviour of the parties. These are different from general understandings, dimensions or terms because they relate to behaviour rather than background knowledge. The third type of implicit understandings concerns those about how commercial relations in a particular sector are carried out – the practices or norms with which parties must become familiar in order to participate in the sector. Although these three types of implicit terms are distinguishable, they are also related since general terms form the basis for sector-specific norms and inter-party understandings.

Campbell and Collins write that even when implicit dimensions are considered by a court

8 Feinman 2000 *Northwestern Univ LR* 739.

9 Gordon 1985 *Wisconsin LR* 568.

10 Bradfield *Christie’s Law of Contract* 205–206. However, an exception may be applied. The question in such a case is whether the other party to the contract is reasonably entitled to assume that the first signatory was signifying his intention to be bound by the contract.

11 Bradfield *Christie’s Law of Contract* 187.

12 Explained by Bradfield in his reference to *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 206 (A) 531 where the judge held that: “[I]t is used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference of the actual intention of the parties. The intention of the parties is not totally ignored. Such a term is not normally implied if it is in conflict with the express provisions of the contract. On the other hand, it does not originate in the contractual consensus: it is imposed by the law from without.”

13 These, Bradfield notes, are those terms between terms implied by the law and tacit terms. He writes that “[i]f the trade usage is known to both parties their knowledge will be a contextual consideration informing a decision as to whether the trade usage ought to be incorporated in their contract as a tacit term. The implication will not be made by law but the term will be incorporated into the contract because of the presumed common intention of the parties to include a term customarily included to the knowledge of both of them... If, however, one party cannot prove that the other knew of the trade usage, it will nonetheless be incorporated as an implied term in the contract, if in addition to other requirements, it is so universal and notorious that the party’s knowledge and intention to be bound by it can be presumed.” Bradfield *Christie’s Law of Contract* 190.

14 Bradfield 187. Alternatively referred to as terms implied from the facts by Bradfield. These are unexpressed terms of the contract, derived from the common intention of the parties to the contract. It is inferred by the court from the surrounding circumstances and express terms of the contract. Bradfield *Christie’s Law of Contract* 196.

15 Scott notes that the formalistic nature of classical contract law is not as radical as it seems. He is of the view that parties to a contract have learned to behave in terms of two sets of rules. First, a strict set of rules for purposes of legal enforcement and a second more flexible set of rules for social enforcement. He notes that any attempt to “judicialise” these social rules will destroy the very formality that makes them so effective in the first place. See Scott “The Case for Formalism in Relational Contract” 2000 *Northwestern Univ LR* 847 852.

16 Campbell and Collins “Discovering the Implicit Dimensions of Contracts” in Campbell, Collins and Wightman (eds) *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (2003) 26–27.

17 Wightman “Beyond Custom: Contract, Contexts, and the Recognition of Implicit Understandings” in *Implicit Dimensions of Contract* 147–148.

of law, the analysis is based on the assumption that the legal reasoning will not refer to these implicit dimensions. When these implicit dimensions are in fact considered, they are marginalised or minimised by classical legal doctrine as they amount to “dangerous supplements” to classical reasoning. This means that the acknowledgement of implicit dimensions in a contract “threatens the collapse of an analysis that holds itself out as being an instrument of explicit, rational choices.”¹⁸ Relying on express terms only and the literal meaning thereof is in fact to misunderstand the communication system used in written contracts.¹⁹ Campbell and Collins argue that whenever a contract is interpreted, the legal reasoning should involve or engage with the implicit dimensions of the relationship in order to make sense of the express contractual terms.²⁰ This is in line with contextual interpretation of legal documents and advocated by the court in *National Joint Municipal Pension Fund v Endumeni Municipality*²¹ when dealing with legal interpretation.²² In line with this, Bhana writes that:

[W]hilst still subject to legal constraint, judges must adjudicate now in a more realist medium which *explicitly* mandates transformation of the civil, political, social and economic order by way of a constitutionalised system of law. In other words, South African law operates now in terms of a ‘transformative constitutionalism’ ideology where a more full-bodied constitutional self, as grounded in the basic values of freedom, dignity and equality, is able to realise his or her vision of the ‘good life’. Accordingly, judges can no longer camouflage the essentially political nature of the underlying judicial ideology. They are now necessarily subject to a ‘more plastic’ legal constraint in the performance of the adjudicative function and accordingly, ought palpably to be more amenable to a ‘policy-oriented and consequentialist’ approach, rather than the predominantly formalist approach. Liberal legalism therefore, as received from the apartheid era, presents an uneasy fit with our substantively progressive and transformative constitutional framework.²³

18 Campbell and Collins “Discovering the Implicit Dimensions of Contracts” in *Implicit Dimensions of Contract* 27. Bhana writes that the “hands-off” approach by the state and thereafter the law, facilitated a strict divide between the public and private law spheres. This divide came to be regarded as a wall through which public law norms could not infiltrate into private law matters such as contracts. Therefore, the judiciary was able to maintain “the veil of judicial neutrality” in the law of contract and insist on a conservative approach to contract interpretation. What was contemplated was a formal or strict application of the law premised on a rules-based analysis with minimal judicial discretion. The idea was that judges would “simply feed the ‘hard facts’ of problems into the ‘common law of contract machine and the machine in turn would spit out the ‘logically correct’ (and therefore *formally just*) legal solution (original emphasis).” See Bhana “The Role of Judicial Method in Contract Law Revisited” 2015 SALJ 122 126. Deputy Chief Justice Dikgang Moseneke to this end writes that the law of contract is meant to facilitate the market needs. It is meant to be a value-neutral set of rules that ensure certainty whilst inspiring confidence in the market place. For this reason, the law of contract allows for limited or no judicial discretion. See Moseneke “Transformative Constitutionalism: Its Implications for the Law of Contract” 2009 *Stellenbosch LR* 3 9.

