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A GENEALOGY OF THE TURN TO 'FAIRNESS' IN THE REGULATION OF SOUTH AFRICA'S FINANCIAL SECTOR

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Declaration

I, Yazeed Adams, hereby declare that the work on which this thesis is based is my own original work (except where indicated otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

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Above all, I thank the Almighty for granting me the courage and perseverance to embark upon and continue this work.

Note on Referencing and Style

The referencing style of the South African Law Journal is adopted throughout this thesis and is also used for the Bibliography.

ABSTRACT

Governments and their financial sector regulators the world over have, since the onset of the new millennium, been facing growing consumer distrust in the mechanisms, policies and laws that govern financial products and services as well as profound doubt in terms of their effectiveness in dealing with wealth inequality, asymmetries of power and knowledge, and predatory business practice. In response, a new global trend and dispensation has been emerging since the 2008 global financial crisis. It involves changing the design of laws and regulatory bodies that oversee the financial sector, with the promise of placing the consumer first, embedding fair business practices and addressing power imbalances. Ultimately, the reforms aim to rebuild trust with society and maintain the stability of the financial sector and its markets with a view to substantially reduce the risk of future realisations of contagion and the possibility of a collapse of the interconnected financial system and sectors.

In South Africa, the reform of laws regulating financial products and services is underway in an attempt to reimagine the contractual relationship between consumers and businesses as one that is foremost fair. Relaxing or tightening rules to improve public confidence and ensure fairness in the relationship between the financial sector, on the one hand, and consumers, on the other, has long been part of this trend. The reforms have also seen laws governing the financial sector move from rules to principle and outcome-based regulation. This thesis will critically examine the causes and effects of the shift from rules to alternative forms of regulation in South Africa's financial sector, with a focus on the laws governing financial services and the long-term insurance industry. This thesis will furthermore critically examine how the emergence of contemporary forms of regulation in the sector may not be based on novel concepts. Their aims of promoting fairness, as central to a new legal approach in the financial services and insurance sector in South Africa, presents, however, a unique opportunity to (re)introduce normative sociality into contracts concluded between individuals and the financial sector.

The research undertaken in this dissertation will highlight the most prominent shifts in economic, legal and political discourse, as well as the sources of and impetus for the new trajectories in global and domestic policy and the regulation that has resulted. The research focuses on the regulatory reform of overarching laws in the sector, including the laws related to long-term insurance and financial services. I undertake a genealogical analysis, reaching back into the relevant periods in the historical archive, to contribute to the explanation of the occurrence of the contemporary juridical phenomena. The thesis also problematises the newly

emergent juridical discourse, including its trajectory of new laws and regulatory design in relation to a fairer financial sector that is intended to serve South Africans.

Excavating and understanding the historical conditions pertaining to the sector in South Africa (in contrast to dominions with similar regulatory reform) is, on the argument advanced here, key to acknowledging the country's uniqueness within the global discourse for a socially aware, fairer financial sector. I employ literary theory and criticism with a view to improve the understanding in relation to the contextual influences on the legal language and the literature that has been produced in the form of state-funded research and positioning papers, policies, outcomes-based laws and principle-based guidance and injunctions. The principal justification for this methodology lies in its capacity to function as the means to reckon and reason with the rhetoric attendant upon the shift in the relevant laws from a basis in rules to an alternative grounding that seeks specific *outcomes* from contractual relationships and commercial activity in the financial sector. An exegesis of the existing legal text in relation to its benefits and shortcomings is foundational to a critique of the rigid juridical framework that emerged, and which is set to be abolished as contemporary laws and their structures are implemented.

Ultimately, the aim of the thesis is to expose an aperture in the laws of the South African financial sector, which aperture represents an 'outside'[1] in terms of the prevailing legal logic and the law of precedent. I suggest that this aperture gestures at a post-capitalist and more socially conscious, transformative juridical regime. The likelihood that the regulatory reform is merely the iteration of a reform in the economic and financial system that ultimately leaves the bottom line of the status quo intact, is an ever-present reality. As a result, scepticism in relation to such reforms, coupled with revivified consumer activism, is called for as the principle tenets of a critical legal orientation moved by the desire to approach that transformative regime of law.

[1] The 'outside' stems from the work of Michel Foucault and refers to space beyond established discourses, systems of thought, and power structures, particularly those of Western philosophy and social norms. See, Cintya Regina Ribeiro '"Thought of the Outside", Knowledge and Thought in Education: Conversations with Michel Foucault' (2011) 37 *Educação e Pesquisa* 613; and Thomas Flynn 'Foucault and the Spaces of History' (1991) 74 *The Monist* 2 165.

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CHAPTER 1: INSTITUTING *FAIRNESS* IN SERVICE OF THE SOUTH AFRICAN FINANCIAL SECTOR CONSUMERS

1. Introduction

In *Plato's* Republic, written between 380 and 370 BCE, Socrates and Polemarchus debate the nature of justice. The dialogue exposes the limitations of the contemporary 'common sense' utilitarian version of the concept. Socrates leads Polemarchus away from a legalistic and transactional view of justice, toward a more philosophical version concerned with the moral virtues of discernment and fairness.[1] For Socrates, justice and fairness understood exclusively from within the paradigm of the *techne* (as commercial craft or skill) are insufficient.[2] Instead, he looks for the deeper philosophical principle that underlies well-being, fairness, and justice, which he argues must consider context and consequences, not just formal obligations.[3] The debate is relevant to this thesis in so far as I trace the development, principles, and technical operation of law in South Africa's financial sector and its aims to enable commercial endeavour, assign obligations, and serve the wellbeing of South African society, all while acceding to principles of fairness in a post-colonial, post-apartheid South Africa.

In the aftermath of apartheid, a set of laws governed the financial services and insurance sector of South Africa the principal feature of which was its clear intention to protect the financial sector in a rigid and legalistic way. These laws have since been subject to reform with the aim of enlivening a consumer-centred discourse within the financial sector.[4] The reforms took the principle of fairness as a cornerstone of financial services regulation.[5] This thesis concerns the shift in the design and operation of the relevant laws, particularly the shift from rules-based laws to other forms of regulation, most notably principle and outcome-based laws that call for fairness to both legitimise and validate contractual relationships formed with financial sector industry players. The shift in the basis of the design of the laws upends the

[1] Plato *Republic* (1888) (trans. Benjamin Jowett) at 6-17.
[2] David Roochnik *Of Art and Wisdom: Plato's Understanding of Techne* (2010) at 121-208.
[3] Satinder Dhiman 'Being Good and Being Happy: Eudaimonic Well-being Insights from Socrates, Plato, and Aristotle' in Satinder Dhiman (ed) *The Palgrave Handbook of Workplace Well-being* (2020) at 1.
[4] Tsai-Jyh Chen, ed. *An International Comparison of Financial Consumer Protection* (2018) 1. See also, Andrew Schmulow, Rofikoh Rokhim and Ida Ayu Agung Faradynawati 'The International Review of Financial Consumers' (2017) *Australian Financial Review*.
[5] Andy Schmulow 'Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks' (2022) *African Journal of International and Comparative Law* 30 25.

theretofore predominant legal order, opening new ways in which to consider the meaning of commercial enterprise, the applicable law and especially the role of the community within which these laws are applicable. However, the radical changes in legal reasoning that are implied and underlie the shift have created a sense of unease on the part of the financial sector's prevailing knowledge systems, given that the success of the reform has yet to be realised.

The 18th century's Age of Reason was a time characterised by the well-known epigram 'chaos of clear ideas'.[6] It was a period of widespread reform that improved society and the lives of many by recognising the individual as a separate, autonomous self.[7] The Age of Reason (or the Enlightenment), came about in opposition to the dogma, maxims, and rules inherited from the social order of the age of faith.[8] A key proposition of the period was that reason must be founded in and grounded by science and logic, as opposed to belief.[9] In this way, the Age of Reason was the result of both existential and epistemological crises in relation to which it set out on a new journey, insofar as the structure of knowledge shifted from ecclesiastical and non-secular forms that were long considered legitimate, to those positioned as scientific, objective and reasoned.[10]

The post-enlightenment era, also known as late modernity or sometimes simply referenced as postmodernism, had a major influence and impact upon the contemporary versions of rule-based law in society, which was the major juridical product of the Age of Reason that required the rules to operate together as a technical and predictable rule of law.[11] The postmodern period is often correlated to the philosophical revolution that was nihilism, which emerged in the 19th and 20th century, and which reduced universal values, rights of man and common-sense beliefs to nothing more than meaninglessness and thereby rejecting the fundamental truths that were until then considered conducive to societal progress.[12] Put starkly, late-modernity or postmodernism is understood to, at its core, reject the supremacy of the logic and reasoning of the enlightenment period.[13] In this thesis, I ask whether the undercurrent of

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[6] John Rule 'Voltaire's Politics: The Poet as Realist' (1960) 17 *The William and Mary Quarterly* 3 408; and Peter Gay *The Party of Humanity: Essays in the French Enlightenment* (1959).
[7] JI Israel *Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (2001
[8] Ibid. See also, Yasumtomo Morigiwa, Michael Stolleis, Jean-Louis Halpérin *Interpretation of Law in the Enlightenment Period: From the Rule of the King to the Rule of Law* (2011).
[9] Supra note 7.
[10] Supra Morigiwa et al. at note 10.
[11] Francis J Mootz 'Is the Rule of Law Possible in a Postmodern World' (1993) 68 *Wash. L. Rev* 249.
[12] B Olivier 'We live in a Nihilistic Age' (2015) available at: https://thoughtleader.co.za/bertolivier/2015/12/15/we-live-in-a-nihilistic-age/, accessed 2 August 2025.
[13] Milan Zafirovski 'Counter-Enlightenment, Post-Enlightenment, and Neo-Enlightenment' in *The Enlightenment and Its Effects on Modern Society* (2011) at 279.

contemporary reform in relation to consumer laws generally, and finance sector specifically, is completing unfinished business from the Enlightenment in terms of realising rational and fair treatment of consumers for the wellbeing of society, or, whether the postmodern critique of these reforms might designate them as, on the whole, a miss-step that was never properly grounded in reason to begin with. Whatever the case may be, the regulatory shifts that this thesis considers, together constitute a time of change attendant upon and responding to a time of economic crises.

Despite recent shifts in thought and knowledge, the development of laws and jurisprudence during the Enlightenment marked the golden era for the construction and epistemology of particularly Roman-based laws, remaining in operation today in most Western jurisdictions across the globe.[14] Taking account of the epistemological crises in Western Europe (at the time founded in religious and cultural practice) as the cause for Enlightenment philosophies, it can be said that the contemporary legal reform that is the subject of this thesis, is encountering a similar epistemological crisis in relation to the laws of today, specifically the rigid rules based systems and atomistic autonomy that governs contract law historically and that continues to apply to many consumer contracts and contracts of adhesion.[15] There is now decidedly a reformative trend that is moving the relevant laws away from maxims and rules developed in the Enlightenment era by way of the adoption of statutory law and the development (although fairly limited) of the common law.

The reformative trend intends the progress of society along the lines of the promotion of consumer rights that aim for legal developments that would adequately protect consumers and result in fairness as a key feature of business conduct. The shift in legal substance is also clearly accompanied by a shift in legal form, since it is through the adoption of outcomes and principles-based laws that substantive fairness is said to be realisable.[16] Reforms of law, however, do not take place in a vacuum. To address the growing demands for the well-being of society and the security of the market economy through predictable outcomes, new rationalised systems of law are being developed and they signify on the whole a new trajectory that can be

[14] Supra Israel at note 7.
[15] F Kessler 'Contracts of Adhesion - Some Thoughts About Freedom of Contract' (1943) 43 *Columbia Law Review* 5 629.
[16] Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv. l. rev.* 1685. See also, Julia Black, Martyn Hopper and Christa Band 'Making a Success of Principles-based Regulation' (2007) 1 *Law and Financial Markets Review* 3 191.

usefully apprehended as the juridical response to the age of technological rationality that may arrive at, or create, a new source of truth and justice.[17]

Throughout history, there have been developments in the global economy that were framed by the master narratives[18] as industrial revolutions. The first significant development took place with the emergence of an industrialised and urban way of living through crafting inventive products made of iron and textile to be sold and distributed in the market economy.[19] The second industrial revolution offered the allure of electricity, telephones, and the light bulb, whilst the third revolution was springboarded by new technologies such as the internet and renewable energy.[20] Interestingly, commercial laws relating to contract, delict, and enforcement remained largely stagnant and near universal over the course of these changes in the market economies.[21] Today, the prevalence of Artificial Intelligence in the public discourse and the framing of a new industrial revolution (coined as the fourth industrial revolution) coincides with a period of significant reform in the financial sector laws under discussion.[22] Understanding the potential of the dual (r)evolution and whether there are ways in which it can promote the achievement of fairness are central considerations of this thesis, which seeks to propose a new interdisciplinary legal approach through which the objectives of contemporary reform might be better realised. The industrial revolutions have been critical in terms of the production of the reasoning that pertains to the widespread culture of 'consumer society' which is accompanied by a bureaucratised and rationalised art of regulation and government.[23]

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[17] Mritunjay Kumar 'Episteme of Justice: A Genealogy of Rationality' (2019) *Shimla Law Review* 2. See also, Ben Green 'Escaping the Impossibility of Fairness: From Formal to Substantive Algorithmic Fairness' (2022) 35 *Philosophy & Technology* 4 90.

[18] Jean-François Lyotard refers to meta or master narratives as overarching stories that aim to explain universal knowledge and truth to legitimise social and historical phenomena. See, Jean-Francois Lyotard *The Post-Modern Condition* (1994); Özgül Ekinci and Hülya Yaldir 'Periodical Transformation of Narratives of Legitimization of Knowledge according to Jean-François Lyotard' (2016) *Current Topics in Social Sciences* 1; and Luis Alexandre Ribeiro Branco *Jean-François Lyotard* (2014).

[19] Haradhan Mohajan 'The First Industrial Revolution: Creation of a New Global Human Era' (2019) 5 *Journal of Social Sciences and Humanities* 4 377. See also, Harshit Agarwal and Rashi Agarwal 'First Industrial Revolution and Second Industrial Revolution: Technological Differences and the Differences in Banking and Financing of the Firms' (2017) 2 *Saudi Journal of Humanities and Social Sciences* 11 1062.

[20] Jeremy Rifkin *The Third Industrial Revolution: How Lateral Power Is Transforming Energy, the Economy, and the World* (2011).

[21] Bruce L Benson 'The Spontaneous Evolution of Commercial Law' (1989) *Southern Economic Journal* 644. See also, Jan M Smits *Contract Law: A Comparative Introduction* (2021).

[22] Langelihle Gift Mnyandu *The Impact of the Fourth Industrial Revolution on Financial Services Regulation and the Realisation of Socio-Economic Rights* (2019). See also, Gideon Rose *The Fourth Industrial Revolution: A Davos Reader* (2016) *Foreign Affairs* 1.

[23] Jean Baudrillard 'On Consumer Society' in James Faubion (ed) *Rethinking the Subject* (1995). See also, Ben Fine and Ellen Leopold 'Consumerism and the Industrial Revolution' (1990) 15 *Social History* 2 151.

The market economy, within which financial services and insurance products are sold, is inseparable from the law that governs it.[24] Interpretation, undertakings, performance and consequences of breach and non-compliance find themselves applied and interpreted through the prevailing legal logic of the time.[25] Historically, the Enlightenment, in its classical period, emphasised freedom of contract based on autonomy and consent, rather than whether terms were substantively fair. This meant that agreements were upheld in terms of what was offered and accepted between parties, regardless of whether the terms of agreement were fair or not.[26] Recently, the South African Constitutional Court affirmed that while fairness informs the public policy standard, fairness is not a predominant criterion of validity or enforcement of a contract (in the way that autonomy is).[27]

Today's financial regulation laws are being subjected to reform. The substantive of which is shifting how those laws are designed, applied and enforced in order to embed an outcomes-based regulatory regime focused on substantively fair outcomes in the contractual relationship. The theory behind the new legal rhetoric promotes a nuanced approach of outcomes-based regulation with the aim of releasing financial sector businesses from the limitations brought about by a legalistic formalist interpretation of its policies, contract terms, business processes, and how it deals with, interprets, and complies with the law.[28]

The new approach is believed to overcome hurdles that have led to adverse client experience, misconduct/mischief in treating clients, and a general challenge to inclusiveness in

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[24] Roger Cotterrell 'Rethinking 'Embeddedness': Law, Economy, Community' (2013) 40 *Journal of Law and Society* 1 49-67.

[25] Peter Gabel 'Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory' (1976) 61 *Minn. L. Rev.* 601.

[26] Hans-W Micklitz 'On The Intellectual History of Freedom of Contract and Regulation' (2015) 4 *Penn St. JL & Int'l Aff.* 1.

[27] In the Supreme Court of Appeal judgement, the court stated: 'although fairness and reasonableness inform policy they are not self-standing principles'. In the Constitutional Court judgment it states that 'this Court has authoritatively stated that the application of public policy in determining the unconscionableness of contractual terms and their enforcement must, where constitutional values or rights are implicated, be done in accordance with fairness, justice and equity, and reasonableness, which cannot be separated from public policy.' See, *Trustees, Oregon Trust v Beadica 231 CC* 2019 (4) SA 517 (SCA) (Supreme Court of Appeal judgment) at para 35; and *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at para 175.

[28] Julia Black 'Principles Based Regulation: Risks, Challenges and Opportunities' (2007) available at https://eprints.lse.ac.uk/62814/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Black,%20J_Principles%20based%20regulation_Black_Principles%20based%20regulation_2015.pdf, accessed 3 August 2025. See also, Julia Black 'Proceduralizing Regulation: Part II' (2001) 21 *Oxford Journal of Legal Studies* 1 33; Todd H Baker and Corey Stone 'Making Outcome Matter: An Immodest Proposal for a New Consumer Financial Regulatory Paradigm' (2020) 4 *Bus. & Fin. L. Rev.* 1; and Bryane Michael, Say-Hak Goo and Svitlana Osaulenko 'Does Objectives-Based Financial Regulation Imply a Rethink of Legislatively Mandated Economic Regulation? A literature review' 46 (2019) *J. Legis.* 245.

the financial service and insurance sector.[29] It was mainly for this reason, and that of regaining public confidence, that attention should be given to the socio-economic and historical issues of South Africa.[30] At the outset of the reform project government cited the new trajectory as not only concerned with financial stability, the reform is intended to support the ongoing transformation of South African society and bring a better life to all through financial inclusion, consumer protection and the new outcome based regulatory dispensation.[31] However, the South African government's cause for reform also stems from pressure to keep up to date with the trend in the world's developed economies and to remain relevant on the global stage.[32] Arguably, these constitute greater reasons for present endeavours to modify the legal framework, which is generally regarded as traditional and old-fashioned.[33]

Moreover, the penal consequences of non-compliance with regulations have been the big stick, forcing financial sector actors to dedicate resources to what is perceived as a risk to reputation and profitability.[34] Quasi-judicial industry and regulatory bodies impose fines and administrative enforcement where non-compliance with the laws is discovered. Therefore, embedding fair consumer outcomes in the law is now believed to be an effective method of transforming the financial sector, due to the impact that it can have on business' reputation and profitability if it is found wanting when compared to the regulatory expectation,[35] albeit that

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[29] Republic of South Africa, Department of National Treasury 'A Safer Financial Sector to Serve South Africa Better' (2011) 42. See also, Roger Miles *Conduct Risk Management: Using a Behavioural Approach to Protect your Board and Financial Services Business* (2017); and Iain Ramsay and Toni Williams 'The Crash that Launched a Thousand Fixes: Regulation of Consumer Credit after the Lending Revolution and the Credit Crunch' in W G Hart Legal Workshop 2009: Law Reform and Financial Markets: Institutions and Governance, 23rd - 25th June 2009.

[30] Lydie Louis and Frederic Chartier 'Financial Inclusion in South Africa: An Integrated Framework for Financial Inclusion of Vulnerable Communities in South Africa's Regulatory System Reform' (2017) 1 *Journal of Comparative Urban Law and Policy* 1 13. See also, World Economic Forum '6 Challenges to Financial Inclusion in South Africa' (2017) available at https://www.weforum.org/agen da/2017/04/financial-inclusion-south-africa/, accessed 12 July 2025.

[31] Supra National Treasury note 29. See also National Treasury *Twin Peaks in South Africa: Response and Explanatory Document* (2013) available at https://www.treasury.gov.za/twinpeaks/, accessed 3 August 2025.

[32] Ibid. See also the commitments made by President J Zuma at the G20. G20 'Declaration on Strengthening the Financial Systems – London Summit, 2 April 2009' available at https://www.fsb.org/wp-content/uploads/london_summit_declaration_on_str_financial_system.pdf, accessed on 3 May 2024.

[33] Supra Louis and Chartier note 30. See also Seraaj Mohamed (ed) *The South African Financial System* (2017) in FESSUD Studies in Financial Systems No 15 available at https://fessud.org/wp-content/uploads/2012/08/FESSUD_The-South-African-Financial-System_15.pdf, accessed 3 August 2025.

[34] Glen Hepburn 'Alternatives to Traditional Regulation' (2009) available at https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=341f735be4c0876b04932558d2c8b052aced68ec, accessed 3 August 2025 at 13 – 18. See also, Daleen Millard and Wendy Hattingh *The FAIS Act Explained* (2016) 2nd Edition at 142.

[35] Ibid Millard et al. at 95. See also, Financial Sector Conduct Authority 'FSCA Integration Report 2023/2024' (2024) available at https://www.fsca.co.za/Annual%20Reports/FSCA%20Integrated%20Report%202023-24.pdf, accessed 3 August 2025 at 12-43; and Financial Regulatory Reform Steering Committee 'Implementing a Twin Peaks Model of Financial Regulation in South Africa' (2013) available at

the present juridical effect of this transformative impulse is a parallel operation of the laws, creating contractual uncertainty, and seemingly in fundamental want of express jurisprudential grounding and acknowledgement of transformational constitutionalism.[36]

2. Research Objective and Questions

This thesis critically investigates the ongoing transformation of financial sector regulation in South Africa, focusing particularly on the shift from rigid rule-based approaches to contemporary forms of laws, such as risk-based, principle-based, and outcomes-based regulation. I look at the reasons behind these legal changes, the ideas that support them, how they were developed in South Africa, how they've been put into practice, and how they relate to the goal of fairness in contracts under the country's post-apartheid constitutional system.

The overarching objective of this research is to assess both the causes and effects of the regulatory reform in the financial sector. On the one hand, I trace the evolution of the regulatory transformation through international and domestic economic and legal pressures, including ideological influences, and policy and legislative development. On the other, I evaluate the effectiveness and the accommodation of the promise of the incoming laws and methods to achieve fairness in terms of client-centricity and consumer protection, in the prevailing laws of the 'new' South Africa. Furthermore, the thesis seeks to determine the impact of the reformist agenda, and how the development of new forms of regulation, particularly outcomes-based regulation, presents new challenges and legal uncertainty in its quest to achieve 'fairness' and establish a client-centric outlook in terms of the relationship between the financial sector and consumers, which it hopes will (re)establish trust between the parties.[37] Yet, as I note, the migration to a new legal discourse upsets the prevailing legal order and logic in the context of a postmodern world, where the sanctity of the principles that underlie the South African law of contract and thus grounds it, is in particular facing an unprecedented challenge.

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https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%203%20roadmap.pdf, accessed 9 December 2024.

[36] Transformational Constitutionalism for Karl Klare is 'a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.' See Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human* 146, 150.

[37] Supra (Financial Regulation Reform Steering Committee) note 35.

In providing new understandings of the development of regulation in the financial services and insurance sector, the key research questions that animate this study are:

- What are the principal laws governing financial services and insurance in South Africa, and what is the underlying rationale of the recent and present regulatory reforms? This research question is first explored in Chapter 2.[38]
- What are the hallmarks of the historically rigid rules-based system of laws that reforms are moving away from, why did it not adequately protect consumers and why is it incapable of embedding fairness? This research question is largely examined in the two-parts of Chapter 3 (A and B).
- What legal reform has been undertaken to achieve substantively fair outcomes and are they realistically achievable through legislative reform, and what role would the common law and consumer society play in realising a fair outcome? A response to this research question, albeit reflective throughout this thesis, is encapsulated in Chapter 4 where the new laws and their contemporary forms are discussed.[39]
- How is the general law of contract impacted by the new legal paradigm in the financial sector which establishes the outcome (fairness) as a critical supersession to mere contractual agreement, thereby introducing fairness as a new *iusta causa* or binding force without which the contractual validity is contestable? Research in response to this question can be found in Chapter 5 whereat I address the notion of 'achieving fairness' by discussing the legal application of abstract ideals, the emergence of fairness in contemporary legal discourse in the financial sector and the impact it has on contractual certainty. The constitutional, social and economic relevance of fairness in South Africa will also be covered in this chapter in response to this research question.
- If the new regulatory discourse is dominated by language to attain fairness, enabled by novel forms of law, how does it compare to the existing operations of fairness in the South African legal system, specifically in the common law of contract and precedent, and how coherent is the new juridical imagination of fairness in the context of South African contract law doctrines? This research question is explored in Chapter 6 by

[38] In Chapter 2 I present research and discussion on the geneses of insurance in South Africa and trace laws that regulated insurance practices and the role of insurance in South African society prior to the democratic era. In the two parts of Chapter 3, I lay out the financial services and insurance laws and how they are identified as the rules-based order. Furthermore, in Chapter 4 I present research and discuss the rationale for legal reform in the financial sector after the economic crises of 2008

[39] In addition, Chapter 5 and Chapter 6 focusses on the constitutionally aligned forms of fairness (and their relation to constitutional concepts like 'justice' and 'equality') from the perspective of economic theory and legal precedent.

looking at the locus classicus *Beadica*[40] matter, the development of the common law of contract and the evidence of the void in which the new fairness discourse exists as evidenced in the Ganas and Momentum[41] dispute.

- What new avenues to work towards the ideals of the post-apartheid mission are being opened for South African society by these reforms that are changing financial sector regulation substantively by requiring fairness? This issue is examined, in brief, in the conclusion chapter of this thesis (Chapter 7), building on the analyses of the previous chapters.

The thesis will also elaborate some of the jurisprudential questions arising from what it identifies as a new challenge in the application of laws by insurers and financial services providers, regulators, adjudicators, as well as in the assertion of rights by clients and members of the public. Within this context, concerns in relation to the Constitution's influence and impact, present further questions centred around the context of a community of consumers to which the law is applicable. This exercise necessarily involves critical discussion of common legal concepts like public policy, fairness, *boni mores*, and *bona fides*, in juxtaposition with the libertarian, negative version of freedom of contract as *pacta sunt servanda* and *caveat conscriptor*.

3. Scope of this Thesis

Primarily, this thesis is centred around laws regulating the relationship between consumers of the financial sector, with the commercial activity presenting itself in the form of insurance and assurance (or risk mitigation services),[42] and the trade in financial products and financial services. I examine the evolution of financial regulation in South Africa, with particular attention to fairness-focused reforms within the insurance and financial services sectors. The core of the study is a critical legal analysis of the shift from a rule-based regulatory regime to

[40] Supra note 27.

[41] Dispute detailed in Annalise Kempen 'Insurance Disclosure – The Importance of Revealing the Truth, the Whole Truth and Nothing but the Truth' (2019) 112 *Servamus Community-based Safety and Security Magazine* 2 16-18.

[42] 'Insurance' means protection against risks that might happen in the future, and 'assurance' means protection against events that are inevitable (like death). These terms are used interchangeably in this thesis as both are generally applicable to the discussion and analyses. See Francois Ewold 'Insurance and Risk' in Graham Burchell, Colin Gordon and Peter Miller (eds) *The Foucault Effect: Studies in Governmentality* (1991) at. Robert K. Elliott, 'Twenty-first Century Assurance' (2002) 21 *Auditing: A Journal of Practice & Theory* 1 139.

the principles, structures and rhetoric that underpin a principle-based and outcomes-based regulatory regime in the South African context, but also as a global trend.

The study is conceptually grounded in critical regulatory theory, contract law, and a transformative reading of relevant constitutional principles (such as dignity, equality, and access to justice).[43] However, it also draws secondarily on economic thought, some literature on public policy and on jurisprudential thought more generally, in order to explore how regulatory reform in the financial sector interacts with broader societal transformations. Although the financial sector is a vast and multi-faceted domain, this research narrows the scope to focus, as is implied above, on the client–provider relationship specifically, the legislative framework that governs it, and the institutional dynamics that mediate this relationship. Genealogical[44] analysis is enlisted to constitute a framework by which to trace the historical and conceptual development of fairness in financial regulation, while I rely on critical legal realism especially to contextualise these developments within actual practices, disputes, and outcomes.[45]

The contours of the genealogical approach employed here are grounded in two core themes. The first revolves around the question of how the new regulatory trajectory in the financial sector serves South Africans through promoting the value of community and the constitutional ideals and rights of dignity and equality. The second question asks whether the turn to fairness, particularly in its outcomes-based and principle-based (thus substantive) forms, represents a meaningful shift toward a concept of justice that could be said to correspond with a transformative post-apartheid society, or merely masks enduring structural inequalities

[43] In this regard, the works of influential critical legal theory scholars include: Roberto Unger *Law in Modern Society* (1976); Roberto Unger *The Critical Legal Studies Movement (1983)*; Mark Kelman *A Guide to Critical Legal Studies* (1987); and Duncan Kennedy *Form and Substance in Private Law Adjudication* (1976). Additionally, although not considered as part of the critical legal theory movement, the works of South African, Alfred Cockrell, no doubt inspired by Kennedy, especially his essay *Substance and Form in the South African Law of Contract (1992)* form part of the critical framing of this thesis. See Alfred Cockrell 'Rainbow Jurisprudence' (1996) 12 *South African Journal on Human Rights* 1 1; and Alfred Cockrell 'Form and Substance in the South African Law of Contract' (1992) 109 *SALJ* 40.

[44] Michel Foucault 'Nietzsche, Genealogy, History' in Paul Rabinow (ed) *The Foucault Reader* (1984). See also Adam Sitze *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (2013).

[45] John Dugard believed that critical legal realism in South Africa was a significant aspect of post-apartheid South Africa that still required attention. Albertyn and Davis comment as follows: 'The lessons of legal realism in relation to the dominant legal method (formalism) and the nature of private law were not really taken up by lawyers and legal academics under apartheid. This meant that South African lawyers were ill-prepared for the challenges of transformation in the legal system, especially in relation to legal method, the form and content of private law and the development of law under ss 8 and 39(2) of the Constitution'. See: Cathy Albertyn and Dennis Davis 'Legal Realism, Transformation and the Legacy of Dugard' (2010) 26 *South African Journal on Human Rights* 2 188.

under the language of reform. The field of critical legal studies challenges how seemingly progressive laws can be emptied of transformative content through judicial interpretation and legal culture.[46]

The notion of contractual fairness, for instance, is increasingly embedded in the language of modern regulation, but it remains a contested concept in the arena of commercial relationships, as will be evident via the case law that I will discuss. Fair outcomes are hardly capable of universal consensus and what financial institutions view as equitable routinely conflicts with consumer expectations and where asymmetries of power, knowledge, and access are fundamentals of the contractual relationship and are as such entrenched, the 'fair' outcome that wins out is the version of the financial institution or service provider.

Yet, as will be seen within the scope of the work that unfurls, maintaining consumer confidence in the regulatory and financial models increasingly requires meeting consumer expectations and this growing aspect of the relationship bears the capacity of shifting the discursive juridical power in significant ways. The thesis explores how the contractual relationship between financial product and service providers, on the one hand, and clients, on the other, becomes a site of moral, legal, and economic tension marked by discursive contestation, particularly in circumstances where regulatory reform as a result of the dynamic described above, at least ostensibly seeks to override or reshape foundational legal doctrines, such as, for instance, the historically dominant libertarian reading of the foundational *pacta sunt servanda* maxim.

The arguments advanced thus invariably bear upon the difficulties in terms of balancing rights and interests (public and private), conflicts of interests (which industry actors, such as financial services representatives, encounter), expectations of clients, and the profitability of insurers and financial service providers, when interpreting and applying principle and outcomes-based laws. The balancing act pits corporate interests – founded on previous rigid and predictable laws (outgoing legislation and traditional common law of contract principles) – against consumer expectations under the incoming laws, with the aim of reaching fair client outcomes and achieving the advancement of a more fair, just and symmetrical relationship between the parties (and more broadly, a transformative society as envisaged in the South African Constitution). In adopting, and adapting to conform and comply with the expectations of the fairness-focussed outcomes-based regulatory trajectory, financial services providers and

[46] Karl Klare *The Origins of Modern Legal Consciousness* (1978).

insurers are arguably being required by the law to perform a fine balancing act which lives up to a less prescriptive, yet defined, regulatory promise for more client-centric outcomes that could be conducive to the (re)building of public trust in the financial service and insurance sectors, respectively.

As is already clear, fairness is the ultimate envisaged outcome and the north star of the incoming laws (the legal dimensions of which will be explored in chapters 4, 5 and 6). In operation, the handling of disputes under the contemporary forms of regulation by Courts, Ombudsman offices, and the Financial Sector Conduct Authority, especially highlights the challenges encountered as the legal terrain transitions and reimagines that which would demonstrate regulatory compliance with the incoming laws.

Wherever relevant, this thesis will point out the legal lacunas and pitfalls as law in the financial sector evolves and transitions to a new regulatory dispensation. The breadth of discussion and analysis is limited to what is considered most critical to a critical understanding of the relevant literature and the ultimate purpose of advancing a nuanced critical legal argument. The growing adoption of advanced technologies to discharge rights and obligations, enter into contracts, and regulate market activity is relevant, but not central, to this thesis. I consider technology and data processing as a new and pervasive human evolution, presenting an opportune time to understand asymmetries, gain efficiencies, and to practically give effect to a pluralised and diversified socio-legal discourse and the ultimate pursuit for substantively fair outcomes that the new law mandates. It is the considered position of this thesis that this outcome is more achievable today if an interdisciplinary approach that includes the roles of technology is deployed to serve the legal, moral and commercial imperatives.

The philosophical grounding of the work spans several centuries. It considers aspects of traditional critical theory to understand what changes in the regulatory fields of study mean for our relationship with structure, law, power, global economic systems and the conduct of private and commercial actors, which we enlist to apprehend (juridical) reality. Moreover, uBuntu, the critical African philosophy foregrounding the perspective of interconnectedness, has been explicitly linked to the application of a more substantively grounded version of fairness in the context of contracts and interpreting public policy under the common law and the Constitution.[47] As such, uBuntu is considered at appropriate points in the discussion as a

[47] Theophilus Edwin Coleman 'Reflecting on the Role and Impact of the Constitutional Value of uBuntu on the Concept of Contractual Freedom and Autonomy in South Africa' (2021) 24 *PELJ* 1.

way of supplementing the traditional Western versions of normativity with a constitutionally recognised version for South African law and society.

The thesis is not a comprehensive analysis of global regulatory systems, nor does it consider the full spectrum of comparative international case law. Rather, it focuses on the South African instance, its legal system and history, drawing only selectively from other jurisdictions to support or contrast findings. At its heart, the thesis is a critical jurisprudential inquiry, concerned with the coherence, legitimacy, and transformative potential of new financial regulation. The new forms of regulation moreover require new methods of interpretation by lawyers and those asked to comply with it, and in the insurance and financial services industries, they change the operation of contract law.[48] As a result, statutory interpretation and the development of the common law of contract through precedent, to accommodate more explicitly the growing demand for substantive fairness, is squarely within the purview of this thesis.

While this thesis addresses a broad set of interlocking issues, certain areas fall outside its analytical scope. Comparative international case law is not analysed in detail, although selected global developments are referenced for the shifts they signify in contemporary global order, customary, normative, and socio-legal traditions beyond foundational concepts. Excluded are in-depth analysis of customary legal systems, financial regulation in Asian and Latin American economies, the technical details of private law mechanisms beyond what is necessary to understand the impact on contractual form, and empirical testing or statistical impact assessments.

The thesis also does not provide a technical analysis of actuarial science, risk modelling, or financial accounting standards, even though these influence product design and regulatory logic. While economic inequality is a recurring theme, the study does not attempt a full empirical account of inequality metrics or economic redistribution mechanisms. Instead, I rely on existing authority to situate these concerns. Far Eastern and South American legal systems are excluded from comparative analysis, with English, Roman and Dutch legal history preferred, given the jurisdiction under consideration. Digitalisation and artificial intelligence in financial services are acknowledged, but not analysed as primary subjects. However, the ubiquitous nature of these concepts to the modern world cannot be overlooked and are thus

[48] In this regard the research as presented in Chapters 5 and 6 look at the development of the common law in South Africa through the judicial posture and academic propagation, and how is bears relevance to the study of the development of laws in the financial services and insurance sectors.

presented as the Zeitgeist in which the regulatory turn arrives. Advanced technology is therefore only referenced insofar as it affects regulatory assumptions or social outcomes sought to be achieved.

4. Methodology

As mentioned above, the thesis adopts a genealogical method by tracing the evolution of legal and economic concepts related to fairness, justice, and commercial relations across time.[49] It draws on global and domestic criticism of systems of laws considered inept in terms of accommodating contemporary ideals of fairness in financial sector dealings. Legal philosophy, economic theory, constitutional law, and modern regulatory policy are used to understand how the ideal of fairness has been operationalised in law and commerce and how it might be reimagined in the South African context.[50] The design of the prevailing legal order is apprehended via an exegetical and hermeneutic interrogation of the language, method and structure of the rigid rules-based regime that is being replaced by the regulatory reform. As such, the dissertation is fundamentally an inquiry into how the present evolution of laws in the financial sector has come to be. I consider power relations and asymmetries in knowledge and legal discourses in society critically to reveal contemporary concerns about the cause, impact and potentialities of the regulatory turn in the financial sector. The primary sources are legal, normative and economic literature, global and domestic policy, and South African legislation, precedent, and custom. By tracing the 'history of the present' (or, as I argue, the continued presence of the past) that these sources relate, a historical review of law, power and social conditions reveals the emergence of the relevant concepts and institutions, and how they have led to asymmetrical and unfair power relations in the financial sector.[51] Streams of economic theory[52] and their relation to rights-based constitutionalism in South Africa are used to understand legal reason better and to gauge rationality, while aiding the inquiry into the overall juridical conditions confronted by the incoming financial sector legal discourse.

[49] Supra note 44.
[50] Supra note 43.
[51] Supra note 44.
[52] The key theorists I draw on are Alfred Marshall *Principles of Economics* (1920); Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (2007); Adam Smith *The Theory of Moral Sentiments* (1790); Thomas Picketty *Capital in the Twenty-First Century* (2014); and Grietjie Verhoef 'Africa and the Firm: Management in Africa Through a Century of Contestation' in Bradley Bowden (ed) *The Palgrave Handbook of Management History* (2020) 1207.

For Foucault, genealogy is not a search for linear origins or universal truths, but rather, an excavation of discontinuities, ruptures, and power relations embedded in discourse and institutional practice.[53] For these reasons, a genealogical approach is preferred when tracing the emergence, transformation, and strategic deployment of fairness as a regulatory ideal in South Africa's financial and insurance sectors. Such an approach aids with interrogation into the use of abstract concepts in law, and a critique of the use of law to advance capitalist commercial interest. An exposition of contemporary international standards, bilateral institutional policy positions, and the major literatures on concepts such as fairness and client-centricity, as newly found authority in the financial sector, are explored through the historically contingent alignments of knowledge, power and social need that they evince.

In applying this method, the thesis explores how laws have been constructed, deployed contested and operationalised across the historical phases of merchant capitalism, colonial commercial law, apartheid-era legal formalism, and the post-apartheid constitutional era. The genealogical method allows this study to expose the impact of constructed legal certainties and the expediency (through command and control) to which they gave rise, which is majorly concentrated, generally speaking, in a historically dominant reading of an atomistic sanctity of contract and the maxims that have been interpreted to block substantive fairness judicially as a decisive autonomous consideration. Rather than treating outcomes-based regulation as a rational or inevitable reform against this backdrop,[54] the genealogical lens uncovers it as a product of specific institutional anxieties, economic imperatives and global regulatory trends. This approach ultimately enables a richer critique of how legal ideas with respect to fairness are shaped not only by ethical commitments, but also by shifting economic structures and the demands of regulatory legitimacy. The research that emerges through the genealogy arrives at a juncture that studies the relation between 'the world of the law and the world that the law purports to govern'.[55]

[53] Supra note 44. See also Maria Tamboukou 'Writing Genealogies: An Exploration of Foucault's Strategies for Doing Research' (1999) 20 *Discourse: Studies in the Cultural Politics of Education* 2 201.
[54] Supra note 43.
[55] Soren Chunuram 'Legal Research Methodology: An Overview' (2021) 8 *Journal of Emerging Technologies and Innovative Research* 1 443.