19 Campbell and Collins “Discovering the Implicit Dimensions of Contracts” in *Implicit Dimensions of Contract* 35.

20 Campbell and Collins “Discovering the Implicit Dimensions of Contracts” in *Implicit Dimensions of Contract* 34. The authors write that lawyers are aware of the fact that contracts have implicit (meaning implied, tacit or unexpressed) dimensions. However, despite this, the law or “legal reasoning” as they refer to it, has not developed adequately to incorporate these dimensions into its analysis of contracts and the remedies available in the event of a dispute. Campbell and Collins “Discovering Implicit Dimensions of Contracts” in *Implicit Dimensions of Contract* 35.

21 2012 4 SA 593 (SCA).

22 In elaborating on this, the authors refer to Wittgenstein’s reference to “language games” used by courts to interpret the meanings of words. The question to be answered is which language game is applicable when interpreting a contract. The document might be regarded as a description of the reciprocal undertakings of the parties. In this case, the description should be interpreted according to the ordinary meaning of words. In other words, by use of literal interpretation. This is because this “language game” relies on those meanings for the purpose of description. On the other hand, if the document or contract is a record of instructions to each party designed to implement a purpose such as the sale of goods and services, the “language game” changes to one that determines meaning by reference to purpose. In order to determine the purpose of the parties to the contract, they note that it is essential to place the express terms of the contract in context of the implicit understandings of the contract. Therefore, meaning can only be correctly attributed to contracts by reference to purpose of the contract, which relies on the implicit dimensions of the contract.

23 Bhana 2015 SALJ 130–131 (original emphasis). Brownsword notes that a contextual approach to interpretation refers to three elements. The meaning of a contract is that which would be conveyed to firstly a reasonable person, who secondly, is put in the situation of the parties at the time they concluded the agreement and who thirdly, is informed of the background knowledge that the parties would have had at that time. In other words, contracts must be interpreted in a way that “keeps faith” with the reasonable expectation of the parties to the contract. See Brownsword “After Investors: Interpretation, Expectation and the Implicit Dimension of the ‘New

In illustrating the usefulness of contextualism, Brownsword uses the following example:

Context... can assist our understanding at more than one level. First, at a level of general orientation or focus, it enables us to select the relevant intended meaning – for example, when the words are, say ‘civil service’, context enables us to take this as a reference to a mode of public administration or to a mode of marriage ceremony. Secondly, assuming that our general orientation is appropriate, there is a level of corrective effect that context can supply – for example, when we are talking about public administration, context will enable us to recognise ‘silver service’ as a slip of the tongue when ‘civil service’ is what is actually intended... What is distinctive about contextualism, as against literalism, is that the *corrective* effect of context is applied much more robustly as well as being fully integrated into the process of construction.²⁴

With regard to classical contract law remedies, the courts have regard for the terms of the contract and whether the obligations were performed incorrectly or late.²⁵ The method used in determining liability is therefore rather strict as no external or surrounding circumstances are considered. Campbell and Harris assert that the remedies used in classical contracts are simply not applied in long-term contracts and rely on empirical studies which confirm this.²⁶

The nature of classical contract law causes an adversarial relationship between parties and may lead to alienation from one another and is therefore detrimental to future business dealings. This in turn increases the likelihood of disputes, which results in contracts being costly and therefore the playground of those parties who are financially able to entertain contractual disputes. There is thus no obligation to act in good faith as confirmed by our courts.²⁷

MacNeil writes that classical contract law treats as irrelevant the identity of the parties to the contract. It commodifies the subject of the contract, it limits the sources which can be used in establishing the substantive content of the transaction, and only limited contract remedies are available.²⁸ It also draws a clear distinction between being bound and not being bound to a contract.²⁹ Lastly, the involvement of third parties in a contract is not encouraged since it causes too many poles of interest which may complicate and eventually destroy discrete

Contextualism” in *Implicit Dimensions of Contract* 104.

24 Brownsword “After Investors” in *Implicit Dimensions of Contract* 111 (original emphasis).

25 Bradfield *Christie’s Law of Contract* 585.

26 Campbell and Harris “Flexibility in Long-term Contractual Relationships: The Role of Co-operation” 1993 *Journal of Law and Society* 166 168.

27 See for example *Brisley v Drotzky* 2002 4 SA 1 (SCA) and *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA). In a paper in which the common and civil contract law systems are compared, Galletti writes that the common-law approach has been to exclude duties of good faith. The adversarial system used in common-law countries mean that there is no duty on a contractor to consider the economic interests of another party. The courts will therefore objectively approach contractual duties without implying any terms and without recognising a duty of good faith. The absence of a duty of good faith, she notes, is not a barrier to judges ensuring that their interpretation of contracts amounts to the fair framework for people’s dealings. In this regard she refers to South African Steyn J who wrote that there is no material difference between good faith and the reasonable expectations of parties. See Galletti “Contract Interpretation and Relational Contract Theory: A Comparison between Common Law and Civil Law Approaches” 2014 *CILSA* 248 252–253 and Steyn “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” 1997 *The Law Quarterly Review*.

28 Currently, in South African law, a contract can be declared invalid based on illegality due to the fact that it offends against public policy. This appears to be the only ground on which substantive matters can be included in the interpretation of contracts. It has been noted that the extent to which good faith and public policy differs is difficult to determine as our courts have held that contractual terms cannot be escaped or enforced based on good faith. See Hutchison “Agreements to Agree: Can there ever be an Enforceable Duty to Negotiate in Good Faith?” 2011 *SALJ* 273 291. However, the Constitutional court in *Barkhuizen v Napier* 2007 SA 323 (CC) para 73–74 held that “[p]ublic policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. Public policy, it should be recalled, ‘is the general sense of justice of the community, the boni mores, manifested in public opinion’... while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties.” On good faith, the court held at para 80 that good faith is not unknown to our common law and that it underlies contractual relations in our law. Kruger, in writing on the influence of public policy in contracts notes that public policy means that a judge, when engaging with it, is equipped with a “basket” of policy considerations. From this basket, he/she is required to choose the considerations or factors most relevant to the facts of the case at hand and to balance these factors against one another. The outcome of this identification and balancing process is what he notes the courts term public policy. See Kruger “The Role of Public Policy in the Law of Contract, Revisited” 2011 *SALJ* 712–740.