5. Literature Review

In the development of this thesis, I drew from a range of disciplines and sources. This section outlines and discusses three major areas of literature, in relation to the central themes of this thesis:

1. The changing nature of regulation in the financial services sector globally and in South Africa.
2. Historical and critical legal approaches to the law and economy in South Africa.
3. Different philosophies of ethics, and their relevance for the South African legal order.

5.1. On Regulatory Models for the Financial Sector

Following global trends to overhaul financial services regulation after the economic crisis, the South African government kicked into gear and followed suit as a diligent member of the global community by taking steps to restore public trust in the financial sector.[56] Through the influence of international institutions such as the World Economic Forum, the International Monetary Fund, the Organisation for Economic Co-operation and Development (OECD), the Financial Stability Board, and the World Bank,[57] the South African government was led to a new regulatory frontier at which it was to create a more robust and stable financial system with a view to enliven an optimistic outlook for consumers of financial products and services as well as society more broadly.[58]

During the period immediately following the Great Recession, the OECD specifically, was influential in shaping the need for a different approach to regulating financial services. In observing and recognising the need for alternative forms and modes of regulation following the financial crises, the OECD issued a seminal report in 2009 to guide policymakers in shifting

[56] Andrew W Lo 'Regulatory Reform in the Wake of the Financial Crisis of 2007-2008' (2009) 1 *Journal of Financial Economic Policy* 4.
[57] Financial Regulatory Reform Steering Committee 'Implementing a Twin Peaks Model of Financial Regulation in South Africa' (2013) available at https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%203%20roadmap.pdf, accessed on 9th December 2024.
[58] Jointly the IMF and World Bank through its Reports on the Observance of Standards and Codes (ROSC) concluded that improvements to South African financial regulation were required. See International Monetary Fund 'South Africa: Detailed Assessment of Observance on the International Association of Insurance Supervisors' Insurance Core Principles' (2010) available at https://www.elibrary.imf.org/view/journals/002/2010/354/article-A001-en.xml, accessed on 3 May 2024.

away from command-and-control or rules-based forms of regulation, which it deemed inefficient and ineffective to deliver on the demands of contemporary policy issues.[59]

Alternatives to rules-based command-and-control regulation, which the OECD regards as 'traditional regulation',[60] stemmed from analysis that found that governments' first response to perceived policy, market or conduct issues is to regulate.[61] The OECD questioned whether traditional regulation was the best way to address the trust deficit that had emerged following the financial crisis and realise the results and consequent stability that the global economy and its governments needed to survive. In doing so, the OECD stated that alternatives to the 'regulate first approach' must be preferred.[62] Those alternatives, such as market-based instruments,[63] self-regulation and co-regulation,[64] along with information and education schemes[65] were considered as more effective ways to achieve the desired results and meet the objectives to deter misconduct and outcomes that harmed consumers and the reputation of the financial sector. The OECD in this context proposed three major, relatively novel, forms of regulation: principle-based, outcomes-based and risk-based regulation.[66] These alternatives to rule-based command and control laws are discussed next.

5.1.1. Market-based Regulation

The OECD explains market-based regulation as forms of economic incentives and disincentives with which to address misconduct and adverse outcomes, changing thereby the conduct of actors which holds the potential to encourage positive public sentiment.[67] An example of market-based regulation can be found in the regulation of tobacco products, where

[59] Supra note 34.
[60] The OECD classified command and control regulation as traditional regulation and claim that is incapable of keeping pace with rapidly advancing economic, social and technological changes. See, OECD 'Alternatives to Traditional Regulation' (2008) 4; OECD, 'Co-operative Approaches to Regulation' (1997) *Public Management Occasional Papers*, accessed at https://www.oecd.org/content/dam/oecd/en/publications/reports/1997/09/co-operative-approaches-to-regulation_g1gh143e/9789264162761-en.pdf, accessed 3 August 2025; and OECD 'Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest' (2011) available at https://www.oecd.org/content/dam/oecd/en/publications/reports/2011/10/regulatory-policy-and-governance_g1g1415c/9789264116573-en.pdf, accessed 3 August 2025.
[61] Ibid (2011) at 125.
[62] Supra (OECD, 2008) note 60.
[63] Supra (OECD, 2008) note 60 at 5.
[64] Supra (OECD, 2008) note 60 at 6.
[65] Supra (OECD, 2008) note 60 at 7.
[66] Supra (OECD, 2008) note 60 at 14. See also, Julia Black 'The Rise, Fall and Fate of Principles-based Regulation' in Kern Alexander and Niamh Moloney (eds) (2011) *Law Reform and Financial Markets* (2011) 3.
[67] Ibid (Black).

governments often impose high taxes to discourage their use due to the harms to society and the health of persons. The effectiveness of market-based instruments is contingent upon objectives that are well defined.[68] Furthermore, the effectiveness of market-based regulation is usually high, due to the adverse financial impact on business and consumers.[69]

As an alternative to traditional command and control systems of regulation, market-based regulation targets the very issues which industry actors are most concerned about, namely the financial or economic bottom-line. Other than the penalties and fines that are imposed due to non-compliance, market-based laws have as yet not been effectively used in the financial services industry.[70]

5.1.2. Self and Co-regulation

Although they are distinct concepts, the OECD places self-regulation and co-regulation into the same category due to the reliance of these concepts on latent industry knowledge and expertise as tools with which to regulate the activities in the sector. In both cases, the regulator and those setting its policy and drafting its laws, work mostly cooperatively with industry and then pass to it the duty to actualise government policy as well as the practical accountability for the norms, codes, rules and laws that become adopted in this way.[71] In her assessment, Black links this decentring of regulation away from State to other actors to the Foucauldian apprehension in relation to the fragmentation of power in modern society, so as to emphasise that in addition to the fragmentation of knowledge there is in postmodern society also typically a fragmentation of power and control.[72]

In discussing the decentralisation of regulation, Black further suggests that the power to regulate outside of and beyond the State will produce changes in behaviour, conduct and attitudes of compliance and that the resultant relative autonomy associated with the self-

[68] Euphemia Godspower-Akpomiemie and Kalu Ojah 'Market Discipline, Regulation and Banking Effectiveness: Do Measures Matter?' (2021) *Journal of Banking & Finance* 133.
[69] Supra (OECD, 2008) note 60 at 5.
[70] Supra (OECD, 2008) note 60 at 57. See also, Abdullah Al-Shebli and Thafar M. Alhajri 'What is the International Best Practice for Regulation of Financial Markets? From A Legal and Practical Perspective' (2024) 3 *Journal of Ecohumanism* 4 1143.
[71] Supra (OECD, 2008) note 60.
[72] Julia Black 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a "Post-regulatory" World' (2001) 1 *Current Legal Problems* 54 103; and Julia Black and Dimity Kingsford Smith 'Critical Reflections on Regulation [Plus a Reply by Dimity Kingsford Smith]' (2002) *Australasian Journal of Legal Philosophy* 27 1.

regulation of compliance actors decreases the chances of central State over-regulation but that, through this decentring of unified statutory legal order, the certainty of the applicable laws also decreases.[73]

In the context of the South African financial sector, self-regulation is not a novel undertaking. Voluntary industry bodies such as the South African Insurance Association (SAIA) and the Association for Savings and Investment in South Africa (ASISA), have set rules and codes of conduct for its members in various forms since at least 1907.[74] The voluntary bodies regulated, through self-regulatory means, the non-life and life insurance industries respectively. Members were held to account by various structures and were fined for not adhering to the practices that they had subscribed to.[75] It was only as a result of the regulation of the financial sector through statute from 1991 onwards, that the role of voluntary associations and self-regulation diminished.[76]

The legal status of self-regulation and voluntary association is in essence that it amounts to a set of binding undertakings by members of such an association toward one another.[77] It is not without limitation and is susceptible to outside influence as, ultimately, the process and voluntary codes, commitments and rules that are developed are heavily influenced by the funders of the voluntary associations – its members – who are typically the proverbial 'captains of industry'. The FSB along with the statutory codes of conduct, disclosure requirements and fit and proper characteristics that came with it, superseded voluntary self-regulatory codes as well as the governmental expectation to self-regulate.

Indeed, the laws covered in chapter 3A and 3B are to the foundations of the rules-based order that ensued and are, due to their compulsory nature, antithetical to alternative forms of regulating such as self and co-regulation. As explained in chapters 3, strict compliance with laws under the rule-based order created inflexibility and compliance would not necessarily lead to better consumer outcomes nor protection. Voluntary associations, like ASISA, under the rules-based order, became observers of industry practice and represented its members by

[73] The effects of this, according to Black, are fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private. See ibid (Black, 2001).
[74] Grietjie Verhoef 'The World Insured South Africa *Corporate'* in Robin Pearson and Takau Yoneyama (eds) *Forms and Organisational Choice in International Insurance* (2015) 145; Grietjie Verhoef and Adri Drotskie 'Sustained in a Competitive Environment: Organizational Capabilities and Sanlam, 1918–1945' (2015) 10 *Management & Organizational History* 3-4 251.
[75] Retha van Reenen 'Beware, Risk Ahead: Insurance Matters' (2008) 2 *Enterprise Risk* 1 12.
[76] L Blom 'Review of Governance in the South African Mortgage Origination Industry and Suggested Framework for a Governance Body' (unpublished PhD thesis, University of Stellenbosch, 2011) at 25.
[77] Julia Black 'Constitutionalising Self-regulation' (1996) *Mod. L. Rev.* 59 24.

engaging with the FSB to help shape the regulatory discourse, but it lacked sufficient powers to enforce it,[78] while its influence over legal development was on the whole quite limited and restricted.

The role of voluntary associations under alternative modes of regulation, such as outcomes-based regulation, may yet become pivotal, and co and self-regulatory mechanisms will enable it to move away from its current observer and commentator status.[79] The position of this thesis is that the regulation of market conduct via voluntary self and co-regulatory bodies will increasingly be required if the industry is to meet the new policy objectives. This is due simply to the burdensomely extended effort and prohibitive cost that would be involved in developing the laws centrally only, via regulators or via the common law in precedent, or via a combination of these.

The distinction between co and self-regulation is that co-regulation involves government explicitly.[80] As a result, pure self-regulatory methods are unlikely to be revived, whether under principle or outcomes, since the promulgation of laws to regulate conduct in the financial sector (covered later in this chapter). . Therefore, co-regulation, I propose, is the model that the South African financial sector will be required to embrace more avidly as it undergoes the regulatory turn toward principle, performance and outcome-based regulation through which abstract ideals are expected to be achieved or realised with the compulsory guidance of less prescriptive legal language and less government and judicial involvement.

Although the boundary between self-regulation and co-regulation is not always clear,[81] one of the main mechanisms of both self and co-regulation is the development of codes of conduct aimed at promoting certain types of human conduct and organisation control.[82] Self and co-regulation are promoted as methods that hold an advantage over traditional command and control regulation because it offers 'greater flexibility and adaptability; potentially lower compliance and administrative costs; an ability to address industry specific and consumer

[78] Because the rule of the law under the rules-based order effectively superseded self-regulation, the voluntary association's ability to hold its members to account, was nullified in the process.
[79] Corne Heydenrych and John Luiz 'Regulatory Interaction with the Long-term Insurance Industry in Pursuit of Market Stability and Financial Inclusion' (2018) 49 *South African Journal of Business Management* 1 1.
[80] Supra note 34 at 6. See also, Edward J Balleisen and Marc Eisner 'The Promise and Pitfalls of Co-regulation: How Governments can Draw on Private Governance for Public Purpose' (2009) *New Perspectives on Regulation* 127 133.
[81] Supra note 34 at 35. See also, Lorant Csink and Annamaria Mayer 'How to Regulate: The Role of Self-Regulation and Co-regulation' (2014) *Hungarian YB Int'l L. & Eur. L.* 403.
[82] Damian Hodgson *Discourse, Discipline and the Subject: A Foucauldian Analysis of the UK Financial Services Industry* (2017).

issues directly; and quick low-cost complaints handling and dispute resolution mechanisms'.[83] Consequently, there is a case to be made that the language of the law passed by the legislature in this regard, should be similarly flexible and adaptable, in essence, primarily formulated in the language of open-ended standards.

A criticism of the co and self-regulatory approach (and a key concern of this thesis) is that the development of codes and practices – especially via alternative modes of regulation like principle and outcomes-based laws with their open-ended language – lacks transparency and takes place outside of a higher decisional instance or law setting body.[84] It is therefore likely, as this thesis argues here and in Chapters 5 and 6 of this thesis, that industry forms of best practice will exist in parallel to prevailing legal logic, doctrine and prescripts. Furthermore, the influence that industry bodies and actors exercise over regulators as well as the development of regulatory instruments within the context of such influence, should be considered with a degree of scepticism. Forewarnings from academic authorities including Black[85], Schmulow,[86] and Heydenrych and Luiz,[87] who have all studied the modalities of regulation in the context of influence over regulators, about 'the business of business' and not necessarily of consumers, raise the concern of inevitable 'regulatory capture' under contemporary forms of regulation.[88] The major criticism is that co-regulation is susceptible, particularly so when the laws are dominated by principle and outcome-based language, to the outright promotion of industry interests exclusively. In short, industry holds the power to sway the regulatory discourse away from outcomes that may negatively impact it, even if there are greater benefits and outcomes for consumers and society (discussed in Chapter 4 of this thesis).

5.1.3. Information and Education

[83] Supra note 34 at 6.
[84] Maria De Benedetto 'Effective Law from a Regulatory and Administrative Law Perspective' (2018) 9 *European Journal of Risk Regulation* 3 391. See also, Jonathan Remy Nash 'When Is Legal Methodology Binding?' (2023) *Iowa L. Rev.* 109 739; and Michael Latzer, Natascha Just and Florian Saurwein 'Self-and Co-regulation' in Monroe Price, Stefaan Verhulst and Libby Morgan (eds) *Routledge Handbook of Media Law* (2013) 373.
[85] Supra note 77.
[86] Supra note 5.
[87] Corne Heydenrych and John Luiz 'Regulatory Interaction with the Long-term Insurance Industry in Pursuit of Market Stability and Financial Inclusion' (2018) 49 *South African Journal of Business Management* 1 1.
[88] Ibid.

The third alternative that the OECD suggests is initiating information and education programs to change market and industry conduct.[89] The availability deficit in relation to information for all affected persons, not only business and some consumers, that is implicitly raised here, points to the OECD's concerns about asymmetrical power and information dynamics and aims to address this knowledge gap. The OECD cites examples of this modality in which regulation might also take place as 'education campaigns, labelling requirements and disclosure'.[90] Financial literacy and consumer education programmes that aim to improve consumer knowledge and bridge the information gap, are seldom carried out benevolently to improve consumer knowledge. The FSCA has accordingly instituted laws to regulate financial literacy programmes that prohibit the use of financial education initiatives as in essence marketing campaigns.[91]

At the same time, the OECD emphasises that education programmes alone, as a means of addressing poor conduct and delivering on policy objectives to promote fairness, amount to a touch that is too soft if there are no binding rules or laws directing its application.[92] Admittedly, information dissemination and education, as alternatives to traditional command and control systems of regulation, are less about imposing a standard, code, or binding rule, but rather involves setting as its objective the need to bring relevant information to par in a transparent manner. The incoming laws at least seem to employ this method with a view to achieve the results of its policies in the financial services sector.

Given the historical context of South African society, the knowledge gap and the concomitant need for financial literacy is crucial, given especially that numerical literacy in South Africa ranks amongst the worst in the world.[93] The expectations placed on business to develop societal knowledge and financial literacy is therefore an important element of realising the fairness that is now incumbent on it to promote. The risk, however, is that the responsibility to address information asymmetry and the ability to sufficiently monitor the direction of

[89] Supra note 34.
[90] Supra note 34 at 7.
[91] Financial Sector Conduct Authority 'Communication 11 of 2023: Notice Regarding the Publication of Draft Conduct Standard – Requirements for Financial Institutions Providing Financial Education Initiatives' (2013) available at https://www.fsca.co.za/Regulatory%20Frameworks/Regulatory%20Frameworks%20Documents/FSCA%20Communication%2011%20of%202023%20(GENERAL).pdf, accessed 3 August 2025. See also, Financial Sector Regulation Act 9 of 2017, FSCA Conduct Standard 1 of 2025 issued under s106.
[92] Supra note 34.
[93] Mhlonishwa Khuma and Reward Utete 'Factors That Influence Academic Performance of Students: An Empirical Study' (2023) available at https://ssrn.com/abstract=4593470, accessed 3 August 2025. See also, Centre for Development and Enterprise 'The Silent Crisis: Time to Fix South Africa's Schools' (2023) available at https://www.cde.org.za/the-silent-crisis-time-to-fix-south-africas-schools-2/, accessed 3 August 2025.

industry in terms of educating the public, are not traditionally the responsibility of business[94] and that the evangelisation and education *en masse* that business undertakes, will as a result ultimately be directed at serving no more than the stability of the financial services and insurance market, at the least potential cost of promoting a more robust and consumer friendly version of fairness.

5.1.4. Outcomes-Based Regulation: Toward Fairness

In recent decades, the regulation of financial markets has undergone profound shifts, both globally and within South Africa, mirroring broader political and economic reconfigurations. The current regulatory turn is – as I show over Chapters 3A, 3B and 4 – a departure from rigid, rules-based paradigms to more principles-based, responsive and outcomes-oriented frameworks.[95] Julia Black conceptualises this evolution as decentred regulation, wherein multiple actors co-construct norms beyond state command and control.[96] The OECD similarly promotes the movement away from a rigid rules-based legal system to alternative forms of regulation with *ex post* evaluation of the attainment of the regulatory aims (the attainment of our outcome set as the reason for regulation, which, in the case of the reform in South African financial sector is the attainment of fairness) as emblematic of the alternate forms of regulation.[97] In South Africa, National Treasury policy papers have endorsed this transition, recognising the imperative of embedding fairness and accountability within financial sector conduct. In turn, the South African legislature is adopting language that attempts to convey the spirit of the law over its legal form.[98]

It has become axiomatic that new versions of law are required to regulate the financial sector. This is due in part to changes in the market economy, with technology streaking ahead while legal development struggles to catch up. However, the need to re-regulate the financial

[94] Through the use of data financial services and insurance business are expected to understand different market segments and provide information in the form of statutory returns on market conduct and prudential management as informed by the Financial Sector Regulations Act.
[95] Cristie Ford 'Principles-based Securities Regulation in the Wake of the Global Financial Crisis' (2010) 55 *McGill Law Journal* 2 257. See also: Jonathan Koekemoer 'The Future of Banking in South Africa Towards 2055: Disruptive Innovation Scenarios' (2019) 1 *Faculty of Business and Economic Sciences* 1; and Teresa Izzo *The Integrated Reporting Paradigm* (2024).
[96] Julia Black 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) *Regulation & Governance* 137.
[97] The OECD also acknowledges the likelihood of legal uncertainty with the move from ex ante to ex post evaluation and effect of the new forms of law. See supra note 60 (OECD, 2011); and supra note 34 at 8.
[98] Supra note 29.

sector in the current era of reform is due primarily to the regulatory environment imposed upon it, which failed to prevent bad conduct that harmed individuals and society.

From the outset, the arrival of the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) was heralded in the language of consumer protection, when mainstream media headlines in 2004 proclaimed: "How the FAIS Act protects you".[99] In addition to the regulatory intervention via the FAIS Act, consumers were also expected to protect themselves first and foremost by ensuring that they dealt with authorised persons and businesses and complied with the law (see excerpt below). The Financial Services Board (FSB) hence created hotlines for consumers to call and check whether they were dealing with an authorised and registered person.[100] This responsibility was well captured in an article published upon the introduction of the FAIS Act, which stated that:

> The legislation, however, does not mean that people with ill-intent will not try to con you. You still have an obligation to protect yourself, and to ensure that the person or institution giving you advice or selling you a financial product is properly licensed and behaves according to the law.[101]

Central to the legal transformation is a redefinition of legal form as well.[102] The move from prescriptive rule-orientated legislation to principles that are applied flexibly, has reoriented regulators towards achieving fairness in outcomes, rather than merely enforcing compliance or limiting fairness to administrative action, process and procedure.[103] Black, Schmulow and Millard have provided foundational accounts of how principles-based regimes emerged in the United Kingdom, Australia and South Africa respectively, with Treating Customers Fairly ('TCF') becoming evocative of this trend.[104]

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[99] See for example, IOL 'How the FAIS Act Protects You' available at: https://www.iol.co.za/personal-finance/financial-planning/how-the-fais-act-protects-you-995278, accessed 3 August 2025.
[100] Ibid.
[101] Ibid
[102] Sam Ashman and Ben Fine 'Neo-liberalism, Varieties of Capitalism, and the Shifting Contours of South Africa's Financial System' (2013) 81 *Transformation: Critical Perspectives on Southern Africa* 1 144.
[103] Andrew Godwin, Timothy Howse and Ian Ramsey 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 134 *South African Law Journal* 3 665-702.
[104] Supra Black note 72; Andy Schmulow 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks' (2018) *African Journal of International and Comparative Law* 25; and Daleen Millard and C. J. Maholo 'Treating Customers Fairly: A New Name for Existing Principles' (2016) *THRHR* 79 594.

In South Africa, Millard and the King IV Report illuminate how principles are operationalised in codes of conduct, fit and proper standards and the supervisory mandate of the Financial Sector Conduct Authority (the FSCA).[105] Legislative enactments such as the FAIS Act, the Long-Term Insurance Act 52 of 1998 (the LTIA Act), the Policyholder Protection Rules (the PPR), the General Code of Conduct (the GCOC), the Fit and Proper Requirements (FPR), the Financial Sector Regulation Act 9 of 2017 (the FSR Act), and the anticipated Conduct of Financial Institutions Bill (the COFI Bill) are the key legislative interventions that this thesis will focus on. These laws have created the structure and the regulatory expectations that financial sector businesses must abide by. A change from stricter rules-based legal forms to principles and outcomes-based forms, is arguably creating a monumental shift in terms of how financial sector businesses adhere to the applicable laws. The South African version of the TCF regime and twin-peaks model[106] is, at the time of this research (July 2025), being finalised and is in the process of implementation, with a fundamental component of the regulatory turn yet to be implemented, namely the COFI Bill. The first draft of the COFI Bill was presented for public comment in 2018, and seven years later, it is still up for further comment and consideration with its promulgation into law expected later in 2025.[107] The COFI law, once in force, apexes the regulatory turn and further enables the FSCA to address market conduct that it deems unfair.

5.2. On Historical and Critical Approaches to the Law and Economy

A robust understanding of contemporary regulation demands historical contextualisation. The scholarship of Grietjie Verhoef and Johan Fourie arguably provides unique South African reflections in the context of the global order.[108] Tracing the institutional evolution of South

[105] Ibid Millard. See also, Institute of Directors 'King IV Report on Corporate Governance for South Africa' (2016).

[106] The twin-peaks model refers to a financial sector regulatory framework being adopted in South Africa, but established in other jurisdictions, that divides oversight into prudential regulation that focusses on the stability and soundness of financial institutions) under the Prudential Authority and market conduct regulation focused on how financial institutions conduct business and treat customers under the FSCA. The implementation of the twin-peaks model in South Africa is intended to create a more robust and resilient financial system that better serves the needs of all South Africans. Supra at 29.

[107] The delay in promulgating the COFI Bill into law is due to factors that protect industry and the markets, as opposed to the moral, constitutional, philosophical and jurisprudential questions I seek to illuminate as imperative to consider.

[108] Supra Verhoef note 52. See also, Johan Fourie 'The Data Revolution in African Economic History' (2016) 47 *Journal of Interdisciplinary History* 2 193; Willem H Boshoff and Johan Fourie 'When did South African Markets Integrate into the Global Economy?' (2017) 41 *Studies in Economics and Econometrics* 1 19; and Johan Fourie 'Who Writes African Economic History?' (2019) 34 *Economic History of Developing Regions* 2 111.

Africa's financial sector within the broader currents of global capital flows, provides an understanding of what Hal Scott warns is the contagion impact of institutional and market collapse when reputation leads to widespread mistrust of the system of laws, institutions and financial sector businesses and actors.[109]

It was the classical economists, Adam Smith and Alfred Marshall, who laid the intellectual groundwork undergirding modern-day capitalism.[110] Their work, however, was propagated at a time critically different from today in the history of the world and South Africa It was a time defined by the prevalence of merchant capitalism, racial capitalism and the emergence of liberal capitalism. It was, as such, a time unlike the present in which fairness is dominant in the economic discourse. Smith and Marshall's work is centred around the interplay between the market and the commercial society. They believed that humanist rights would reflect moral sentiments and display that to gain societal approbation.[111] This too is how they argue that market sustainability and persistence meet the aims for profit and social harmony.[112]

The moral and distributive dimensions of contemporary capitalism are the subject of Thomas Piketty's work, which examines wealth concentration empirically.[113] John Rawls' normative framework of 'justice as fairness',[114] and the lesser-known work of Adam Smith, *Theory of Moral Sentiments*,[115] provide, in the context of this thesis, insight into the genealogical dimensions of the contemporary formations of capital vis-à-vis the emergent fairness discourse. The latter, for instance, crucially emphasises that commercial endeavours must have moral actors who care for social harmony and that the capitalist model should avoid becoming an immoral pursuit, prioritising individual prosperity over social cohesion and human dignity.[116] Pertinent to this thesis, of course, is precisely the deep-seated structural inequality that persists despite the liberalisation of South African society. This perspective

[109] Hal Scott *Connectedness and Contagion: Protecting the Financial System from Panics* (2016).
[110] Alfred Marshall *Principles of Economics* (1920) 8th edition, MacMillan See also, Peter Groenewegen 'Alfred Marshall and the History of Economic Thought' (1991) *Quaderni di Storia Dell'economia Politica* 59; Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776); and G. R Bassiry and Marc Jones 'Adam Smith and the Ethics of Contemporary Capitalism' (1993) 12 *Journal of Business Ethics* 621.
[111] Adam Smith *The Theory of Moral Sentiments* (1790). See also, Hans E Jensen 'Alfred Marshall as a social economist' (1987) 45 *Review of Social Economy* 1 14; and Miriam Bankovsky 'Alfred Marshall on Cooperation: Restraining the Cruel Force of Competition' (2018) 50 *History of Political Economy* 1 49.
[112] Ibid
[113] Thomas Piketty *Capital in the Twenty-First Century* (2014)
[114] John Rawls *Theory of Justice: Revised Edition* (1999).
[115] Supra Smith at note 111.
[116] Ibid.

normatively animates the TCF Regime and broader regulatory reforms that aim to balance commercial enterprise with social and contractual justice.

The emergence of the fairness regime in the financial sector, coincides with South Africa's shift in its governing normativity, not only within economic theory and political economy, but also interestingly in the subordinated law of contract, where public policy and constitutional values are increasingly shaping private legal relationships. From within private law, the fairness discourse has come up against traditionalist contract theory,[117] while prominent commentators promote the constitutional values of dignity, equality and freedom's infusion into consumer contracts and the use of unfair contract terms legislation to protect consumers.[118] Whilst this work concerns traditional contract law's negative impact on consumers, there is no focus in it on the financial sector.

Furthermore, with the introduction of the Consumer Protection Act (CPA) in 2008, the academic inquiry appears to have become at least partially satiated, especially after the Constitutional Court's *locus classicus* judgment in *Beadica*[119] which confirmed that fairness is not an autonomous consideration in relation to enforceability in terms of the general principles of the South African law of contract.[120] The non-banking financial sector is exempt from the CPA, and therefore, the protections afforded via the CPA do not offer legal protection to consumers adversely affected by the poor practices and bad actors in the same way as other industries. The laws governing the financial sector, unlike the CPA, have remained somewhat oblivious to the history and conditions that have brought about the social and economic asymmetries now being sought to be addressed through the current regulatory reform, albeit with language that is less direct than statutes, such as the CPA and Broad-Based Black

[117] Frederik DJ Brand 'Equity and Certainty in Contract Law' (2021) *Acta Juridica* 1 141.
[118] Frederik DJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *South African Law Journal* 1 71; and Philip N Stoop 'Background to the Regulation of Fairness in Consumer Contracts' (2015) 27 *SA Mercantile Law Journal* 2 191. See also, Philip N Stoop 'The Concept of 'Fairness' in the Regulation of Contracts Under the Consumer Protection Act 68 of 2008' (unpublished PhD thesis, University of South Africa, 2012); and Tjakie Naude 'Unfair Contract Terms Legislation: The Implications of Why we Need it for its Formulation and Application' (2006) 17 *Stellenbosch Law Review* 3 361.
[119] Supra note 27.
[120] 'There is agreement between this Court and the Supreme Court of Appeal that abstract values [like fairness] do not provide a free-standing basis upon which a court may interfere in contractual relationships. As mentioned, they perform creative, informative and controlling functions.' Supra note 27 at para 79, and see also, para 64.

Economic Empowerment Act ('BBBEE'),[121] that imbues the transformative mandate of the constitutional dispensation.

In the meantime, the work of Dale Hutchison,[122] Andrew Hutchison[123] and Jaco Barnard-Naudé,[124] for instance, grapple with the resistance of traditionalists and juridical obstacles to advancing normative considerations like bona fides, boni mores and uBuntu (informing social dignity and fairness) into the field of contract law. They call for the realignment of contract law principles with normative and constitutional understanding that addresses South Africa's legacy of economic dispossession and inequality. Scholars such as Jackie Dugard and Joel Modiri have offered, additionally, critical socio-legal perspectives on how law mediates social power, through their contextualisation of South Africa's failure to address the harms of apartheid and their suggestion that the rights based model (of the Constitution) requires a revivified vision to address inequality and poverty.[125] Similarly, international theorists like Evan Gold and Larry Temkin present philosophical accounts and critiques of abstraction, virtue-based elements, fairness, and bargaining power with which to address outcomes and circumstances considered unjust.[126] The work of these scholars offers new contextual jurisprudential pathways through which to understand the financial sector reform and the praxis of the law to transform power relations and economic asymmetries.

The field of critical legal studies,[127] which emerged in the 1970's by scholars Duncan Kennedy and Mark Kelman argue that legal reasoning is not neutral or objective and that legal

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[121] Act No. 53 of 2003, as amended by Act 46 of 2013. See also the Financial Sector Code published in the Government Gazette in terms of the section 9 of the Act available at https://www.thedtic.gov.za/wp-content/uploads/Amended_Financial_Sector_Code.pdf, accessed 3 August 2025.

[122] D Hutchison 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 99.

[123] Andrew Hutchison 'Good Faith In Contract: A Uniquely South African Perspective' (2019) 1 Journal of Commonwealth Law 227; and Andrew Hutchison 'Decolonising South African Contract Law: An Argument for Synthesis' in Luca Siliquini-Cinelli and Andrew Hutchison (eds) *The Constitutional Dimension of Contract Law: A Comparative Perspective* (2017) at 151.

[124] Jaco Barnard-Naude 'Form and Substance in the Constitutional Court: Whither Contract Law's Policy after Apartheid?' (2021) 183 *South African Law Journal* 3 569; and Jaco Barnard-Naudé 'Lost in the Fundamental Contradiction: Revisiting Beadica (2024) 141 *South African Law Journal* 4 666.

[125] Jackie Dugard 'Courts and Structural Poverty in South Africa: To What Extent has the Constitutional Court Expanded Access and Remedies to the Poor?' in Daniel Bonilla Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (2013) 293; and Joel M Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2 223.

[126] Larry S Temkin 'Thinking about the Needy, Justice, and International Organizations' (2004) *The Journal of Ethics* 8 349; and Larry S Temkin *Rethinking the Good: Moral Ideals and the Nature of Practical Reasoning* (2012).

[127] Critical Legal Studies is a school of thought that critiques the law as a social construct, particularly its claims to objectivity and neutrality, by examining its social, political and economic contexts, and demonstrating that law is not a neutral system but rather a tool used to maintain existing power structures and inequality. See, Alan Hunt 'The Theory of Critical Legal Studies' (1986) 6 *Oxford J. Legal Stud.* 1. See also, supra note 43.

doctrine, rules and procedure masks political and economic choices under the guise of formal legal logic.[128] Kennedy, in 1976, wrote his seminal 'Form and Substance in Private Law Adjudication'[129] which, at its core, argues that private law shifts between two polarities, those being formality versus contextuality and individualism versus altruism.[130]

Kelman, similarly, contends that legal expectation and adjudication oscillate between form and substance, but never reach the crux to deal decisively in protecting societies from harm, preferring instead to police legal thought where it might be harmful to the goal of political and economic development.[131] Kelman, also critiques legal reasoning, particularly liberal legalism, doctrinal formalism and the ideological role of law in legitimising social hierarchies, offering alternative modes of rhetoric and critique in his book 'A Guide to Critical Legal Studies',[132] wherein he promotes radical indeterminancy and claims that much legal thought is tautological and that courts, in most legal disputes, reference supposedly neutral principles which lead to contradictory conclusions as the legal practice applied through such principles persist in efforts to unify practice through central hegemonic legal institutions.[133] Furthermore, Kelman, in 'Choice and Utility' challenges prevailing law and economics approach that confines legal evaluation to utility maximisation that are blind to contextual factors that, he argues, should determine preference.[134]

Roberto Unger, the other influential voice from the critical legal school of thought, who, unlike Kelman (who is criticised for a radicalism that would render law ineffective due to his nihilistic approach to doctrinal formalism)[135] approaches the disjoint of form and structure in his seminal work *Law in Modern Society*.[136] Here, he argues that modern legal systems, while appearing rational and neutral, are embedded in 'formative contexts' that structure power and identity.[137] Law, for Unger, is both a constraint and a tool for social reconstruction. He proposes

[128] Duncan Kennedy *The Rise & Fall of Classical Legal Thought* (2006). See also, Mark Kelman 'Intuitions' (2013) 65 *Stan. L. Rev.* 1291.
[129] Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv. l. rev.* 1685.
[130] Ibid.
[131] Ibid. See also, Mark Kelman *A Guide to Critical Legal Studies* (1987) 1.
[132] Ibid Kelman.
[133] See also, Paul Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' in Richard Bellamy (ed) *The Rule of Law and the Separation of Powers* (2017) 95.
[134] Mark Kelman 'Choice and Utility' (1979) *Wis. L. Rev.* 769. See also, Mark Kelman 'Hedonic Psychology and the Ambiguities of "Welfare"' (2005) 33 *Phil. & Pub. Aff.* 391.
[135] Richard Michael Fischi 'The Question that Killed Critical Legal Studies' (1992) 17 *Law & Social Inquiry* 4 779.
[136] Roberto Mangabeira Unger *Law in Modern Society* (1977).
[137] Ibid.

'destabilization rights' and new institutional forms that can challenge the rigidity of markets, bureaucracies, and legal formalism.[138]

Another key thinker I rely on is Karl Klare. His concept of *transformative constitutionalism* – first articulated in his 1998 article in the South African Journal on Human Rights – has become a cornerstone of South African constitutional discourse. He defines it as a long-term project of legal and institutional reform aimed at achieving substantive equality, participation, and democracy.[139] Central to his analysis is the idea that South Africa's inherited legal culture, which he describes as technical, formalist, and depoliticised, is fundamentally at odds with the constitutional vision.[140]

Lastly, I refer to the work of Alfred Cockrell, and particularly his essay on 'Substance and Form in the South African Law of Contract'.[141] Here, he applies Kennedy's framework to show how South African private law is shaped by a classical model that privileges freedom, consent, and formality, often at the expense of fairness and substantive justice.[142] He advocates for giving normative force to principles like good faith and public policy, warning against their marginalisation as 'background' values.[143] His critique of 'constitutional exceptionalism' - the idea that transformative principles should only rarely intrude into private law – helps explain the courts' reluctance to apply fairness systematically, which I discuss in detail in Chapter 6 of this thesis. Cockrell's work underscores that fairness in regulation must be internalised into legal doctrine, not just bolted on as policy rhetoric.[144]

5.2. On Ethics

The question of ethics is central to assessing the rationale behind initiating change to any regulation. Ethics, in relation to the focus of this thesis, concerns the treatment of, and unfair outcomes on, consumers due to poor behaviour or unethical conduct by financial sector actors.[145] In this section, I set out four branches of ethics and justice, which have been important

[138] Ibid.
[139] Supra note 36.
[140] Ibid.
[141] Supra Cockrell (1992) at note 43.
[142] Ibid.
[143] Ibid.
[144] Ibid. See also Chapter 6 of this thesis.
[145] Joe McGrath and Ciaran Walker 'The Systemic Problem of Unethical Behaviours in Financial Services' in Ciaran Walker and Joe McGrath (eds) *New Accountability in Financial Services: Changing Individual Behaviour and Culture* (2022) 53.

to the development of my arguments on fairness in this thesis. Namely: utilitarianism, egalitarianism, Nietzschean ethics, and Aristotelian virtue-based ethics.

Utilitarianism is an ethical theory that holds that an individual's moral worth is determined by conduct that bears overall utility and is generally pleasing.[146] Actions are judged right or wrong solely based on their outcomes; therefore, utilitarianism requires impartial consideration of everyone's interests, aiming to maximise net positive consequences.[147] Its influence on legal text, however, has led to coercive rules being put into formulation.[148] This form of ethics was embedded in the Anglo (and US) economic system, exported across the world, including South Africa, where the utility of laws was used to reach a deterministic outcome that benefitted a system that would trickle down benefits to all.[149] The regulatory reform project in South Africa promotes outcomes-based regulation to achieve its aims of a more ethical insurance and financial services market; however, its operation seeks to avoid using instructive language. This, however, is not a contrast to the outcomes sought by utilitarianism in an economic and ethical sense – where, provided all in society in some way benefit from its approach to the moral or ethical question before it (however remote that might be) – the maximum efficiency and largest benefits are to be pursued.[150]

The utility of law in the rules-based system was perceived more in respect of expediency and resulted in hard-coded rules and common law contract doctrine practices to apply to as many situations as possible. This form carries with it the benefit of providing certainty to the greatest degree. The ethical outcome is, as a result, dictated by regulation written as rules that apply to all, and that is to be complied with literally, ignoring questionable and malicious conduct of actors and unfair or predatory impacts on consumers. Certainty and predictability to the greatest degree rank above arriving at an individually fair and just outcome in utilitarian ethics.[151]

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[146] John Stuart Mill *Utilitarianism* (1966).
[147] Ibid.
[148] Paul J Kelly 'Utilitarian Strategies in Bentham and John Stuart Mill' (1990) 2 *Utilitas* 2 245.
[149] Salwyn Schapiro 'Utilitarianism and the Foundation of English Liberalism' (1938) *J. Soc. Phil.* 4 121. See also, A. W. Coats 'Utilitarianism, Oxford Idealism and Cambridge Economics' in Peter Groenewegen (ed) *Economics and Ethics* (2002) 92; and Prakash Sethi and Oliver Williams 'Economic Imperatives and Ethical Values in Global Business: The South African Experience and International Codes Today' (2000) *Springer Science & Business Media* 1.
[150] Claire Andre and M. Velasquez. 'Calculating Consequences: The Utilitarian Approach to Ethics' (1989) 2 *Issues in Ethics* 1 37.
[151] Katherine Kortenk, and Colleen F. Moore 'Ethics Under Uncertainty: The Morality and Appropriateness of Utilitarianism when Outcomes are Uncertain' (2014) 127 *The American Journal ofPpsychology* 3 367.

Later in this thesis, I discuss egalitarian ethics and justice-as-fairness under the egalitarian model.[152] Its fundamentals aim to reduce injustice and grant equal access to resources, opportunities, and respect.[153] A pillar in egalitarianism is garnering fairness through promoting the social contract.[154] From an egalitarian perspective, all are afforded equal rights, and a fair distribution of resources with a bias toward those most in need.[155] Egalitarianism has influenced policy, but it does not present a form or manner to address inequality or poverty; instead, by equally affording basic rights, it indirectly aims to alleviate unequal economic situations.[156] There is a connection between egalitarian 'social justice' theory and the pinnacle law in South Africa conception of the same concept. Later in this thesis,[157] I will delve into the work of John Rawls[158] as a leading theorist in the field of egalitarian ethics.

By contrast to utilitarian and egalitarian ethics, Nietzschean ethics diverge sharply from traditional moral systems.[159] Friedrich Nietzsche criticised conventional moralities of theology and utilitarian ideals, claiming that it created what he termed 'slave morality' – that suppresses human excellence and creativity.[160] Nietzsche championed a 'master morality' rooted in individual strength, self-overcoming, and the flourishing of exceptional individuals.[161] His value system celebrates life-affirmation, the revaluation of all values, and the cultivation of the 'Übermensch' (Overman) who creates their own ethical codes.

A Nietzschean approach to achieving moral, ethical, just or fair outcomes disregards those concepts altogether. It, instead, questions the issue to which it applies.[162] The economic activity and its impacts are unsympathetic to the affected subject or consumer. This would be a predatory and vile financial services and insurance market, focused exclusively on the bottom line at all costs. It is an extreme version of the phenomenon presented in this thesis as the cause for regulatory reform – that being, mistrust in the financial services and insurance sector post

[152] See Chapter 5 of this thesis.
[153] John Rawls *A Theory of Justice* (1999).
[154] Rousseau writes that the social contract 'the social contract is the act by which a people becomes a people' and says of the social contract that it is a something of common interest and general will to surrender natural liberty to create a legitimate policical community. See: Jean-Jacques Rousseau 'The Social Contract' in Ricardo Blaug and John Schwarzmantel (eds) *Democracy: A Reader* (2016) 2nd Edition 43.
[155] Adam Jr Gifford 'The Evolution of the Social Contract' (2002) 13 *Constitutional Political Economy* 4 361.
[156] Supra note 153.
[157] See Chapter 5 of this thesis.
[158] Supra note 153.
[159] Simon May *Nietzsche's Ethics and his War on 'Morality'* (1999).
[160] Andrew Huddleston '"Consecration to Culture": Nietzsche on Slavery and Human Dignity' (2014) 52 *Journal of the History of Philosophy* 1 135.
[161] William Peter Wood 'Nietzsche's Praise of Master Morality: The Questions of Fascism Revisited' (2021) *Politeja-Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego* 129.
[162] Supra note 159.

the global economic crisis and consumer sentiment, due to selfish, greedy and malicious conduct by industry actors (some local and some far afield).

Finally, Aristotelian ethics is primarily concerned with virtue and abstraction.[163] Actions are judged by the collective societal impact.[164] The moral and ethical decision approach to contribute toward advancing social good in a material and immaterial way, that being, for economic wellbeing and to improve the dignity and good life for all.[165] This idealist approach or 'virtue ethics'[166] would require a collectively individualised system to achieve a good ethical society throughout, leaving little room for human nature of individualism so prevalent in the current era.

Virtue ethics use of abstraction and ideals would ultimately need to be reduced to rhetoric and codification to be applied, leaving the question once more to the community or the people to deduce the ethical and fair conduct or determine a fair outcome through the lens of society or the *mores*. Within the logic and lexicon of the South African Constitution there is a similarity with egalitarianism and virtue ethics.[167] The stated objectives of the Constitution are indeed the virtuous aspiration of the modern South African society to whom South Africans are bound and expected to progressively realise.[168] Aristotelian virtue ethics is foundational to human rights and expects individuals to act with good character.[169]

6. Structure of this Thesis

The thesis is divided into six chapters, each addressing a specific aspect of the overall argument. This chapter (Chapter 1) outlines the research aims, scope, methodology, and central argument.

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[163] John Doris 'Persons, Situations, and Virtue Ethics' (1998) 32 *Nous* 4 504. I explore Aristotelian ethics in Chapter 5 of this thesis.
[164] John Marangos and Nikos Astroulakis 'The Aristotelian Contribution to Development Ethics' (2010) 44 *Journal of Economic Issues* 2 551.
[165] Ibid.
[166] Supra note 163. See also, Daniel Statman 'Introduction to Virtue Ethics' in Daniel Statman (ed) *Virtue Ethics: A Critical Reader* (1997) 1. See also, May Sim 'Rethinking Virtue Ethics and Social Justice with Aristotle and Confucius' (2010) 20 *Asian Philosophy* 2 195.
[167] Arther Chaskalson 'From Wickedness to Equality: The Moral Transformation of South African Law' (2003) 1 *International Journal of Constitutional Law* 4 590.
[168] Drucilla Cornell *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation* (2014).
[169] Supra note 166.

Chapter 2 sets the historical and philosophical foundations, exhibiting particular historical periods, geographies, and phenomena to better understand the argument expressed as a genealogy. Furthermore, I explore prominent historical and theoretical foundations of law, commerce, and fairness, with emphasis on South Africa as a global player in the market economy.

Chapter 3 is divided into parts A and B. Both parts examine the laws regulating financial services and insurance in the first period of reform in post-apartheid South Africa. The law implemented in this period precedes the discourse that emerged after the global economic meltdown in 2008. Part A provides a detailed analysis of key statutes of this period, it goes on critically to explain the structure of these rigid laws, the regulatory bodies that were created, and how the minimal considerations in relation to fairness and consumer protection were ineffective due to a rule orientated legal interpretation and application, that evinced procedural subservience, unconcerned with substantive harm. The *Emkhe*[170] case is discussed in this part to demonstrate the legal logic that signifies the rules-based system in practice in the financial sector at the time. Part B continues the analysis of the prevailing rigid 'tick-box' legal logic and its laws. It looks at the parameters of and limitations to substantive mitigation of poor industry conduct during the period covered in this part of the chapter. Furthermore, I critique the roles created to oversee the financial sector and how the stature, competence, and ethical requirements of the roles set the bar, through the legal language, for fair dealing by financial sector actors. The effectiveness of regulating client-centric and ethical conduct via means tantamount to checklists I suggest is inherent in the rules-based order as it was empirically implemented and practiced. Consumer protection and managing asymmetrical relationships is briefly assessed in this chapter with reference to the work of Julia Black, because the latter furnishes a global policy perspective. I also include South African case law and commentary.

Chapter 4 traces the sweep of change following the 2008 economic meltdown, which resulted in the implementation of the new regulatory dispensation that is presently underway. I present the shift away from tick-box regulation, towards laws and regulatory bodies designed to address and advance fairness and consumer protection in financial services, insurance and broadly the financial sector (in ways that look beyond doctrinal dogma and procedurality). Modern legal concepts and logic introduced in the regulatory turn are examined to reveal the changes in the operation of law brought about via principle and outcome-based regulation.

[170] *Ehmke v Shutzler & Others* 2014 FAB10/2014.

Furthermore, the genealogy and rhetoric of the new regulatory order led by principles and outcomes is presented through discussion of global and domestic trends and policy positions which critically state the uniqueness of South Africa's past and present and past-in-present. One pitfall of the new methods is that it is invariably exposed to influence from both consumer and industry alike (although of course not equally). Chapter 4 also highlights the impact of the new regulatory regime on contract law and the notion of 'contracts of adhesion', where the outcome expected may render the contract meaningless and thus creates uncertainty in the contracting process. This chapter argues that the impact of the change, the sharpness of the regulatory turn, and the potential it has, is either oversold to solely drive market confidence, or is intended to improve the economic circumstances within society through the financial sector – in which case the steps necessary to meet the ambitious rhetoric for better consumer and societal outcomes, are heavily underestimated. This chapter thus bridges the critique in earlier chapters with the fairness discourse that is then further covered in chapters 5 and 6.

Chapter 5 squarely represents the inquiry into fairness, drawing on key thinkers such as John Rawls.[171] It its largely concerned with the philosophical underpinning and the constitutional, moral and economic thinking in relation to what constitutes, or would constitute, appropriately nuanced understandings of fairness, justice and equality in post-apartheid society. This chapter does not follow the chronology of earlier chapters – it is first of all concerned with concepts novel to the financial sector's legal order but prevalent in discussion in adjacent academic review. The chapter argues that regulatory reform of the financial sector can be understood critically as a call on egalitarian normativity to enter the consideration of what constitutes fairness in the South African financial sector. It furthermore situates inequality within the discussion to magnify the social reality within which the regulatory objectives are being pursued, to suggest that the project for fairness is inseparable from the 'achievement of equality'[172] in South Africa. A fair outcome must accord with constitutional objectives to address inequalities that result from the past. One such inequality that leaves the majority of South Africans in poverty is the role of the financial sector in safeguarding and offering products that perpetuate the inequality (yet carries the potential to alleviate economic strife) of those who cannot afford its products. This dimension invariably sustains and improves the lives

[171] Supra note 153.
[172] The South African Constitution states: '[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.' See Constitution of the Republic of South Africa Act 108 of 1996, section 9 (2).

and wealth of those who are already economically superior as well as their progeny, while those most affected by racial laws and racial capitalism under apartheid are seemingly unceremoniously left behind.

Chapter 6 continues the concern related to the discourse of fairness, begun in Chapter 5. In this chapter, I consider case law, normative legal concepts, and through academic and judicial sources, I revisit the debate about developing the common law of contract to reflect normative concepts in the constitutional text so as to highlight the long-standing legal wrangling for and against principle and outcomes orientated concepts and their centrality to modern South African contract law. Furthermore, I argue that whilst the community's role and its normativity is set to be strengthened via recent precedent, the objectives of the new regulatory order in the financial services industry seeks to promote this development without proper consideration of the precedential jurisprudence. Chapter 6 also consolidates the argument that the financial sector's regulatory turn may establish a parallel legal order that looks beyond a strict application of the prevailing law of contract. To illustrate this, I contrast case law with the dispute between the insurer Momentum and Mrs Ganas.[173] This case, which was resolved outside of the courts due to a lack of precedent, demonstrates how new regulatory expectations and societal standards in the financial sector can override established contract principles such as pacta sunt servanda. The outcome shows that, in this new environment, the need to achieve fairness for individuals and society can take precedence over upholding the strict terms of an existing agreement.

7. Conclusion

In its most basic form, this is a dissertation on how laws in the financial services and insurance sector have been developed and updated to accommodate substantive fairness by using outcomes and principle-based language, logic and laws. The intention behind embarking on this research is to offer insight into the regulatory agenda and theory that has caused much frenzy in the financial services and insurance industry.[174] Lawyers, actuaries, accountants and all measure of professionals are confronting the task of interpreting and applying principle and

[173] Patrick Cairns 'So You Treated Me Fairly. Should I be Grateful?' (2019) *Personal Finance* 456 13. See also, Annalise Kempen 'Insurance Disclosure - the Importance of Revealing the Truth, the Whole Truth and Nothing but the Truth' (2019) 112 *Servamus Community-based Safety and Security Magazine* 2 16.
[174] Ademola Oluborode Jegede, Michael Addaney and Untalimile Crystal Mokoena 'Climate Change Risk and Insurance as an Adaptation Strategy: An Enquiry into the Regulatory Framework of South Africa and Ghana' (2020) *Handbook of Climate Services* 279.

outcomes-based laws, following more than a decade of legal reform.[175] It is from within the practical implications of the regulatory turn (from rule-based laws to fairness-seeking outcomes and principle-based laws) that I pursue improved clarity, logic and cogency,[176] as I borrow from history, jurists, philosophers and judges; and, via analytical methods, express the sources and impacts of laws regulating fairness. In doing so, via the genealogy, an aperture emerges through which to view the regulatory reform, its disruption of traditional legal concepts and methods, and the potential it offers to those who are to adhere and those who might ultimately benefit from the parity it calls for. As a unique contribution to knowledge I first, provide a genealogy of the financial service and insurance laws in post-apartheid South Africa; and second, provide insight into the accommodation and consideration of fairness law in the South Africa, its court and financial services and insurance arena. This is the contribution to knowledge of this research.

This dissertation threads through human-centred pursuits for moral, just and fair outcomes over a selected continuum of time, thought, and commerce, but it is not complete in all the experience and the possible critique in relation to the role of private and contract law views on communitisation and abstract notions like justice, fairness, and equality and how they are relevant in considering the change in insurance and financial service laws. Sustainability (or simply survival) and consumerism provide much of the impetus to further the ideals of a system expecting consumer buy-in and looking to sustain its prominence in a capital-orientated world, which, through its reimagining under new methods of law and policy, takes a bold step away from the system it seeks to maintain.

At this point, I suggest in conclusion that the architecture of modern global financial governance is remiss of South Africa's post-apartheid situation.[177] This suggestion then sparks brief further interrogation into the impact and influence of the global financial order (led by bilateral institutes like the Bank of International Settlements, Financial Action Task Force, World Bank, G7, IMF, OECD and many more) on South Africa's vision for a more equal society. I ask whether global trends that are localised in the South African scene, hinder the

[175] Christopher Decker *Modern Economic Regulation: An Introduction to Theory and Practice* (2023). See also, Christopher Decker 'Reform and Modernisation of Legal Services in England and Wales: Motivations, Impacts and Insights for the OECD PMR Indicators' (2021) available at: https://www.oecd.org/regreform/reform/Reform-and-modernisation-of%20legal-services-in-England-and-Wales.pdf, accessed 3 August 2025.

[176] 'A philosophic study of the development of philosophies should be content to seek out the bases and cogencies of philosophies rather than engage upon a nostalgic search for sympathetic doctrines' See, Richard McKeon 'Thomas Aquinas' Doctrine of Knowledge and its Historical Setting' (1928) 3 *Speculum* 4 425.

[177] Stephen Malherbe and Nick Segal *Corporate Governance in Development The Experiences of Brazil, Chile, India, and South Africa: The Experiences of Brazil, Chile, India, and South Africa* (2003).

advancement of the historically denigrated social and economic status of impoverished South Africans (due to the legacy of an unjust and immoral apartheid system).

Financial services and insurance businesses, and the laws and rules established to manage its market activity part-fell in the ambit of the common law of contract to regulate. Oftentimes there is, in this legal context, an imbalance of bargaining power between the contracting parties (more unfavourable in the financial sector's insurance market) where contracts of adhesion are entered into with internal risk mitigation and rules set by the corporate actor, who holds disproportionate power over the contract terms and in which the ecosystem revolves around the interest of the insurer.[178] The change in financial sector laws that is underway, centres the consumers and policyholders and addresses the imbalances and asymmetries that exist in such consumer relationships with the financial sector.[179]

The emerging global fairness discourse in the financial sector is, however, also centred on sustaining globalised forms of capitalism and markets through reputation-enhancing outcomes-based, consumer-protective, equilibrium-seeking regulatory models applicable in commerce, law, policy, and economics. However, fairness, like its root word 'beauty',[180] may be in the eye of the beholder, 'pleasing on the moral eye' for it to be fair.[181] This thesis suggests ultimately that it is imperative as a matter of post-apartheid justice, that the beholder must look through two important lenses: first, constitutional consideration; and second, the community of consumers who interact and hold contractual relationships with the financial sector (expecting a beneficial outcome or performance from the relationship).

Parsing a contemporary assessment of complex present-day legal development with economic, jurisprudential, and societal impacts is necessarily an interdisciplinary undertaking. As a result, although the research and argument of this thesis is rooted in legal and regulatory theory, it leans on non-legal literature (such as economic and critical theory) appropriately at times to better understand the symptoms, conditions and challenges presented by the introduction of the new laws that cause the emergent juridical lacunas.

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[178] Examples of which are the FAIS Act, the LTIA, and the FSR Act – as covered in Chapters 3 and 4 of the thesis.
[179] An assertion I analyse to varying degrees of depth will be to understand whether the system is for the benefit of the consumer or the persistence of hegemonic market activity.
[180] The etymology of 'fair' and 'fairness' stem from old English words *fæger* and *fægernes*, both meaning that which is pleasing, attractive, and beautiful. See https://www.etymonline.com/word/fair and https://www.etymonline.com/word/fairness accessed on 15 July 2025.
[181] Geoffrey Cupit 'Fairness as Order: A Grammatical and Etymological Prolegomenon' (2011) *The Journal of Value Inquiry* 45, 389-401.

CHAPTER 2: A BRIEF HISTORY OF THE PRESENT

1. Introduction: The Presence of the Past

This chapter provides a depiction of South Africa's past in relation to the present, which comes in later chapters. The method adopted in this chapter is in line with the genealogical approach,[1] which unfolds a critical history of the factors and conditions by which the present came to be. The chapter diagnoses the factors and conditions that have caused the move toward fairness-seeking regulation in insurance and financial services, which is the focus of this thesis. In problematising the history and intentions of the present legal order in the insurance and financial services sector of South Africa, I bring to bear a fuller understanding of the notions of fairness and good conduct that are central to the new legal order and the history of the present.

In orientating the history of the present or the continued presence of the past today,[2] I adjunct South African constitutionalism and philosophy to support the diagnoses and analytical approach adopted. Scholars of ethics and economics, such as Adam Smith, their approaches and key concerns, are used as tools of inquiry to understand whether the touted contemporary legal framework, globally and domestically, which signposts later discussion, is indeed novel or whether, as will be seen in this chapter, is a reintroduction of age-old questions – about conduct and ethical business practice – appearing as unique to the interconnected and technologically advanced society in which we exist today.

This chapter frames the relevance of South Africa's history and precipitative situations where society, law, and global and domestic commercial systems intersect. In Chapter 4, I explore today's novel and ubiquitous discourse toward better client outcomes between contracting parties in the financial services and insurance sectors. The framing that this chapter contributes is, however, critical, and it is returned to in later chapters. As a synthesis of the

[1] David Garland 'What is a "History of the Present"? On Foucault's Genealogy and their Critical Preconditions' (2014) 16 *Punishment and Society* 4 365.

[2] History of the present is a Foucauldian method of inquiry which reaches back in time to assist in explaining the conditions that led to an event. I have deliberately titled this section as 'The Presence of the Past' to exemplify that the conditions leading to the present are also the conditions that existed in the past – where poor conduct in commerce and the economics of the market raises the moral question around business ethics and societal inequality. See, Brett Bowman 'Foucault's 'Philosophy of the Event': Genealogical Method and the Deployment of the Abnormal' in Derek Hook (ed) *Foucault, Psychology and the Analytics of Power* (2007) 138.

history examined in this chapter and what is revealed by the present history, it is somewhat of a forbearance to the legal flux identified in the thesis as momentary, albeit stark.

The inquiry into the causes and effects of the regulatory overhaul towards better forms of regulation favouring consumers and an improvement of societal conditions – in Chapters 4 and 5 – will reveal a lack, on the whole, of proper consideration for the history and the constitutional paradigm that ensued. This very history is what I intend to showcase in this chapter. Furthermore, the chapter will explain what caused the need for the current discourse seeking a fairer and more equal society. I argue that the history discussed in this chapter is key to understanding the development required in jurisdiction and jurisprudence. Within the void left by a philosophical and jurisprudential lacuna, this chapter seeks to show similar periods where history grappled with the questions that the new regulatory turn confronts. These questions turn on adopting normative communitarian values and the practices associated with such values, as conditions for contract validity and enforceability.[3]

When addressing past moments, this chapter is broadly chronological, with periodic interpositions away from the timeline to frame the relevance of the history. It traverses a brief historical account of how South Africa became important to the early days of the global economy in the period of voyage and merchant capitalism. Alongside global trade and commerce, communities and societies affected would carry sentiment toward the radical changes experienced under early liberal forms of capitalism – following centuries of feudal systems – where private ownership and wealth become value-based societal constructs to aspire toward. Racial determinism under South Africa's 20th-century laws is viewed through the lens of inequality as not the genesis of segregation and inequity in South African society, but more as a recent legacy out of kilter with the development of social and human rights in the rest of the world. These three angles are critically evaluated to bring to the fore 1. the history of unfair conditions and inequality, especially in South Africa, 2. the adoption of the new forms of commerce and the attitudes of the 'commercial society',[4] and 3. the South African outlook and

[3] Chapter 5 and 6 further develops what is covered related to inequality and communitarian systems of law and order.

[4] The term 'commercial society' carries a divergent discourse given the contrasting views of key contributors such as Adam Smith and Jean Jacques Rousseau. Adam Smith held a positivist view, often argued as 'natural', in that the commercial society through the free market uses self-interest to lead society to what is publicly good by acknowledging inequality and relying on social mobility, moral sentiment, and social institutions to achieve a harmonious society. Jean Jacque Rousseau, on the other hand, sees the commercial society as the cause of inequality and moral decay, believing that humans driven by private ownership and competition would diminish the likelihood of peace, equality, and self-sufficiency, positing that the commercial society alienates individuals from their true selves by ignoring human connections and leads to an increase in exploitation and injustice. See R Douglass 'Theorising Commercial Society: Rousseau, Smith and Hont' (2018) 17 *European Journal of Political*

needs in relation to the global discourse for fairness in the relationship between business and society.

Furthermore, this chapter introduces changes to laws in pre and post-modernity and gleans over the immoral laws that established Apartheid – societal and business conduct were corrupted and there is little evidence to support the jurisprudential inquiry into fair dealing and conduct amongst contracting parties within commercial activity over this time. Apartheid was a crime against humanity, and any good that emerges from the system, whether by design or accident, one is hard-pressed to attribute to the Apartheid system. However, where relevant, discussions on the operation of financial services and insurance in early postmodernity and more recent times are interrogated against the backdrop of changes to laws in the 21st century (covered in Chapter 6).

The analysis in this chapter uses cross-disciplinary voices. Legal scholars and jurists, philosophers, and economists are mostly leaned on to raise to prominence the challenge faced in South Africa today and throughout many periods worldwide as communitarian ideals and values enter an economic sphere of logic. This interplay is not assessed in a vacuum, as the research will show the interplay of wealth, the financial industry, and society. And furthermore, how financial services and insurance products unlock value for ordinary retail clients/citizens looking to safeguard themselves and society from dereliction.

2. Adam Smith's 'Fortunate' Colony[5] – the Cape of Good Commerce

'Wherever profit leads us, to every sea and shore;
for love of gain the wide world's harbours we explore.'
Joost van den Vondel, 1639[6]

During the 17th Century, an already inhabited South Africa was discovered by European voyagers. The Cape Colony, located around present-day Cape Town, South Africa, was

Theory 4 501. See also, Jean-Jacques Rousseau (translated by A Donald) *Discourse on the Origin and Basis of Inequality Among Men* (1992).

[5] Adam Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (2007) Salvio M Soares (ed) at 1088.

[6] See also, Claudia Schnurmann '"Wherever Profit Leads Us, to Every Sea and Shore...": the VOC, the WIC, and Dutch Methods of Globalization in the Seventeenth Century' (2003) *Renaissance Studies* 474.

occupied by Dutch and British explorer communities during this period. Coming with them were European ideologies around private land ownership, monetised transactions, Western judicial systems, and Western legal doctrine.[7]

In the decades and century that followed, Cape Town became a pivotal player in the global economic system, serving as a refreshment post between the Western world (largely European) and the East. This period witnessed the phenomena of colonisation, the expansion of European empires to foreign lands, and the legal and economic systems that are foundational to present-day South Africa.[8] The discovery of the Cape of Good Hope occurred when European nations sought prosperity and wealth for their own inhabitants through inexhaustible labour and markets that came with voyages to foreign lands—a step away from the narrow circle of ancient commerce.[9] New forms of exchange became possible, intended to be advantageous to both the European and colonised lands, yet the result was savage injustice, rendered possible by European advances, ruinous and destructive to several unfortunate countries.[10]

Adam Smith remarked on the discovery of the Cape of Good Hope as one of the greatest and most important events recorded in mankind's history (the other being the passage to America).[11] In 1776, approximately 120 years after foreign ships first discovered the Cape of Good Hope, Smith writes that the consequences of the new commercial centres of passage were great; however, no human wisdom could foresee the benefits and misfortune to mankind.[12] Indeed, the subject of empire and colonialism and its effects on the history of the world remains a subject of great contention, with advocates for the benefits stating the overall advancement of mankind, whilst others mark its achievements merely as racist, creating inequality and a world of unequals and war.[13]

As if foretelling, Smith, despite lessening the effects from the age of exploration and exploitation, highlights the time of early globalised commerce as having superiority of force

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[7] Andrew Hutchison and Nkanyiso Sibanda 'A Living Customary Law of Commercial Contracting in South Africa: Some Law-Related Hypotheses' (2017) 33 *SAJHR* 3 380. See also, Gerrit Schette 'Company and Colonists at the Cape, 1652-1795' in Richard Elphick and Hermann Giliomee (eds) *The Shaping of South African Society 1652 – 1840* (1979) 283.
[8] Walter Rodney *How Europe Underdeveloped Africa* (1981) 177.
[9] Supra note 5 at 343.
[10] Ibid.
[11] Supra note 5 at 485.
[12] Ibid.
[13] Patrick Manning 'Analyzing the Costs and Benefits of Colonialism' (1974) 1 *African Economic History Review* 22. See also, Sally Engle Merry 'Race, Inequality, and Colonialism in the New World Order' (2006) 40 *Law & Society Review* 1 235.

so great (on the side of the Europeans) that they were able to commit with impunity every sort of injustice they willed. His view, reflecting both caution and optimism for the future, considers that the 'natives' of the imperilled countries may someday grow strong and Europe concomitantly weak.[14]

Such a change of fortune, Smith believes, would only occur collectively by all nations through 'equality of courage and force, by which inspiring mutual fear, can alone overawe the injustice of independent nations into some sort of respect for the rights of one another'[15]. But, he states, 'nothing seems more likely to establish this equality of force than that mutual communication of knowledge, and all sorts of improvements, which an extensive commerce from all countries to all countries naturally, or rather necessarily, carries along with it'.[16] This statement is relevant to this thesis as Smith, first a lawyer and later an economist and philosopher, is regarded as the father of capitalism – the economic system that has dominated the world over.[17]

Smith, however, regards the likelihood of a change benefiting poorer nations as unlikely to occur in human history – positing that the discovery of the Cape of Good Hope and Batavia (territories connected as trade routes established by Dutch voyagers) were two of the most successful and fortunate colonies in terms of generating value and wealth, and in the process, excluding native communities.[18] He described the Cape of Good Hope as having barbarous inhabitants incapable of defending themselves.[19] Thus, through this discovery and commercial endeavour, Europe (generally referred to in Smith's work as 'the Western nations') had raised the mercantile system to a degree of splendour and glory that had the exclusive effect of consequently enriching Europe alone. Such ascension was supported by the laws and social order favouring the European occupiers. At the same time, it claimed to introduce natives to civil and orderly life. Yet, in practical terms they were destitute in asymmetrical societies established through slave and servant labour practices and unequal rights.[20]

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[14] Supra note 5 at 485.
[15] Ibid
[16] Ibid
[17] G. R Bassiry and Marc Jones 'Adam Smith and the Ethics of Contemporary Capitalism' (1993) 12 *Journal of Business Ethics* 621.
[18] Smith contends that the dreadful misfortune of the 'natives', such as subjugation, was by accident rather than through the intentional nature of the events that culminated in colonial rule – a view that is unlikely to resonate broadly 250 years later but which should not be dismissed out of hand. See Supra note 5 at 485.
[19] Supra note 5 at 492.
[20] Supra note 5 at 485. The enrichment of European enterprises over this period was exponential as laws favoured their practices and, where found to be incongruent with the European possessive interest, often were not followed. There were no judges or adjudicators at the time to protect the interests of the native populations.

An even-handed representation of the father of capitalism's fundamentals for the economic model attributable to him is found in *The Theory of Moral Sentiments,*[21] literature which he sees as elaborating the more important parts of the capitalist model, in whichever form. Yet, this work appeals less and has been less relevant to the design of capitalism over the last century when compared to his seminal *Wealth of Nations*.[22] According to Smith's work, the moral questions for commercial and proprietary enterprises are concerned with justice, remorse, and merit. He believes sentiments tap into understanding influence, fortune and wealth, as well as human conduct or sense of duty, in a system where some may prosper above others and cause unequal societies. The latter, an unequal, or better termed as a 'stratified' society, is considered a natural human formation to be accepted as such.[23] The presence of naturally forming unequal or stratified societies, however, does not, according to Smith, absolve us from the obligation to act with good conduct, which is the action of a virtuous character, and is essential to foster trustworthy behaviour in the economic and social realm.[24] Smith writes that man ought to regard himself as a citizen of the world and not as something separate or detached, he should always be ready to act in the interest of the community by sacrificing his own interests.[25] Morality in the capitalist economic model is acting to satisfy a universally moral existence enlightened by feedback from conduct.[26] In the financial services and insurance sectors, we're returning to this foundational moral view of the capitalist system in the present period of reform without an express acknowledgement of it being a transition to moral commerce.

Public policy and sentiment encouraged the utility of market feedback to better outcomes for society. Market feedback was partitioned into what is viewed as pleasing and aesthetic to mean that which is in vogue or popular, unlike that which is unpleasant and deformed and immoral. These sentiments toward the market, its actors and conditions, were important to maintain the reputation of and grow trust in the fledgling years of dealing with a rampant free market and capitalist economy. This approach, and seemingly the ills, are similar to the ills that has brought about a change in regulatory discourse to accost the moral dilemma

[21] Adam Smith *The Theory of Moral Sentiments* (1790) Sixth edition.
[22] Daniel Klein 'Adam Smith's Rebuke of the Slave Trade, 1759' (2020) 25 *The Independent Review* 1 91.
[23] Paul Raekstad 'Human Development and Social Stratification in Adam Smith' (2016) 9 *The Adam Smith Review* 293.
[24] Jeremy Shearmur and Daniel Klein 'Good Conduct in a Great Society: Adam Smith and the Role of Reputation' in Daniel Klein (ed) *Reputation: Studies in the Voluntary Elicitation of Good Conduct* (2000) 29. See also, Paul Raekstad 'Human Development and Social Stratification in Adam Smith' (2016) 9 *The Adam Smith Review* 293.
[25] Supra 5 at 123.
[26] John Dwyer 'Ethics and Economics: Bridging Adam Smith's *Theory of Moral Sentiments* and *Wealth of Nations*' (2005) 44 *Journal of British Studies* 4 662.

of the modern market economy where financial services and insurance have a meaningful role. Moral sentiment must look at the individual and the collective in tandem – at the individual for virtuous conduct, prudence and happiness from the system that would dominate (as well as, indeed, how the actions of one may lead to the unhappiness of another); at the collective, to find the order within which individuals are directed by nature to care, beneficence, and universal benevolence.[27]

Smith, not well known for his belief in natural philosophy and the nature of being, underscored mutual kindness as the main feature of the economics he promoted. Kindness, however, measured not by reciprocity and gratitude from the recipient of the good conduct, acting as he does beneficently, but rather humanity, by assisting and excusing those of weaker standing.[28]

There is no doubt of the concern for morality in early theories of capitalism. However, it would still be tinged with race, culture and class hierarchies as sociological truths in a time where cultural supremacy was a feature of Europe and, through colonisation, flowed to South Africa and other colonies. High society was only for the civilised and those exhibiting western rationalism, while the lower rungs were savages and barbarous.[29] Although anti-slavery rhetoric emerged from Europe during this golden age of merchant capitalism, anti-racist rhetoric would only emerge in the 20th century, implying that the persistence of anamoral political basis was necessary to justify economic domination.[30]

In a commercial society inequality is an accepted reality we cannot escape. Yet, participation and the free market extends the possibility of well-being and social cohesion, as if free market access is a tonic to the adverse social outcomes. The presence of unequal conditions with unfair outcomes in commercial society was not due to the prowess of a few in society with extraordinary aptitude; the society had normative and cultural practices that diminished the value of some beneath others. This caused an enabling environment for liberal economic activity and transactions at the cost of the imposition of immoral commercial practices on others (typically weaker ones).[31] Social inequality, in steeply stratified societies,

[27] Supra 5 at 213.
[28] Supra 5 at 64 and 204.
[29] Wulf Hund *Racism in White Sociology. From Adam Smith to Max Weber* (2022).
[30] Michael Cloete 'Neville Alexander: Towards Overcoming the Legacy of Racial Capitalism in Post-Apartheid South Africa' (2014) 86 *Transformation: Critical Perspectives on Southern Africa* 1 30.
[31] Supra note 24.

results in burdensome dependency owing to entrenched commercial practices exerted upon a lower class of society.[32]

Indeed, a moral question is a question of all time.[33] It should not be temporal in its essence and yet can be answered through the modality of its conditions.[34] In the case of economic activity, marketing, fashion, and culture would influence markets and public sentiment.[35] Consumer 'approbation' and 'disapprobation', simply meaning consumer approval or strong disapproval, respectively, can raise profound moral questions about commercial practices.[36] This feedback loop, however, remained inherently exclusive to dominant echelons of society and colonial power in the case of occupied and overthrown dominions.[37] The disunity in society due to the disparate accumulation of wealth and power led to a revolt against the profit gauging that occurred in Holland due to exploration and inspired anti-slave movements in the West and Europe, accompanied by calls for a more moral economic system aware of the impact it had on social harmony and individual liberties.[38]

2.1. Dominion and the Genesis of Form and Structure in Global Finance

The Dutch East India Company, also known as the *Verenigde Oost-Indische Compagnie* or 'VOC', was the main corporate body serving as the trailblazer for voyages and exploration from Europe (Holland specifically) to the Cape and the East. It expanded Dutch influence and administrative territory and established a centre of commerce in Java, Indonesia. The Cape of Good Hope (modern-day Cape Town, South Africa) became central to globalised trade and commerce as a midpoint from Europe to the East. The VOC's relevance to the world of modern

[32] Supra Rousseau (1992) at note 4.
[33] Hannah Arendt 'Some Questions of Moral Philosophy' (1994) *Social Research* 739.
[34] Ferenc Kiefe 'On Defining Modality' (1987) 21 *Folia Linguistica* 1 67.
[35] Craig Smith 'Adam Smith's "Collateral" Inquiry: Fashion and Morality in the Theory of Moral Sentiments and the Wealth of Nations' (2013) 45 *History of Political Economy* 3 505.
[36] In judging the morality of an act in the marketplace Smith relies on a natural attraction or aversion to certain behaviours, as a method of judging one can assume the character of an 'impartial spectator'. See: James Otteson 'Adam Smiths Marketplace of Morals' (2002) 84 *Archiv für Geschichte der Philosophie* 2 190.
[37] In Chapter 4 and 5 I cover the regulatory expectation and laws imposed on corporate actors to design products and processes that cater for and favour all and is not exclusive in deducing market feedback – be it through product developments, market testing, complaints, or demographic analysis.
[38] Supra note 21.

law, commerce, and capitalism is profound.[39] It bound law, financial services, capital markets, and trade to create the conditions and structure of merchant capitalism.[40]

The market structure that became dominant in Europe at the end of the sixteenth century spurred economic growth and, in the case of the VOC, led to the establishment of the first-ever stock market when, in 1602, it issued the first 'initial public offering' (IPO).[41] The IPO opened part ownership of the company to the public through the issuance of shares in exchange for a monetary investment, providing the first opportunity for average persons to share in the spoils of exploration. The system pressured, as is common in today's markets, the company to do whatever it took to grow and be profitable in order to avoid a discontented commercial society and Dutch proletariat. Share contracts and conditions of investment were regulated under a series of Dutch ordinances, as the legalities followed the economic function.[42] At the same time, the need for insurance grew to protect investment and mitigate the risk of loss over what was a critical part of an early global market.[43] This period is arguably the roots of today's globalised financial service and insurance economic system.

By 1662, the first pro-consumer movement had emerged within Dutch society, shareholders of VOC stock demonstrated against the market being outrageously profitable to those who ran it. As a result, governing business activity became important to manage market sentiment and trade dynamics.[44] The renewed emphasis on the governance of business activity, sparked by this early pro-consumer pressure in Dutch society, soon found its way to the Cape colony, when its administration adopted trade ordinances in 1717 which curbed monopoly practices, regulated trading, and set rules and standards for imports and exports to avoid social disharmony and discontent with exclusively lucrative commercial activity.[45] Before this, the VOC at the Cape had benefited from the self-regulating market environment, now their

[39] Guido Van Meersbergen 'Writing East India Company History after the Cultural Turn: Interdisciplinary Perspectives on the Seventeenth-Century East India Company and Verenigde Oostindische Compagnie' (2017) 17 *Journal for Early Modern Cultural Studies* 3 10.
[40] Nelson Lichtenstein 'The Return of Merchant Capitalism' (2012) 81 *International Labor and Working-Class History* 8.
[41] Lodewijk Petram *The World's First Stock Exchange* (2014).
[42] Markus Vink '"The World's Oldest Trade": Dutch Slavery and Slave Trade in the Indian Ocean in the Seventeenth Century' (2003) 14 *Journal of World History* 2 131.
[43] Oscar Gelderblom, Abe de Jong and Joost Jonker 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC 1602-1623' (2013) 73 *The Journal of Economic History* 4 1050.
[44] Matthijs de Jongh 'Shareholder Activism at the Dutch East India Company 1622–1625' in Jonathan GS Koppell (ed) *Origins of Shareholder Advocacy* (2011).
[45] Oldrich Krpec and Vladan Hodulak *Trade and Power: A Historical Analysis of Trade Power* (2014) at 27 – 37.

practices were deeply impacted by the new forms of market regulation.[46] Such market regulation increased as the VOC's profits decreased and it lost its public support in Holland.[47] More market regulation and regulation over the purchase and sale of slaves were introduced in 1770 and 1793, respectively, coinciding with the end of VOC trade dominance and Dutch rule in the Cape, a consequence of the change in the commercial market brought about through legal reform.[48]

2.2. Battleground Europe Effects on Commercial and Legal Dominance

A series of European conflicts in the 17th Century initially had minor impacts on Dutch dominance over its territories abroad and trade to the East via Cape Town. French and British companies seeking trade expansion could initially not gain much over the VOC, despite Holland being involved in battles in Europe with France and England.[49]

The Franco-Dutch War followed the Anglo-Dutch War of the mid-17th century: failed treaties and negotiations over dividing European lands between the Dutch, English, and French saw the monarchs, in particular the Dutch King (William of Orange), resort to armed conflict to protect Holland's territorial and economic dominance. Early military successes for the Dutch would not lead to territorial gains as France and Britain ensured the war was long and drawn out. Eventually, the Dutch economy (not its military) became a casualty of war when in June of 1672 the stock market collapsed and capital and credit for international projects fell flat.[50] This market turndown or crash, like the global economic meltdown that predicated the regulatory overhaul covered in Chapters 3 and 4, was not the first of its kind.

A previous event displaying the market's fallibility to human conduct was the Dutch Tulip Bulb Crisis. It emerged when contracts to purchase tulip flower bulbs exchanged hands multiple times, driving up prices in the market without delivering the physical asset,

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[46] Kyle D Kauffman 'Company Colonies, Property Rights, and the Extent of Settlement: A Case Study of Dutch South Africa, 1652-1795' (2005) available at https://escholarship.org/uc/item/2q0704w6, accessed 4 August 2025 at 3 – 8.

[47] Under the VOC controlled administration at the Cape the following laws and rule were in place: 'Plakaat' proclamations and ordinances whenever a new rule was implemented (like announcements), Trade Regulation ordinance of 1717 regulating monopolistic practices (Dutch influenced), Ordinance on Market Regulation of 1770, and the Ordinance on Slave Trade of 1793.

[48] Clifton C Crais 'Slavery and Freedom Along a Frontier the Eastern Cape, South Africa: 1770–1838' (1990) 11 *Slavery and Abolition* 2 190. See also, Clifton Crais *White Supremacy and Black Resistance in Pre-Industrial South Africa: The Making of the Colonial Order in the Eastern Cape, 1770-1865* (1992).

[49] Pieter C Emmer and Jos JL Gommans *The Dutch Overseas Empire, 1600–1800* (2020) (trans. Marilyn Hedges).