29 In this sense he refers to the strict rules of unambiguous offer and unambiguous or unequivocal acceptance as also required by the South African law of contract. See MacNeil “Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law” 1978 *Northwestern Univ LR* 854 863–864.

relations.

Regarding the law and the ineffectiveness of the current classical contract law Campbell and Collins write that:

For some people, the concern may be with the disfunction of the law. If the law seeks to protect and enforce contractual agreements, the recognition that it has a partial and incomplete understanding of those agreements suggests that it fails in many instances to achieve its goals by enforcing not the agreement of the parties in all its relevant dimensions but a truncated perception of that agreement. From another functional perspective, the law of contract promotes and controls social practice of entering self-regulated transactions, and misunderstandings of this practice create the risk that legal regulation will either fail adequately to support the practice when required or misdirect its controls so that they are ineffective.³⁰

Bradfield argues that the basic idea that people must be bound to the agreements they conclude means that it “would obviously be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected.”³¹ The doctrine prevents anyone not directly involved, in other words, someone who is not a party to a contract, from litigating with the contracting parties or either one of them on the matter. This doctrine has been carried over to the public procurement context, where only tenderers who have submitted a tender or have been involved in the tender process can approach a court for legal redress. This doctrine prohibits not only the application of section 38(d) of the Constitution which allows anyone who acts in the public interest to bring a matter to the court’s attention, but also denies the fact that the public has an interest in public procurement matters. To this end, the private law of contract cannot simply be applied to a public law context. The public law sphere and even more so in a public procurement context, an acknowledgement of the public interest is paramount. A relational approach to public procurement may be the solution to this problem and is discussed further in the second part of this article.

3 WHY A RELATIONAL PROCUREMENT LAW IS NEEDED

Mitchell claims that contracting parties inhabit two different worlds – an artificial world created by the law and the real world in which they perform their contractual duties.³² Furthermore, the artificial or “paper” contract does not reflect the actual or “real” contract.³³ The latter is the agreement as understood by the parties based on their desire to achieve their economic goals and is informed by values or norms created amongst themselves. The “paper” contract is the formal contract in which allocation of risks and obligations are set out, which often seems far removed from the “real” contract.³⁴ Mitchell bases this assertion on empirical studies which indicated that contractors made little use of legally enforceable contracts and even less so in the case of disputes. She writes further that the influence of the legal approach to relational contracts is that the law attaches importance to the point of view of the “reasonable person” about what the contract means and not that of the actual parties to the contract.³⁵

Collins writes that the non-use of contracts alleged by commentators is misleading because the importance of the formal contract should nevertheless not be understated. He notes that it is true that the law is seldom used to enforce “self-regulation”, but this does not mean that contractual terms are unimportant. The reasons for not resorting to legal action may be varied. These may include the cost involved in litigation especially if the debtor is in a weak financial position, and the potential damage to business reputations and long-term business relations in the event of a dispute. The contract is used as security during negotiations towards settlement of a dispute, even though the parties may have no intention of using it. Collins is

30 Campbell and Collins “Discovering Implicit Dimensions of Contracts” in *Implicit Dimensions of Contract* 27.

31 Bradfield *Christie’s Law of Contract* 302.

32 Mitchell “Contracts and Contract Law: Challenging the Distinction Between the ‘Real’ and ‘Paper’ Deal 2009 *Oxford Journal of Legal Studies* 675 676.

33 Macaulay “The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules” in *Implicit Dimensions of Contract* 51 51. By referring to “real” deal, Macaulay means those actual expectations that exist in and out of a contract and the general expectation that a partner will behave in a certain manner. He notes that the question the courts ask when interpreting the real deal is whether the parties signed or accepted the contract and if they did what the “plain meaning” of the wording is.

34 Mitchell 2009 *Oxford Journal of Legal Studies* 676–677.

35 Mitchell 2009 *Oxford Journal of Legal Studies* 683.

of the opinion that a fundamental problem with the assertion that contracts are not at all used in exchange relations, is that it fails to recognise a three-dimensional context of relational contracts.³⁶ He notes that an argument exists that:

It is desirable for legal reasoning to incorporate a recognition of implicit dimensions of contracts in its regulation of transactions, but also, and more fundamentally, that such a process of legal recognition of implicit dimensions is necessary and inevitable in any system of law. In order for legal reasoning to understand and regulate the social practice of making contracts, it has to appreciate that contractual behaviour relies upon several contexts for its meaning and purpose. As well as the explicit agreement between the parties, the participants also conduct themselves by reference to their economic interests in having the deal successfully completed to the benefit of both parties, and by reference to their expected or desired long-term business relationship.³⁷

Collins further notes that two diverging views of justice exist when it comes to vindicating rights in contract law. On the one hand, there is procedural justice, which is achieved once the procedure for concluding a legally binding contract with all the necessary express terms has been completed. Enforcement of the agreement will satisfy procedural justice. On the other hand, completion of this procedure does not bring about substantive justice. This is because the agreement does not in fact constitute the complete agreement between the parties and that implicit obligations outside the written document exist.³⁸