[50] Jonathan Israel *Dutch Primacy in World Trade, 1585–1740* (1989).

inadvertently creating the first futures market (ironically, 'futures contracts' are the class of instruments traded in the derivatives market and were a major cause of the 2008 global economic meltdown).[51] In its most effective way of addressing conduct that had damaging consequences, the Dutch Government coordinated campaigns against speculative market practice and set the 'morality tale' for good conduct in the market and parties entering into a commercial exchange (in an effort, ultimately to safeguard the reputation of the market and consumers).[52] The Dutch government's campaigns to bring awareness to good and bad financial contracts and decisions via morality tales, addressed market speculation and agreements between contracting parties which had started to erode societal cohesion and good order.[53] Meanwhile, the Dutch government stepped in to prop up the capital needs of the VOC following the 1672 crash, making the VOC hugely indebted to the government of Holland. After several decades of declining profits and negative public sentiment the Dutch government cut its losses and liquidated the VOC in 1789, [54]

The 17th-century Dutch success in staving off military incursions by Britain and France led to an inwardly focused Holland closing rank and protecting its European dominion. The 18th century saw a change in how trade, and particularly the VOC, would operate. It changed, largely, from a commercial enterprise to a quasi-political establishment in its territories, with its headquarters in Java, modern-day Indonesia.[55] In the Cape, the VOC ruled with authoritarianism over this period, with little political accountability to, or involvement from, the Dutch government.[56] The demise of the Dutch government's interest in the VOC toward the end of the 18th century, due to social pressures around the VOC's practices, its authoritarian

[51] The 'Dutch Golden Age' provided the conditions under which the Tulip crisis emerged and has been likened to poor market practice that led to the global economic meltdown of 2008. See, Jon-Arild Johannessen 'The Tulip Crisis of 1637' in Jon-Arild Johannessen *Innovations Lead to Economic Crises: Explaining the Bubble Economy* (2016) 35. See also, Paul Krugman 'Dutch Tulips and Emerging Markets' (1995) 74 *Foreign Aff.* 28.

[52] The morality 'tale' or 'play' is terminology used as it appeals to the moral and ethical consideration of why, for example, speculation, or other market behaviours that lead to adverse outcomes are bad and what is good to do. In some instances these would take the form of art. See, Christian Day 'Paper Conspiracies and the End of All Good Order: Perceptions and Speculation in Early Capital Markets' (2006) 1 *Entrepreneurial Bus. LJ* 283. See also, Toon Kerkhoff *A History of Dutch Corruption and Public Morality (1648-1940)* (2020).

[53] After a period of liberal forms of capitalism damaging society, Dutch contracts between parties would need to be overseen by an officer of the peace to ensure it subscribed to good community values. See, Brandon Pepijn '*Masters of War: State, Capital, and Military Enterprise in the Dutch Cycle of Accumulation (1600-1795)*' (unpublished dissertation, Universiteit van Amsterdam, 2013). See also, Max Weber *'Structures of Power' Imperialism* (2023) 325; and supra Day at note 52.

[54] D.G.E Hall 'The Zenith and Decline of the VOC, 1684–1799' (1981) *A History of South-East Asia* 350-365.

[55] Kirsten McKenzie 'Franklins of the Cape: the South African Commercial Advertiser and the Creation of a Colonial Public Sphere, 1824-1854' (1998) 25 *Kronos: Journal of Cape History* 1 88.

[56] Wim A Dreyer 'South Africa: The Early Quest for Liberty and Democracy' (2015) 71 *HTS: Theological Studies* 3 1. See also, Markus Vink 'Freedom and Slavery: The Dutch Republic, the VOC World, and the Debate Over the 'World's Oldest Trade'.' (2007) 59 *South African Historical Journal* 1 19.

style of governing (which was not the case in Holland) and the large sums of debt it owed the Government, led to it being cut off completely by the metropole.[57] Dutch inhabitants at the Cape were eventually left as they were and abandoned by Mother Holland.[58] This led to a strained social and economic life in the Cape and the eventual movement of settlers away from the Cape to inner parts of South Africa (these settlers later became known as the 'Voortrekkers', people of Dutch heritage) as they were ultimately driven out by Britain in the Cape, later re-identifying themselves as 'Afrikaners'.[59]

Enlightenment thought and theories, and the revolution in France in 1787, brought unrest to Europe and a change in the social and political landscape.[60] It led to the fall of the French monarch and the rise of Napoleon Bonaparte, under whose military expansion and rule Holland was occupied. These events were major inflection points in Europe, the effects of which spilt over to the territories of the Dutch, including the Cape of Good Hope.

The period of economic dominance by Dutch corporations, a privatised empire of sorts, overlapped with immoral practices in the territories it exploited to rise to affluence.[61] The conduct and decisions of those directing the affairs of Dutch interests abroad led to abhorrently unjust outcomes for slaves, workers and communities where the VOC operated. The first anti-slave movements, much like the first consumer activism in response to the tulip crises, emerged within Dutch society as a moral response to the commercial enterprises' actions abroad and domestically.[62] The Dutch maxim 'vergaan onder corruptie' – translating to 'succumb to corruption' – would be realised as the VOC saw public sentiment, investment, and its fate dwindle as the commercial societies protested corrupt practices it employed to prosper.[63] Dutch bourgeois citizens wanted reform, initially for moral reasons and then political, creating a

[57] Stoyan V Sgourev and Wim van Lent 'Balancing Permission and Prohibition: Private Trade and Adaptation at the VOC' (2015) 93 *Social Forces* 3 933.
[58] William Mark Freund *Society and Government in Dutch South Africa: The Cape and the Batavians, 1803-1806* (1971).
[59] Joahn Fourie 'The Settlers of South Africa and the Expanding Frontier' (2020) available at https://www.ekon.sun.ac.za/wpapers/2020/wp142020/wp142020.pdf, accessed 21 February 2025.
[60] O.D Schreiner *The Contribution of English Law to South African Law; and the Rule of Law in South Africa* (1967). See also, John A Powell and Stephen Menedian 'Remaking Law: Moving Beyond Enlightenment Jurisprudence' (2010) 54 *St Louis ULJ* 1035.
[61] Pieter C Emmer, Jos Gommans *The Dutch Overseas Empire, 1600–1800* (2020). See also, Kees Boterbloem *The Dirty Secret of Early Modern Capitalism: the Global Reach of the Dutch Arms Trade, Warfare and Mercenaries in the Seventeenth Century* (2018).
[62] Supra note 21. See also, David Head *Encyclopedia of the Atlantic World, 1400–1900: Europe, Africa, and the Americas in an Age of Exploration, Trade, and Empires* (2017).
[63] Chris Nierstrasz *In the Shadow of the Company: The Dutch East India Company and its Servants in the Period of its Decline (1740-1796)* (2012). See also, supra Shearmur at note 24; and Teun Baartman *Cape Conflict: Protest and Political Alliances in a Dutch Settlement* (2019) 129.

climate where honesty in corporations and public affairs became a public issue.[64] The moral and anti-corruption climate and discourse would lead, by the end of the 18th century, to a series of new standards institutionalised within a central government to deal with the systemic effects of unacceptable market conduct on society. These standards represented a shift toward recognising public values in commercial enterprises and regulating commercial activity toward collectively better outcomes.[65] Justices of the Peace were employed and empowered to determine consumer fairness, contract validity, and pronounce on whether commercial terms in a contract aligned with community values and fairness – using the principle of aequitas[66] and the general principles of law.[67] Normative communitarian readings of values and principles like fairness, justice and equality, which emerged in Dutch society over this period, are pertinent to the legal discourse of a post-Apartheid South Africa covered in detail in Chapters 4 and 5.

To balance the argument, not by justifying corrupt practices or misconduct in business, but rather to explain its existence as characteristic of the human instinct for progress and prosperity, the chief of 20th-century economic theory, Englishman Alfred Marshall, says of the role of financial service and insurance to address greed as follows:

> Indeed some who find an intense pleasure in seeing their hoards of wealth grow…are prompted partly by the instincts of the chase, by the desire to outstrip their rivals; by the ambition to have shown ability in getting the wealth, and to acquire power and social position by its possession…But were it not for the family affections, many who now work hard and save carefully would not exert themselves to do more than secure a comfortable annuity for their own lives…from an insurance company. [I]n this country alone [England] twenty millions a year are saved in the form of insurance policies and are available only after the death of those who save them. A man can have no stronger stimulus to energy and enterprise than the hope of rising in life, and leaving his family to

[64] Metter Frisk Jensen and James Kennedy 'Fighting Corruption in Modernity: A Literature Review' (2014) *Anti-Corruption Policies Revisited: WP2, History of Corruption in Comparative Perspective* 13
[65] Ibid at 14.
[66] 'Aequitas' is a Latin word used in Roman law to describe 'fairness and justice' founded on the idea of equal and fair treatment to everyone, it is the primary principle of equity. See, Magdolna I Sic 'The Interpretation of Law in Accordance with the Principle of Aequitas in Roman law' (2015) *Zbornik Radova* 49 617.
[67] Emese von Bone 'The Justice of the Peace in the Dutch Judiciary System in Historical and European Context' (2011) 19 *Seoul Law Review* 1.

> start from a higher round of the social ladder than that on which he began. It may even give him an overmastering passion which reduces to insignificance the desire for ease, and for all ordinary pleasures, and sometimes even destroys in him the finer sensibilities and nobler aspirations.[68]

The recognition that what drives aggressive pursuit for wealth is both instinct to compete and dominate over rivals (in a rat-race)[69] as well as a desire to raise the affluence of one's progeny remains a vital moral consideration – for businesses and those directing the affairs of financial services and insurance companies, as well as consumers thereof – as noted by Marshall in 1920. As if a countermeasure to employing exploitative free-market activity, Marshall relies on how rightly principled aspiration and insurance (to mitigate the risk of overzealous instincts in man under liberal capitalism) can serve personal financial stability and wealth distribution through generations. Absent from the text, however, is 'to what end' the system is working toward, whether it is simply to cascade wealth for selected groups or to uplift society to be more socio-economically equal. After all, neo-classical economic theory such as the one Marshall instituted was the bedrock of empire in the late 19th and early 20th century, used by the British government as the model most geared toward making Britain one of the most powerful and wealthiest colonial powers, at the cost of local and foreign land occupiers, such as those of Dutch and Indonesian decent in the Cape, or, native communities indigenous to the southernmost tip of Africa.[70]

2.3. British Administration and Commercial Law

The Roman-Dutch legal system, its reason and rationality, continues to influence the system of laws in South Africa up to the present day. An analysis of the South African system of laws, specifically post-Apartheid constitutionalism and contract law (as they pertain to the Long-term insurance sector and insurance law), cannot ignore its foundational reasoning. Roman law

[68] Alfred Marshall *Principles of Economics* (1920) 8th edition 189. See also, Peter Groenewegen 'Alfred Marshall and the History of Economic Thought' (1991) *Quaderni di Storia Dell'economia Politica* 59.
[69] Where people work hard in order to outstrip others by the measures of wealth, power, and status. See Massimo De Angelis & David Harvie 'Cognitive Capitalism' and the Rat-Race: How Capital Measures Immaterial Labour in British Universities' (2009) *Historical Materialism* 17.
[70] Supra note 67.

established the norms for contracts of sale and services.[71] The legal form followed private mercantile practices prevalent in societies with dominant Anglo, Dutch and Roman influence.[72]

In the mid-18th century English Company Law, laws regulating merchant shipping, insurance and negotiable instruments were adopted and introduced in South Africa, with minor variations to the laws that applied in Britain.[73] However, unlike in the Dutch administration, where court decisions did not follow the precedent of courts from Holland, English case law and writing were used by judges to decide cases in South Africa. The principle of binding precedent, or the common law, utilised concepts like the *rationes decidendi* and *stare decisis*.[74] Tiered courts of different ranks were established to handle appeals to judgements made in lower courts, with the Appellate Division being the only court able to deviate from legislation and precedent. Other than legislation, under English law, no other source of law has the potency comparable to that of precedent.[75]

By the last decade of the 18th century, Britain's long-time ambitions and battle for dominance over the Eastern trade routes would see success when it occupied the Cape in 1795. The change of hands from Dutch (after the disbanding of the VOC) to British rule would end Dutch economic practices and administrative presence and establish British occupation, law and social life in the Cape. This would start a reformation of the Cape to become a British colony, which led to further expansion into the rest of today's South African Eastern regions.[76]

By 1814 – after a period of legal reforms in the earlier parts of the century where Dutch administration was replaced with British administration – the laws of Britain had been vested in the Cape with the construction of a new Court open to the public and the appointment of British judges to handle disputes.[77]

In the years that followed, English law continued to be entrenched with attempts to bring about a semblance of equality and liberty to all peoples with a non-racialised rhetoric.

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[71] Under Roman Law, for a contract to be valid, it requires (1) a 'Thing'; (2) a Price; and (3) Agreement/consent. See, Rena Van den Bergh 'The Roman Tradition in the South African Contract of Sale' (2012) 1 *Journal of South African Law* 53. See also, Ben Beinart 'Roman Law in South African Practice' (1952) 69 *SALJ* 145; and Hanri Du Plessis 'The Unilateral Determination of Price in Roman-Dutch law' (2012) 18 *Fundamina: A Journal of Legal History* 2 50.
[72] Supra note 5.
[73] Supra 59.
[74] Ibid.
[75] Ibid.
[76] Supra note 47.
[77] Supra note 57. See also, G Verhoef *The Power of Your Life: The Sanlam Century of Insurance Empowerment, 1918 – 2018* (2018).

Officially non-race-based slavery, however, prevailed and became codified in law, requiring masters to have valid contracts in place with servants, which included punishment for desertion and insubordination.[78] At the time, these were permissible within law and recognised by society and may be regarded as legally enforceable contracts of slavery (paradoxically imposed as voluntary).[79]

During this period, Britain, along with other Western European nations, adopted liberal capitalism, founded on freedom of contract, freedom of commercial exchange, and freedom of self-government (curtailed by the British administration in the territories it oversaw), based on expanding wealth through innovative technologies, commerce, and financial services. These Western powers unscrupulously vied for dominance between themselves.[80]

British control over the Cape led to reform, adopting business practices that suited an expansionist agenda using capitalism liberally.[81] The rules and laws to support liberal capitalism were catalysed in stages to maintain market stability and progress for those it served.[82] Native communities were once more overlooked, and so too were the abandoned Dutch settlers ('Afrikaners') who had arrived at their own version of nationalism, identity, and attachment to South Africa – a genuine attachment, it would seem, grounded in formalising entrepreneurial enterprises and unionised employment, including separate financial services and insurance businesses. The Afrikaner identity was attached to South Africa exclusively; it is characterised as having no nationalism other than Afrikaner, and everyone who had the well-being of South Africa at heart was an Afrikaner.[83]

By the late 19th century, merchant capitalism had seamlessly morphed into 'liberal capitalism' in Europe and had spread to colonial territories.[84] Western nations looked forward to the turn of the century, expecting prosperity and progress, as scientific and technological

[78] Albie Sachs 'Enter the British Legal Machine: Law and Administration at the Cape, 1806-1910' (1971) 10 *Collected Seminar Papers,* Institute of Commonwealth Studies 8.
[79] Danny Frederick 'The Possibility of Contractual Slavery' (2016) 66 *The Philosophical Quarterly* 262 47.
[80] Robert Skidelsky 'The Growth of a World Economy' in M Howard and W M Louis (eds) *The Oxford History of the Twentieth Century* (1998) 50. See also, supra note 76.
[81] David Johnson 'British Models of Colonial Governance: Adam Smith and John Bruce on the Cape Colony' (201) 51 *The Eighteenth Century* 1 103.
[82] Zine Magubane *Bringing the Empire Home: Race, Class, and Gender in Britain and Colonial South Africa* (2004). See also, J Ramsay and Frederick Jeffress *The Rise and Fall of the Bakwena Dynasty of South-Central Botswana, 1820-1940 (Volumes I and II)* (1991).
[83] Around 1911 South Africa's population consisted of 5.972 million people, 21, 4% white (largely urbanised and split 48% British, 52% Afrikaner), 8.6% coloured, 2.4% Indian, and 67.5% were black. See, supra Verhoef at 77.
[84] Clifton Crais 'South Africa and the Pitfalls of Postmodernism' (1994) 31 *South African Historical Journal* 1 273.

advancement had already brought them higher living standards.[85] As Western influence spread, Africa and its many parts became an important territory over which to rule.[86] In South Africa, as elsewhere on the continent, economic benefits and the economy were largely in the hands of Europeans and their descendants, particularly, in South Africa, those of British descent.[87]

English Law generally (including contract law) under the British administration evolved from selected parts of Roman Law and court precedent. The praxis of Roman life and laws were adopted to serve the interest of the British empire as its established legal framework.[88] Roman principles and maxims had already been interposed into English law long before English statutes and common law were introduced in South Africa. Under English law, illegal contracts were discouraged, and fairness in contracts was not to be ignored and was to be consistent with public policy[89] – which would be developed via the common law, setting what the public or community accepted as fair contract conditions.[90]

A basic principle of contract law in South Africa was that a contract entered into lawfully was enforceable, with the basic tenant being 'offer and acceptance' between contracting parties holding capacity to contract.[91] Even in 19th-century South Africa, as is the case today, there were juristic debates around what constitutes consensus in an agreement and whether it should be assessed through objective or subjective means.[92] However, English law sets as primary importance that laws should be clear and certain.[93] The objectives of mercantile endeavour and convenience require certainty to be decisive and efficient, as, after all, the presence of the British in South Africa was not only to regulate the land and labour through

[85] Supra Verhoef at note 77.
[86] Karl Polyani *The Great Transformation*: *The Political and Economic Origins of our Time (2001)* 78 – 120. See also, Kristin Mann and Richard L. Roberts *Law in Colonial Africa* (1991).
[87] Supra Verhoef at note 77.
[88] Supra note 59 at 41.
[89] The 'Doctrine of Public Policy' is a concept used to avoid the enforcement of a contract, using societal values (which can change over time) to ensure it does not undermine public and moral expectation and standards. For further discussion on the role of public policy see, Farshad Ghodoosi 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements' (2016) 94 *Nabraska Law Review* 3. See also, Farshad Ghodoosi *International Dispute Resolution and the Public Policy Exception* (2016).
[90] Considering society at the time was segregated across education, class, economic and race lines (non-white people only of a certain education and wealth level were permitted to partake in civic life in South Africa). See, Ben Beinart 'The English Legal Contribution in South Africa: The Interaction of Civil and Common Caw' (1981) *Acta Juridica* 7. See also, Frederik DJ Brand 'The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution' (2009) 126 *SALJ* 1 71.
[91] Supra note 71.
[92] Discussion on this is expanded on in the case law discussion in Chapter 6. See also, Schalk van der Merwe and L. F. Van Huyssteen 'Reasonable Reliance on Consensus, Iustus Error and the Creation of Contractual Obligations' (1994) 111 *SALJ* 679.
[93] D Bhana, E Bonthys and Nortje *Student's Guide to the Law of Contract* (2009) 77.

legislation and precedent but to do this to ultimately to serve the economic interest of the Empire.[94] It, therefore, followed that in the context of the British intentions and rule there was no obvious balance of justice on one side or the other to reach the best outcome.[95] The certainty of laws and contracts and the seemingly conflicted position it holds relative to outcomes-based regulation that favours the consumer is the 'inversion dilemma' found in Chapter 1 and is an important thematic of the research.

The role of Latin maxims and doctrines of contract law stemmed from century-long practices, augmented over time, and entrenched in Roman-Dutch jurisprudence as the founding formation of the legal order in South Africa. However, an attachment to select Roman principles and their preferential status in South African law (even in its most rudimentary forms), such as the judicial clash, throughout the twentieth century, between *pacta sunt servanda*, on the one hand, and the role of the *boni mores* and the meaning of *bona fides*, on the other, have been unmovable hurdles to reaching outcomes that progressively realise fairness and equality via the courts and judiciary, as will be expanded further on in Chapter 6.[96]

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[94] Supra Mann at note 86.

[95] Supra Crais at note 48. 45 See also, Kyle D supra note 46; and supra note 59 at 42.

[96] The discord at the judicial level is on display in judicial pronouncements that favour progressive realisation of fairness and uBuntu over maxims and procedure, notably:

1. *Barkhuizen v Napier* 2007 5 SA 323 (CC) – here, the court ruled that whilst *pacta sunt servanda* remained important, contractual terms must be consistent with constitutional values and, therefore, good faith, fairness and Ubuntu were considered key to evolving contract law within the common law system using public policy notions of justice, equity and fairness. The summation in this case was that contra boni mores contract terms are unenforceable (para 52).
   See also, Jaco Barnard-Naude 'Form and Substance in the Constitutional Court: Whither Contract Law's Policy After Apartheid?' (2021) 138 *South African Law Journal*, *3* 569.
2. *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 1 a 256 (CC) – here, the court suggested that good faith, fairness and uBuntu were to be given a more prominent role in contract law, albeit that the outcome in this case was resolved on technical ground and the suggestion did not become authoritative.
   See also, Brighton Mupangavanhu 'Yet Another Missed Opportunity to Develop the Common Law of Contract? An Analysis of Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd' (2013) *SPECJU* 7.
3. *Beadica 231 CC v Trustees, Orgean Trust* (2020) – the court recognised that the rigid enforcement of contract can lead to unjust outcomes. However, it is non definitive and left open-ended questions about judicial discretion.
   See also, Jaco Barnard-Naudé 'Lost in the Fundamental Contradiction: Revisiting Beadica (2024) 141 *South African Law Journal* 4 666; and Jaco Barnard-Naudé 'Contract from the Margins: The Becoming of a Minor Jurisprudence in the Minority Judgment of Froneman, J in Beadica 231 CC v Trustees for the Time Being of the Oregon Trust 2020 5 SA 247 CC' (2024) 27 *Potchefstroom Electronic Law Journal (PELJ)* 1 1.

Whereas, judicial pronouncements that reinforced the sanctity of contract law and its maxims like *pacta sunt servanda* over the development of the common law of contract were:

4. *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) 580 (A) – in this case, which preceded the constitutional dispensation in South Africa, the court cautioned against public policy interfering with freely concluded contracts (the basis of pacta sunt servanda).
5. *Sasfin v Beukes* 1989 (1) SA (A).

The frictions between the Afrikaner South African community, residing independently in the Transvaal region after the First Boer War of 1881, would reemerge by the end of 19th century and eventually led to the South African War between 1899 and 1902. This war was an attack on self-governing Afrikaner life, after it formed the South African Republic, which was unacceptable to Britain vis-à-vis its continued rule in the region. Britain, at its height as an imperial power, totally overthrew the Afrikaners – who were of Boer and Dutch descent in South Africa - and instilled British-sanctioned independence under the Union of South Africa, which would be founded on 'European political supremacy'.[97]

Large numbers of English-speaking 'uitlanders' ('outsiders' – a reference used by Dutch Afrikaner inhabitants to describe the influx of English-speaking people) arrived at the Cape before the war. This worried the Afrikaner community, who had established their own republic in the North, and they were concerned with their governing power.[98] The British prevailed over the Afrikaners through use of new-age war tactics over a guerilla-type Afrikaner army and the Afrikaners eventually became fully integrated into the British administration without the option to self-govern, after the Treaty of Vereeniging was signed to establish the Union of South Africa.[99] Despite the British mercantile and legal system taking precedence over Dutch versions by this time, it largely focused on regulating land and master-servant 'employment' relationships and the structure of corporations and insurance companies; the actual commercial practices were grounded in contracts which were governed via the common law.[100]

6. *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
7. *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) – the judgement in this case upheld the sanctity of contract law and the strict adherence to pacta sunt servanda even where asymmetrical bargaining positions existed. See also, supra Brand at note 90.
8. *Bredenkamp v Standard Bank Ltd* 2010 – here, the court ruled that fairness alone, or the lack thereof, was not a ground to invalidate a contract, proffering, in essence, that contract terms superseded fairness considerations. See also: Jaco Barnard-Naude 'Deconstruction is What Happens' (2011) 22 *Stellenbosch Law Review* 1 160.

Additionally see *Thebus and Another v S* 2003 (6) SA 505 (CC) at para 31, where the judiciary discussed the 'protectors and expounders' of the common law with a duty to 'refashion and develop the common law in order to reflect the changing social, moral, and economic make up of society'.

[97] As remarked by Grietjie Verhoef, 'the British-sanctioned constitution of the Union of South Africa did not grant equal franchise to all inhabitants of the new Union'. See, supra note 77 at 2.

[98] The South African Republic, also known as the Transvaal Republic, existed from 1852 to 1902. See Stanley Trapido 'The South African Republic: Class Formation and the State, 1850-1900' (1973) 16 *Collected Seminar Papers. Institute of Commonwealth Studies* 1.

[99] Leonard Monteath Thompson *A History of South Africa* (2001) 122.

[100] Supra Van den Bergh at 71.

2.4. Relevance of the 'Presence of the Past'

South Africa's contract law originated in Europe and underwent periods of enlightenment that repositioned its purpose and application.[101] A (re)emerging quandary of South African contract law today, presented in the case law in Chapter 6, and highlighted by the changes in the operation of contract law in the financial services and insurance sectors as demonstrated in chapter 3 and 4, is that it fails to serve as a means to create substantively fair outcomes and is not sufficiently orientated toward what is right and just in the constitutional society. The underlying principles of jurisprudence stemming from the need to uphold certainty through *pacta sunt servanta*, hinder those claiming unfair or harmful outcomes in circumstances where there is an abuse of unequal bargaining power and knowledge asymmetry, leading to the weaker party to a contract being unduly disadvantaged.

The jurisprudence of fairness and good conduct in contracts is not a novel concern, it was present through the ages (as covered so far in this chapter), albeit not equally afforded as substantive rights to all. It was especially the focus of Christian religious-based systems of law (canon law) and written on extensively in the pre-modern world by jurists such as de Grotius and Aquinas, whose message would later be drowned out by the advancement of technology and the industrial revolution in the late 18th century, nearly replacing it with the atomistic, self-interested vagaries of capitalism, modernity and secularism, which elevated unbridled individualism to the level of dominant political morality.[102]

When recounting the development of our globalized economic system, the question of how far back one has to go to explain the source of this phenomena, is up for debate. Adam Smith's writing certainly finds relevance to the roots of our economic system, but his work on the morality of free-market capitalism was not considered as-is by major economic institutions in the twentieth century as they set course for client-centric commerce. Such major institutions include the Institute of Insurance Supervisors, the World Bank, the International Monetary Fund, and the G-20. Whilst there is no doubt that during the long 20th century, where modernism, liberal capitalism, military and economic power were the order of the day, there were voices highlighting the ills of the global economic model and its paved road to inequality (voices such as that of the French Marxist thinker, Louis Althusser, (to whom I return in later

[101] Harold J Berman 'The Religious Sources of General Contract Law: An Historical Perspective' (1986) 4 *Journal of Law and Religion* 1 103.
[102] Ibid. See also, Geoffrey Eugene Schneider *Economists and the Problem of South Africa: The Evolution of Liberal and Marxist Thought on Capitalism and Apartheid* (1997) 4.

chapters)), these voices were, much like the voices of the pre-modern thinkers of Western jurisprudence, drowned out by the hegemonic peak of free-market neoliberal capitalism towards the end of the century.

Over time, this led to different modes of law and legal application that veer towards supporting commercial objectives and certainty over fairness and protection for weaker parties and consumers.[103] This is despite the rise of consumer protection legislation, plagued as these are by arguably structural obstacles in relation to their enforcement, across the globe. For the bulk of the twentieth century, South Africa had an economic model that was exclusive. The racial capitalism that prevailed, entailed accumulation by racialised dispossession, forceable exploitation of racially devalued populations, and job protection for dominant groups.[104] Liberal capitalists tried to replace Apartheid, which it saw as restricting growth compared to Western nations but at least until the end of the century, it proved impossible to disentangle racism from capitalism in South Africa.[105] A more social form of economic activity, most prominently neo-Marxism, therefore, almost naturally, became a part of the anti-Apartheid movement.[106]

The primary traits of today's global economic systems are material value, personal wealth, inequality, money, profit, contractual relationships, and risk management.[107] Academics, philosophers, sociologists, and economists have dedicated much attention to the conditions of our age and solutions for the ills which cause indignity and inequality common to our time. Economist Thomas Piketty examines present-day inequality, capitalism, and taxation in *Capital* and calls on a multi-dimensional interdisciplinary assessment of inequality and methods to alleviate its causes. (Re-)distribution of wealth would not be possible otherwise. Piketty believes 'it is of interest to everyone, and that is a good thing. The concrete, physical reality is visible to the naked eye and naturally inspires sharp but contradictory political

[103] Philip N Stoop 'Background to the Regulation of Fairness in Consumer Contracts' (2015) 27 *SA Mercantile Law Journal* 2 191. See also, Kati Cseres 'The Controversies of the Consumer Welfare Standard' (2006) 3 *Competition Law Review* 2 121.
[104] Andy Clarno and Salim Vally 'The Context of Struggle: Racial Capitalism and Political Praxis in South Africa' in Zachary Levenson and Marcel Paret (eds) *The South African Tradition of Racial Capitalism* (2024) 23.
[105] Ibid. See also, Neville Alexander *Some are More Equal than Others* (1993). Salim Vally and Enver Motala 'Neville Alexander's Warning' (2021) 25 *Educ. as Change* 1.
[106] Supra note 101.
[107] According to Marsha Richins, 'because low-materialism consumers care more strongly about interpersonal relationships than do other individuals, they are more likely to cultivate possession meanings that relate to interpersonal ties. High-materialism consumers, on the other hand, place a greater emphasis on financial security than do low materialism consumers; the private meaning of their possessions are likely to relate to financial worth.' See: Marsha Richins 'Special Possessions and the Expression of Material Values' (1994) 21 *Journal of Consumer Research* 3 523.

judgements.'[108] This view is similar to the writing of Alfred Marshall and Adam Smith. It appeals to a naturalistic human nature of capitalism and economic progress in the interest of the many and not a few exclusively or any individual specifically. Individualism, under neo-liberal societies has however created a Western culture that is concerned with the 'self' more than the collective or society.[109]

3. Financial Services and Long-term Insurance in South Africa

Financial services and insurance in South Africa were among the first efforts to mitigate the risk of loss and damage to societal well-being.[110] It initially emerged as a necessity to prevent financial loss as maritime activity (including cargo and slaves), death, and other unforeseen events such as fire and drought affected livelihoods and social harmony.[111] Insurance was a means of mitigating loss of wealth and income in business and personally.[112]

Albeit that informal community and social arrangements to mitigate and share losses existed in a rudimentary form before and at the time of colonial powers jousting, formalised financial services and insurance, in their modern form, was introduced by the British colonial project.[113] Risks covered by early formal insurance in South Africa followed the fashion of Britain's insurance market (Lloyds of London had existed since 1688 as a corporate entity governed by statute). The South African insurance market became an extension of British companies. Insurance agents were sent from Britain to service the needs of a growing British colonial population (eventually extending to non-British inhabitants too) and generated revenue for the 'home office' in Britain. Marine, fire, cargo, and life insurance products were

[108] Thomas Piketty *Capital in the Twenty-First Century* (2014) 3.
[109] Rachel S Turner *Neo-liberal Ideology: History, Concepts and Policies* (2008). See also, Jeffery C Alexander 'Modern, Anti, Post, Neo' (1995) *New Left Review* 63.
[110] Tom Baker and Jonathan Simon (eds) *Embracing Risk: The Changing Culture of Insurance and Responsibility* (2002).
[111] Pier Vellinga and Evan Mills 'Insurance and Other Financial Services' (2001) available at https://www.ipcc.ch/site/assets/uploads/2018/03/wg2TARchap8.pdf, accessed 4 August 2025 at 417.
[112] Grietjie Verhoef 'Who Do You Trust? Trust and Insurance Through Africa's Past and Future' (2023) 17 *Asia-Pacific Journal of Risk and Insurance* 2 233.
[113] Phoenix Assurance Company of London which started operating in 1806 was the first insurance business in South Africa and offered fire insurance. Before then, informal, community-based, customary mechanisms and traditions functioned as *de facto* insurance – indigenous South African communities (like the Khoikhoi, Xhosa and Zulu) had mutual aid networks. Similarly, early colonial settlers had informal mutual aid societies to deal with uncertain events resulting in loss. See G Verhoef 'The World Insured South Africa' (2015) *Corporate Forms and Organisational Choice in International Insurance* 145. See also, Simone Halleen 'From Life Insurance to Financial Services: A Historical Analysis of Sanlam's Client Base, 1918-2004' (unpublished dissertation, University of Stellenbosch, 2013); Charles Feinstein *An Economic History of South Africa: Conquest, Discrimination, and Development* (2005) 13 – 43 and 113 – 132; and Colin Bundy *The Rise and Fall of the South African Peasantry* (1979) 28.

sold into the market and of all British insurance interests worldwide, South Africa, outperformed all other markets in distributing life insurance.[114] In a progressive move at the time, life insurance was offered to the working class (a small premium life policy renewable weekly), females and emancipated slaves of both genders.[115]

The nature of commerce in the Cape influenced the laws it required. The first insurance Act was the Marine Insurance Act of 1866, based on the British legislation governing maritime insurance, including cargo (such as slaves) and ships as insurable assets. In 1891, the Insurance Companies Act and Life Assurance Act were promulgated to address an insurance company's financial and capital requirements and ensure that policyholder money was safeguarded. All three Acts were copies of the UK version.[116]

The South African Mutual Life Assurance Society (known today as 'Old Mutual') was established in 1845 to serve British interests and grow its financial services and insurance market to become transnational.[117] At the time the Afrikaner, the indigenous, and other non-British communities were outsiders in the economic realm as British rule was intended to serve British interest, not the local communities – whether native to the land or settlers who bound their future to the country. By this point, the Afrikaner community, originally Dutch settlers, had called South Africa their 'motherland', accepting their future detached from Holland.[118]

More privileged than the non-European inhabitants of South Africa, the Afrikaners became insular, establishing voluntary social enterprises (which raised capital for Afrikaner economic activity that would uplift the Afrikaner community, such as life insurance) to stave off destitution for those of Dutch heritage and to retain a dignified and harmonious society. Afrikaner leadership believed it necessary to establish its own social enterprises, and in 1910 South Africa's first home-grown financial services and insurance company was created with

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[114] G Verhoef 'From Friendly Societies to Compulsory Medical Aid Association: The History of Medical Aid Provision in South Africa's Public Sector' (2006) 30 *Social Science History, Special Issue: The Persistence of the Health Insurance Dilemma* 4 at 609-611. See also, G Verhoef 'Wie Moet Sorg? Gesondheidsbeleid en Mediese Fondse in Vergelykende Perspektief in Suid-Afrika en Gemenebeslande, 1900 – 1970' (2007) 52 *Historia* 2 at 20-22.

[115] Cited in Lorraine Greyling and Grietjie Verhoef 'Savings and Economic Growth: A Historical Analysis of the Cape Colony Economy, 1850–1909 (2017) 32 *Economic History of Developing Regions* 127. See also, Supra Verhoef (2006) at note 114 at 145.

[116] Justine Van Vuuren 'A Historical Analysis of the Origins, Development and Nature of Market Conduct Regulation: A Study of Four Insurance Markets' (unpublished dissertation, University of the Witwatersrand, 2017).

[117] G Verhoef 'Life Offices to the Rescue! A History of the Role of Life Insurance in the South African Economy during the Twentieth Century' in R Pearson (ed) *The Development of International Insurance* (2015) 145.

[118] Supra Verhoef note 77. See also, Grietjie Verhoef 'Nationalism, Social Capital and the Economic Empowerment: Sanlam and the Economic Upliftment of the Afrikaner People, 1918 – 1960' (2008) 50 *Special Issue: Putting Social Capital to Work* 6 694.

Afrikaner interest in mind. The South African National Life Assurance Company (known today as 'Sanlam') was established to confront the eroding economic relevance of the Afrikaners and the onset of poverty for the majority of the Afrikaner community. This project was successful in generating, regaining and retaining wealth for Afrikaner families and economic interests. However, the insular nature of the project created a clear delineation between wealthier Europeans (from Dutch and British decent) and other communities (native Black and Khoisan, and imported slave communities) due to access to resources, education, and the legal systems working in their favour.[119]

3.1. South Africa, A Constitutional Democracy Emerging from Socio-political Ruins

'Apartheid' in name started in 1948 when institutionalised racial segregation became the primary government policy. In the run-up to legal-Apartheid, militant Afrikanerism grew (asserting dominance over African and other non-White communities). The influence of Liberals on the free market and freedom of association faded. By this time, an economic model founded on the works of W.H. Hutt and his Industrialization Thesis, had taken root in South Africa.[120] The model, in its simplest form, advocates that growing profits would inevitably lead to a decline in poorer classes made up of non-white people through racism.[121] The imposition of institutionalised racism during Apartheid, which lasted from 1948 to the early 1990s, Hutt believed, came at a great cost and inconvenience to capitalists.[122] Despite this, an example of a true Liberal, Hutt, believed that salvation from inequity and racial discrimination was through racial capitalism and the Afrikaner-led national party. His view was that labour markets for black South Africans would grow if the capitalists were allowed to continue their practices and abide by segregation laws. This would supposedly eventually lead to enough social pressure from the non-Afrikaner community to replace apartheid with a true liberal and free-market system.

Native and non-European people living in South Africa were, through the age of exploration, its evolution to modernism and then Apartheid, a disenfranchised people. It started with slavery and European nations vying for dominions that enriched its home population,

[119] Ibid. Supra Verhoef at note 77.
[120] Geoffrey Eugene Schneider *Economists and the Problem of South Africa: The Evolution of Liberal and Marxist Thought on Capitalism and Apartheid* (1997).
[121] Supra note 102.
[122] Ibid

governments and monarchs. Up until 1990 South Africa only knew segregation and division based on class, race, education and wealth. The establishment of Apartheid and the struggle against racial determinism took up much of the 20th century. South Africa was sidelined from the rest of the world for most of the 20th century and looked inward, relying on its rich natural resources and the endowment that it had inherited from colonialism – British and Dutch. By the late 1980's, the South African government confronted local and foreign forces desperate to dispel Apartheid and free the population from racial segregation and inequality. [123]

Nelson Mandela was released from prison in 1990, signalling a change to South African politics, and a mood of reconciliation descended (though not absolutely) with a nation-building rhetoric becoming his prophetic message.[124] Civil liberties, rights and freedoms were fairly simple to institute and deliver, the early 1990's seeing the draft of the first South African Constitution, followed by the first general election for all in 1994, and leading to South African values and mission crystalised in the final constitution of 1996.

Politically, how the transitional government and government of national unity (made up of candidates across the political spectrum) would achieve a more equal and fair society were tensely negotiated between 1990 and 1994. It culminated in a non-violent transfer of power and the establishment of the 'rainbow nation', guided by arguably the best constitution in the modern world, which figures as, a pledge to the well-being of South Africa, recognising its past and working for the future of its people.[125] The basic aspiration for South Africa post-apartheid was to achieve and embed a dignified life equally.[126]

Moreover, the custodianship and duty to oversee transformational results as part of the new economy were assigned to the Reserve Bank, set up by The South African Reserve Bank Act of 1989,[127] as the primary overseer of and regulator over: the Banks Act of 1990,[128] the Financial Markets Act of 1989,[129] and the Financial Services Board Act of 1990.[130] The

[123] Francesca Romana Dau 'From Disenfranchisement to Enfranchisement: The Right to Vote in South Africa' in Hugh Corder and Veronica Federico (eds) *The Quest for Constitutionalism* (2016) 143.
[124] Ronaldo Munck 'South Africa: The Great Economic Debate' (1994) 15 *Third World Quarterly* 2 205.
[125] Rebecca Davies 'Afrikaner Capital Elites, Neo-Liberalism and Economic Transformation in Post-Apartheid South Africa' (2012) 71 *African Studies* 3 391. See also, Laurence Harris 'South Africa's Economic and Social Transformation: From "No Middle road" to "No Alternative"' (1993) 20 *Review of African Political Economy* 57 9.
[126] Bhekizizwe Peterson 'Dignity, Memory and the Future Under Siege: Reconciliation and Nation-Building in Post-Apartheid South Africa' in Samson Opondo and Michael Shapiro (eds) *The New Violent Cartography*: Geo-Analysis After the Aesthetic Turn (2012) 214.
[127] Act 90 of 1989.
[128] Act 94 of 1990.
[129] Act 55 of 1989.
[130] Act 97 of 1990.

Financial Services Board ('FSB') was the regulatory body established by statute to oversee the rest of the legal reform that would come. In the second wave of reform, from 1998 onwards, laws regulating Short and Long-term Insurance were deemed most critical to the mandate of the FSB – this period is covered in Chapter 3.

The introduction of the Constitution was premised on, and would only fully deliver on its pledge by adopting, a new economic path to reverse inequality. Fairness-seeking policies spread, employee protective employment laws meshed with progressive government policies like Broad-Based Black Economic Empowerment ('B-BBEE'), and consumer (and market) protective legislation like the FSB Act and the Financial Market Act were enthusiastically adopted. However, whilst insurance penetration and access to banking and financial services certainly grew, wealth inequality persisted. The custodians and regulators of wealth and money in South Africa had not foreseen this, nor did they adequately gear the system to work toward economic, social, and financial equality.

A history of commercial conditions that were unfavourable, arguably immoral, in relation to vast segments of South African society – the consequence of which resulted in poverty and poor education – was the history that the early constitutional order had to contend with.[131] It was, after all, the aspiration for South Africa post-apartheid, under the constitutional dispensation, to achieve and embed a dignified life for all.[132] The dismantling of the Apartheid system arguably created a new consumer situation, opportunities, and society in a country that had seemingly been isolated from an 'outside' world that had exploited and benefited from liberal free-market capitalism – which in itself created global imbalances of 'the first-world', 'third-world countries', and 'developing economies'.[133] Nevertheless, South Africa was once more a part of the global economy, only this time it was not the critical refreshment post to advance to the East.

In an effort to reintegrate into the global economy, South Africa aligned to international ways of organising and institutionalising commerce, insurance and financial services. In doing so, it overlooked the immediate need for achieving parity in its society, relying on civil freedoms and an entrepreneurial spirit of a free people operating in a free market with

[131] Siri Gloppen *South Africa: The Battle Over the Constitution* (2019).
[132] Supra 123. South Africa's staggering levels of inequality may not have been as stark, given its natural resources and history, had it not been for apartheid and the dark years of isolation with racial segregation as its dominant governmental policy.
[133] B.C Smith 'The Idea of a "Third World"' in B.C Smith *Understanding Third World Politics* (1996) 3. See also, Jeremy Bulow 'First World Governments and Third World Debt' (2002) 1 *Brookings Papers on Economic Activity* 229.

unobstructed access, locally and abroad, to be resourceful and drag the majority of its population out of poverty.[134] Thirty years after the first democratic election South Africa remains the most economically unequal society in the world.[135] This thesis takes the position that there is a uniqueness to the South African situation that differs from other global legal reforms, especially so where economic disenfranchisement is considered.

Chapters 5 and 6 collectively argue for the application of residual normative concepts such as *aequitas*, *bona fides*, *boni mores* and perhaps most significantly, *uBuntu*, in response to the less prescriptive principle and outcomes-based regulatory order that is being introduced in the financial services and insurance sectors. This view, supported by constitutional imperatives, exposes an aperture through which to view and understand the condition and circumstances of individuals and society and how theory, community, and individual rights are impacted. This is also the thematic focus of the sections that follow, where South Africa's more recent history of financial services and insurance in an unequal society in the 20th and 21st centuries is introduced in an effort to sketch the genealogy most accurately.

3.2. Regulatory Reform: What is the Regulatory Turn all About?

Chapter 4 covers a detailed assessment of the regulatory reform project. At this point, introducing the impetus for the reform is deemed relevant to sketch the landscape and provide context and framing for the work that follows.

The conception of fairness in regulating the financial services sectors came to prominence in South Africa in response to the global economic meltdown of 2008. South Africa's National Treasury published National Treasury's policy 'A Safer Financial Services Sector to Serve South Africa Better', which put into motion reform across all areas of financial services, banking, credit and insurance.[136]

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[134] The post-apartheid reliance on civil freedoms and entrepreneurial initiative to alleviate poverty reflects the ideals that drove inequality under Merchant and Liberal forms of Capitalism, such as those promoted by Smith and Marshall. Both theorists shared faith in market-led progress, an approach echoed in South Africa's transition, which prioritised access and liberty over immediate parity. Supra note 5; supra 65; supra 68; and supra 81.

[135] Neva Seidman Makgetla 'The Post-Apartheid Economy' (2004) 31 *Review of African political economy* 100 263.

[136] The reform introduced the 'Treating Customers Fairly' regime. See, National Treasury 'A Safer Financial Sector to Serve South Africa Better' (2011) available at https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf, accessed 9th December 2024.

The stance taken by the South African government in the policy is to address the cause and effects of the global recession experienced and to set out a new approach that would achieve fairer outcomes for South Africans, under 'outcomes-based' regulation. The approach effectively toed the line of international efforts to stabilise and secure the global financial and economic environments to minimise the risk of similar global crises by centring a broader concept of socio-economic wellbeing.[137]

The policy acknowledges that the risks posed by the financial sector, which it states 'is at the heart of the South African economy', is when it [the financial sector] 'chases short-term artificial profits'.[138] Global, macro and micro-economic, and cross-border investment, stability is threatened when conduct, behaviour, and actors are short-sighted, pursuing profits even at the cost of a stable financial market. The policy states that global and domestic financial stability was not the only objective in creating a safer financial services sector. Indeed, creating a safer financial services sector has a dual benefit: first, to mitigate threats to the global economy; and second, by addressing the need to transform society and better the lives of South Africans generally through improvements to market conduct, consumer protection and financial inclusion.[139]

Accordingly, the policy clearly states its objectives and path to achieving it, as follows:

> To promote sustained economic growth and development, South Africa needs a stable financial services sector that is accessible to all. This policy document sets out government's proposals, emphasising financial stability, consumer protection and financial inclusion. The main proposal is to separate prudential and market conduct regulation. In addition, it addresses:
>
> - Stability. The Reserve Banks mandate for financial stability will be underpinned by a new Financial Stability Oversight Committee, co-chaired by the Reserve Bank Governor and the Minister of Finance.
> - Consumer protection. Government will enhance consumer protection. The structure of the Financial Services Board (FSB) will be broadened to include a banking services market conduct regulator.

[137] Ibid at 144.
[138] Ibid.
[139] Ibid.

- Access to financial services. Financial access will be broadened. The Financial Sector Charter will be reviewed and reforms undertaken to encourage "micro insurance".
- Coordination. Regulatory coordination will be enhanced, and regulators strengthened as required. The Council of Financial Regulators will be formalised.
- Comprehensiveness. All businesses in the financial sector should be licensed or registered. Institutions providing similar services should be regulated by the same agency.'

New legislation will be required to implement the proposals. Several bills dealing with banking, financial markets, credit rating agencies and the regulatory powers of financial supervisors will be tabled in Parliament during 2011.[140]

Laws regulating the financial services sector were lined up for review to give effect to, and allow for, the implementation of the policy objectives. A period of legislative reform would thus follow in the subsequent years.[141] The Financial Sector Regulation Act[142] created a market conduct authority which would be known as the Financial Sector Conduct Authority ('FSCA') that would be seen as one of the most significant ways to reach the policy objective. Furthermore, a contemporary legal language created a mandate to regulate the financial services sector toward an outcomes-based and client-centric regulatory order. The conduct authority would attempt to regulate sentiments and behaviours primarily during contracting with consumers but also throughout the lifecycle of proprietary activity by insurers and financial service providers and allow for substantively fair and equal outcomes for individuals and consumer communities.[143]

Attempts to address matters related to market conduct and behaviour, as will be highlighted in Chapters 3 and 4, were good starting points. However, had it not been for the global pressure due to South Africa's economy being interwoven into the global system of commerce (a legacy of its origins as a commercially important economy), it would likely not

[140] Ibid at 2.
[141] Chapters 3 and 4 of this thesis traces the sweeping changes.
[142] Act 9 of 2017.
[143] Supra note 136.

have been changed as the existing financial and insurance legal frameworks were less than 10 years old when the reframing mission was set into motion by the 2011 policy.[144]

Additionally, the policy position was precipitated by the desire to grow the South African economy under a strained global market after the global economic meltdown, with the old laws seen as threatening consumers and inhibiting growth, inclusivity and innovation.[145] Regulatory reform was thus viewed as a key enabler to support economic growth. The Policy states:

> The New Growth Path developed by government aims to increase the rate of growth to above 6 per cent and create 5 million jobs by 2020. In the G-20, President Jacob Zuma committed South Africa to a global financial regulatory reform agenda aimed at strengthening financial stability. These commitments are in four areas:
>
> 1. A stronger regulatory framework – developing appropriate principles for weak areas of the global system of financial regulation.
> 2. Effective supervision – strengthening the effectiveness, governance and domestic and international coordination of our regulators.
> 3. Crisis resolution and addressing systemic institutions – ensuring that the costs of a financial institution‘s failure are as small as possible, and that such a failure does not affect the broader financial system.
> 4. International assessment and peer review – undertaking regular assessments of the regulatory system and benchmarking our principles and practices against the international norms.[146]

[144] After 1994, the South African government had promulgated insurance and financial services related statutes which are the subjects of the discussion in Chapter 3 and 4, notably the Financial Advisory and Intermediary Services Act 37 of 2002.
[145] Supra note 136.
[146] Supra note 136 at 4.

The 2011 policy sets out one of the first instances of the term “conduct” (or behaviour) within the financial services regulatory rhetoric. As demonstrated earlier in this chapter, conduct and behaviour are essential to the upkeep of reputation and trust in an economic system and within society.

'Conduct', as a noun, by its dictionary definition is the way a person behaves, especially in a particular place or situation. It can also be the manner in which an organisation or activity is managed or directed.[147] As a verb, the term ‘conduct’ refers to how something is organised, or an action carried out. It also refers to how we lead or guide (someone) to a particular place or outcome.[148] This act of doing (or not), by an individual or organisation, has a dual impact. Inwardly, it demonstrates the behaviour of a person or juristic entity. While outwardly, with respect to the financial services and insurance, it impacts on the lives of consumers who place their funds and trust in financial institutions. Therefore, conduct within the regulation of the financial and insurance industry, can be understood as being directed toward achieving the policy objectives and the behaviour of persons acting within the market economy. Financial services undertaken in a manner that considers the outcome upon consumers and society relies on how educated and well-informed the consumer society is (as means of consumer protection). This is the key objective of outcomes-based market conduct regulation I cover in chapter 4. Given the history of South Africa, pervasive poverty and inequality, and the unequal levels of literacy (worse for financial literacy) this is not a level playing field.

3.3. Impact on the Common Law

An inquiry into barriers to developing the common law (expensive, administrative, language, etc.) and the limitations in the dogma of maxims and doctrines, along with consequent legal debates and judgments in recent case law about communitarian value systems, will be covered in Chapter 6.[149] In this section, the operation of the common law under the regulatory reform project is explored as the context for the discussion in Chapters 5 and 6.

[147] Oxford Dictionary ‘conduct’. Available at https://en.oxforddictionaries.com/definition/conduct, accessed 4 August 2025.
[148] Ibid.
[149] Drucilla Cornell *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation* (2014).

The onus of developing the common law largely rests on litigants asserting rights and the judiciary carefully developing precedent (or common law).[150] Nevertheless, principle and outcome-based regulation first asks the corporate/commercial actor to interpret and apply (essentially 'develop') a practice to attain just and fair consumer outcomes.[151] Thereby removing any barrier to the progressive realisation of better client outcomes. Under outcomes and principle based regulation determining fairness happens outside of the line of formal precedent-setting bodies (a higher decisional instance[152]) or the conviction of the community.[153] It, therefore, has a differentiated element from the traditional operation of principles in a legal sense. Development of the common practice in the financial services and insurance sector, under these circumstances, will, I argue, result in the application of law being out of sync with legal and what's considered lawful practice in financial services and insurance – save for high-profile matters which reach judgement in a court of law and creates a precedent. As argued in this thesis, it creates a legal lacuna, uncertainty and incongruent public expectation, which will grow, as principle and outcomes-based practices are embedded.

Under principle and outcomes-based laws, an onus is placed on commercial actors to 'apply and explain'[154] how and why it interpreted and applied a non-prescriptive law in a particular way. Under this model the ability to collectively develop the common law in a traditional sense (where it applies to all), that is, via courts, is removed. Meaning that there may be a disassociation between the practices of commercial actors toward consumers in adhering to the principles and outcomes expected by law and policy (as is the case for the TCF regime) as common and precedent law stagnates.

Under the Roman-Dutch influenced South African common law, contracts entered validly and freely are enforceable. However, under contemporary laws in the financial services

[150] Jackie Dugard 'Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice' (2008) 24 *South African Journal on Human Rights* 2 214. See also, Adrian Vermeulen 'Common Law Constitutionalism and the Limits of Reason' (2007) 107 *Colum. L. Rev.* 1482.
[151] Dennis Davis and Karl Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 3 403. See also, Karen Yeung 'Towards an Understanding of Regulation by Design' (2008) 79 *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* 88; and Julia Black, Julia Martyn Hopper, and Christa Band 'Making a Success of Principles-Based Regulation' (2007) 1 *Law and Financial Markets Review* 191.
[152] Lawrence B Mohr 'Organizations, Decisions, and Courts' (2019) *Criminal Courts* 221. See also, A W Bradley 'The Role of the Ombudsman in Relation to the Protection of Citizens' Rights' (1980) 39 *The Cambridge Law Journal* 2 304; and Charles Dlamini 'An Ombudsman for South Africa' (1993) *De Rebus*. A 'higher decisional instance' is regarded as a precedent setting body, typically a court. In Chapter 6 the role of the judiciary to develop the common law is evaluated.
[153] See discussion in Chapters 1, 4, and 6.
[154] See discussion on King Code on Corporate Governance addressed in Chapter 4 of this thesis.

and insurance sector, a contract may be disputed if it has an adverse or unfair outcome for a consumer, even if it is legally valid (considering the current common law).[155] The process of contracting, performance, and an *ex-post ab initio* assessment of contracts aiming for a fair outcome may, therefore, have two bases of development. One being the courts, and the other, between parties in a contract for insurance or financial services.[156] The operation of law *ex post* may then carry a bias of the regulatory objective and client sentiment as will be highlighted in Chapters 5 and 6.[157]

Thus, an argument and seemingly obvious conclusion is that the financial services and insurance sector has started to establish an after-the-event legal interpretation based on client and regulatory expectations. Parties to a contract may be less bound by *ex ante* agreement to demonstrate compliance, but, instead, will need to check if the outcome of the contract complies with the abstract, principle and outcome-led laws.[158] This situation may lead to resolution and remedies inconsistent with judicial interpretation and precedent over the same circumstances and regulation. A practice of mutual agreement and 'settlement', albeit in trend with the alternative dispute resolution mechanisms, is therefore likely to become equal to traditional precedent – the creation of an alternative and parallel legal system which may yet prove to be more effective than court precedent and common law.

The development of the common law is labour-intensive, expensive, and often lengthy. At the pinnacle of the South African judiciary, the Constitutional Court is out of reach of many consumers.[159] And it is unlikely to be called on frequently to determine 'fair client outcomes'. However, there are differing views on whether commercial activity between contracting parties should carry a constitutional concern, even by those who are short-changed or unfairly treated. The counter view simply holds that all life in South Africa should accord with the Constitution – even between private parties to an agreement. The method of legal development through

[155] Supra note 93. Also see discussion on contract law doctrines, common law, and normative practices in Chapter 6.
[156] Mahmood Bagheri and Chizu Nakajima 'Ex Ante and Ex Post Allocation of Risk of Illegality: Regulatory Sources of Contractual Failure and Issues of Corrective and Distributive Justice' (2002) 13 *European Journal of Law and Economics* 5. See also, Andrew Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) 1 *Journal of Commonwealth Law* 227.
[157] David P Baron and Robert A Taggart 'A Model of Regulation Under Uncertainty and a Test of Regulatory Bias' (1977) *The Bell Journal of Economics* 151. See also, Michael Collins and Carly Urban 'The Dark Side of Sunshine: Regulatory Oversight and Status Quo Bias' (2014) 107 *Journal of Economic Behavior & Organization* 470.
[158] Iman Anabtawi and Steven L. Schwarcz 'Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure' (2013) 92 *Tex. L. Rev.* 75. See also, Eric Talley 'On Uncertainty, Ambiguity, and Contractual Conditions' (2009) 34 *Del. J. Corp. L.* 755.
[159] Supra Dugard at note 150.

precedent and the common law and the progressive realisation of the aims of the constitution leading to disjointed legal understanding is well put by Stu Woolman below, as he seemingly takes offence to the role of the constitution's bill of rights not establishing or encouraging confluence and consistency in legal application:

> [R]eaders of a judgment [of the Constitutional Court] are at a loss as to how the Bill of Rights might operate in some future matter. An approach to constitutional adjudication that makes it difficult for lower court judges, lawyers, government officials and citizens to discern, with some degree of certainty, how the basic law is going to be applied, and to know, with some degree of certainty, that the basic law is going to be applied equally, constitutes a paradigmatic violation of the rule of law.[160]

Although the excerpt above warns of the waning certainty in developing laws that align with the Bill of Rights, it also signals an impending and amplified fate of developing law that places the principle above the letter of the law and traditional precedent.[161] The regulatory expectation under the incoming regulatory order within the financial services and insurance sector might yet realise this 'paradigmatic violation of the rule of law' as it expects actors to look beyond established legal practice to handle the plethora of interpretations of unfair consumer outcomes. Each case will need to be substantively fair and bring to bear 'ultimate fairness' for weaker contracting parties (specifically retail consumers) via principle and outcomes led assessments of what constitutes fairness in every unique case. In contrast to Woolman's concern, I argue here, as a preface to what is covered in Chapters 5 and 6, that achieving equalising and fair outcomes, whether through application of principles, outcomes based, or traditional laws, aligns with the paramount objectives of the Constitution against the backdrop of the historically rules-based order (discussed in Chapter 3), which represents significant obstacles to the promotion and achievement of a substantive fairness outcome. Attaining consistent and certain, or procedurally repeatable, fair outcomes for consumers akin to the traditional rule of law as a law of rules, which Woolman takes care to point out, stands to be violated, is accordingly not within the remit of this thesis.

[160] Stu Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *SALJ* 4 762.
[161] Ibid.

However, it is important to highlight that while fairness in the context of the regulatory reform project is, one might say, focussed on substantive elements at an individual consumer level, the problem is open-ended and exposed to the many forms of unfair outcomes and treatment of consumers. Such a proliferated situation almost naturally calls for less reductive legal language. Furthermore, the sheer number of decisional moments to deduce and decide on whether a situation or outcome is fair or unfair, necessitates for pragmatic reasons that many such decisional moments must occur outside of courts that judge and adjudicate a dispute in a final sense. A justice of the peace, deciding over consumer affairs, may yet be required in these moments. The work of this thesis is however, only to highlight how laws that govern commerce, especially financial service and insurance, are mandated to care for the well-being of society and social harmony emanating from its successes.

3.4. A Global System

Near instantaneous communication and transaction capability - first as wires, then analogue to terrestrial, and electronic to digital, capabilities emerged in the mid-20th century as technology and globalisation grew. [162]

Globalisation booned economies in the 20th century whilst South Africa was in isolation.[163] Regulation also increased in the main economies, notably the United States of America, which became the dominant economic powerhouse early in the century.[164] Under the climate of rampant growth and globalised commercial and financial sectors, more regulation was deemed necessary, as determined by global treaty bodies and in-country lawmakers (following World War 2).[165] At the time, principle-based laws were considered to regulate the financial sector to mitigate systemic risks and the threat of the collapse of financial institutions

[162] Susan Scott and Markos Zachariadis 'A historical analysis of core financial services infrastructure: "A historical analysis of core financial services infrastructure: society for worldwide society for worldwide interbank financial telecommunications (SWIFT)"' (2010) accessed at https://eprints.lse.ac.uk/33886/1/wp182.pdf, accessed 4 August 2025. See also, Ceyla Pazarbasioglu et al. 'Digital Financial Services' (2020) 54 *World Bank* 1; and Paul Mulligan and Steven R. Gordon 'The Impact of Information Technology on Customer and Supplier Relationships in the Financial Services' (2002) 13 *International Journal of Service Industry Management* 1 29.
[163] Ronaldo Munck *Globalisation and Labour: The New 'Great Transformation* (2002).
[164] John W Mayo 'The Evolution of Regulation: Twentieth Century Lessons and Twenty-First Century Opportunities' (2013) 65 *Fed. Comm. LJ* 119.
[165] Frank Levy and Peter Temin 'Inequality and Institutions in 20th Century America' (2007) *National Bureau of Economic Research Working Paper Series* 13106.

[including insurers].[166] Instead, global regulation and legislation in the main Western economies opted for legal certainty as a critical way to support efficient business.[167] A rules order was created to regulate consumer and commercial practices and continued to be the predominant legal order over financial services and insurance in the Western world up until the start of the 21st century. Regulation proliferated to handle the pace at which the market was moving and new technologies rapidly emerged which compacted time and delivered products and services at lightning speed.[168] Western economies and the geographies they wielded influence over followed suit by institutionalising an efficient legal system where businesses could continue to grow and remain compliant with the law while at the same time in fact harming society and benefitting a small percentage of the population. [169]

Legal reform ideas-engines, like the Committee on Capital Markets Regulation in the United States, the epicentre of the 2008 economic meltdown, viewed outcome and principle-based regulation as being less about efficiency and political expediency and called for reform to be based on fundamental principles which are concerned with regulatory effectiveness as equally important to coverage and certainty.[170] With regard to political expediency, this was the approach of the prevailing laws of the time and the product of decades of regulation to keep pace with new methods of transactions, types of contractual relationships, products, and innovation, ie. to have regulation that covers all aspects of the financial industry. Furthermore, the Committee's report states that the most important of the fundamental principles should be to reduce the systemic risk, where failing institutions create a 'chain-reaction' and leads to failures due to the "interconnectedness problem"[171] of liability and asset management, ultimately resulting in contagion risk.[172]

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[166] Committee on Capital Markets Regulation 'The Global Financial Crisis: A Plan for Regulatory Reform' (2009) available at https://capmktsreg.org/wp-content/uploads/2024/01/TGFC-CCMR_Report_5-26-09.pdf, accessed 4 August 2025.
[167] John Braithwaite 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australasian Journal of Legal Philosophy* 47.
[168] Joseph D Kearney and Thomas W Merrill 'The Great Transformation of Regulated Industries Law' (1998) 98 *Colum. L. Rev.* 1323. See also, Kenneth A Bamberger 'Technologies of Compliance: Risk and Regulation in a Digital Age' (2009) 88 *Tex. L. Rev.* 669; and John Braithwaite *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (2008).
[169] Milford Sibusiso Soko 'Re-engaging with the Global Trading System: The Political Economy of Trade Policy Reform in Post-Apartheid South Africa, 1994-2004' (unpublished dissertation, University of Warwick, 2004).
[170] Supra note 164.
[171] Hal S Scott *Connectedness and Contagion: Protecting the Financial System from Panics* (2016).
[172] Hal S Scott 'Interconnectedness and contagion-Financial Panics and the Crisis of 2008' (2014) Available at https://ssrn.com/abstract=2178475.

Although this thesis does not intend to deal in any depth with the financial/prudential elements and the mechanisms of asset/capital management of the finance and insurance sector, it would be remiss to not introduce a discussion on interconnectedness and contagion risk with any other subject matter than this. This is because the very nature of the interconnected world is due to the flow of money and funds which sustain and promote economic activity. Scott mentions in the Committee's 2012 report on regulatory reform that asset connectedness concerns itself with the failure of one institution, which could be seen as one sector of the financial industry (for example, the insurance sector), and thus all institutions exposed to that institution or industry also collapsing due to its exposure.[173]

In the context of this thesis and the outgoing and incoming laws, covered in Chapters 3 and 4, respectively, the primary objective of the regulatory reform is to improve trust in the finance sector to protect it from a 'consumer trust crises' which will lead to contagion risks being realised, or worse, collapse. If the risk that requires mitigation is one of contagion connected by funds flowing through a domestic and global system, then the remedy to ensure risk is avoided will be to ensure the sustainability of the fund flows. However, a key policy stance (in addition to the prudential mandate to state regulators) is to promote trust and manage the conduct of actors to sustain the economic activity and avoid contagion risk. In chapter 4 and 5 I question the strategic intention and whether the regulatory reform is being rolled out to deliver better outcomes, or whether it is in fact more for market protection, and whether the two can co-exist.

Understanding the cycle of the interconnected financial sector and its financial market economy, which exists in nearly every transaction, from payment systems, insurers, hedge funds, retail and institutional investment, asset management, and many more subsects of its wide-reaching existence, therein lies a co-dependency. As an example, premiums received from a policyholder on a life insurance policy (which is pooled, invested, and eventually pays out to beneficiaries when an insurance event, like death, arises) are not all accumulated in the insurer's bank account to defray costs or pay claims. The money/premiums collected from clients by insurers are used to invest in low and medium-risk assets, such as bonds and equities.[174] Similarly, credit agreements, corporate finance, and activity on the stock exchange

[173] Ibid.

[174] Maja Susac 'Structure of the Investment Portfolio in Insurance Companies' (2022) *Economic and Social Development: Book of Proceedings* 80. See also Gideon Els, Grietjie Verhoef and Yolande Hagedorn-Hansen 'Regulatory Changes in South Africa and their Impact on the Short-Term Insurance Environment, 1960–1980' (2019) 12 *Journal of Economic and Financial Sciences* 1 1.

create flows of capital that circulate and permeate between one another. Money paid as retirement savings or held in bank accounts does not lie idle, it is invested, insured, and used to fund other activities in the global financial sector economy. The interconnectedness and the flow of funds in the financial services sector are not by any means of the kind that could be scrutinized in isolation. The very nature of the contagion risk is that all sectors in the globalised system seek to avoid a failing of one industry in the cycle of capital flows, placing the entire financial system in jeopardy.

4. Conclusion

This chapter's purpose was to set out a critical introduction and account of the history and conditions that have led to unequal societies over the ages, especially in South Africa. The result is unfairly unequal societies due to the punitive political orders and poor conduct of nations, corporations, and individuals as they relate to South Africa and within a global context.

The chapter diagnoses factors that have caused the move, over different periods, toward socially aware, fairness-seeking economic activity in financial services. It serves as the context for the analysis in Chapters 4 and 5, which examine the incoming laws and methods of regulating better outcomes for consumers and society and the role of the constitution and common law.

To contextualise the history of the present or the continued presence of the past today – as I have termed it – scholars of economics and law and their writings were used to advance the argument that a paradigm shift touted by the regulatory reform presently underway are not novel and unique to the present.

The relevance of South Africa's history over 4 centuries was presented as the precipitative moments in time where society, law, and global and domestic commercial systems intersected to present both challenges and opportunities domestically and in the global economy. Additionally, this chapter introduced how public sentiment and communitarian values were oftentimes how market conduct, reputation and trust in the system business operated in were assessed and corrected where necessary. In this chapter, the validity of a commercial agreement was first contestable (under Dutch systems) where it was not in line with community expectations. Under the Roman-Dutch system, maxims which made for more efficient legal instruments to serve commercial endeavour, also seen as hindering progress

toward a fairer society, were presented. These are areas of interrogation which continue in chapters 5 and 6.

This chapter highlighted laws over the centuries covered, and the advent of Apartheid and the birth of constitutional democracy were introduced to provide the South African context into which the global legal reform agenda arrives (see further the discussion in Chapters 4 and 5). It furthermore furnished a concise description of the globalised system within which South Africa has been 'rebirthed', so to speak, and then presented the risks of the failing and ailing components of this system and its consequently responsive call for universal language, practices and norms to avoid contagion impacts.

The praxis of new laws is intended to boost the reputation of financial services and insurance companies by addressing blights of unfair client and societal outcomes due to human conduct in financial services contracts. In the next chapter, I do a deep dive into the structure created in the financial services and insurance sector that gave rise to conditions where unfair and poor conduct was at such a level of concern that it needed to be replaced.

CHAPTER 3A: THE ESTABLISHMENT OF THE RULES-BASED ORDER IN SOUTH AFRICA'S FINANCIAL SERVICES AND INSURANCE SECTOR

1. Introduction

Since the birth of post-apartheid South Africa, the country's financial services sector experienced two major periods of reform, the first of which will be discussed in this chapter and concerns the period of review and repeal following the inauguration of the new constitutional and democratic dispensation.[1] In this period, the most significant regulatory instruments to be developed within this sector were the Long-Term Insurance Act (LTIA)[2] and its subordinate Policyholder Protection Rules (PPR),[3] the Financial Advisory and Intermediary Services Act (FAIS) [4] and its subordinate law, the General Code of Conduct (GCOC).[5]

These laws constituted the first step in post-Apartheid South Africa towards a fairer and more ethical financial services sector for the new democratic dispensation. Chronologically, they were enacted before the Consumer Protection Act,[6] which came into force in 2008 and firmly establishes and protects within the law of the Republic the value of consumer protection. However, the position of this chapter is that these laws were considerably hamstrung by the prevailing formalist rules-based and procedural legal logic inherited from the apartheid legal order and which was such a prominent - perhaps even the predominant - jurisprudential feature of that order. Within this juridical context, the new laws established a rule-based command-and-control regulatory environment which restricted its facilitation of meaningful societal transformation.

[1] As mentioned in the previous chapter of this thesis, the 'final' version of the South African Constitution was enacted in 1996. Although the formation of the Constitutions of South Africa is covered under the period of this chapter, it is under Chapters 5 and 6 of this thesis that the relevance of the Constitution is explored in detail. Note that the transitional period in South Africa, from 1989 – 1994 is discussed in Chapter 2. Constitution of the Republic of South Africa Act 108 of 1996.
[2] Long-Term Insurance Act 52 of 1998.
[3] GNR 1129 of 30 September 2004, promulgated under s 62 LTIA.
[4] Financial Advisory and Intermediary Services Act 37 of 2002.
[5] BN 80 GG 25299 of 8 August 2003, promulgated under s 14 FAIS.
[6] Consumer Protection Act 68 of 2008.

The position of the chapter is that the inherited juridical proclivity for procedure, control, and order practically undermined and marginalised the substantively fair and ethical potentialities of these laws. These laws, as well as the supervisory and administrative structure they created, accordingly became largely inadequate in terms of realising consumer-friendly ideals.

This chapter proceeds in two parts. The first part (Section 2) reviews the establishment of the LTIA, FAIS, PPR and GCOC, and critiques the limitation of their rules-based legal logic to achieve meaningful transformation for a new South Africa. The second part (Section 3) turns to examine the role played by key regulatory bodies established through these laws in terms of entrenching the rules-based order. I closely analyse the *Emkhe* case,[7] adjudicated by the FAIS Ombud and the Appeal Board of the FSB, concerning a matter of fair treatment of a consumer, to demonstrate the role of adjudicative bodies in further entrenching this rules-based order. Finally, I illustrate the limitations of this approach when addressing matters of consumer protection and fairness.[8]

This chapter continues the genealogy that was begun in the previous chapter, through an exegesis of the language contained in the period's relevant laws in statute and their interpretation by industry bodies. The subject matter of this chapter has not received a great deal of academic attention. The available literature is sparse at best and exegetical scholarly works, where the semantic value of the legal discourse becomes relevant, are almost non-existent. Instead, the literature mostly comprises reports published mainly by the state and or quasi-state bodies, such as position and policy papers. The exegetical approach further embarked upon here, addresses the lack of scholarship analysing these laws in the literature and is aimed at building new insights as regards the prevailing legal order in this part of the law during its first period of reform. Specifically, the exegetical argument is at pains to reveal the enlistment of neutralising language in the law and its interpretation and to highlight the absence of clear and direct legal language that is forthrightly consumer protective. In this regard, my position holds that this first wave of legal reform missed an opportunity to move the proverbial needle in terms of the potentialities of this part of post-apartheid law to facilitate wider redress and economic transformation in South Africa.

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[7] *Ehmke v Shutzler & Others* 2014 FAB10/2014.

[8] Notably the Emkhe case was decided on in 2014, during the period of the second regulatory agenda reform. However, the form and structure of the laws covered in this Chapter were still the only active laws at the time. Arguably, it was at the time the first regulatory reform (this chapter) was mature and already in question, yet there was no instrument in law to assist with achieving a consumer-protective and fair decision.

2. A Rules-Based Regime for the New South African Financial Services Industry

The first period of South African consumer consciousness and rights in the financial services sector, was precipitated by the end of Apartheid and the advent of democratic ideals. The period commences in 1990 with the establishment of the Financial Services Board (FSB),[9] which was empowered to develop laws to protect the market and consumers (discussed in more detail in Section 2.1 and Section 3 below). Under the supervision of the FSB, the LTIA and its subordinate rules, the PPR, which came into effect in 2004, provided a measure of consumer protection for long-term insurance policyholders.[10] Indeed, a government green paper on consumer policy published in the same year as the PPR noted that 'the apartheid legacy also included a disregard for consumer rights', thus clearly demonstrating the new government's awareness of the issues and the concomitant need to better address them through legal reform.[11]

The LTIA was established to govern and control insurance and the activities of those who intermediate on behalf of insurance companies, that is, the insurance broker or intermediary (typically, a salesperson).[12] It was, in fact, the first 'modern' economic law under the supervision of the FSB.[13] In 2002, the FAIS Act was promulgated,[14] followed shortly by its subordinate law, the GCOC of 2003.[15] The legal framework protecting consumers of insurance activity and financial services was exclusively within the remit of FAIS and the LTIA and given practical effect to through the subordinate laws of GCOC and PPR. I explore these laws in detail in Sections 2.1. (PPR), 2.2. (FAIS) and 2.3. (GCOC) below. I suggest that they together constitute and consolidate a strictly ruled-based approach to the regulation of financial services

[9] Financial Services Board Act 97 of 1990. See also Financial Services Board *Presentation to the Standing Committee on Finance* (2016), available at *https://static.pmg.org.za/160413fsb.pdf*, accessed on 16 November 2024.
[10] There is limited scholarship analysing the PPR. While not of direct relevance to the discussion set out in this thesis, see also the following texts: Roulton John *Ballack* 'An Analysis of the Impact of the Policyholder Protection Rules (Short Term Insurance) 2018 on Consumer Credit' (unpublished LLM thesis, University of Johannesburg, 2019); and Michele van Eck & Samantha Huneberg 'The Dismantling Force of Smart Contracts in South African Policyholder Protection' (2023) *Journal of South African Law* 3 at 521.
[11] The Draft Green Paper on Consumer Policy Framework (GN 1957 in GG No. 26774 of 9 September 2004) at 22.
[12] Supra note 2.
[13] Brian C Benfield and Robert W. Vivian 'Insurance in the 1990s. A. The Long-term Insurance Market 1990-2000' (2003) 18 *South African Journal of Economic History* 1 275; and Daleen Millard *Modern Insurance Law in South Africa* (2013).
[14] Supra note 4.
[15] Supra note 5.

and insurance in South Africa, which, as will be argued, substantially curtailed the substantive achievement of consumer fairness in the context of South Africa's unequal history.

2.1. The Policyholder Protection Rules for the Long-term Insurance Industry

The PPR for the long-term insurance industry first came into operation in 2004. As the name suggests, this was a body of *rules* and a significant juridical step in terms of espousing ideas that go beyond product designation and capital adequacy requirements, which were the focus of previous insurance laws, including the 1998 LTIA.[16] For the insurance industry, the PPR is said to have set in motion a wave of attempts to realise consumer-protective and client-centric (or policyholder-centric) reform that remained in its infancy more than a decade later.[17] Although the significance of the PPR at the time cannot be understated, one would be hard-pressed to overcome the enormity of its objective set out below, particularly in relation to the 'interests of the parties' and that of the public at large:

> The objective of these Rules is to ensure that policies […] are entered into, executed and enforced in accordance with sound insurance principles and practice in the interests of the parties and in the public interest.[18]

Accordingly, the PPR set out rules for intermediaries[19] who sell, distribute or service insurance products. It also set rules around cancellation of products and granted cooling-off periods to afford clients the right to change their mind after purchasing a product without facing barriers or penalties.[20] Additionally, the rules required that general and specific policy conditions had to be disclosed, which included explaining the service rendered, commission earned, design of the product, and expectations or commitments of clients or policyholders.[21] All financial service providers and intermediaries were to comply with the rules set out in the PPR as they

[16] Supra note 3.
[17] Supra Van Eck & Huneberg at note 10.
[18] Supra note 3 at part 1, and s 2.
[19] Supra note 3 at part 4 s 5.
[20] Supra note 3 at part 5.
[21] Supra note 3 at part 5 s 6.

rendered financial services for insurance products.[22] The PPR also regulated contemporary forms of distributing insurance products under its rules for direct marketing, which, at the time, related to non-face-to-face methods of entering into insurance contracts by selling insurance products via telephone, post or fax (and not the direct marketing dominated by mobile and online transactions that are prevalent today).[23]

A significant shortcoming of the PPR was the limited protections it afforded policyholders who had entered into relationships with insurers prior to the law coming into effect. As Collen Kgaolo Stephen Matshitse[24] and Samantha Huneberg[25] both note in their work, the PPR was not retrospective in its application to certain activities, such as all forms of direct marketing.[26] This meant that older policyholders were left behind by this wave of regulation, leaving them with very little by way of legal protection. What protection they could rely on would be found in existing common law, with reliance on contract law remedies that were not particularly inclined towards client protection (discussed further in Chapters 5 and 6 of this thesis).[27] Perhaps more significantly, the non-retrospectivity of the PPR demonstrates its limitations in relation to substantive and comprehensive protection of the public interest in the manner that the formulation of its objectives – quoted above – leads one reasonably to expect.

The limited retrospective application of the PPR is a shortcoming easy to highlight today, considering developments in consumer rights and the rise of the notion of Treating Customers Fairly,[28] which changed the relationship between financial services, insurance products, and the end client. However, at the time at which the PPR came into operation, the legal climate and understanding of the 'right' interpretation of these laws had not yet shifted beyond a formal, strictly legalistic and contractual interpretation, as discussed throughout this thesis. At the time, three major fields of law was relied on to guide and enforce PPR and FAIS. The first was criminal law, with the criminalisation of non-compliance with FAIS or LTIA resulting in fines and imprisonment of up to 10 years or R10 million. The second was

[22] Supra note 3 at part 2 s 3. See also Birgit Kuschke and Daleen Millard 'Transparency in Insurance Law and Regulation: In South Africa' in Pierpaolo Marano and Kyriaki Noussia (eds) *Transparency in Insurance Regulation and Supervisory Law* (2021) 491.
[23] Supra note 3 at part 3 s 4.
[24] Collen Kgaolo Stephen Matshitse 'Intermediaries and Advisors' Duties to Disclose Onerous Clauses to Prospective Policyholders' (unpublished LLM thesis, University of Johannesburg, 2019).
[25] Samantha Huneberg 'English Insurance Law Reforms: Lessons for South Africa' (2019) 40 *Obiter* 1 at 18.
[26] Supra at note 3 part 2 s 3.
[27] See also supra van Eck & Huneberg at note 10.
[28] Financial Services Board 'Treating Customers Fairly, A Discussion Paper Prepared for the Financial Services Board' (2010).

administrative law, with the actions of the FSB and the procedure for debarment of wayward intermediaries regarded as administrative action as it exercised public power in these processes, making it subject to the Promotion of Administrative Justice Act[29] and judicial review of the administrative action.[30] Finally, the third was common law, where the affordance and protection of the legal rights of individuals and the recourse against natural and juristic persons is reflective of the common law relied upon by these laws. The cumulative interpretative effect of the influence of these bodies of law in the Hartian hermeneutic 'penumbra' of the PPR,[31] was that the strictly legalistic form of the PPR was taken to mean that its own limitations, such as the lack of retrospective application, could not be overcome through more generous outcomes-focused interpretation.

Unlike the Consumer Protection Act,[32] the PPR did not overtly clarify its attempt to realise consumer protection. Whilst the title suggests that the PPR rules were in place to protect policyholders, in practice, complying with the PPR would not necessarily achieve the outcome of protecting clients. When the latter realisation (finally) rose to the level of the legal consciousness of policy- and lawmakers, it triggered the new set of reforms discussed in Chapter 5 of this thesis. In the intervening period, compliance with the rules prescribed under the PPR, on the part of intermediaries and insurers, would be sufficient to deem their conduct consumer-protective and lawful.[33] In practice, this meant that the PPR was used as a defence by representatives of financial services and insurance businesses to enforce (unfair) insurance contract terms on the strength of compliance with the PPR rules, leaving little protection for consumers who may have been adversely affected due to the (mis)conduct of the insurer, intermediary or the product and service so provided.[34] Compliance with the PPR rules and strict adherence to the recognised tenets of contract law (which had long been steadfastly averse to a fairness jurisdiction[35]) would be sufficient to claim that the actions (with an adverse or unfair

[29] Promotion of Administrative Justice Act 3 of 2000.
[30] See *Pienaar v Registrar of Financial Services* (629/2013) 2013 ZAECPEHC 27.
[31] HLA *The Concept of Law* (1961) 119-120.
[32] Supra note 6.
[33] J du Plessis 'Fairness in the Law of Contract: Reflections on *Beadica'* (2022) 12 *Constitutional Court Review* 1 197. See also: *Maree v C Booysen t/a NVM Beleggings & Versekeringsadviseurs* (307/09) 2010 ZASCA 44 (31 March 2010) 9; and *Matlala v Mutual & Federal Insurance Company Ltd* (31369/2005) 2007 ZAGPHC 178 (5 September 2007).
[34] In Chapter 6 of this thesis, the use of PPR as a defence by financial services and insurance businesses is demonstrated through analysis of a number of cases adjudicated by South African Ombuds and Courts.
[35] Bank of Lisbon and South Africa Ltd v De Ornelas 1988 (3) 580 (A); Sasfin v Beukes 1989 (1) SA (A); Brisley v Drotsky 2002 (4) SA 1 (SCA); and Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).

result for a client) were legal and therefore "fair" (albeit substantively speaking not the case) and, additionally, both founded and grounded in ethical conduct.[36]

The other attempt to regulate consumer protection in the financial services and insurance market in the period under investigation was the FAIS Act,[37] to which this chapter turns next. However, unlike the PPR, the FAIS Act dictated the administrative and organisational structure that had to be followed by organisations to be authorised to operate in the financial services sector.[38] The structure created under the FAIS Act, discussed below and in the subsequent chapter of this thesis, was largely effective in that it made it harder for nefarious or dishonest actors to assume important roles in relation to financial services to consumers, but, at the same time, the FAIS created new limitations in terms of the achievement by the law of substantive fairness. A discussion of the FAIS Act and the structures it establishes to protect the repute of the financial services sector and protect consumers, follows.