Although Mitchell notes that the “real” and the “paper” deals are very different, she is of the view that this does not always mean that an authentic agreement can be found in either the formal contract or the relational contract. At times it may be difficult to draw a clear distinction between the two. What is needed instead is a type of legal reasoning sensitive to the operation of relational norms. An integrated approach is therefore called for.³⁹ This is somewhat in line with Collins’ idea that exchange or transactional behaviour is based on three dimensions of normative systems.⁴⁰ These are the business relation,⁴¹ the economic deal⁴² and the formal contract.⁴³ It has been noted that a deeper understanding of the legal framework in business dealings has the capacity to improve the quality of contract law insofar as the law underpins or contributes to commercial contracts.⁴⁴

The presence of three different normative frameworks or dimensions to a relational contract may be confusing. To this end, Collins uses the example of a breach of contract in failing to deliver goods. In such a case, the business relation may require that a party ignores the breach in order to preserve that relationship. It may also encourage the party guilty of breach to make amends. The economic deal may dictate that considerations of economic interest prevail when considering a response to the breach. It may lead to a compromise of interests in which late delivery is accepted or the goods entirely rejected. However, more often than not, a compromise of interests would mean that the response to breach should create a situation in

36 Collins *Regulating Contracts* (1999) 137. From a practical viewpoint, Macaulay notes that big corporations consist of a large number of people and as such those who negotiate the contract and those who draft it are often not the same people. This naturally leaves room for differing and even contradictory assumptions and expectations between parties. Macaulay “The Real and the Paper Deal” in *Implicit Dimensions of Contract* 55.

37 Collins “The Research Agenda of Implicit Dimensions of Contracts” in *Implicit Dimensions of Contract* 8.

38 Collins “The Research Agenda of Implicit Dimensions” in *Implicit Dimensions of Contract* 10–11.

39 Mitchell 2009 *Oxford Journal of Legal Studies* 677.

40 Collins *Regulating Contracts* 128.

41 This, Collins writes, precedes the transaction and continues after its completion. It consists of the trading relation between the parties and involves enquiries, discussion of plans and solving problems that may have already arisen. He notes that surrounding this business relation, the parties may encounter social relations such as business lunches, family links or friendship networks, ethnic identity or membership of clubs. This is the part of the entire relational experience that provides a source of trust between the parties and encourages them to enter into a transaction. It also has the purpose of preserving and enhancing the trust between parties. See Collins *Regulating Contract* 129.

42 This is the part of the transaction in which obligations are created, economic incentives are established, and non-legal sanctions are determined. Collins notes that economic rationality provides the normative framework in terms of which parties will establish and assess their contractual behaviour. Collins *Regulating Contract* 129–130.

43 This normative framework (each of the three dimensions are said to constitute a normative framework according to which the parties behave) as Collins describes it, consists of the standards provided by the self-regulation contained in the contract. In other words, the express norms parties record in the contract. Collins *Regulating Contract* 131.

44 Mitchell 2009 *Oxford Journal of Legal Studies* 684.

which economic viability for all parties is preserved. The last dimension of the relation entails asserting rights of the parties where a “winner takes all” approach may be followed.⁴⁵ This description, Collins notes, is the most common observation of contractual behaviour.

Hawthorne relies on MacNeil’s assertion that there exists a hidden sub-culture which constitutes an enforcement mechanism based on social norms and codes of conduct particular to certain contracts. This mechanism, she writes, does not fall within the ambit of classical contract law which supports the literal enforcement of rules but is to be found in relational contract theory.⁴⁶ Interestingly, she does, however, proffer that although it does not provide for it, classical contract law perhaps has the capacity to provide for a mechanism to accommodate the realities of context-based long-term contracts based on the principle of good faith.⁴⁷ However, this may not be a plausible solution based on the confirmation by South African courts that good faith is not a “free-floating” principle to be used to enforce or set aside terms of a contract agreed to consensually.⁴⁸

Quinot notes that the private law doctrine of privity limits *locus standi* in that only those with a direct interest in public procurement matters may approach a court for relief.⁴⁹ The substantive interests of those not directly involved in a procurement matter but nonetheless influenced, namely the public, are also unjustifiably limited.⁵⁰ Section 38 of the Constitution sets out the various categories of individuals who have *locus standi* to approach a court for legal redress. Subsection (d) which provides for those acting in the public interest is one of those categories. It is common cause that public procurement matters are in the public interest as public funds are expended when the government contracts for goods, works or services. Therefore, the public interest in such matters is clear.

45 Collins *Regulating Contracts* 133-134. He notes further at 137 that the contractual framework does not disappear when a party to the contract chooses not to invoke a contractual norm and instead emphasise a business relation norm. The contractual framework may be used at any time. He notes though that all three frameworks or dimensions will usually be available for parties to use to negotiate their position and at different times throughout the relational exchange, some dimensions may take priority over others. Collins *Regulating Contracts* 137–138.

46 Hawthorne “Justice Albie Sachs’s Contribution to the Law of Contract: Recognition of Relational Contract Theory” 2010 *SAPL* 80 85. This intersection between law and society, she notes, is the beginning of a paradigm shift from formal legal enforcement to the recognition of solidarity and co-operation in the interpretation of contracts. This will in turn give effect to the constitutional imperative of substantive justice. She further notes that the recognition of the principle of *Ubuntu*, which relates to a “fellow feeling” or the relationship formed amongst people who live or work together, can introduce co-operation into contracts which will protect weaker parties and create a duty to co-operate. In the same vein, Cornell writes that “ubuntu thinking” is crucial to the purpose of the Constitution which is to develop an interpretation of the Bill of Rights that goes beyond the limited notion of such a bill as only a defense against state intrusion. See Cornell “A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation” 2004 *SAPL* 666 675.

47 Hawthorne “Relational Contract Theory” in *Essays in Honour of AJ Kerr* 139–154. She writes that in the event of unequal or inequitable contract terms, a contractant has recourse to doctrinal protection in the form of estoppel, rectification, mistake, misrepresentation, duress and undue influence. She thus concludes that “the concept of good faith is inescapably connected to implicit dimensions of contracts.” She acknowledges that long-term contracts are based on co-operation and that strict insistence on execution of terms may negatively affect co-operation between parties. To this end, she is of the view that classical contract law addresses this issue by recognising a fiduciary duty of good faith and loyalty in specific contracts of partnership, agency and insurance. This of course is not provided for in a public procurement context and the manner in which good faith has been applied by our courts does not lend itself to a relational interpretation of contract terms.

48 *Brisley v Drotzky* 2002 4 SA 1 (SCA) paras 14–15. Although a minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* NO 1997 4 SA 302 (SCA) held that good faith is part of public policy and therefore that the application thereof is in the public interest, this view was rejected by the court in *Brisley v Drotzky* and was held to have been merely the opinion of a single judge and not legally binding. The position of good faith in South African contract law as set down in *Brisley v Drotzky* was again confirmed in *Afrox Healthcare Ltd v Strydom* 2002 6 SA 21 (SCA). Although it was argued in both *Brisley* and *Afrox* that the court should on the basis of good faith declare the applicable contractual terms invalid, the court held at para 32 of the *Afrox* judgment that when it comes to the enforcement of contract terms, the court has no discretion whatsoever and does not act based on abstract ideas but on expressly specified legal rules. Hawthorne notes that the Constitution contains values which may conflict at times such as good faith and freedom of contract as seen in these two judgments. See Hawthorne “Closing the Open Norms in the Law of Contract” 2004 *THRHR* 294 294. See also Van der Sijde *The Role of Good Faith in the South African Law of Contract* (LLM-thesis, University of Pretoria, 2013).

49 Quinot *State Commercial Activity – A Legal Framework* (2009) 202–207.

50 204 Quinot. This issue is addressed in an article following part 2 of this series of articles.

It has been noted that the Constitution is meant, in the main, for societal transformation.⁵¹ Swanepoel notes that one of the mandates of societal transformation was the insertion of section 38 which has significantly broadened the scope for *locus standi*.⁵² Despite this, the private law of contract is still applicable to public procurement matters, therefore the doctrine of privity finds application. The result is that the public is barred from challenging public procurement matters despite a section 38(d) right to do so due to the doctrine's application. Moreover, the public is not regarded as having an interest in such matters at all for purposes of litigation based on a lack of direct involvement or interest.⁵³ However, in *Secureco (Pty) Ltd v Ethekwini Municipality*,⁵⁴ the court acknowledged a public interest in a tender process by stating that the question of public interest is one to be considered in this case. The court held that it was in the public interest to set the unlawful tender aside.⁵⁵

One of the common contract norms, which it is argued in this article, is a foundational norm of public procurement, is harmonisation with the social matrix. What this means is that whatever the norms of a particular society are, they become the norms of the contracts concluded in that society. The South African society and its norms are informed by the Constitution. It is argued in this article, that the South African Constitution is a relational document. All law, including the private law of contract and public procurement law must comply with it. A further value or norm of the Constitution is involvement of the public in the governance of the country and enforcement of its laws. Therefore, it is only fitting that the public should be able to challenge public procurement matters based on their inherent public interest. A relational procurement law will certainly assist in this based on the common contract norms. It is acknowledged that differences between private and public procurement exist, however, apart from that discussed below and for the purpose of this article, no further fundamental differences between private and public procurement exist which may impact upon the working of a relational procurement law.

The above indicates that the nature of contracts, especially long-term contracts which are most prevalent in the construction industry, is much more relational than is acknowledged or allowed for in classical contract law. Therefore, there exists a need for a law or part of the law to be developed in order to adequately regulate public procurement contracts.

4 RELATIONAL CONTRACT THEORY⁵⁶

4.1 Defining Relational Contract Theory

Relational contract theory begins with the concept of exchange. MacNeil defines exchange as the act of giving someone a commodity with the expectation that something of value will be received in return.⁵⁷ He notes that due to the fact that our economy is based on economic exchange motivations, many of our social values are expressed in the ways in which we respond to these exchange transactions.⁵⁸ These exchange transactions, are often done by way of concluding contracts. He writes that a contract has four roots – society,⁵⁹ specialisation

51 Swanepoel "The Public-interest Action in South Africa: The Transformative Injunction of the South African Constitution" 2016 *Journal for Juridical Science* 29 30.

52 Swanepoel 2016 *Journal for Juridical Science* 31.

53 This has been the manner in which *locus standi* has been approached by our courts. See *Areva NP Incorporated in France v Eskom Holdings* (CCT20/16, CCT24/16) [2016] ZACC 51 (21 December 2016) in which the court held that a tenderer who challenges a tender process but did not submit a tender in its own right, did not have *locus standi*. See also *Trans Creations KZN CC v City of Cape Town* (19367/2014) [2015] ZAWCHC 32 (23 March 2015) where the court relied on s 38(a) which allows for *locus standi* for anyone acting in his or her own interest and not s 38(d).

54 (1100/2015) [2016] ZAKZDHC 14 (1 April 2016).

55 See para 13(e).

56 MacNeil later referred to his theory as essential contract theory in order to distinguish it from any other relational theories. However, in this article, reference will be made to relational contract theory. See MacNeil "Contracting Worlds and Essential Contract Theory" 2000 *Social & Legal Studies* 431-438.