2.2. The Financial Advisory and Intermediary Services Act

In November 2002, the FAIS was assented to and came into operation under the stewardship of the FSB.[39] At the time, the FSB was a single juristic body functioning as an advisor to government on matters relating to financial institutions (except banks) and financial services.[40] The main role of the FSB was to 'supervise […] over the activities of financial institutions and over financial services'.[41] The FSB's oversight role initially only included supervising and enforcing compliance of stock exchange and insurance business activity and laws.[42] During the time that the FSB was in operation, financial sector laws and legal instruments mushroomed.[43] The most far-reaching of the laws that proliferated under the watch of the FSB was indeed the FAIS Act. In broad terms, the FAIS Act clearly set out to achieve consumer protection in the sector and to professionalise all aspects of financial services.[44]

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[36] See also A Hargarter and G van Vuuren 'Assembly of a Conduct Risk Regulatory Model for Developing Market Banks' (2017) 20 *South African Journal of Economic and Management Sciences* 1.
[37] Supra note 4.
[38] Ibid.
[39] Supra note 4; and supra FSB at note 9.
[40] Supra note 9 at s 28. See also Chapter 2 of this thesis where the South African Reserve Bank as the overseer of the Bank's Act and the regulator of banking affairs is discussed.
[41] Supra note 9 at s 3.
[42] Supra note 9 at s 3.
[43] David Peter van der Westhuizen 'Evaluating the Effect of the Legislative and Regulatory Requirements in the Financial Services Industry' (unpublished PhD thesis, North West University, 2014).
[44] Supra note 4.

In the financial sector, no legislation has had as wide an application as the FAIS Act. The FAIS Act spanned the breadth of the non-banking financial services industry, bringing into its ambit businesses that distribute, manage and service products across the spectrum of financial products and services – from funeral parlours selling simple burial plans, representatives advising on unit trusts, to complex investment and hedge fund businesses. In short, it regulated all financial services which fell outside of the ambit of the Banks Act[45] The definition of a financial product under FAIS also left no stone unturned. Financial products within its remit ranged from shares, unit trusts, and debentures, to medical aid, pension funds and funeral policies.[46] In addition, the definition of a financial product included two catch-all provisions: 1) for any other products not explicitly mentioned but which are similar to any of the ones mentioned; and 2) for any financial product from a foreign product supplier marketed in South Africa that is similar in nature and character to any product that the Act defines.[47]

Throughout, the regulatory expectation was to demonstrate compliance to the Registrar of the FSB as a requisite of being awarded and then maintaining an operating license as a financial services provider.[48] Actors in the financial services industry who were known as brokers or advisers at the time and later classed collectively as 'financial services providers'[49] would need strictly to adhere to the FAIS Act and its subordinate GCOC in the rendering of all of their financial services.[50]

The FAIS Act imposes a set of obligations on financial service providers and their representatives that are intended to regulate for good conduct in the sector. In broad terms, the focus on conduct and the regulation thereof in furtherance of the 'good', was considered by lawmakers as an important indicator of a fair and transparent market which benefits consumers

[45] Banks Act 94 of 1990. Supra note 4.
[46] Ibid at s 1(1)
[47] Supra note 45. See also Daleen Millard 'Through the Looking Glass: Fairness in Insurance Contracts – A Caucus Race?' (2014) 77 *Journal of Contemporary Roman-Dutch Law* 562.
[48] Supra note 9 at s 7 & 8.
[49] A financial services provider is defined under FAIS as 'any person, other than a representative, who as a regular feature of the business of such person –

(a) furnishes advice; or
(b) furnishes advice and renders any intermediary services; or
(c) renders an intermediary service'

Supra note 3 s 1.
[50] For a review of the PPR in relation to consumer credit, a related field, but beyond the scope of this thesis, see supra Ballack at note 10.

and businesses alike.[51] The responsibilities on financial service providers and their representatives are set out under Chapter 4, Section 16 of the FAIS Act, as follows:

> (a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;
>
> (b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;
>
> (c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;
>
> (d) act with circumspection and treat clients fairly in a situation of conflicting interests; and
>
> (e) comply with all applicable statutory or common law requirements applicable to the conduct of business."[52]

Under FAIS, the responsibility placed on financial services providers and representatives is formed through a mix of instructive (obligations set out in the Act), abstract (conceptual conduct-related notions such as "fair" and "honest" set out in (a) above), procedural (process-determined pathways for conflict resolution, for example), and legal expectations (responsibilities set out explicitly in the Act). This mix represents an initial step on the part of lawmakers to move beyond legal form alone, by placing a set of responsibilities ((a) to (e) above) on authorised parties to subscribe to conduct befitting of an ethical and moral subject acting with integrity.

[51] S Henrie 'Risk Benefit Provision Through Provident and Pension Funds' (2007) available at https://www.treasury.gov.za/publications/other/ssrr/session%20one%20papers/group%20risk%20benefits%20-%20genesis%20report%2020071018.pdf, accessed 4 August 2025 at 24.
[52] Supra note 3 at chapter 4 s 16.

According to Klopper, the FAIS Act patently and effectively served to curb abusive and inappropriate conduct of some actors in the financial services industry.[53] However, in a commentary for the Finance Portfolio Committee of the South African parliament that was tasked with developing the FAIS Bill, published before the publication of the FAIS Act, Malherbe and Morojele argued that the FAIS Act and its intention to professionalise financial services in South Africa may not sufficiently address the industry's infamous greed for profit.[54] In the next section, this thesis turns to examine the General Code of Conduct promulgated under the FAIS Act in an attempt to assess the extent to which this subordinate law could address some of the concerns Malherbe and Morojele raised in relation to the limitations of the FAIS Act.

2.3. The General Code of Conduct for Authorised Financial Services Providers and Representatives

Under Chapter 4 of the FAIS Act, the Registrar of the FSB was empowered to draft codes of conduct that would be binding on all financial service providers. The *General Code of Conduct for Authorised Financial Services Providers and Representatives*[55] (GCOC), which emanated from Chapter 4 of the FAIS Act, represents the first general code of its kind in the financial services industry. By definition, a code of conduct is an agreement on rules of behaviour which in this case is aimed at financial service providers and their representatives.[56] The GCOC imposes a general duty on financial service providers to act honestly, fairly, with due skill, care and diligence, in the interest of clients and to maintain the integrity of the financial services industry.[57] Like the PPR and the FAIS Act itself, the regulatory expectation for financial service providers set out in the GCOC is achieved through rules-based provisions that are instructive and put forth the structural arrangements required to comply with the law.

[53] H Klopper 'The Regulation of Advice Within the Financial Services Sector' (2007) 28 *Obiter* 1 133. See also Erik Bähre 'The Janus Face of Insurance in South Africa: From Costs to Risk, From Networks to Bureaucracies' (2012) 82 *Africa* 1 150.
[54] S Malherbe and M Morojele 'The Cost and Benefits of the Financial Advisory and Intermediary Services (FAIS) Bill' (2001), available at https://static.pmg.org.za/docs/2002/appendices/020917cba.htm, accessed on 16 November 2024.
[55] Supra note 5.
[56] Collins English Dictionary (2005) at 'code of conduct'.
[57] Supra note 5 at s 2.

Specific duties, such as giving clients factually correct information, adhering to disclosure requirements, reducing decisions to writing, and avoiding or disclosing conflicts of interest, are some of the prescriptive rules found in the GCOC.[58] The Code also contains a significant amount of overlap with the LTIA's PPR discussed earlier. Unlike the PPR, the GCOC distinguishes itself by addressing service and the quality of engagement between client/consumer and financial service provider by creating subordinate laws on the suitability of advice (by an authorised representative or intermediary), the principles to be adhered to when a financial service provider sets up a control environment, and the infrastructure required to deal with complaints.[59]

One of the more notably significant aspects of the GCOC is its emphasis on disclosure and furnishing information so that clients can make informed decisions when dealing with financial service providers.[60] In general, financial and insurance products are constituted in complex ways through actuarial reasoning and quantitative risk assessment and are not readily understood by the laypeople who purchase them.[61] Because of this information asymmetry between customer and financial service provider, the bargaining power of the consumer is limited in ways that can lead to economic duress.[62] Of primary importance, therefore, is the effort to address this imbalance under the GCOC principles of transparency and the assignment of responsibility to financial service providers to inform clients, together with the procedural mechanisms the GCOC established to ensure this in practice.

In all, the introduction of the GCOC, like the PPR, steered the legal discourse in the direction of greater consideration of the consumer's interests, but it did not meaningfully place the consumer at the centre of the law.[63] Rather, it facilitated the imposition of a culture of tick-box compliance without necessarily enabling greater bargaining power for consumers or meaningfully advancing consumer rights in the financial services and insurance industries. Admittedly, the GCOC established effective procedures and processes for conduct regulation and introduced industry-accepted practices into the legal framework. However, the impact of

[58] Supra note 5 at s 3, 4, 5, 7, and 8.
[59] Supra note 5 at s 8, 9, 11, 12 and 16.
[60] Supra note 5 at s 16.
[61] See B Roberts, J Struwig and S Gordon, S *Financial Literacy in South Africa: Results from the 2013 South African Social Attitudes Survey Round* (2014) Report prepared by the Human Sciences Research Council on behalf of the Financial Services Board.
[62] 'Economic duress' is defined as 'imposition, oppression or taking undue advantage of the business or financial stress or extreme necessity or weakness of another'. Cited in M F Cassim '*Medscheme Holdings (Pty) Limited v Bhamjee*: The Concept of Economic Duress' (2005) 122 *SALJ* 454 at 528.
[63] If it had meaningfully centred the customer, then the legal reforms that came about under the second wave – discussed in Chapter 5 of this thesis – would not have been necessary.

the legislation in terms of consumer protection was watered down as merely a by-product of the dictated structure created by the financial services entity and the regulatory bodies. Demonstrating compliance with the law would not mean providing evidence that the client had been protected or that a non-prejudicial outcome for the client was ensured. This could mean that while a financial service provider could show compliance with the laws, the outcome for the customer may nonetheless be substantively unfair.[64] More broadly, this left the door open for substantively unfair treatment of consumers by financial service providers to be judged legitimate and, accordingly, it enables the denial of accountability on the grounds of mere formal compliance, ticking the boxes, barring, admittedly, cases of fraud or criminality.[65] Ultimately, this casts doubt over the effectiveness of the GCOC, FAIS, PPR and LTIA more broadly to transform the culture, conduct or behaviour of an entire industry with a view to improving client outcomes and reaching parity in the relationship between the client and the financial services provider.

In its 2013 global evaluation, the OECD reviewed policyholder protection schemes in financial sectors. The evaluation results found that governance frameworks, management of insurance funds and their safekeeping were most common across the territories under review (including South Africa).[66] It further noted that while protecting client interest from bad actors or poor management that might lead to insolvency, the laws and schemes more generally did not progressively realise better outcomes for consumers – other than as a byproduct of ensuring financial stability. Instead, this form of (somewhat indirect) consumer protection is more concerned with the circulation of capital and maintaining stability in the markets and industry by meeting solvency and bottom-line expectations, rather than actively striving for better consumer outcomes[67] – arguably amounting to a veritable race to the bottom.

Indeed, rules-based orders like those set out above follow a predefined structure and are concerned with regulatory expediency, process and literal interpretation; they favour consistency, predictability and certainty.[68] Such an approach relies almost exclusively on the

[64] Han Benshalom 'Rethinking International Distributive Justice: Fairness as Insurance' (2013) *BU Int'l LJ* 31 298.
[65] In Chapter 6 of this thesis case laws demonstrating this in practice are discussed.
[66] OECD 'Policyholder Protection Schemes: Selected Considerations' (2013) *OECD Working Papers on Finance, Insurance and Private Pensions*, No. 31.
[67] Ibid.
[68] For a further discussion on rules-based approaches to regulation, see Christopher Decker 'Goals-based and Rules-based Approaches to Regulation' (2018) *BEIS Research Paper 8*; and Brigitte Burgemeestre, Joris Hulstijn, and Yao-Hua Tan 'Rule-based Versus Principle-based Regulatory Compliance' in G Governatori (ed) *Legal Knowledge and Information Systems* (2009) 37. For a further discussion on the limitations of a rules-based approach, see Chapter 6 of this thesis.

golden rule[69] and mischief rule[70] as the 'right' methods of interpretation to be followed by oversight and adjudicative bodies handling complaints and disputes. This setup, not unusual to the law in practice, does not, however, look at the principles upon which the statute may be based nor the wider social outcomes it might contribute to achieve beyond the strict adherence to the rule-based order (where the procedure and form takes precedence over substance and outcomes). Procedural compliance, and the harms that may arise therefrom, represent a significant barrier to the realisation of better substantive consumer outcomes and protection. Under rules-based regulation, actors and parties to a financial transaction only need to demonstrate compliance with the rules to be regarded by the law as rendering services ethically and in conformance with the regulatory expectation.[71]

In the next section, I turn to discuss the organisational structure of regulatory oversight established through the laws discussed above and also how this structure amplified the rigid rules-based order through its interpretation of the laws and oversight, again failing to create the juridical conditions conducive to the meaningful realisation of substantively fair consumer outcomes.

3. The Structure of Oversight over the Rules-Based Order

3.1. The FSB

The Financial Services Board Act of 1990 established the FSB, an administrative machine set up to serve as the home of non-banking financial services regulation.[72] The body came into operation on 1 April 1991 and, through other Acts, grew in its authority and oversight. The FSB was born out of the recommendation of the Van der Horst Committee which was established while apartheid President P W Botha was still in power. Very little information about this Committee is available, except that the committee reported to the Financial Institutions Review Committee and made recommendations regarding the role of a formal regulator to have

[69] In short, the golden rule of legal interpretation dictates that the law must be interpreted in terms of its intent and that the intent of the statute is generally embedded within the literal meaning of its wording. See Jeffrey Wattles *The Golden Rule* (1996).
[70] The mischief rule, as a rule of legal interpretation, guides the interpreting body to consider the wider mischief the statute is attempting to curtail and to promote a remedy to this mischief through interpretation. See Samuel L Bray 'The Mischief Rule' (2020) *109 Geo. LJ* at 967.
[71] See Lauren Wright 'Utmost Good Faith and Fairness in Life Insurance: Restoring Consumer Confidence' (2017) *UNSWLJ Student Series* 17.
[72] Supra note 9.

prudential controls over non-banking financial services, leading to the establishment of the FSB.[73]

The protection of consumers was not a direct mandate assigned to the FSB. Instead, the FSB focused on safeguarding funds and prudential management to protect the market first of all and thus only indirectly the consumer, from malpractice or greed.[74] At the time the FSB was called for and established, the Apartheid government was in crisis and the stability of the market and its economy was of great concern to progressive members of Parliament and later the transitional government.

The establishment and operationalisation of the FSB contributed to a siloed approach to financial regulation and supervision, one where banking, securities and non-banking (largely insurers) were regulated separately.[75] By enactment of the LTIA, which – as noted above – came into effect in 1998, the Registrar of Long-term Insurance was assigned to the executive officer of the FSB.[76] The FAIS Act further conferred powers to the executive head of the FSB and amended the meaning of financial institution to accord with the definition thereof under the FAIS Act.[77] However, the FAIS Act also provided for the establishment of the FAIS Ombudsman Office.[78] Unlike the FSB, the FAIS Ombud had judicial powers to preside over disputes between consumers and the financial services structure set up by the FAIS Act.[79]

Through the FAIS Act, the legislature wanted sufficiently overarching supervisory power to be granted to the FSB. There were two areas that the FSB nonetheless did not cover. The first was the banking environment (which was essentially institutionally regulated by the Reserve Bank[80]), and the second was credit provider establishments (which was institutionally

[73] Presentation by the Financial Services Board to the Portfolio Committee on Finance and the Selection Committee of the National Council of Provinces (16 August 2000), available at *https://static.pmg.org.za/docs/2000/appendices/000816FSB.htm*, accessed 16 November 2024.
[74] See Gail Pearson, Philip N. Stoop and Michelle Kelly-Louw 'Balancing Responsibilities–financial Literacy' (2017) 20 *Potchefstroom Electronic Law Journal* 1.
[75] Erika Botha and Daniel Makina 'Financial Regulation And Supervision: Theory And Practice In South Africa' (2011) 10 *The International Business and Economics Research Journal* 11 27.
[76] Supra note 2.
[77] Supra note 4 at s 1(1).
[78] Supra note 2 at s 20.
[79] Supra note 4 at s 27 – 28, notably s 28(b)(iii) which states: 'The Ombud must in any case where a matter has not been settled…make a final determination, which may include – …(b) the upholding of the complaint, wholly or partially, in which case – …(iii) the Ombud may make any other order which a Court may make'. See also, 'The Office of the Ombud for Financial Services Providers Annual Report 2006 – 2007', available at https://static.pmg.org.za/docs/2007/071121faisrep1.pdf, accessed 8 March 2025.
[80] South African Reserve Bank Act 90 of 1989.

regulated by the National Credit Authority[81]). Both industries are megaliths of their own and were covered by their own legal dispensation and regulatory oversight bodies.[82]

Despite this, banks and credit providers often sold financial products, as defined under the FAIS Act, as complementary to their own products and services and were, accordingly, subject to oversight by the FSB and hence the need to demonstrate compliance with the FAIS Act (including seeking approval to render financial services and adopting the FAIS designations).[83] It is in part because of these overlapping and duplicitous roles and mandates within the financial services and insurance sector and banking and credit provision more broadly that the new wave of legal reform (discussed in Chapter 4 of this thesis) came about, which clearly demonstrated the limited efficacy of the prevailing legal order and its oversight bodies discussed in this chapter. However, before this thesis can turn to examine the next wave of legal reform, it is important to understand, first, the particular role played by the FAIS Ombud in terms of embedding and entrenching a rules-based order, and, second to this, the limitations of its approach to dispute resolution and interpretation of the statutes in view of the objective to achieve substantively fair outcomes for the consumer.

3.2. The FAIS Ombudsman Office

The FAIS Act established a statutory Ombudsman (FAIS Ombud) office specifically for financial services. The FAIS Act Ombud was established to handle and adjudicate complaints in an 'independent and impartial' manner.[84] The FAIS Act sections relevant to the FAIS Ombud are found between sections 20 to 32 of the FAIS Act. The provisions largely address the internal structure and administration of the FAIS Ombud. Within these sections, the powers of its Board, the remit of complaints handling, and promoting client education was assigned to the FAIS Ombud.[85] Under the FAIS regime, the FAIS Ombud is the primary ex-post facto enforcement mechanism.[86]

[81] Established under the National Credit Act 34 of 2005.
[82] For a discussion here see Millard supra note 47 at 562. Also, note that the products under both the credit and banking sectors are now under review and are being added under new amendments to the FAIS laws (as well as the successor to the FAIS Act - The Conduct of Financial Institutions Bill - discussed in Chapter 4 of this thesis).
[83] See Chapter 4 of this thesis for a discussion on FAIS designations.
[84] Supra note 4 at s 20(4).
[85] Supra note 4 at s 26, 27 and 32.
[86] Supra note 4 at Part VI.

It is a commonplace that an Ombudsman office constitutes an institutional mechanism driven by alternate dispute resolution. It is usually set up in the private sector and is designed as an explicit alternative to court action which is litigious in nature. Ombudsman offices are generally regarded as the "gold-plated service" of alternate dispute resolution mechanisms, aimed at improving standards in a sector by taking a broad approach to its alternate dispute resolution mandate and thus providing feedback, training and identifying issues of concern in the relevant sector.[87] For the FAIS Ombuds, although it was designed to resolve disputes between consumers and persons under the authority of the FAIS Act, it was not a higher decisional body than a court. This meant that while it was bound by the statute, it could not progressively develop law and set jurisprudence in the manner of a court.

Under FAIS, the FSB was to '*make rules***,** including different rules in respect of different categories of complaints or investigations by the Ombud' (my emphasis)[88] on the following:

> (a)(i) any matter which is required or permitted under this [FAIS] Act to be regulated *by rule*; […]
>
> (iv) *the rights of complainants in connection with complaints, including the manner of submitting a complaint to the authorised financial services provider or representative concerned*; […]
>
> (vii) the circumstances under which a complaint may be *dismissed without consideration of its merits*.[89] [my emphasis]

In the sections outlined above, the rules-based regime in terms of which the FAIS Act Ombud was both created and that it was intended to embed, is set out. The FAIS Ombud was to achieve its objectives through enforcing compliance with the law. This approach is reinforced in Section 27 of the FAIS Act where it states:

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[87] For a discussion on the roles of an ombudsman, see A. W. Bradley 'The Role of the Ombudsman in Relation to the Protection of Citizens' Rights' *The Cambridge Law Journal* 304.
[88] Supra note 4 at s 26(1).
[89] Ibid.

27. (1) On submission of a complaint to the Office, the Ombud must –

(a) determine whether the requirement of the rules contemplated in section(1)(a)(iv) have been complied with;
(b) in the case of any non-compliance, act in accordance with the rules made under that section.[90]

The premise for any complaint to be heard by the Ombud was that it first had to qualify as a valid complaint through compliance with the procedural rules of the FAIS Act, failing which it is not a dispute that the Ombud can lawfully preside over. Critically, this does not allow for an exception for the Ombud to receive and preside over complaints on substantive grounds.

Beyond the procedural grounds on which the FAIS Ombud can receive a complaint, the FAIS Act states that a complainant may raise a complaint if the complaint alleges that an FSP or representative 'has treated the complainant unfairly'.[91] Within the laws discussed in this chapter, this is the first time that fair treatment of a customer is directly mentioned.[92] These references are contained in the definition of a complaint under the FAIS Act. That is, where a financial service provider has allegedly treated a complainant unfairly, this constitutes a ground for submission of such a complaint to the FAIS Ombud. Another reference to unfairness in relation to clients is in Section 34 of the FAIS Act, which addresses undesirable practices by any financial service provider, and is discussed in further detail in Section 4 below.

The FAIS Ombud was required to consider complaints 'by reference to what is equitable in all circumstances'.[93] Yet, to do so, it is first required to understand and assess the contractual and legal relationship governing the parties' lawful conduct.[94] And, what is more, is that the FAIS Ombud must 'consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner'.[95] Therefore, reaching equity is framed overall from within the confines of the contractual and legal apparatuses prescribed to interpret the relationship between disputing parties and the speed at which the complaint could be resolved. The reins placed on the scope and sources of law available to the Ombud are therefore rather

[90] Supra note 4 at s 27(1).
[91] Supra note 4 at s 1, definition of 'complaint' (c).
[92] Note that Section 16 of the FAIS Act, on the principles of codes of conduct, notes that all authorised financial service providers and their representatives are obliged to 'treat clients fairly in a situation of conflict of interest'. This is discussed in further detail in Chapter 4 of this thesis. Supra note 4 at s 16.
[93] Supra note 4 at s 20(3).
[94] Supra note 4 at s 20(3)(a).
[95] Supra note 4 at s 20(3)

restrictive. First, the contractual relationship and particulars in the retail insurance and financial services are designed and drafted by the industry actor (in standard form contracts) which holds the knowledge and power to negotiate contractual terms to their liking and preference, leaving the client with severely limited contractual or bargaining power to negotiate terms according to their interests. Secondly, seeking out equitable outcomes quickly and in an inexpensive manner may often result in ignoring substantive issues that might be more complex to explore and assess.

Based on the above, the office of the FAIS Ombud was arguably tightly constrained by the fixed administrative and formal legal outlook when it considered the objective of achieving fairness and fair outcomes.[96] In this context, the application of law as it extends to fairness is narrow and limited to "procedural fairness" and, both as a matter of legal history as well as a matter of the 'presence' of that history within existing law, it entirely misses the opportunity to address substantive fairness, which naturally goes well beyond procedural fairness and contractual relations in the mediation and adjudication of disputes between clients and financial services providers.

In the next section, this thesis turns to explore how the design of the regulatory order in the first wave of financial services and insurance sector reforms would struggle to deal with cases that are seemingly substantively unfair but procedurally sound.

4. The Limitations of the Rules-Based Approach in Practice

4.1. FAIS Ombud: A Case Study of Complaints Handling

As argued above, despite the ambitious and progressive project set out under the FAIS Act, it was limited in its ability to directly advance consumer protection, particularly where disputes arose in respect of substantive outcomes for clients, resulting in a muted effect on realising client-centricity from an industry which, not always with ill-intent, gamed the system.[97] An

[96] For a discussion on the limitations of consumer protection law in South Africa during the first wave of reform and the role of alternate dispute resolution bodies, see Tanya Woker 'Consumer Protection: An Overview Since 1994' (2019) 30 *Stellenbosch Law Review* 1 97; and Tanya Woker 'Consumer Protection and Alternative Dispute Resolution' (2016) 28 *SA Mercantile Law Journal* 1 21.

[97] See also N Kilian 'The Question is "Should Insurers Continuously Update Policyholder Records"? Insurance Law Requires the Principles of Administrative Law to Settle Disputes between the Policyholder and the Insurer' (2019) 22 *PELJ.*

example of the impotence of the FAIS Act to realise client centricity is apparent in the disputes covered later under the *Ehmke* case considered by the Appeal Board of the FSB.[98]

Section 1 of the FAIS Act sets out the definitions of a 'complaint', which the Act requires to be in relation to a financial service rendered by an financial services provider or representative, whether wilfully or negligently, or in the context of failing to adhere to a provision of the FAIS Act. A financial services provider or representative would either be a natural or juristic person. At a rudimentary level, in this context a complaint is an expression of dissatisfaction at the service, product, advertising, or other activity in relation to the financial service or a financial service offering. Amongst the grounds necessitating the declaration of a complaint, the complainant would need to allege either that the FSP or representative contravened a provision of the FAIS Act, the result of which leads to, or is likely to lead to, the complainant suffering 'financial prejudice or damage'.[99] In this respect, the words 'likely to' are included in the clause to protect clients/consumers who have not yet suffered an actual loss due to the actions or failure to act by a representative or financial services provider, as will be demonstrated in the *Ehmke* case, a discussion of which this thesis turns to next.

In 2014 the Appeal Board of the FSB heard a matter between Ferdi Ehmke (appellant) and Leonard Edward Schutzler (first respondent) and Derick Edward Schutzler (second respondent). The Ombud for Financial Services Providers (FAIS Ombud) was listed as the third respondent. The main issue of dispute in the *Ehmke* appeal case concerned the time constraint placed on complaints under section 27 of the FAIS Act, which cross-references the Prescription Act.[100] The FAIS Act stipulates that the prescription period is suspended when a complaint is submitted. Section 27 of the FAIS Act further imposes a jurisdictional restraint of prescription after three years to be applied by the FAIS Ombud.

In brief, the facts of the case relate to a R1 million investment from the appellant in a property syndication scheme.[101] After receiving the interest payments from the investment for approximately one year, the interest payments stopped and the appellant suffered a substantial financial loss. A contentious point in the interpretation of the loss suffered by the appellant was that upon the appellant's enquiry to the scheme owners about the investment in September 2010 (approximately one year and six months from the date of initial investment), the appellant

[98] *Ehmke v Shutzler & Others* 2014 FAB10/2014.
[99] Supra note 4 at s 1.
[100] Prescription Act 68 of 1969.
[101] Supra note 98 at para 3.1.

became aware of the likelihood of suffering a financial loss. Three years and one month after the alleged realisation of this likelihood the appellant complained to the FAIS Ombud. The FAIS Ombud, in turn, took the view that the complaint was "time-barred", that is, that the prescription period had lapsed, because the appellant was supposed to have complained within three years after the enquiry to the scheme owner (in September 2010) and the alleged realisation that there would likely be a financial loss. Substantively, however, the appellant had in the first place invested in a dubious or poorly designed financial product. However, this point was not considered in the merits of the case adjudicated by the FAIS Ombud, which instead focused solely on the procedural elements regarding the prescription of the case.

Of interest here is the charge by the appellant that at a meeting of investors in the scheme in February 2011 (six months after the enquiry the appellant made to the investors in September 2010), investors were informed that, in all likelihood, the investment would be lost.[102] This later date is the date the appellant relied on as the basis of his rebuttal of the earlier September 2010 date alleged as the start of the prescription period. The appellant argued that actual knowledge of a likely loss arose at the investors' meeting in February 2011 and not before. Had this been the date of having a 'likely' realisation of potential financial prejudice or loss, the appellant would have been successful in his bid to claim that the date of such realisation fell within the three-year prescription period.[103]

Not yet three years from the February 2011 meeting, the complainant (later appellant) lodged a complaint with the FAIS Ombud. The FAIS Ombud had determined at that stage that the complainant had realised the likelihood of a financial loss in September 2010 when he had enquired about the investment. A technical legal point in relation to prescription was thus put into circulation and became the basis for the initial Ombud decision that was appealed at the FSB Appeal Board. Indeed, the entire matter fell flat from the point of view of the complainant, because it became based on when the complainant 'likely' realised a financial prejudice or loss. Yet ironically, in many ways, any financial product that carries an investment component is not free of risk and there is always a degree of likelihood of loss by its very nature.[104]

Under the section of the FSB Appeal Board's decision on 'Applicable Legislation and Legal Principle' it makes a critical reference to Section 20(3) (also discussed above) of the

[102] Supra note 98 at para 3.5.
[103] Supra note 98.
[104] Supra note 98.

FAIS Act, but it neither quoted the relevant provision fully, nor explored its possible and potential legal implications further. Section 20(3) in the decision reads:

> The objective of the Ombud is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner and by reference to what is equitable in all the circumstances.[105]

Yet, as discussed above, Section 20(3) – which pertains to the manner and method in which the Ombud is to review a complaint – also dictates that the Ombud is to assess any matter, whether fairness is a consideration or not, in relation to the contractual or other legal relationships at play between the complaining parties.[106] Should there be no supporting law, or the law itself is not geared to consider a fair outcome, there would be no consideration given to the proclaimed consumer protection and fair treatment of clients as espoused by the FAIS Act and laws ancillary thereto, claiming to promote fair outcomes within the confines of existing laws. Today, this section of the FAIS Act remains unchanged.

In the *Ehmke* case, the particularity of words and conditional language played an important role in the adjudication of the dispute. In particular, the phrasing of 'is likely to suffer' in relation to financial loss or prejudice was critical to the determination of the justiciability of the complaint by the Ombud.[107] Within the strictly ruled-based legal order of this first wave of financial reforms, the strict procedural interpretation did not favour the substantive interests of the appellant or consumer. Under the outcomes-based regulatory order (discussed in Chapter 4 of this thesis) that was to arise during the second wave of reform, this kind of consideration – taking into account the substantive issues in the case – may well have resulted in a different and more favourable outcome for the appellant or consumer.

Although achieving substantive fairness may be inferred from the role that the Ombud is to play, achieving it in practice is hindered by procedural pomp. To achieve a just outcome requires looking beyond procedural fairness and compliance with legislation and the relevant

[105] Supra note 98 at s 20(3).
[106] Ibid.
[107] Ibid.

contractual terms. It would require substantively assessing what is equitable in the circumstances and according to the merits of each case.

4.2. Undesirable Practices

Having assessed the limitations of the FAIS Ombud to address matters of fairness beyond procedural fairness, this section examines the other provision in the FAIS Act where fairness is referenced. Although limited in its practical application, section 34 of the FAIS Act considers fairness in relation to the power granted to the registrar to declare undesirable practices.[108] As noted by several commentators including Daleen Millard and Birgit Kuschke, the FAIS Act does not define 'undesirable practices' but contains principles that guide the registrar in detecting it.[109]

In the period from its inception to its disbanding in 2017 the FSB issued just one undesirable practice notice. The notice known as 'Directive 135A' (2002) reinforced an earlier version which had contained wording that left room for regulatory arbitrage. In the Directive 135A the FSB says:

> After Directive 135 was issued, it has come to the attention of this office [FSB] that some insurers have taken advantage of the statement made in paragraph 4 of Directive 135 which reads as follows: "[…] It should be made clear however that the Act does not compel an insurer to agree to such transfers of business should an insurer not wish to do so. It will remain the prerogative of an insurer to decide whether it wants to allow such replacements […]." The said paragraph endeavoured to give a strict legal interpretation to the situation with regard to specific requests to transfer policies between insurers. However it has been found that insurers have not taken due cognisance of the need to transfer such policies in the market nor

[108] Supra note 4 at s 34.
[109] Daleen Millard and Birgit Kuschke *Insurance Law in South Africa* (2018). See also, Andrew Schmulow 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks' (2017) 25 *African Journal of International and Comparative Law* 3 393; and Gail Fry 'New PPR Rules in Regulatory Reform' (2017) *MoneyMarketing* 6.

> the reasons why policyholders want to effect transfers, to such an extent that the supervisor has no alternative but to intervene.[110]

In the writing of the FSB above, it relied on a strict legal interpretation of its language, as stated above. The original Directive 135 had set out the form and manner of protecting consumers from undesirable practices, which entailed the insurers and policyholders signing the prescribed form and standard contract.[111] The practice so declared undesirable related to insurers refusing client requests to transfer from one compulsory linked annuity policy (typically using proceeds from a retirement fund) to a similar product at another insurer. In essence, an insurer would lock a policyholder into a post-retirement product which paid out monthly based off the net investment value, and did not permit the replacement of the product with that of another insurer of the clients choice (even in cases where a change would benefit the policyholder). The lack of adherence, by insurers, to the diktat outlawing the practice in the first instance was due to seemingly ambiguous wording being taken advantage of and leaving little protection to policyholders. However, this directive, albeit an undesirable practice, was not issued under Section 34 of the FAIS Act, but under Section 50 of the Long-Term Insurance Act (LTIA).[112]

The undesirable provision of the FAIS Act has, in fact, never been invoked, while the undesirable business practice section of the LTIA was repealed in 2013.[113] Had it been that the FAIS Act was utilised, the FSB's authority to promote fairer outcomes in respect of relevant business practices might have been closer to being achieved. However, its failure to promote consumer protection in this particular context, turns on the failure to rely on principles which in practice are harder to enforce.[114] These principles are discussed in turn next.

There are four principles or circumstances listed by the FAIS Act that guide the determination of whether a practice should be designated an undesirable one. The principles are discussed in

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[110] Financial Services Board 'Directive 135 A' available at https://www.fsca.co.za/Enforcement-Matters/Directives/Directive%20135%20A.pdf, accessed on 9 March 2025.
[111] Financial Services Board 'Directive 135' available at https://www.fsca.co.za/Enforcement-Matters/Directives/Directive%20135%2010%20January%202001.pdf, accessed on 9 March 2025.
[112] Section 50 of the Long-term Insurance Act 52 of 1998.
[113] Section 96 of the Financial Services Laws General Amendment Act 45 of 2013.
[114] An additional cause of the lack of reliance on the undesirable practice clause by the FSB is the routine involvement of industry bodies in protecting entrenched business practices. In chapter 4, I discuss the subject of regulatory capture. Here, however, it is noteworthy to state that the impact of Directive 135 and Directive 135A was that insurers lost revenue, resulting in a cautious and controlled approach by industry to all investigations of practices that may be regarded as undesirable.

turn below and are not lacking in their objectives but they do, I would argue, lack sufficient enforceable and interpretable meaning with reference to what it actually is that stands to be protected.

According to the FAIS Act, a practice that either directly or indirectly leads to or might lead to a harmful relationship between financial service providers and clients or the public is an undesirable practice.[115] This seemingly broad principle is arguably in place largely as a measure to manage the reputational risk of an entire industry which reputational risk arises in the first instance from unchecked practices that end up harming the industry's reputation, yet benefit those acting undesirably. That the practice is unchecked, may lead to an impression of tacit condonation on the part of the consumer and even widespread acceptance on the part of the providers, such that the dialectic that is established here results eventually in widespread mistrust of the industry by the 'general public'.[116] However, the principle has limited reach in circumstances where an individual has been hard done by due to the conduct of a financial service or insurance product provider or their representatives and agents, unless such an incident has ramifications for the entire industry. The first principle thus largely concerns itself with practices of systemic concern.

The second principle guides the FSB to a declaration that a practice is undesirable when it unreasonably prejudices a client.[117] The prejudicial outcome is determined with reference to whether it is reasonable or not. Reasonableness is a value-based assessment that determines what is right and good and is less concerned with logical correctness, efficiency, or empirical truth and reliability.[118] In a rules-based legal order, as is applicable in this instance (the FAIS Act coupled with the contractual undertaking), a questionable actor would, for instance, need to present evidence to prove that all disclosures were read and that a client understood and accepted all terms, the effect of which is that such understanding: 1.) excuses possible poor conduct; 2.) considers the conduct as that of a 'reasonable actor'; and 3.) may yet justify a poor or prejudicial outcome. All this, through the tick-box method of adherence to the form prescribed, supposedly demonstrates reasonableness (as it formally complies with the law) and

[115] Supra note 4 at s 34(2)(a)(i).
[116] Supra note 4 at s 34(2) which states: '(2) the practice concerned, directly or indirectly, has or is likely to have the effect of - (i) *harming the relations* between authorized financial services providers or any category of such providers […] and clients or the *general public*' [my emphasis]. See also, Barbara Calvin and Gerhard Coetzee 'A Review of the South African Microfinance Sector' (2010) *Center for Microfinance*.
[117] Supra note 4 at s 34(2)(a)(ii).
[118] Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini Reasonableness and the Law (2009) 5-6. See also Nicholas Rescher 'Reasonableness in Ethics' (1954) 5 *Philosophical Studies: An International Journal for Philosophy in the Analytical Tradition* 4 58.

therefore absolves the actor who may have performed a substantively harmful act from accountability, all on the strength of reasonably good conduct, formally speaking, and the rules-based apodictic conclusion of a non-prejudicial outcome.

Moreover, under a rules-based regulatory order a significant limitation arises in the practical application of determining the reasonableness of a claim of prejudicial treatment. This situation arises because clients who lack knowledge about financial or insurance products must first establish that their experience was unreasonable. In practice, this means they are required to prove they were not adequately informed when deciding to enter into a financial service or insurance contract.[119] A desire for greater financial prosperity oftentimes drives decisions in relation to what constitutes better financial security and a financial legacy – as do the promises offered by financial services and products.