57 MacNeil *Cases and Materials on Contracts* (1971) 1.

58 MacNeil *Cases and Materials on Contracts* 1.

59 MacNeil writes that the basis of contract is society. From society arises common needs, languages and norms needed to form the basis of a contract. He notes that exchange in any meaningful economic sense is impossible without society since society is the provider of a means of communication, a system of order which allows parties to exchange, a system of money and lastly an effective enforcement mechanism.. MacNeil *The New Social Contract: An Inquiry into Modern Contractual Relations* (1980) 1 and 11.

of labour and exchange,⁶⁰ choice⁶¹ and an awareness of the future.⁶² At first, in 1963, Macaulay⁶³ defined “contract” as the (a) rational planning of a transaction with careful provision for as many future possibilities or contingencies as possible and (b) existence or use of actual or potential legal sanctions to ensure performance or to compensate for non-performance. MacNeil later defined a contract as:

[T]he relations among parties to the process of projecting exchange into the future. A sense of choice and an awareness of future regularly cause people to do things and to make plans for the future. When these actions and plans relate to exchange, it is projected forward in time. That is, some of the elements of exchange, instead of occurring immediately, will occur in the future. This, or rather the relations between people when this occurs, is what I mean by contract.⁶⁴

4.2 Discrete and Relational Contracts

In explaining relational theory, MacNeil initially makes a distinction between discrete and relational contracts. In effect, he places general contract law or classical contract law as he refers to it and what has been named relational contract law at opposite ends of the contract law pole.⁶⁵ He writes that classical contract law on the one hand, prescribes a contract based on defined rules and obligations. These he describes as discrete contracts.

On the other hand, relational contracts are characterised by long-term relationships between the parties to a contract. MacNeil is of the view that human behaviour creates norms which over time become the norms on which contracts are based.⁶⁶ He writes that the existence of contractual relations creates an expectation that exchange will occur in future and that it will occur in predictable patterns.⁶⁷ He notes that just as discrete behaviour creates discrete norms, so does relational behaviour create relational norms.⁶⁸ Often, a large number of people are party to a relational contract.⁶⁹ It involves a great deal of planning, with the hope that an exchange will occur in future. There is a division of risks, benefits and obligations and encompasses an awareness of a possible conflict of interest. Due to the extended duration of the contract, not all details to the contract can be clearly defined at the time of conclusion.⁷⁰

60 MacNeil notes that specialisation entails having a specific skill and using this for the purpose of exchange. Therefore, without exchange, specialisation cannot exist. MacNeil *The New Social Contract* 2. Subsequently, MacNeil made a distinction between non-specialised and specialised exchange. The latter refers to an exchange of goods made with a specific and specialised skill. For example, where a certain tribe makes wooden bowls, the other makes pottery and they exchange with one another. Non-specialised exchange occurs where there is vice-versa movement between people not resulting from a specialisation of labour. For example, if a cow is given to someone as a gift with the understanding that a cow will be given in return or a different commodity with roughly the same value. See MacNeil “Exchange Revisited: Individual Utility and Social Solidarity” 1986 *The University of Chicago Press* 567 570–571.

61 This relates to freedom of contract – a sense of freedom of will in choosing to conclude a contract and which behaviour or norms of behaviour to consider binding within the contract. MacNeil *The New Social Contract* 3.

62 As a fourth root of contract, MacNeil notes that once humans have this awareness, the potential of a contract, which involves an exchange in future, arises. See MacNeil *The New Social Contract* 3–4.

63 See Macaulay 1963 *American Sociological Review* 56.

64 MacNeil *The New Social Contract* 4. He further notes that “contract” is what denotes these relations and the contract, meaning the physical document, refers to an example of such relations. See MacNeil “Relational Contract Theory: Challenges and Queries” 2000 *Northwestern Univ LR* 877 878 fn 6.

65 MacNeil “Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and De Vos” 1987 *Journal of Institutional and Theoretical Economics* 272 276. See also Eisenberg “Why there is no Law of Relational Contracts” 2000 *Northwestern Univ LR* 805 805.

66 MacNeil 2000 *Northwestern Univ LR* 879.

67 MacNeil *The New Social Contract* 8.

68 MacNeil 1987 *JITE* 276.

69 MacNeil 1987 *JITE* 276.

70 Speidel notes that an extended relationship could mean that the parties concluded a series of “spot” contracts over an indefinite period or it could consist of a twenty-year contract between the parties. It could also involve third parties. Therefore, “patterns of interaction and expectation develop that involve more than two people and transcend the boundaries of the traditional discrete bargain.” See Speidel “The Characteristics and Challenges of Relational Contracts” 2000 *Northwestern Univ LR* 823 828.

It therefore requires open terms and discretion⁷¹ in performance on the part of all parties. This type of contract is in MacNeil's opinion "the dominant form of exchange behaviour in society" and is the focus of this article.⁷²

In discrete contracts, limited to no relations exist. This means that there is a mere exchange of goods between two parties with no expectation of a long-term relationship. The contract is therefore of a short duration and is quickly terminated.⁷³ Furthermore, minimum co-operation is expected, no sharing of any benefits takes place and no altruism is expected.⁷⁴

MacNeil later developed relational contract theory from making a strict distinction between discrete and relational contracts by attempting to identify a distinguishing factor, to discovering that all contracts are in fact relational to some extent. In other words, he places discrete and relational exchanges or contracts on the common norm continuum. In other words, all contracts, whether discrete or relational ascribe to common contract norms. Depending on the context of the exchange, one will move to one side or the other of the continuum in order to determine which contract norms are applicable.

4.3 Relational Norms

MacNeil's view that human behaviour gives rise to contractual norms has led to his identification of nine common contract norms. He notes that contract behaviour cannot exist without these common contract norms. In the event that the common contract norms which underlie discrete or relational norms disappear, contract behaviour will disappear.⁷⁵ These common norms include role integrity,⁷⁶ mutuality,⁷⁷ implementation of planning, effectuation of consent,⁷⁸ flexibility,⁷⁹ contractual solidarity, linked norms: restitution, reliance and expectation interests,⁸⁰ creation and restraint of power,⁸¹ harmonisation with the social matrix⁸² and later propriety of

71 According to Speidel, the parties to a relational contract may view their exchange as an ongoing integration of behaviour which will grow and vary as time progresses. Therefore, they may at conclusion leave certain terms open or reserve a discretion to be exercised when the need arises. At the same time, he warns that opportunism may occur when a party exceeds its discretion or departs from the internal norms of the contract. In such a case, where the contract does not provide for this, a court would have to intervene. The question the court is faced with will then be whether the conduct is permitted or whether breach of the contract has occurred. Speidel 2000 *Northwestern Univ LR* 828, 838–839 and 823.

72 MacNeil "Reflections on Relational Contract" 1985 *JITE* 37 37.

73 MacNeil 1987 *JITE* 275. See also MacNeil 1981 *Northwestern Univ LR* 1018 1025 where he lists the differences between discrete and relational contracts. These he notes as commencement, duration and termination, measurement and specificity, planning, sharing versus dividing benefits and burdens, interdependence, future co-operation and solidarity, personal relations among and number of participants and last power between the contracting parties.

74 MacNeil 1987 *JITE* 275. Walker and Davis conducted a study on contractual relationships in local authorities in the UK and discovered that the same norms in discrete or transactional contracting and relational contracting exist in the public sector as those in the private sector. They found that aspects of the relational contracting most appreciated amongst contractors were co-operation, communication, the fact that the relationship should be seen as a joint effort and lastly that difficulties are solved by mutual co-operation. See Walker and Davis 1999 *Local Government Studies* 28.

75 MacNeil 1983 *Northwestern Univ LR* 355. He writes that "[r]elative dearth of the discrete or the relational norms does not destroy contractual relations. Rather, dearth of the discrete or relational norms causes, respectively, the relation to become less discrete (more relational) or less relational (more discrete)."

76 This norm has three further aspects namely, consistency required by each party who plays a role in a contract, conflict which arises because of the desire to maximise immediate selfish gains and maintaining social solidarity with other participants to the contract. Lastly, complexity which exists because of the conflict aspect of contracts. MacNeil *The New Social Contract* 40–44.

77 Later referred to as "reciprocity". See MacNeil 1983 *Northwestern Univ LR* 347 fn 19. Mutuality or reciprocity occurs only when all parties will benefit from the future exchange. It calls for what MacNeil terms "evenness" between parties based on contractual solidarity. MacNeil *The New Social Contract* 44–47.

78 This relates to the exercise of choice which may include sacrificing other opportunities by agreeing to conclude a contract. MacNeil *The New Social Contract* 47–50.

79 Meaning flexibility between parties to the contract. MacNeil *The New Social Contract* 50–52.

80 These three norms operate together in order to perform obligations and bring contract goals to fruition. MacNeil *The New Social Contract* 52–56.

81 This concerns the power that is transferred between parties when they enter into a contract and the restraint of that power. MacNeil *The New Social Contract* 56–57.

82 MacNeil *The New Social Contract* 40. In explaining this norm, MacNeil writes that "[w]hatever the norms of that society must become at least partially the norms of the contracts occurring within it. These norms are particularistic to the extent the societies differ." MacNeil *The New Social Contract* 58.

means was added.⁸³

He makes a further distinction between norms. External norms are those considered important by the surrounding environment in which the parties to the contract operate. For example, those of the specific industry involved.⁸⁴ Often, internal and external norms may merge. MacNeil uses the example where parties, who consider legal remedies for breach of a sales contract to be important (external norms), incorporate these into their contract. These norms therefore become internal.⁸⁵ Further examples of external norms are those imposed by the government legal system and socially reinforced habit and institutional behavioural patterns.⁸⁶ Therefore, three classes of contract norms exist: common contract norms, discrete norms (resulting from discrete behaviour patterns) and relational norms (resulting from relational behaviour).⁸⁷ A further classification of norms exists – internal and external. MacNeil writes that common contract norms are essential to any contractual behaviour and become rules which “are” and rules which “ought to” be applicable. They are therefore principles of “right action”.⁸⁸ He then notes that:

Given the intertwining of these norms in behaviour, principle, and rule, they encompass the two merged value-arenas of contract behaviour and internal principles and rules. The common contract norms are then, in my view, the values in the internal (as opposed to external) arenas of contracts whether the contracts are discrete or relational.⁸⁹

Feinman notes that the use of a normative structure in contracts leads to a rejection of doctrinal method as traditionally used in favour of a more policy-like analysis of contracts.⁹⁰ He succinctly says that:

In analyzing a relation, we find facts that, when seen through the structure of norms internal and external to the relation, suggest that the law ought to reach a certain result. This analysis is aimed at determining the benefits of acting in a certain way, however, not at formulating rules or principles that dictate results independent of the norms.⁹¹

He suggests that the substantive core of relational contract theory is based on the proposition that contract essentially concerns co-operative social behaviour and that relational contracts are the dominant forms of contract. This suggests that there is a minimum obligation required from parties to a contract that arises from contract norms. This is not the case in general or classical contract law. Therefore, relational contract theory should be considered an alternative to general contract law.⁹²

In addition to the above norms, MacNeil writes that relational contract theory is based on four core propositions. First, every transaction is embedded in complex relations. Second, understanding any transaction requires an understanding of all the essential elements of the enveloping relations in the contract. Third, in order to effectively analyse any transaction, a recognition and consideration of all the essential elements of the relations that might affect the transaction significantly is required. Fourth, a combined contextual analysis of relations and transactions is more efficient and produces a more complete and final product than a non-contextual analysis of transactions.⁹³

83 MacNeil 2000 *Northwestern Univ LR* 879–880. Vincent-Jones describes this norm as “placing constraints on the ways in which ends may legitimately be achieved.” See Vincent-Jones *The New Public Contracting* (2006) 5. MacNeil notes that these common contract norms or “categories of behaviour” conflict in many ways and also overlap in many ways but some basic level of compliance is required in the case of each norm, otherwise the relations will cease to exist. See MacNeil “Contract Remedies: A Need for Better Efficiency Analysis” 1988 *JITE* 6 7–8 and Vincent-Jones *The New Public Contracting* 5.