The third principle relates to actions by a financial service provider or their representative that are likely to deceive a client.[120] This, like the other principles, contains a value-based judgment. Its examples are practices such as miss-selling, fraud, and/or misleading advertising – all of which, together with others, are fundamentally the mischiefs that the FAIS Act and the PPR aimed to address. A conundrum that might render this codified principle ineffective in protecting clients from deception is that unless there is a widespread and flagrant disregard for the process and procedure expected by the FAIS Act and its subordinate laws (seen by the FSB as the measure to demonstrate fair and ethical dealings), an assertion that such deception could be substantially hampered by technical compliance with the letter and procedure prescribed by the law. An example of this is where, in the promotion of a dubious product or service by an FSP, it details all the pitfalls to prospective clients in conformity with the FAIS laws and then goes on to determine that the product is nonetheless viable, based on complex calculations. This makes the practice defensible, and the deception is reduced from being a blatantly deceitful act and disregard for the client interest to being a poorly considered product or service. This situation would not invoke section 34. The fourth principle is broad and bold, calling for the denouncement of practices that unfairly affect any client. The fourth principle, valiant as it is, was almost too broad to serve as an effective counterweight to the

[119] The relationship between the parties is contractual and the burden of proof is thus placed on the party who alleges (the complainant). However, in the FAIS Ombud setting a complainant need only present a prima facie case for a reverse onus to be invoked calling on the respondent to present evidence of compliance with the rules, see: case heard by the Financial Sector Tribunal: *D Risk Insurance Consultant CC and Another v Bujok* 2018 *ZAFST 3* (FAB/2018); and Jacques Du Plessis 'Illegal Contracts and the Burden of Proof' (2015) 132 *South African Law Journal* 3 664.
[120] Supra note 4 at s 34(2)(a).

domination of the rule-based regulatory order. In addition, it must be borne in mind that it is only applicable in a very limited context, namely the designation of an undesirable practice in terms of section 34 which itself has limited practical application as suggested above. In short, the law provides no meaningful determinants of normative practice in the industry that would promote fair outcomes for clients and there are no jurisprudential or practical precedents in existence regarding undesirable practices which could be built on or used as a normative basis for the interpretation.

Section 34 continues with an overall conditional provision that a practice would need to meet before it would be considered undesirable:

> [And] that if the practice is allowed to continue, one or more objective of this [FAIS] Act will, or is likely to, be defeated.[121]

The conditional element which follows in section 34 limits the diagnoses of the presence of unreasonable and unfair circumstances by placing the FAIS Act as the commanding and controlling lens through which to determine fairness.

During the period covered in this chapter, the practices investigated for possible designation as undesirable were only the misappropriation of funds by financial institutions, most typically Ponzi and pyramid schemes.[122]

5. Conclusion

In this Chapter, I have presented a close reading of the major movements in the financial services and insurance sector during the post-1994 period and the first wave of reforms. I have sought to demonstrate the limitations of the rules-based order in relation to consumer protection and fairness.

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[121] Supra note 4 at s 34(2)(b).

[122] National Treasury 'A Safer Financial Sector to Serve South Africa Better' (2011) available at https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf, accessed 4 August 2025.

What is revealed in this chapter is that the genesis of laws in democratic South Africa (post-1994) but before the present period of reform (set about by National Treasury's 2011 Safer Financial Services Policy Paper covered in detail in Chapter 4) were aimed loosely at protecting consumers of financial services and insurance products by strengthening integrity and conduct via the PPR and the GCOC. The shift in regulatory focus after the establishment of the FSB and before the current reform period are important, because they lay the foundation for the regulatory change discussed in Chapter 4 and the introduction of fairness as a primary objective for individuals and societies consuming and holding financial products.

Overall, the structure created by the FAIS Act achieved the task of setting up organisational and oversight frameworks for the financial services sector. The introduction of specific roles to be accountable for its law (discussed in the next chapter), penalties for non-compliance, offences, adjudication powers, and the establishment of an ombudsman office, were hallmarks of the regulatory system that the operationalisation of the FAIS Act had brought about. However, the limitations of the FAIS Act would not lie in its ability to bring about structures to facilitate fairness in the financial services industry, but rather in terms of its ability directly to protect consumers from improper conduct by financial services providers and their representatives.

The protection of the consumer in financial services broadly and specifically in long-term insurance where funds of policyholders are held, managed, and invested for the benefits of policyholders was considered in this chapter. Later, the thesis hones in on the economic conditions, affordability and access for persons who are not able to engage with formal financial services and insurance products or transactions, and those who participate but who are incapable of materially changing their socio-economic circumstances – not for want of trying but simply due to the inequality of bargaining power, starting positions, affordability, knowledge, and access – are no lesser part of the consumer community that needs to be protected. Additionally, the common law with respect to fairness or equity, under which contract law can operate for dispute resolution, was majorly underdeveloped in South Africa at the time of the first wave of reforms discussed here, and therefore misaligned to the objectives of the constitution due to decades, arguably centuries, of inequality, precedent and a legal system animated by the 'morality' of routine unfair discrimination.[123]

[123] Juan Carlos Izaguirre 'Making Consumer Protection Regulation More Customer-Centric' (2020) *Working Paper World Bank.*

The following chapters will address the re-orientation of the legal language towards imbuing fairness and addressing asymmetry in consumer relationships. By providing the foregrounding presented here, this chapter intends to present a directly comparable vexing between hard and soft law under the current reform period – the former presented in the style of command-and-control laws and the latter as outcomes and principle-based laws and practices.

CHAPTER 3B: REGULATING CONDUCT: A STEP IN THE RIGHT DIRECTION?

1. Introduction

Doyen of good governance, chair of the King Committee on Corporate Governance, and former South African Supreme Court judge, Mervin King, said: 'regulation cannot create competency or honesty, nor can it stop incompetency or dishonesty'.[1] I deliberately preface this chapter with these words reflective of a sober factual realism. In this chapter, I continue the critique of the financial services rules-based regulatory regime presented in the previous chapters. I, furthermore, present the legal paradigm into which the financial sector laws were born, and within that, the episteme[2] that condoned finite rule-based assessments for fairness and honesty, creating narrow legal pathways and forging an image of ethical financial service providers that act with integrity formally yet, in practice, inhibit the promotion of consumer protection by failing in general to establish substantive fairness.

This chapter provides (in sections 3 and 4) an in-depth review and critique of the roles and conditions created in this regard by the terms of the Financial Advisory and Intermediary Services Act (FAIS).[3] The purpose of the review and critique is to illustrate the narrowness of the approach that was implemented. I argue that through the system of assigning responsibility for the implementation and enforcement of the rules-based order and its proclivity for procedural over substantive fairness to certain individual role players in the industry, compliance with the legal form and assessment attenuated consumer protection. I discuss the personal character, competency and operational requirements expected to be complied with by the designated role players and how, through a checklist of attributes, they are deemed fit and proper (by the law) to render fair financial services. I highlight and critique how, through formality, the legal order considers these role players to be of sufficiently high standing to act in the interest of consumers and, importantly, are then said to represent an ethical financial services industry.[4] As there is limited scholarship that addresses the relevant laws, the chapter

[1] Cited in Silke Colquhoun 'Solid Foundations: A Strong Corporate Regulatory Framework is Vital in Developing a Principled Business Environment' (n.d.) JSE Magazine available at *https://www.jsemagazine.co.za/special-reports/solid-foundations/*, accessed on 10 May 2025.
[2] Michel Foucault *The Order of Things: An Archaeology of the Human Sciences* (1970).
[3] Financial Advisory and Intermediary Services Act 37 of 2002.
[4] A central theme running through Chapter 3 is that, during the first period of legal reform in South Africa's financial services and insurance sector, the focus was placed on regulating form rather than substance. Laws

is based on my own close reading of the laws. Literature related to the subject, particularly the work of Julia Black, that explores the complexities of regulating the professional conduct of persons who provide financial services, is invoked where it is appropriate and relevant.[5]

I conclude the genealogy of this period of financial sector laws by offering an analysis of the predominant legal thinking at the time of enacting the FAIS Act and other financial sector laws over this period, by drawing on case law and scholarly discussion of these cases. In doing so, I demonstrate that while good faith, fairness and principle-based laws and logic may be in focus in financial services today, the debate around attaining substantively fair outcomes in contract law, particularly contracts of adhesion (which financial services and insurance agreements are), is long-running. Notable works and commentary by Jaco Barnard-Naude,[6] Dennis Davis,[7] Tjakie Naude,[8] Andrew Hutchison,[9] and Dale Hutchison[10] have long raised the debate about the future prominence in South African contract law of the notion of contractual

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emphasized tick-box assessments based on specific attributes - such as competency and integrity - using checklists to judge who could be considered moral and ethical actors. The system prioritized procedural and literal compliance with financial sector laws, often at the expense of achieving genuine fairness and substantive outcomes for consumers.

[5] Julia Black is an important figure in the field internationally, since her work has informed the work of regulators in both the UK, where she is based, and South Africa. Notable work cited here include Julia Black 'The Rise, Fall and Fate of Principles-based Regulation' in Kern Alexander and Niamh Moloney (eds) *Law Reform and Financial Markets* (2011) 3; Julia Black 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 1 163; Julia Black 'Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation' (2003) *Public Law* 63; and Julia Black 'Forms and Paradoxes of Principles-based Regulation' (2008) 3 *Capital Markets Law Journal* 4 425.

[6] AJ Barnard Naude has long been a proponent of contractual justice, calling for the reform of South African law of contract to protect and indeed induce substantive fairness for weaker parties in South Africa. See, for instance, Jaco Barnard-Naude 'A Critical Legal Argument for Contractual Justice in the South African Law of Contract' (LLD Thesis, University of Pretoria, 2006); Jaco Barnard-Naude 'Deconstruction is What Happens' (2011) 22 *Stellenbosch Law Review* 1 160; Jaco Barnard-Naudé 'Justice Moseneke and the Emergence of a New Master-Signifier in the South African Law of Contract' (2017) *Acta Juridica* 1 247; Jaco Barnard-Naudé 'Lost in the Fundamental Contradiction: Revisiting Beadica' (2024) 141 *South African Law Journal* 4 666.

[7] Dennis Davis 'Refusing to Step Beyond the Confines of Contract: The Jurisprudence of Adv Erasmus SC' (1985) *Indus. LJ* 6; Dennis Davis 'Transformation: the Constitutional Promise and Reality' (2010) 26 *South African Journal on Human Rights* 1 85; and Dennis Davis and Karl Klare 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *South African Journal on Human Rights* 3 403.

[8] Tjakie Naude 'The function and determinants of the residual rules of contract law' (2003) 120 *South African Law Journal* 4 at 820; Tjakie Naude 'Towards augmenting the list of prohibited contract terms in the South African Consumer Protection Act 68 of 2008' (2017) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 1 at 138; Tjakie Naude 'The preconditions for recognition of a specific type or sub-type of contract-the essentialia-naturalia approach and the typological method' (2003) *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 3 at 411; Tjakie Naude and Jacolien Barnard 'Enforcement and effectiveness of consumer law in South Africa' in Hans-W. Micklitz and GenevièveSaumier (eds) *Enforcement and Effectiveness of Consumer Law* (2018) at 565.

[9] Andrew Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) *The Journal of Commonwealth Law* 1; Andrew Hutchison 'Decolonising South African Contract Law: An Argument for Synthesis' in Luca Siliquini-Cinelli and Andrew Hutchison (eds) *The Constitutional Dimension of Contract Law: A Comparative Perspective* (2017) 151.

[10] Dale Hutchison 'From Bona Fides to uBuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 1 99.

justice, its relation to fairness and to other related concepts like uBuntu and the (reconstituted) *boni mores.*

However, the judiciary in cases like *Brisley v Drotsky*[11] and *Afrox Healthcare BPK v Strydom*,[12] both pronounced on in 2002, the same year in which the FAIS Act was promulgated, explained away arguments for substantive assessment and a more communitarian normativity to enter the law of contract, preferring to enforce the sanctity and certainty of contract law by hard-coding *pacta sunt servanda* into its legal application and avoiding substantive consumer protection in the general principles and policy of the South African law of contract, on the basis that it would cause 'unacceptable chaos and uncertainty'.[13] The adoption of a rules-based regime in the financial sector, I argue, is both legible and understandable against this backdrop as the prevailing legal paradigm overall, that was (and to a certain extent, at least, still is) enforced by the judiciary. From this point of view, the FAIS Act and other financial sector laws, like the fit and proper requirements (discussed in Section 3), would risk being adjudicated as overly progressive if it was to veer away from the rules-based preference as the general character of the principle and policy of the South African law of contract.

2. The Dominance of the FAIS Act

At the time of enactment, the FAIS Act was a ground-breaking law.[14] Amendments to other laws resulting from the promulgation of the FAIS Act showed the regulatory intent to supervise and regulate all aspects of the non-banking financial services sector.[15] The FAIS Act set definitions that permeated the non-banking financial services and established a new language and set of designations as it cast its regulatory net over the financial services sector. Licensing and registration rules and processes enabled the FSB to exert regulative control over any person or activity in the financial services sector and that required such persons to be registered or formally approved by the Registrar legislatively compelled to follow an administrative and

[11] *Brisley v Drotsky* 2002 4 SA 1 (SCA).
[12] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA).
[13] Supra note 11 at para 21.
[14] Supra note 3.
[15] Supra note 3 at s 45 and Schedule. FAIS notably impacted the Pensions Fund Act 24 of 1956; Long-term Insurance Act 52 of 1998; Short-term Insurance Act 53 of 1998; Collective Investment Schemes Control Act 45 of 2002; Financial Services Board Act 97 of 1990; Stock Exchange Control Act 40 of 2001; and Drugs and Drug Trafficking Act 140 of 1992. The dominant amendment to other laws were around the definition of a 'financial services provider' and a 'representative'.

bureaucratic process.[16] The FAIS Act introduced specific designations to professionalise the financial services industry, namely the 'key individual',[17] the 'compliance officer'[18] and the 'representative'.[19] All financial service providers (referred to interchangeably as an FSP or provider) had to ensure that those appointed in the designated roles demonstrate a specific set of personal character traits, qualities, and qualifications. These specifications were set out in the Fit and Proper Requirements, published at the same time as the *General Code of Conduct for Authorised Financial Services Providers and Representatives*[20] (GCOC), and also in a laws subordinate to the FAIS Act.[21] The subordinate laws represented a step towards market conduct regulation which itself was the product of a regulatory drive that was later amplified in the second regulatory reform period (discussed in the following chapter).

The roles, responsibilities and organisational structures imposed on providers were intended to contribute toward the realisation of two principal objectives. The first was to augment the professionality of the industry. The second objective dovetailed with the first in that the augmented professionality of the industry was widely regarded as a step aimed at meeting this second objective, namely the protection of consumers of financial services and products.[22] Together, these regulatory efforts thus represented a step towards regulating ethical and professional conduct more comprehensively, and they demonstrated especially a newfound awareness on the part of the regulators that the conduct of providers was pivotal to ensuring business practices that would protect consumers.[23]

Yet, the somewhat inquisitorial and heavily bureaucratic process that these laws created, as discussed in part A and B of Chapter 3, missed the mark in terms of establishing a culture of more consumer-focused business practice. It is suggested here that both areas of the legal order that now prevails, the first part discussed in Chapter 3, part A – which covered rules

[16] Erik Bähre 'The Janus Face of Insurance in South Africa: From Costs to Risk: From Networks to Bureaucracies' (2012) 82 *Africa* 1 150.
[17] Supra note 3 at 1(1).
[18] Supra note 3 at 17(1)(a).
[19] Supra note 3 at 1(1).
[20] BN 80 GG 25299 of 8 August 2008, promulgated under s 16 FAIS.
[21] BN 106 GG 31514 of 15 October 2008, promulgated under s 6A FAIS (FPR).
[22] See also Megan Collins 'Intermediaries' Duties to Disclose Onerous Clauses to Prospective Policyholders' (unpublished LLM thesis, University of Johannesburg, 2017).
[23] Regulatory awareness of the centrality of conduct to good business outcomes can be noted in: Financial Services Board 'What is the Purpose of the FAIS Act? Protecting the Consumer' available at https://www.fscamymoney.co.za/Publications/FAIS%20Act%20-%20Protecting%20the%20consumer.pdf, accessed on 3 December 2024; and Financial Services Board Bulletin 'What constitutes "Advice" in Terms of the FAIS Act' (2008) *FSB Bulletin Third Quarter*, available at https://www.fsca.co.za/News%20Documents/2008%20FSB%20Bulletin%20Third%20Quarter.pdf, accessed on 3 December 2024. See also, supra note 3 at s 16 (b); and supra note 20 at Part V s 6(a).

to be complied with to fulfil financial services – and the second part concerning the conduct, and the requirements placed on individuals offering financial service(s) (addressed in this part of the chapter), actually did no more than entrench the formalistic "tick-box" rules-based order in the South African financial services sector.[24] As with the disclosure frameworks discussed in the previous chapter, the rules that apply to individual conduct do not indicate clearly a way to the achievement of substantively fair consumer outcomes. For instance, if an individual ticked all the boxes required for recognition as a fit and proper provider, it is taken as sufficient proof that such an individual is of high social and moral calibre, even if in practice they are not advancing inclusive or fair outcomes for their customers. The requirements represent, in this way, a false safety net for the end consumer because the procedure to be complied with precedes and to a significant extent stands independent from, the substantive outcome - if the procedure is complied with the regulated definition of a lawful act has been met, irrespective of whether the outcome that has been achieved is capable of a characterisation as substantively fair.[25]

3. Regulating Professionalism: The Path to Fairness?

The FAIS Act introduced a set of roles and responsibilities for individuals working within the financial services sector. All providers or FSPs were to formally appoint persons in these roles to meet the responsibilities imposed by the Act. The Act defined an FSP as a business offering people financial advice and/or rendering an intermediary service as a regular part of the activity it engages in.[26] An FSP can take the form of a natural or juristic person and may enter a contract with a client on behalf of a product supplier where the FSP is mandated by a financial product supplier like an insurer, or acts independently.[27]

As indicated in the introduction, the FAIS Act formalised the duties of the main persons involved in financial services into the three role-players of key individual, compliance officer

[24] The ineffectiveness of tick-box formalities was raised by Mervyn King (lead author of the King reports on corporate governance) in his assessment of the conduct of directors charged with overseeing ethical business practice. The King Codes on corporate governance suggests that entrenching a much more integrated method is necessary to realise good and responsible corporate action and that this requires that principles, not necessarily rules, are to be complied with. See: J M Judin 'The King Reports and the Common Law in South Africa' (2020) 11 *Journal of Global Responsibility* 2 167.

[25] It is important to note that actions that meet the definition of undesirability, as discussed in the previous chapter, would not count in this circumstance.

[26] Supra note 3 at s 1 definition of 'financial services provider'. Note that provisions regarding the remuneration of the financial services provider are left to the appropriate product laws, such as the Long-term Insurance Act's regulations on commission payment.

[27] Supra note 3 at s 1.

and representative. The FAIS Act established a two-tier structure in a financial services business, with the key individual at the top and the representative below it. The compliance officer is responsible to monitor overall compliance with the FAIS Act, holds the key individual to account for ongoing compliance with the Act, reports to the Registrar of the FSB and monitors the services rendered by the representative.[28]

The three roles and the extent of their duty to protect consumers and professionalise the industry are discussed below.

3.1. Key Individual

Under the licensing, registration and professional protocols of the FAIS Act there is an important role that is tasked with running a financial services business and individuals fulfilling such a role within an FSP are called key individuals.[29] Section 1 of the FAIS Act defines the key individual as follows:

> In relation to an authorised financial services provider, or a representative, carrying on business as –
>
> (a) A corporate or unincorporated body, a trust or a partnership, [a key individual] means any natural person responsible for managing or overseeing, either alone or together with other so responsible persons, the activities of the body, trust or partnership relating to the rendering of any financial service; or
> (b) [In a] corporate body or trust consisting of only one natural person as member, director, shareholder or trustee, [a key individual] means any such natural person.[30]

From the definition, the key individual is clearly required to operate at a level where it exercises control and oversight over the provider and ensures compliance with the prescribed procedures when rendering financial services. However, there exists no specific assigned duty on the part

[28] Supra note 3 at s 17.
[29] Supra note 3 at s 1 definition of 'key individual'.
[30] Ibid.

of the key individual to protect the consumers of its services, other than by way of such a duty arising strictly indirectly as a by-product of compliance with the GCOC, the FAIS Act and the FPR.

This said, matters affecting clients, such as business processes, pricing, product design, distribution, and remuneration of intermediaries, are also expected to be overseen by the key individual.[31] Critically, it is the process and not the individual impact on clients that the key individual is tasked with carrying out. In addition, the administrative process applicable to registering a key individual requires that a person appointed as a key individual must meet specific personal character and education specifications in order to hold office and oversee financial services.[32] The issue of licences to an FSP to lawfully trade as such is conditional upon an evaluation of its key individuals and the licenses may be revoked if the fit and proper requirements of honesty, integrity, competence or operational ability (which are discussed below) are not met.[33]

In this sense, then, oversight by the key individual could easily fall into the trap of being to no more than conformity with a "tick-box" system of compliance where the process, rule or procedure is the priority. The role of the compliance officer (discussed next) also operates within the paradigm of form over substance as it monitors the effectiveness of the key individual's oversight and ability to institute the structure dictated by the FAIS Act. In this paradigm, within which substantive client matters are glossed over and procedural elements are of primary concern, only wayward activity and improper processes as determined by a key individual are expected to be reported to the FSB as instances of non-compliance. However, where there is conformity with the process dictated by the laws in play, and there is a substantively unfair or poor outcome for the consumer at the same time, there is no expectation to report, or regard, such a situation as an instance of non-compliance.

It is thus no surprise that in the second wave of regulatory reform addressed in Chapter 4, the central focus of the new laws looks beyond the procedural form to the substantive impact upon consumers. As a consequence thereof, the designated key individual role will be replaced

[31] Daleen Millard and Wendy Hattingh *The FAIS Act Explained* (2016) 2nd Edition 80.
[32] Supra note 3 at s 8; and supra note 3 at Part IV.
[33] Supra note 3 at s8 (4), (5), (6) and (7).

with that of a 'key person', who will be placed under a far greater responsibility to actively protect consumers and realise fair consumer outcomes.[34]

3.2. Compliance Officer

Section 17 of the FAIS Act sets out the regulatory requirement that all businesses rendering financial services must have a compliance officer. The primary function of this role is to monitor adherence to the FAIS Act, particularly in relation to procedures prescribed by subordinate laws such as the GCOC.[35]

Like the role of the key individual, the compliance officer would need to apply for approval to be designated as such by demonstrating proof of acceptable competencies to take up duties and be accountable to the Registrar and the FSP in fulfilling its role to monitor compliance with the FAIS Act.[36] Furthermore, the compliance officer would need to, upfront and on an ongoing basis, meet the honesty and integrity requirements applicable and explicitly confirm that it was not a financial delinquent (the latter is important as the regulator considers compliance officers in financial strife to be more at risk of making themselves guilty of unethical conduct).[37]

The compliance officer was obligated to submit reports to the FSB periodically and specifically on occasion of having identified areas of material non-compliance while carrying out its compliance related duties.[38] Periodic reporting was, once more, in the form of a checklist and as such indicative of the formal application of a rules-based approach discussed in the previous chapter.[39] In the second wave of post-apartheid financial services legal reform, the legislated section 17(4)(a) requirement for compliance officers to submit annual compliance reports came to be considered inept given its formal approach to assessing procedures and

[34] Financial Sector Regulations Act 9 of 2027, Section 1. See also, sections 7, 8 and Part 5 of the Conduct of Financial Institutions Bill (2020) which tasks the 'key person' with, amongst others, adherence to conduct standards, changing the business culture to focussed on treating customers fairly, ensuring that the customer needs are met, and promoting fair, transparent financial services which is easy for clients to understand. For relevant academic discussion on this see Lynette Visagie-Swart and Vivienne Lawack 'An Overview of the First Draft of the Conduct of Financial Institutions Bill and the Potential Impact on the National Payment System in South Africa' (2010) 32 *SA Mercantile Law Journal* 1 129.
[35] Supra note 3 at s 17, and supra note 20.
[36] Supra note 3 at s 17 (2). See also Vivienne Lawack-Davids 'Mind the Gap – Increasing Compliance – Burden and Regulatory Misalignment (2011) *Orbiter* 712.
[37] Supra note 20. See also Section 4 below of this chapter; and FAIS Act Board Notice 127 of 2010, *GG* 33537.
[38] Supra note 3 at 17(4).
[39] Ibid.

processes stemming from the FAIS Act.[40] Thus, from 2018 onwards, the Financial Sector Conduct Authority (FSCA) – which replaced the FSB – suspended the application of section 17(4)(a) to replace it with the requirement of a conduct of business report (CBR). The CBR was to be developed and, when it comes into being, is to be outcomes and principles-focused, leaving no room for purely formal compliance reports as contained in the FAIS Act.[41] It is significant that in the Conduct of Financial Institutions Bill (discussed in Chapter 4 as the replacement to the FAIS Act) the role of the compliance officer is removed altogether, both as a regulated role and from the legal lexicon of financial services regulation. This constitutes a clear sign that the role and the nomenclature of 'compliance' is now considered inadequate. Under the rule-oriented regulation prevalent for the period under review in chapters 3A and 3B, the compliance officer played a key role in entrenching the culture of tick-box compliance. It provided assurance and evidence of law-abiding conduct without, at least arguably, reaching substantively improved client protection or results in the financial services market.

Notably in this regard, the compliance officer was not designated in any area of financial services before the enactment of the FAIS Act. The legislated role and duties of the compliance officer were therefore indicative of a new seriousness with which the regulator approached compliance with the FAIS laws and of the likely harm that it considered may be experienced by consumers under circumstances of non-compliance.[42] Yet, non-compliance was only regulated insofar as it could be monitored as a process, policy or disclosure document.[43] The 'softer' issues in relation to how clients were treated, substantive consumer protection and substantively fair outcomes for such consumers were not what the compliance officer would be tasked to monitor and report on.

Compliance, as a word, evokes a sense of rigidity and requires certainty that something is evident and assessable. The tick-box and checklist method as actually resulting in an impediment to consumer protection and hence as the justification for moving away from rule-based to principle and outcomes-based laws (as proposed in Chapter 4), accordingly emerges. Linguistically, "to comply" indicates a state of being, one that is certain and evident at a point

[40] FSCA Communication 13 of 2022 (FAIS); FSCA Communication 16 of 2021 (FAIS); FSCA Communication 17 of 2020 (FAIS); and FSCA Communication 22 of 2019 (FAIS).
[41] Ibid.
[42] For a historical review of the role of compliance officers, in the context of the US, UK and Germany, see Katrin Kanzenbach 'The Role of the Compliance Officer – A Comparison of US, UK and German Law and Practice' (unpublished PhD thesis, Universidad Catolica San Antonio, 2017).
[43] Supra note 3 at s 17(1) and 17(3).

in time and, therefore, obedient to a rule (as opposed to uncertain, fluid, or dynamic).[44] It is at least partly because of this sense that compliance involves no more than a formal and strict adherence to the applicable rules only, that the King Code (a key framework governing corporate good governance issued by the South African Institute of Directors) adopted new language, moving away from the verb 'comply' to a preference for 'apply'.[45] Applying a principle or law necessitates something far more substantive than tick-box compliance. In contradistinction to the King Code, the regime established by the FAIS Act had, for the period under review, not progressed beyond narrowly expecting compliance officers to monitor procedural processes with little to no focus on substantive issues like unfair or poor client outcomes.

Here it is necessary to involve the literature on the advancement of good conduct and ethical acts by businesses. According to Thakhathi, de Jongh and Langeni, businesses need to meet at least the following attributes in order to be evaluated as committed to good conduct and ethical practices more broadly: ethical pragmatism; cultural transformation (of corporations); risk mitigation; improvement in ethical decision-making and adherence to recommended practices for better outcomes; and governance and societal acceptance.[46] Considered from within this framing, the role of the compliance officer was clearly ineffective, as it requires only that the officer looks at how a provider or a provider's service showed adherence to a rule, no matter the quality of the substantive outcome as a result of the rendering of the service.

The culture in the sector has entrenched tick-box compliance as the form of adherence inextricably bounded up with and expressing rules-based regulation. The approach overvalues

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[44] Merriam-Webster 'Comply' in *Merriam-Webster Online* (2024) available at https://www.merriam-webster.com/dictionary/comply , accessed 4 August 2025.

[45] The evolution of adherence to the King Code (authored by the Institute of Directors) went from 'Comply or Explain' under King I and II, to 'Apply or Explain' under King III and then to 'Apply and Explain' in King IV. Institute of Directors 'King I Report' (1994) available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/King_1_Report.pdf, accessed 4 August 2025; Institute of Directors 'King II Report' (2002) available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/94445006-4F18-4335-B7FB-7F5A8B23FB3F/IoDSA_King_II_web_version.pdf , accessed 4 August 2025; Institute of Directors 'King III Report' (2009) available at https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf, accessed 4 August 2025; and Institute of Directors 'King IV Report' (2016) available at https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf, accessed 4 August 2025.

[46] Andani Thakhathi, D. De Jongh and Phumzile Langeni 'What's in a King? Unveiling the Pragmatic Micro-perceived Value Attributes of a Fulfilling Corporate Governance Code for Responsible Sustainable Development' (2021) 4 *Journal of Global Responsibility* 12 469.

both the particular form of certainty that such compliance is associated with along with its expediency and this above assessing the merits of the mischief or poor market conduct.[47] Checking whether a provision, a clause, or a process has been complied with compared to the prescript to which it is meant to adhere, is the only job of the compliance officer. Therefore, it follows that the rule is set and the check to ensure the rule is adhered to, is a compliance check by the compliance officer. It is suggested that such narrow monitoring of procedures by the compliance officer has a muted impact on consumer protection – in the same way as a focus on procedural fairness alone prevents assessment in terms of a broader substantively fair outcome. In essence, the compliance officer role and function was severely limited in its ability to positively influence consumer protection since it was precluded, via the tick-box approach, from monitoring the application of a principle in abstract language like fairness and integrity.

3.3. The Representative

The FAIS Act defines a representative as 'any person, including a person employed or mandated to by such first-person, who renders a financial service to a client for or on behalf of a financial services provider, in terms of conditions of employment or any other mandate'.[48] In practice, the representative is the person who sells and transacts in financial products.

Whilst approval as a key individual and compliance officer rests with the FSB, no express regulatory approval is required for designation as a representative. The FSP must itself assess a proposed representative's compliance with the statutory fit and proper requirements and, if satisfied that they are met, act accordingly by registering the representative with the FSB. Where a representative is caught acting dishonestly it is expected that such a representative will be debarred and then barred from rendering services in the sector for five years.[49] Debarring involves the relevant FSP informing the FSB that the representative in question is no longer fit and proper to work as a representative.[50]

As with the compliance officer and key individual, the representative must adhere to the honesty, integrity and competence (qualification and regulatory exam) requirements.[51] The

[47] International Association of Insurance Supervisors 'Application Paper on Approaches to Conduct of Business Supervision' (2014) 16.
[48] Supra note 3 at 1(a).
[49] Supra note 3 at s 14, supra note 19 and s 9 of FAIS BN 194 of 2017.
[50] Supra note 3 at s 6 and s 14.
[51] Supra note 3 at s 6A and 8A. See also sections 4.1. and 4.2. of this chapter below.

fit and proper requirements are intended to sift out existing persons who contributed to the de-professionalisation of the financial services industry and they would also apply to new entrants to the sector who wish to be appointed as representatives. Meeting the entry criteria for a representative would result in them being deemed by the sector and its regulators as a person of high calibre and standing.[52] Indeed, the professionalisation of representatives was believed at the time of the enactment of the FAIS Act to lead to better client protection through compliance with the FAIS laws.[53]

From the above it should be clear that before appointment as a representative, compliance with the fit and proper requirements must be demonstrated.[54] Rendering financial services as a representative without registration or without being fit and proper is unlawful.[55] However, the absence of registration with the FSB, or authorisation as an FSP, did not make a transaction or contract concluded between a product supplier and a client unenforceable simply because of the absence of formal registration or authorisation.[56]

In practice, the representative is mandated directly by a product supplier or acts independently – the industry parlance for the former is an "adviser", and the latter, a "broker" – both intermediating between a client and product supplier. The proliferation of intermediating arrangements between product suppliers and representatives who peddle the former's products led to conflicts of interest, churn and poor client outcomes, mostly due to remuneration structures that ultimately incentivised, rewarded and financially benefited the representative for acquiring more policies on behalf of the product supplier. National Treasury has termed this 'triangular association' – referring to the relationship between a representative and a client where the representative provides financial advice to a client (as a service to that client) but is paid by the product supplier (for example, insurer) for the service and the intermediation so practiced then results in the entering into of a transaction and contract between the client and the product supplier. The normative consequence of the triangular association is that the intermediary is neither encouraged nor incentivised to act in the best interest of the client and is instead more encouraged simply to sell a product for financial gain. Such conduct of financial services providers as a part of sustaining themselves through generating income from fees, led to what is considered 'churning', whereby providers pursue more income by providing

[52] Julia Black 'Regulation, Education and Training' (2012) *Legal Education and Training Review Symposium*.
[53] Henk Kloppers 'The Regulation of Advice Within the Financial Services Sector' (2007) 1 *Obiter* 28 133.
[54] Supra note 20.
[55] Supra note 3 at s 7.
[56] Supra note 3 at s 7(2).

advisory services which lead to new financial contracts being entered into multiple times and potentially to the detriment of the consumer who is unaware of the underlying motivation to take up or replace a financial product (as the client pays no fee for the advice and financial service from the representative).[57] This is the typical conflict that comes about, as highlighted in section 16 of the FAIS Act, when it calls on representatives 'to act with circumspection and treat clients fairly in a situation of conflicting interests'.[58]

Overall, the structure to support consumer protection via the conduct of representatives, conformed to the administrative and bureaucratic (tick-box) system of governance pervasive at the time and as discussed in the previous chapter. The GCOC and FPR were the primary legal instruments that regulated the rendering of financial services by representatives.[59] In combination, they placed an obligation on the representative, and indeed the entire industry, to act according to what the FAIS laws prescribed and consequently conduct their dealings in financial services in an ethical manner. However, as I have shown, the procedures dictated by the FAIS laws critically did not go beyond the embedding of processes. The objective of substantively achieving consumer protection and fair financial services remained largely remote. A representative only had to show compliance with the process or rule in order to protect themselves, and not necessarily the client as well.

What follows is a reflection on the fit and proper requirements applicable to the role players discussed above.

4. Conditions for Fit and Proper Financial Services

Section 6A and 8 of the FAIS Act directs all those in its remit to the rendering, overseeing, and monitoring of financial services activity by "fit and proper" individuals.[60] Around six years after instituting the FAIS Act, the Determination of Fit and Proper Requirements for Financial Services Providers (FPR) was issued under Board Notice 106 of 2008.[61] Before the FPR were promulgated, persons registered as key individuals and representatives were granted a grace

[57] National Treasury 'A Safer Financial Sector to Serve South Africa Better' (2011) available at https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf, accessed 9th December 2024 at 44.
[58] Supra note 3 at s 16.
[59] Supra note 20 and supra note 21.
[60] Supra note 3 at s 6A and s 8.
[61] Board Notice 106 of 2008 (supra note 20) would be replaced by Board Notice 194 of 2017 as discussed in Chapter 4 of this thesis.

period to comply with its provisions, following which the FPR instructed them to demonstrate their honesty and integrity,[62] competency,[63] experience,[64] qualification,[65] completion of a regulatory exam,[66] and eventually also their ongoing development and learning,[67] at a minimum.

The designated roles and the regulatory expectation of fit and proper persons, laid a yardstick under the FPR to measure human attributes and character by setting rules which were to constitute together the general duty of an FSP. The FPR notes that 'a provider must at all times render financial services honestly, fairly, with due skill, care and diligence, and in the interests of the client and the integrity of the financial services industry'.[68] The focus of the FPR was to characterise and determine an assessment and measurement of how to discharge this general duty.

Three areas of the FPR are considered in this thesis because they are applicable across all areas of the financial services sector and exemplify the effort of the rule-based order to regulate beyond form and structure. These areas are: honesty and integrity; competence (level of education and formal qualification/s one holds); and operational ability.

Due to the sparse academic review of the FAIS Act and its subordinate laws, including the FPR Notice,[69] scholarly review from the United Kingdom is being relied upon in an effort to contribute meaningfully to the discussion about the regulation of human conduct in financial services in terms of the South African dimensions of such regulation. I draw specifically on the extensive work of Julia Black (as lead author with others in some instances) in this regard, because this work is presently regarded as representing leading literature in this field.

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[62] Supra note 20 at Part II. In Chapter 5 of this thesis the operationalisation of abstracted language like 'integrity' and 'fairness' are discussed and the absence of their actualisation in post-Apartheid South African legal discourse is examined.
[63] Supra note 20 at Part III.
[64] Supra note 20 at Part IV.
[65] Supra note 20 at Part V.
[66] Supra note 20 at Part VI.
[67] Supra note 20 at Part VII. In the case of a key individual and compliance officer, one must also demonstrate Financial Soundness to be approved and duly regarded as being fit and proper. Additionally, there was a deferred compliance expectation to perform Continuous Professional Development (CPD), where persons appointed demonstrate that they're continually educating themselves on industry best practices; however this would not be put in place until 2015.
[68] Supra note 20 at Part II, s 2.
[69] Supra note 21.

4.1. Honesty and Integrity

To determine whether a person is honest and has integrity, the FPR designed an inquisitorial process by checking whether in the prior five years a provider had been:

i. found guilty in criminal proceedings of having acted fraudulently, dishonesty, unprofessionally, dishonourably or in breach of fiduciary duty;

ii. found guilty of a sufficiently serious act, that impugns the honesty and integrity of a person, by a recognised statutory body or a voluntary professional body of an act of dishonesty, negligence, incompetence, or mismanagement; or

iii. denied membership to a professional body due to an act at ii above.[70]

Attesting that one is not faced with the above would be sufficient to demonstrate honesty and integrity in line with regulatory expectations. Arguably, this did not set the benchmark to declare someone fit to hold a position and act with integrity as particularly high. It clearly did not and could not prevent incidents of dishonest conduct from occurring. The effectiveness of the checklist (to be declared honest and have integrity), this thesis argues, was not sufficient to sieve out persons who might act dishonestly and without integrity. How, then, can one better assess the honesty, integrity and leaning of a person?[71]

Julia Black, with Martyn Hopper and Christa Band, posit that integrity, much like fairness and suitability, are qualitative terms regulated most effectively through principles that avoid having to set out every likely permutation of behaviour or conduct which could contravene the spirit of the law.[72] Applying the honesty and integrity checklist under the FPR to a particular person currently does not result in there being a direct correlation between the desired virtues expressed by the regulator in the checklist, on the one hand, and the actual behavioural standards meant to be attained in order to regard one as meeting the spirit of the

[70] Supra note 20 at Part 2, s 2.
[71] See also L Wessels 'Honesty and Integrity – How are these Qualities Assessed in Terms of the FAIS Act?' (2003) *FSB Bulletin (Fourth Quarter)* at 2.
[72] Julia Black, Martyn Hopper and Chirsta Band 'Making a Success of Principle-based Regulation' (2007) 1 *Law and Financial Markets Review* 3 191.

law and the general duty, on the other. Indeed, the positioning of how one is regarded as honest and as holding integrity, departs from the lowest denominator of the absence of a criminal record and / or the absence of the denial of professional membership. In this sense, it is less aimed at substantively understanding the conduct and the behavioural risks of the actors involved.

This thesis will not assess the regulatory success of excluding dishonest actors in the manner prescribed by the FPR. However, part of the argument of this thesis is that an interdisciplinary approach is required in order to regulate for substantively fair and just outcomes. If the FPR wanted to understand and regulate ethical conduct of individuals, it would require, for instance, a psychographic or psychological assessment of how a provider would perform in times of conflict, especially so when having to balance client and self-interest,.[73] However, a checklist of compliance with rules aimed at attesting to the absence of culpability with reference to severe cases is not a clear demonstration of an honest and ethical person.[74]

Beyond this there is a need for a convergence of disciplines to realise the principle aspiration to protect consumers from bad actors. Indeed, in the context of good conduct (acting honestly and with integrity), an interdisciplinary approach to law-making is something which this thesis argues is the future of effective regulation.[75] However, at the time of the FPR coming into operation, legislators and regulators wanted certainty that promoted expediency and this became the main feature of the rule-based order.[76]

Although the check for honesty and integrity was but one leg of the overall fit and proper requirements under the FPR, it is likely the most critical. If honest persons with integrity do their best to uphold consumer rights and discharge their general duty and are allowed or expected to go beyond the form and structure of the legal order to realise consumer protection, then the principal objectives of the FAIS regime might have been achievable. However, the

[73] J Barnard Naude argues that ethical obligations when entering into contracts flow in the first instance from the identity and relatedness of a person to society rather than from consent or agreement in a formalistic manner. Therefore, imposing rules related to the protection of the consensus as a design for ethical conduct misses the psychological relationship that people have with justice and law, conjuring false legitimacy of potentially unjust or unfair action. A need therefore exists to understand more holistically the persuasion of individuals to act with integrity and fairness when entering into contractual relationships. Supra note 6 at Barnard-Naude (2006). See also, P Selznick 'The Idea of a Communitarian Morality' (1987) 75 *California LR* 445.