84 Feinman 2000 *Northwestern Univ LR* 742. He defines external norms as those which “include values of the society defined by law that may or may not be reflected in the particular relation... relevant external norms include customs of an industry or other relevant group, rules of a trade association or professional organization, and norms generated by any group intersecting with the relation at issue.”

85 MacNeil *The New Social Contract* 36.

86 MacNeil *The New Social Contract* 37.

87 MacNeil 1983 *Northwestern Univ LR* 346.

88 MacNeil 1983 *Northwestern Univ LR* 346.

89 MacNeil 1983 *Northwestern Univ LR* 347 (original emphasis).

90 In this sense, he refers to doctrine as rules and standards of contract law and policy as a more discretionary form of analysis. Feinman 2000 *Northwestern Univ LR* 743.

91 Feinman 2000 *Northwestern Univ LR* 743.

92 See Feinman 2000 *Northwestern Univ LR* 743–744.

93 MacNeil 2000 *Northwestern Univ LR* 881.

5 THE LINK BETWEEN RELATIONAL CONTRACT THEORY⁹⁴ AND THE LAW

MacNeil writes that exchange relations (as in the case of public procurement) give rise to legal rights which makes the law an integral part of relational contracts.⁹⁵ However, the law is only one of many fields applicable to contracts. He notes that more than the law, contracts are about achieving practical goals such as constructing buildings, buying and selling things and so forth. Furthermore, ascribing a purely legal definition to relational contracts would be too narrow as it creates the impression that relational contracts concern only the law. Therefore, to understand contracts and how contracts operate, one should consider exchange first and the law second.

According to MacNeil, the law provides stability in society. It facilitates co-operation between parties and its enforcement mechanisms allow for continuation of interdependence where it otherwise may not have existed.⁹⁶ In alignment with his notion of common contractual norms, (discussed in this article) he writes that the law is or perhaps should be an indication of our customs and social practices in terms of which human affairs are conducted.⁹⁷ Therefore, the function the law fulfils in this instance is to tell society what its most important norms are and based on relational contract theory, become the norms in terms of which exchanges are conducted.

Gottlieb noted in 1983, and it is submitted that this is still relevant today, that any theory of law which emphasises the law, the courts and enforceable remedies, focusses on the individual, the state, regulation and discrete transactions is “woefully incomplete”.⁹⁸ It fails to recognise the broad spectrum of interaction between institutions and organisations that dominate modern societies and neglects the way the law functions in these societies. This emphasises the fact that the law does not recognise vital social imperatives in its daily functioning. Moreover, numerous constitutional norms indicate the need for the law to recognise social rules and behaviour.

Section 41 of the South African Constitution⁹⁹ regulates principles of co-operative government and intergovernmental relations. It provides that all spheres of government and all organs of state must provide effective, transparent, accountable and a coherent government. It further states that these institutions must co-operate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, consulting one another on matters of common interest, co-ordinate their actions and legislation with one another, adhere to agreed procedures and avoid legal proceedings against one another.¹⁰⁰ Therefore, the Constitution requires that the government must act in accordance with these principles which are akin to those of relational contract theory.

Arrowsmith, Linarelli and Wallace write that procurement refers to the situation where a government entity requires goods or services and contracts with a private body for such goods or services.¹⁰¹ There is therefore an exchange which takes place between the government entity and the private body. Trepte notes that this exchange involves the economic activities of the government “and of its relationship with other economic entities”.¹⁰² The public procurement

94 This theory, which forms the basis of the argument in this article, is explored in detail below.

95 MacNeil *The New Social Contract* 5.

96 MacNeil *The New Social Contract* 93. According to Bell, a long-term relationship may exist between parties based on a deliberate creation of the relationship or as a result of an interaction between the parties over a period. In the case of the former, the law acts to enable and supplement rational planning by the parties. In the latter instance, the function of the law is to secure the expectations which have grown out of the *de facto* long-term relationship and to substitute the planning by the parties, rather than to supplement it. See Bell “The Effect of Changes in Circumstances on Long-term Contracts” in Harris and Tallon (eds) *Contract Law Today* (1991) 195.

97 MacNeil *The New Social Contract* 94.

98 See Gottlieb “Relationism: Legal Theory for a Relational Society” 1983 *University of Chicago LR* 567 567.

99 Constitution of the Republic of South Africa, 1996.

100 Section 41(1)(a)-(h).

101 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement: National and International Perspectives* (2000) 6. Both Vincent-Jones and Davies refer to this as “government by contract” when referring to contracts involving public bodies. This includes *inter alia* contracting out, public-private partnerships and agreements between the government and private parties. See Vincent-Jones *The New Public Contracting – Regulation, Responsiveness, Relationality* (2006) 14 and Davies *Accountability – A Public Law Analysis of Government by Contract* (2001) 1.

102 Trepte *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (2004) 9.

process is, like relational contract theory, based on principles, norms or values such as fairness, accountability, equity, competition, reciprocity, consent and co-operation. It is also a long-term relationship formed between the procuring body and contractors based on the time involved in a competitive tendering procedure. The process and the resultant contract are therefore examples of relational contracts. When applied to this context, the norms MacNeil refers to are or should therefore be the norms on which the procurement process ought to be based.

6 CONCLUSION

Public procurement law in South Africa is a hybrid of public and private law. The aim of this article was to determine whether a process and resultant contract of a public nature should be managed with the rules of the private law of contract. It was established that these rules based on their strictness and formalism are in fact ill-suited for this unique type of contracting. As such, an alternative set of rules is required which will appropriately provide for the needs and rights of those involved in the construction procurement process. This should include the constitutional right of the public to intervene in matters of public interest such as public procurement. This more flexible and thus realistic set of rules could be found in the relational contract theory which lends credence to the "real" practice of contracts and not the rules and obligations on paper. This could be known as relational procurement law based on norms and values found in the South African Constitution. The conceptual working of this concept will be explored in a subsequent article.