[74] In Chapters 4 and 5 of this thesis the role of the individual and community to seek out the good that law can regulate toward and using normative and constitutional interpretation to achieve it, is explored.

[75] In Chapter 5 of this thesis I critique the incoming laws for its appearance as law written by lawyers and then requiring consistent understanding and application.

[76] In Chapter 5 of this thesis, I discuss principles and outcomes-based laws, the explicit advancement of normative practices as well as fair and ethical outcomes that are, in the present zeitgeist, achievable through the design of advanced technologies.

tick-box rule-based order did not expect the relevant actors to shift at all in a substantively ethical direction beyond the prescribed processes of the GCOC and the PFR.

4.2. Competency Requirements

The second fit and proper requirement under the FPR referred to a person's competency to act in financial services.[77] This requirement is deduced from the general duty's expectation that providers act with skill, care and diligence. The competency requirements used education levels as the index to assess whether to permit a provider to work in the financial services sector, thus linking knowledge and education to ethical conduct.

Competency is not a defined term in the FAIS Act or the FPR and it is instead conflated with the level of education one has received. Accordingly, a list of acceptable qualifications was published under the FPR, setting out the certification a person must hold and the regulatory exams a person must successfully sit in order to tick the competency box and pass this leg of the fit and proper assessment. Notably, as Daleen Millard and Wendy Hattingh point out, 'only full [that is, completed] qualifications are recognised' by the law.[78]

In Julia Black's consideration of the role of education and training for individuals with a professional legal duty, she argues that the logic of legislation setting qualification benchmarks is a cornerstone for the promotion of both professional conduct and regulatory compliance.[79] Black, however, holds the view that professionalism, and not competence alone, should be the benchmark through which the aims of a law can be achieved.[80] In her assessment, Black argues that competence concerns itself with technical knowledge and understanding only, whereas, professionalism implies the invocation of a standard above competence and encompasses an ethical commitment to act with care, skill and substantive fairness.[81] Conversely, a distinction of this kind is not found in the legal discourse that was inaugurated by the FAIS Act, despite the aims of the law being to professionalise the industry.[82]

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[77] Supra note 20 at Part III.
[78] Supra note 31 at 102.
[79] Supra note 52.
[80] Supra note 52 at 2. See also, Julia Black 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 2 137; S. Hilton and H. Slotnick 'Proto-professionalism: How Professionalisation Cccurs Across the Continuum of Medical Education' (2005) 39 *Medical Education* 1 58; and Julia Black 'Constitutionalising Self-regulation' (1996) *Mod. L. Rev.* 59 24.
[81] Supra note 52 at 2.
[82] Supra note 3.

Black continues to elaborate a position according to which professionalism comes with a sense of public duty and responsibility that is not necessarily equivalent to holding a qualification.[83] Unlike an education level or certification, professionalism is learned through socialisation and modelling behaviour of other professionals and not only through memorising the rules of conduct or passing an exam.[84] According to Black, then, it is the combination of education *and* professionalism that leads to better conduct.

The emphasis of the Fais Act regime on education levels and registration of professionals with an industry body, takes its cue from the medical fraternity where suitably registered and educated persons are simultaneously expected to act with a high standard of care for their patients. This approach was broadly considered to be transferrable to financial services.[85] However, the relationship between a client and an FSP is different to the relationship between a medical doctor and a patient. For one, the standard of care for human life and well-being is not as pronounced or critical in relation to survival in the financial services context where the care for a financial transaction ultimately serves the purpose of economic gain for (arguably, at least) both parties. The comparison fails at the premise in terms of which natural human instinct to care for the physical needs of humans being is equated to care about the upkeep of good repute in the market and the display of competence. A better comparison can be taken from the wider legal fraternity, for example, in sectors like banking, where qualified professionals are susceptible to disregard for appropriate ethical conduct and instead pursue personal gain beyond ethical constraint, ultimately ending up affecting the clients they are meant to serve detrimentally.[86]

With regards to what motivates individuals to behave professionally in a way that serves a wider public good, Black discusses three key motivations. Adherence to competency laws, she asserts, is motivated by: 1. self-interest, 2. moral agreement, and 3. social pressure.[87] The self-interest motive relates to profits or other matters of self-satisfaction (such as getting a qualification to better one's social status). Moral agreement is a belief in the system's capacity, or the pursuit of a mission within such a system, to promote the good, based on the premise

[83] Supra note 52 at 3.
[84] Supra note 52 at 3.
[85] Ibid. See also Julia Black 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 1 163.
[86] Supra note 52 at 1.
[87] Supra note 512at 3. See also, Julia Black 'New Institutionalism and Naturalism in Socio-legal Analysis: Institutionalist Approaches to Regulatory Decision Making' (1997) 19 *Law & Policy* 1 51; and Julia Black 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 2 37.

that goodness or a "good" will come from it (such as the "good" of adhering to efficient and transparent business practices).[88] Regarding social pressures, a herding effect makes the general adoption of a practice possible and makes it less likely to have many outliers. Black argues that generally prevailing attitudes towards laws are influenced by these factors.[89] The modelling of ethical behaviour and outcomes that are capable of societal acceptance, this thesis argues, would be the most likely regulatory intervention that can yield improved industry conduct.[90]

The competency requirements set out in the FPR also created then insufficiently justified perception that educated, well-trained and qualified people are more willing to give up self-interest in favour of acting in the consumer's interest. Yet, given South Africa's history, where black South Africans were barred from higher education, the education levels and qualifications set out under the FPR effectively excluded many black South Africans from entering the financial services sector. Without a diverse financial services profession, representative of all South Africans, the sector is hamstrung from effectively contributing to the transformation of the broader economic landscape. Thus, in placing exclusive value on qualifications as a proxy of competence and ethical attributes, the laws effectively excluded many historically disadvantaged South Africans from employment and so missed an opportunity to create a diverse sector which could more readily work toward achieving fair outcomes and economic transformation.

So far, this chapter has reviewed the personal qualities outlined in the FPR, namely honesty, integrity and competency. The following section moves away from individual character and conduct laws under the fit and proper requirements to discuss the obligations regarding operational ability, that is, the business capacity of an individual or firm to carry out their duty.

4.3. Operational Ability

Operational ability is the third and final leg of the fit and proper requirements discussed in this chapter. Under the FPR, a juristic or natural person must hold and maintain a range of business

[88] Supra note 52 at 3. See also, Samuel Bowles *The Moral Economy: Why Good Incentives Are No Substitute for Good Citizens* (2016) 160 – 161.
[89] Supra note 52 at 3.
[90] Supra note 52 at 10.

assets and embed procedures and processes to enable it to operate.[91] These requirements range from a fixed business address, registered bank account, and storage and filing systems to logical access security to access information technology and business premises, a business continuity plan, and insurance guarantees for fraud and dishonest actions. The latter is perhaps a recognition of the risk that non-compliance with the FPR poses for an FSP. The duty to maintain operational ability of a financial services business is assigned to the key individual.[92]

The fit and proper requirement's ability to set hurdles before granting certification to render services mitigated the risk of lack of business infrastructure in the execution of financial services transactions. The threshold for operational ability set in the FPR required establishing a structure to deduce whether a person, juristic or natural, is sufficiently capacitated in an environment that would protect consumers through physical actions like keeping records and having filing systems. However, it falls short of realising other ideals set by the FAIS laws, such as fair conduct with due skill, care, and diligence in the interest of the client and the financial services industry and acting with circumspection to treat clients fairly and avoid conflicts of interest.[93]

The FPR prescribed that the internal control environment of an FSP should be monitored against the regulatory expectation. In practice, checklists emerged with documented evidence to tick the boxes of what was expected to demonstrate operational ability. These checklists evidencing the mere presence of an internal control environment, and do not ensure improved protection for consumers beyond the assumption that a well organised and basic internal control environment is likely to contribute to consumer protection.

5. Regulating Conduct

Black asserts that laws are instituted to regulate conduct so that it is consistent with social expectations, and therefore, when a socially expected outcome is achieved by adhering to a law, the legal objective is reached, and the law is successful.[94]

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[91] FAIS BN 106 of 2008, Sections 1-3 Part VIII.
[92] Supra note 20 at s 8.
[93] Supra note 3 at s 16.
[94] Supra note 52 at 3. The alignment of laws with social expectations is discussed in more detail in Chapter 2 and Chapters 5 and 6 of this thesis. In particular, the jostling between societal expectations and the behaviour of commercial actors like financial services providers is a central concern of Chapters 5 and 6 where I analyse the constitutional imperatives, the prevailing legal logic and the challenges and opportunity presented by legal prescripts seeking explicitly to achieve social outcomes.

As mentioned, professionalising conduct in the financial services industry was a key objective of the FAIS regime.[95] The FSB sought to protect consumers and enforce ethical conduct by setting a higher standard than that applicable to an average South African seeking to ply their trade in financial services. However, meeting the standard became a constative act of compliance: the state of affairs in relation to keeping record or evidence of having adhered to a rule.

The FSB was empowered and obligated to draft industry codes of conduct to actualise the ambition of the FAIS Act. The codes created an obligation upon the FSP to transact with an informed client via a designated role with a set amount of transparency as discussed in the previous chapter under the GCOC disclosure expectations.[96] However, as indicated above, the GCOC expressly expected persons to 'act with circumspection and treat clients fairly in a situation of conflicting interest'.[97] The limitation of fair treatment on situations representing a conflict of interest between a client concern and the commercial or self-interest is similar to the basic and innate conflict of the two extreme polar positions between capitalist endeavour and a selfless benevolent provider (in the terms addressed in Chapter 2). As Adam Smith so famously articulated, 'it is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own self-interest'.[98] Using regulation to direct human behaviour and conduct in retail financial services transactions, this thesis argues, stretches beyond the capacity and capabilities of the historically entrenched command and control rules-based laws.[99]

Despite the principles of GCOC being clear and precise in terms of what the code should instil and what it requires actors in financial services to ascribe to, the code itself could not sufficiently guide how conflicts of interest were to be managed in order to promote substantive fairness. The code's guidance only prescribes that financial service providers should avoid conflicts of interest in the first place or seek to lessen the impact of a conflict by ticking a box that the conflict was brough to the attention of the consumer or otherwise declared to them.[100] After this, the rendering of the service is permitted as unencumbered once the formal

[95] Supra note 3.
[96] Supra note 3 at s 15 and 16.
[97] Supra note 18 at s 16(1)(d).
[98] Adam Smith *The Wealth of Nations* (1776) at Book 1, Chapter 1.
[99] In Chapter 4 of this thesis I discuss the Conduct of Financial Institutions Bill which will be central to the new regulatory order.
[100] Supra note 20 at s 3(1)(c).

step is fulfilled.[101] In all, if fair treatment is only explicitly prescribed in instances of conflict of interest, and if the resolution of a conflict of interest is not materially governed under the FAIS Act and its subsidiary laws, then consumers are left with preciously limited protection and the achievement of fair outcomes remains a far-off ideal. In the section that follows I review the law in action insofar as courts and academics addressed conduct within the context of the applicability and application of rules, as well as the consequent outcomes to attain - and oftentimes curtail - a better balance between legitimate contractual conduct in principle and substantively fair relationships in practice.

6. The Role of Case Law in Enforcing the Rules-Based Order

The Latin legal maxim, *stare decisis et non quieta movere* (known in short as *stare decisis*), means "stand by previous judgments and not to disturb settled law", is at the core of the doctrine of precedent or common law.[102] It is a key component of the South African legal system that was entrenched during British rule.[103] The ever-present influence of precedent, pre- and post-democratic era, on the development of South African law has proven both progressive and regressive to social and consumer progress and, arguably, to the realisation of constitutional ideals.[104] Insofar as it relates to matters of the economic *order of things*, precedent has on the whole functioned to legitimise the arguably unjust status quo in South Africa's socio-economic order.[105] With this assertion, the structures of commerce and commercial activity, such as contract law's seemingly disproportionate need for certainty, rule-based enforceability and expediency above substantive fairness and protection of weaker contracting parties, becomes the topic of scholarly concern. Cases that encouraged and enforced the need for certainty in commercial endeavour, and thereby shaped the epistemology and framing of the rule-based

[101] Supra note 20 at s 3(1)(c) and s 3A.
[102] HR Hahlo and E Kahn *The South African Legal System and Its Background* (1968) 214.
[103] George Devenish 'The Doctrine of Precedent in South Africa' (2007) 28 *Obiter* 1 1.
[104] Sindiso Mnisi Weeks 'South African Legal Culture and its Dis/empowerment Paradox' in Marie-Claire Foblets, Mark Goodale, Maria Sapignoli and Olaf Zenker (eds) *The Oxford Handbook of Law and Anthropology* (2022) 56; H Kruuse '"Here's to You, Mrs Robinson": Peculiarities and Paragraph 29 in Determining the Treatment of Domestic Partnerships' (2009) 25 *South African Journal on Human Rights* 388.
[105] A Chatterjee 'Wealth Inequality in South Africa 1993 – 2017' (2022) 36 *The World Bank Economic Review* 1 19. Within the context of law and economic activity, Michel Foucault's idea that the prevailing epistemic structure at any time (such as in the introduction of financial sector laws as covered in chapter 3) is a reflection of reality, is key to understanding the rationale for the preservation of legal principles and theory such as the dominant restrictive interpretation of pacta sunt servanda that may be antithetical to consumer and societal progress. Indeed, what was considered knowledge and truth at the time that the courts pronounced on specific matters in relation to that strict interpretation, is something that is belongs to and thus reflects the relevant historical period. See Serhat Kologlugil 'Michel Foucault's Archaeology of Knowledge and Economic Discourse' (2010) 3 *Erasmus Journal for Philosophy and Economics* 10 53.

financial sector laws in a foundational sense, developed in the period covered here and in the previous chapter. They are briefly discussed by way of justifying the above assertion that precedent pertaining to commercial activity has on the whole functioned to legitimise an arguably unjust socio-economic status quo.

In 1988, two years before the creation of the FSB, the Supreme Court of Appeal, the highest Court in South Africa at the time, adjudicated over a dispute of a financial (loan) agreement in the matter of *Sasfin (Pty) Ltd vs Beukes*.[106] The dispute arose when Mr Beukes was required to step in as a personal surety on behalf of a legal entity. Central to the legal question was whether there was clear evidence of coercion or undue influence when entering into the agreement, on which the Appellant court found there was not. The matter turned on the principle of freedom of contract and the enforceability of contracts entered into voluntarily, and conformance with public policy. On the one hand it dealt with an argument for contracts entered into freely regarded as enforceable regardless of the circumstances around the agreement and the imbalance of bargaining power between the contracting parties, and on the other, it highlighted that unconsciously provisions – in this case a provision that would be tantamount to enslaving the indebted party by taking control of his finances – were contrary to public policy and therefore invalid.[107] The court did set a bar, albeit a high bar, by stating that if a contract was 'clearly unconscionable and incompatible with the public policy…[it was] unenforceable'.[108] Price and Hutchison liken the qualifying criteria for unenforceable contracts as meaning the presence of gross or extreme unreasonableness and not merely unjust circumstances, no doubt leaving many weaker contracting parties at the behest of corporates setting unfair, yet not extremely unjust, contract terms.[109]

In the post-democratic era, the courts' tenuous reliance – in the face of substantively unfair and unequal contracting party relationships – on principles that provide certainty through rigid, arguably anti-consumer, applications of legal principles (notably *pacta sunt servanda*) in commercial contracts was propagated in two key precedent-setting cases: *Brisley v Drotsky*[110] and Afrox vs Strydom[111]. The judgments in these cases, I argue, displays the reticence and even

[106] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A)
[107] In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA), the courts progressed to acknowledge that contractual terms should be agreed upon in good faith and in accordance with public policy.
[108] Supra note 106 at para 29.
[109] Alistair Price and Andrew Hutchison 'Judicial Review of Exercises of Contractual Power: South Africa's Divergence from the Common Law Tradition' (2015) *Rabels Zeitschrift für ausländisches und internationales Privatrecht/The Rabel Journal of Comparative and International Private Law* 4 822.
[110] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[111] *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA).

plain intolerance of the South African judiciary to the notions of fairness, equity and substantive assessments of contracting parties and the resultant adverse outcomes upon weaker subjects. Predictability and the efficiency of the law in commercial arrangements were preferred to hold prominence, and thus protecting businesses, from subjective fairness entering an assessment of contract validity.[112] It left, as had been inherited from *Sasfin*, only manifestly unconscionable contracting situations and clauses to be subject to invalidation and projected a public policy requirement for certainty in contract law as the primary legal concern. In effect, as argued by A. M. Louw, contract law operating within this narrow legal paradigm serves as a weapon of mass destruction in the hands of the economically powerful.[113] The legal machinery, legitimised in this manner, that is, through rigid rule-based supporting certainty in commercial contracts, promotes lopsided power dynamics in favour of one party's interests at the expense of the other and infringes upon the principle of good faith to such a degree that it would outweigh the public interest in the sanctity of contracts.[114]

While the facts of the cases in *Brisley* and *Afrox* differ, the legal principles relied on, the affront to good faith, and the restriction of rights through contractual undertakings are present in both.

In *Afrox* the court dealt with the enforceability of an exemption clause for negligence. It was contended that the clause was unconscionable and presented an undue restriction upon a weaker party – Mr Strydom had been admitted to hospital and due to negligence by medical staff was injured. The court held that the exemption clause was enforceable and upheld the principles of contractual autonomy and freedom to contract. It warned that contracting parties should read contracts and that no legal obligation existed for *Afrox* to explain the terms of the agreement.[115]

The Brisley case concerned a non-variation clause in a contract of residential lease. One of the terms entrenched thereby was a right of the landlord to terminate the contract for late

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[112] Tjakie Naude 'The Consumer's' Right to Fair, Reasonable and Just Terms' under the new Consumer Protection Act in Comparative Perspective' (2009) 126 *South African Law Journal* 3 505.
[113] Andre M Louw 'Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract: Can we banish the Law of the Jungle, while avoiding the Elephant in the Room?' (2013) 16 *Potchefstroom Electronic Law Journal / Potchefstroomse Elektroniese Regsblad* 5 43.
[114] Davis J in *Mort v Henry Shields-Chiat* 2001 1 SA 404 (C) 475A-E.
[115] Supra note 111 at paras 3 – 9, with the arrival of the CPA the views expressed in the *Afrox* judgment (which was grounded in strict formalism) is at odds with the CPA's consumer protective framework. See also Y Mupangavanhu 'Exemption Clauses and the Consumer Protection Act 68 of 2008: An Assessment of *Naidoo v Birchwood Hotel* (2012) 6 SA 170 (GSJ)' (2014) 17 *PELJ* 1167. *S*ee also Deeksha Bhana and Marius Pieterse 'Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited' (2005) 122 *South African Law Journal* 4 865.

payment of the rent. In the subsequent eviction proceedings, the defendant tenant alleged that the plaintiff landlord had orally agreed to a variation of the due date for payment and that he was as a result acting in bad faith in relying on the non-variation clause in the contract (which required all variations to be in writing and signed by both parties).

In *Brisley* the court dealt with a contestation of the non-variation clause in a contact of residential lease, a term of which entitled the landlord to terminate the contract for late payment of rent. However, a verbal agreement had been reached outside of the written contract to change the due date of rent, and Brisley would forfeit his deposit. The non variation clause required that changes to the lease agreement were to be in writing and signed by the parties. Brisley, due was unable to pay the rent on its contractual due date and Drotsky was entitled to evict him, claim the deposit and cancel the agreement. Brisley had sought relief from the court, claiming that the clause was unconscionable and unfair and that a verbal agreement had been reached. However, as with *Sasfin* and *Afrox* discussed above, the court reinforced the sanctity of contracts and freedom to contract claiming that the agreement was entered into freely and without coercion and that the non-variation clause was clear on the requirements for any contract amendments. Therefore, if a term agreed is perceived as unfair, it is not within the court's remit to override the voluntary agreement unless there is fraud or misrepresentation, undue influence, duress or illegality.[116] Hutchison identifies this case as the moment missed in developing the principle of good faith and a contextual and substantive assessment of contract clauses. Technical rules and doctrines relied upon in this case hampered development and progress of consumer protection.[117]

While the doctrine of precedent is law in action, it does not supersede constitutional law and the constitutional court need not abide by previous judgments if held that a constitutional right is infringed upon. Precedent is, in essence, law in action as it applies statute and legal principles, thereby creating consistency and applicability where legislation, like the Constitution or the FAIS Act is tested within real-world situations calling for adjudication. Precedent is the cornerstone of the rule of law. It enables the gradual and orderly development of law, and expecting equal application through the rung of the legal hierarchy. This section highlight how precedent in high profile cases adjudicated on in South Africa, before and during the period covered in this chapter may have influenced the design of the FAIS Act and other

[116] Tjakie Naude 'The Function and Determinants of the Residual Rules of Contract Law' (2003) 120 *South African Law Journal* 4 820.
[117] Supra note 7 at Hutchison (2019). See also, supra note 113.

financial sector laws. In later chapters I continue to track the development of precedent and compare its development to the advancement of consumer protective laws and the increasing call for of communitarian value systems, like uBuntu, and constitutional imperatives entering the contract law discourse.

7. Conclusion

This chapter highlighted the limitations of what could be achieved through regulatory means embedded in a command and control rules-based system of legal order. It must be acknowledged that within the rules-based order, it is of course quite impossible in one codified statute, board notice or code of conduct to provide for all the nuisances of the vast financial services industry and the innumerable transactions that are conducted within it on a daily basis.[118] On the other hand, not doing so leaves room for the possibility of both regulatory arbitrage and unintended suboptimal consequences for individual clients, client groups as well as providers.[119]

The regulatory attributes, particularly the qualification requirements, made working in the financial services sector all but unattainable and elusive for many South Africans seeking employment. Therefore, in its attempt to professionalise the industry, the FSB created a hurdle to market entry to those wanting to render financial services, but did not have the level of education deemed appropriate and used as an index for competency.

This chapter covered how the FSB imposed administrative processes upon persons seeking to ply their trade in the financial service sector, calling on them to prove and attest to their competence through proof of a recognised qualification and relevant experience; by meeting the personal character qualities of honesty and integrity; being financially sound and having a demonstrably clean financial record; and, confirming all tools and equipment to evidence operational ability. All this is expected to yield improved consumer protection yet does not go far enough in terms of ensuring ethically sound conduct by industry professionals at the level of the substance or quality of the interaction in the form of the transaction.

The conclusion drawn from the chapter's assessment of the laws put in place to regulate conduct in financial services is that while these laws appeared robust and sound in terms of

[118] Supra Lawack-Davids at note 36.
[119] Juan Carlos Izaguirre 'Making Consumer Protection Regulation More Customer-centric' (2020) *World Bank Working Paper.*

their formulative construction, they were far from complete in terms of establishing a system that could promote the achievement of fair outcomes. The practical application in relation to determining whether an individual possesses sufficient qualities of honesty and integrity is not, or at least not sufficiently, determinable through the constructs of formal laws and their formalistic application through the imposition of a checklist compliance approach. To satisfy the requirement substantively speaking would necessitate that the regulator looks beyond the rules and the administrative processes they require.

As will be argued in the remainder of this thesis, and particularly in the next chapter, the regulatory turn toward improving market conduct and fair treatment is becoming increasingly relevant in the postcolonial context that is now governed for the overwhelming part, by a decidedly neoliberal logic of capitalist accumulation and consumption. Yet both the statutory and common law regimes in the generally applicable law of contract as well as the legal logics these regimes represent and that are characterised by limited substantive application of normative (constitutional) reasoning and practice, are at bottom an inept foundation for consumer protection with respect to fair and just financial services within the overall neoliberally inflected economic context.[120] While the step to establish a new regulatory approach for the financial services industry better to serve consumer interests was a necessary one, it created an unprecedented legal paradigm which comes with its own pitfalls and challenges.

[120] Daleen Millard 'Through the Looking Glass: Fairness in Insurance Contracts – A Caucus Race?' (2014) *Journal of Contemporary Roman-Dutch Law* 77 547.

CHAPTER 4: THE REGULATORY TURN – PROMOTING 'FAIRNESS' THROUGH LAW

1. Introduction

A second regulatory reform period for financial services regulation commenced in South Africa in the aftermath of the global economic crisis in 2008. It constituted a major shift in the regulatory approach to financial services, the effects of which remain underexplored in scholarly literature. One of the major effects of the 2008 global economic crisis (also known as the 'Great Recession'[1]) was increasingly widespread distrust of the financial services sector on the part of its consumers.[2] Trust in the global financial market and its interconnected systems was profoundly compromised by pejorative market sentiment since highly publicised corporate, capitalist and financial failures triggered the crisis.[3] Although South Africa had been somewhat insulated from the heavier impacts on other economies, it was already of course a global player itself and thus became inevitably subject to the widespread expectation that poor public sentiment and industry misconduct had to be addressed in ways similar to those chosen by its extra-continental counterparts such as Australia, the United Kingdom and the United States of America.[4] As a participant in the reform of financial services globally, the wielders of the balance of power in what remained of the global neoliberal hegemony after 2008, expected the South African government to also introduce measures to prevent the conduct that was documented as having led to and that might in the future lead again to, systemic failures and distrust by the consumer community.[5] Indeed, the global and domestic financial system depends fundamentally upon the generally positive regard of consumers and thus regaining the trust of ordinary persons and their associations within the corporate institutions of global

[1] Thomas Piketty and Emmanuel Saez 'Top Incomes and the Great Recession: Recent Evolutions and Policy Implications' (Paper presented at the 13th Jacques Polak Annual Research Conference Hosted by the International Monetary Fund Washington, D.C., November 8–9, 2012).
[2] Eric Uslaner 'Trust and the Economic Crises of 2008' (2010) 13 *Corporate Reputation Review* 110.
[3] Sue Jaffer et al 'How Changes to the Financial Services Industry Eroded Trust' in Nicholas Morris and David Vines (eds.) *Capital Failure: Rebuilding Trust in Financial Services* (2014) 32-64.
[4] Eno-Obong Akpan 'A Comparative Analysis of Consumer Protection Framework in Nigeria, United States of America and South Africa' (2019) 1 *IJOCLLEP* 133.
[5] Sam Ashman, Ben Fine, and Susan Newman 'The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development' (2011) *Socialist Register* 47.

capitalism alike was necessary to sustain and stabilise the financial sector which comprises of financial services firms, banking institutions, insurers, and pension funds.[6]

Interest in developing ways of improving trust and confidence in the financial services sector and the consideration of initiatives that attempt to do so, was not a mission of the South African government in isolation. Global trends emerged in terms of new ways of thinking about regulation and standards against which progress can be benchmarked. Overall, the expectation was for the introduction of tangible ways to maintain and re-establish consumer confidence where it may have been lost.[7] Largely, the message across the globe was that consumers' mistrust of the financial industries stemmed from the impression that their unfair treatment was rampant and that unfair outcomes had been inflicted upon them pervasively as a result of conduct by corporate actors and their agents.[8]

The vehicles through which consumer confidence may be delivered, such as consumer education, financial inclusion and new regulators and oversight bodies that promote both procedural and substantively fair treatment and improved client outcomes, are now, or are in the process of being, codified into law in South Africa. The consensus among the G20[9] economies was reached that their legal orders needed a fairly drastic reframing, which still aimed ultimately to protect the market as the foundational institution of the global capitalist order, but which would work towards regaining the consumer's trust in that market by focusing on and creating opportunities to realise consumer-centric reforms and law. Significant to this thesis is that the reforms undertaken in South Africa introduced new policies, laws and oversight mechanisms to promote consumer protection and ethical business practice, with a novel emphasis on the notion of (both procedural and substantive) 'fairness'.[10] In particular, a new regulatory oversight system, known as the Twin Peaks model, was promoted as the ideal regulatory oversight architecture, and the model was implemented legally through the enactment of the Financial Sector Regulation Act (hereinafter 'FSR Act').[11]

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[6] Roman Tomasic and Folarin Akinbami 'The Role of Trust in Maintaining the Resilience of Financial Markets' (2011) 11 *Journal of Corporate Law Studies* 2 369.
[7] Supra note 2.
[8] Jocelyn Pixley *Emotions in Finance: Distrust and Uncertainty in Global Markets* (2004).
[9] South Africa has been a member country of the Group of 20 since its founding in 2006. South Africa's Minister of Finance, Trevor Manuel, was chairperson of the G20 in 2007.
[10] Republic of South Africa, Department of National Treasury 'A Safer Financial Sector to Serve South Africa Better' (2011) 14.
[11] Financial Sector Regulation Act 9 of 2017. See also, Financial Stability Board 'Peer Review of South Africa' available at https://www.fsb.org/2013/02/r_130205/, accessed on 3 May 2024.

This chapter concerns the new regulatory approaches, policy trajectory and legal dispensation that overhauls the regulation of the financial sector with the ostensible view to promote both the procedural and substantive dimensions of fairness. Consideration is given to the contemporary methods of regulating to improve the effectiveness of law and how new forms and approaches in the law, such as principle and outcomes-based regulation, seeks to overcome the inhibitions and limitations of a strict rules-based legal order (as described in the previous chapters) in order to realise improved outcomes for consumers and thereby regain their trust.

The chapter thus frames the regulatory overhaul in terms of a shift away from the rules-based that was in force at the onset of the global economic crisis. The new policy trajectory and the consequent laws that are coming into operation as well as the new oversight structures discussed in this chapter, have featured little in scholarship. The chapter considers the work of Andrew Schmulow[12] as the most extensive literature on the regulatory turn in South Africa and it will be relied on and critiqued in the course of the Chapter's close reading of the instrumentalities of reform, such as the policies, discussion documents and domestic and international recommendations that are in the process of thrusting legal development away from rules-based order to a principles and outcomes-based regulatory order. Additionally, the overhaul[13] is critically evaluated with reference to the degree to which it can be said to kowtow to the interests and stated imperatives of international bodies that set the scene for

[12] Andy Schmulow 'Approaches to Financial System Regulation: An International Comparative Survey' (2015) *CIFR Paper* 53; Andy Schmulow 'Treating Customers Fairly (TCF) in the South African Banking Industry: Laying the Groundwork for Twin Peaks' (2022) 30 *African Journal of International and Comparative Law* 1 25; Andy Schmulow 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 11 *Law and Financial Markets Review* 4 at 163; Andy Schmulow and Andrew Godwin 'The Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia' (2015) 132 *South African Law Journal* 756; Andy Schmulow 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks' (2018) 25 *African Journal of International and Comparative Law* 393; Andy Schmulow, Paul Mazzola and Daniel de Zilva 'Combatting Regulatory Capture: Australia's New Financial Regulator' (2022) available at https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/combatting-regulatory-capture-australias-new-financial-regulator#:~:text=Regulator%20Assessment%20Authority%E2%80%94A%20Regulator%20to%20Regulate%20the%20Regulator&text=Twin%20Peaks%20regulators%2C%20ASIC%20and%20APRA%2C%20had%20succumbed%20to%20such%20capture; Andy Schmulow, P Mazzola and D de Zilva 'Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority' (2021) 49 *Federal Law Review* 4 505; Andy Schmulow 'The Four Methods of Financial System Regulation: An International Comparative Survey' (2015) *Journal of Banking and Finance Law And Practice* 26 151; Andy Schmulow 'Empowering Australian Financial Consumers through Plain English Legislative Drafting' (2024) 9 *The International Review of Financial Consumers* 1 43; and Andy Schmulow 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks (2017) 25 *African Journal of International and Comparative Law* 3 393.

[13] Chapter 5 of this thesis presents a critique of the notion of fairness in relation to the law and post-apartheid South Africa.

contemporary financial regulation as part of an effort to internationalise further (and thereby promote 'protection' of) South Africa's financial sector.

The chapter begins by exploring the different regulatory approaches favoured by international bodies following the financial crash of 2008 and how they shaped and impacted the formulation of the global and local response. In particular, I look at the role that principle and outcomes-based laws are expected to play in creating a new regulatory trajectory in South Africa. I then turn to introduce and discuss the new policy trajectory in South Africa that followed this new principles- and outcomes- based approach to the regulation of the financial services sector. It is in the context of this discussion that I will focus on the instrumentalities of the regulatory turn referred to in the preceding paragraph and specifically their provisions relating to fairness. This discussion serves, at the same time, as the preface to the jurisprudential inquiry into the concept of fairness which is the subject of Chapter 5.

2. From Rules-Based to Outcomes-Based Regulation in South Africa's Financial Sector

Scholars of regulatory theory in the financial and insurance industry such as Black and Schmulow, raise the prominence of the new methods of regulation, which step away from the traditional modalities that were discussed as the making of South Africa's rules-based order in Chapter 3. Although not entirely new, risk-based and principle-based regulation are central to the TCF regime as discussed earlier. The latest method has come to be termed 'outcomes-based regulation'.[14] The latter is the much-touted model in South Africa's reform of the rules-based order of the applicable laws. Black calls these new methods 'close cousins'[15] and Schmulow says of them that they cannot easily be separated, that they amount to terms of art, are not scientifically formulated and should be viewed from within their methodological and philosophical underpinnings.[16]

In its report on the alternatives to traditional regulation, the Organisation for Economic Cooperation and Development (hereinafter 'OECD') asked, 'Why Regulate?', and furnished

[14] Julia Black 'Outcomes Focused Regulation: The Historical Context' in A. Hopper and G. Treverton-Jones (eds) *Outcomes-Focused Regulation: A Practical Guide* (2011) 7.
[15] Ibid.
[16] Andy Schmulow 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks (2017) 25 *African Journal of International and Comparative Law* 3 393.

the answer that governments regulate 'in the public interest' to ensure the functioning of society and the economy.[17] However, a narrow application of 'equity and fairness', the OECD insists, detrimentally affects the client perceptions of fair outcomes.[18] As part of steering clear of the narrowing of equity and fairness, the consumer community's role, it asserts, is to determine whether the response by the industry to the regulatory objective of promoting fair outcomes and trust in the financial system, has become an important consideration for the consumer community.[19] The implication, therefore, is that a regulatory instrument must be consciously designed to achieve equitable and fair outcomes as far as reasonably possible which design maximises its impact and can reasonably then be regarded as achieving the stated aims of government policy and laws.[20]

The distinction and correlation between principle, risk, and outcomes-based regulation are best understood with reference to their manner of practical operation. Black places outcomes-based regulation at the pinnacle of the ordering of ways to regulate,[21] its purpose is to set the strategy and, therefore, serve as a destination point towards which the regulatory system should aspire and work in practice.[22] Principle-based regulation is then conceived as the ethos and praxis most conducive to reaching the destination,[23] and risk-based regulation is a tactic employed to nudge and steer industry actors towards the strategic direction of the outcome the regulation has set as the destination.[24] The specificities of the 'destination' in this context will be discussed later, when the new regulatory agenda in South Africa is introduced. A discussion of the three contemporary modes of regulation follow below.

2.1. The Principle-Based Approach

Principle-based regulation focuses on setting high-level principles or objectives that financial institutions must adhere to, rather than providing detailed, prescriptive rules. This approach encourages flexibility and innovation, as firms have the discretion to decide how best to achieve regulatory goals. However, use of this non-prescriptive open-ended language creates

[17] Glen Hepburn 'Alternatives to Traditional Regulation' (2009) *OECD* 9 available at: https://www.oecd.org/gov/regulatory-policy/42245468.pdf, accessed 25 July 2025.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] Supra note 14 at 15.
[22] Supra note 14.
[23] Ibid
[24] Ibid

interpretive ambiguity which creates an incoherence and presents regulators with disunifying complexity when enforcing principles on industry. This seemingly irreconcilable contradiction, once understood in its broader context, transforms the force with which a principle or ideal is pursued.

In her paper titled 'Forms and Paradoxes of Principle-Based Regulation',[25] Black explores substantive principle-based regulation as an alternate to traditional rule-based regulation and identifies its dimensions as comprising of a substantive outcome, supported by new forms of interpretation and enforcement.[26] A challenge that Black raises with this approach, which this thesis highlights as the crux of the misalignment of the new regulatory approaches, is that the flexible mode of interpretation (the interpretive paradox)[27] required for the principle based approach to function, is at odds with formal canons of traditional contractual interpretation where interpretation has been formal, literal and deontologically driven.[28] Black suggests that it is because of the lack of certainty as a necessary tenant of an effective legal order, that lawyers resist this approach when practised by regulators in the financial sector, yet, it is one of the main reasons why politicians and regulators are attracted to this form because of the flexibility that it provides.[29] The interpretive paradox is overcome by deriving certainty from an interpretive community, yet the multiplicity of interpretation leads once more to a lack of certainty, and therefore this approach can only really exist at a notional level because in practice it is indistinguishable from a rules-based regime.[30]

Black argues that principle-based regulation is present if the law must 'contain norms which use simple, general terms and which express the reason for the rule, and if the norms are seen as expressing the fundamental obligations, all subject to them should observe.'[31] Substantively, she argues, the principle based approach enlists an overarching concept in conjunction with traditional legal rules to achieve the regulatory objective, which may be utopian in terms of its full realisation.[32] The framing of the utopian future at the current point,

[25] Julia Black 'Forms and Paradoxes of Principles-Based Regulation' (2018) 3 *Capital Markets Law Journal* 4 425.
[26] Ibid.
[27] Supra note 25 at 25.
[28] Supra note 25 at 18.
[29] Ibid.
[30] Supra note 25 at 25. See also F Schauer 'The Convergence of Rules and Standards' (2003) *N.Z L. Rev 303* 34.
[31] Supra note 25.
[32] Julia Black 'Rules and Regulators' (1998) 25 *Journal of Law and Society* 3 452. See also, Julia Black 'Using Rules Effectively' in Christopher McCrudden (ed) *Regulation and De-Regulation: Policy and Practice in the Utilities and Financial Services Industry* (1999) 95; and J Braithwaite, 'A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 38. In addition, the relevance of utopian thinking was a critical aspect to expanding the possibilities of South Africa's future during the oppressive apartheid system of rule – this is best

such as a fairer and more equal South African society through commercial activity, is the work of the new regulatory order covered in this chapter, the understanding and achievement of which (through legal discourse) is detailed in Chapters 5 and 6.

2.2. Outcomes-Based Regulation

Outcomes-based regulation focuses on demonstrable and measurable outcomes.[33] It focuses on prescribing the outcomes expected from conduct (and is also referred to as performance or goals based regulation), as opposed to method or process based.[34] However, this form of regulation requires clearly defined outcomes to measure compliance against and therefore relies on entities and persons outside of the regulating authority to give effect to the outcomes.

Outcomes-based regulation in South Africa came about due to the prevailing legal instruments at the time, as discussed in Chapter 3, becoming increasingly regarded as traditional methods of regulation which did not adequately foster equitable and fair outcomes for consumers.[35] Procedure, tick-box, and rules-orientated (command and control) laws left room for regulatory arbitrage and created a fragmented oversight of the financial sector. The logic of outcomes-based laws is that, unlike traditional systems of law (under civil law jurisdictions), they move away from an emphasis on codification and predictability, allowing more room for discretion in interpretation and application.[36]

By contrast, common law systems are generally more amendable to principle and outcome-based regulation due to their reliance on case law and precedent which encourages the use of wider interpretive norms and a case-by-case judgment of individual experience.[37] Outcomes and principle based regulation support rapid innovation and adaptability. It is not prescriptive and therefore supports regulators who might not have the knowledge, ability and

exemplified by South Africa apartheid philosopher Rick Turner. See Mary Ryan 'Imagining Utopia in an Unfree World: Rick Turner on Morality, Inequality and Existentialism' (2017) 64 *Theoria* 151 40; and Michael Onyebuchi Eze et al. *Rick Turner's Politics as the Art of the Impossible* (2024).

[33] Eilís Ferran 'International Competitiveness and Financial Regulators' Mandates: Coming Around Again in the UK' (2023) 9 *Journal of Financial Regulation* 1 30. See also Charles Randall 'Outcomes-focused Regulation: A Measure of Success' available at https://www.fca.org.uk/news/speeches/outcomes-focussed-regulation-measure-success, accessed 25 July 2025.

[34] Christopher Decker 'Goals-based and Rules-based Approaches to Regulation' (2018) 8 *BEIS Research Paper* 7 . See also Julia Black 'The Rise, Fall and Fate of Principles Based Regulation' (2010) *LSE Working Papers* 17.

[35] Quanjun Yin *An Outcome-based Approach for Ensuring Regulatory Compliance of Business Processes* (2012) 15.

[36] Supra note 34.

[37] Ibid.

speed of execution to lead industry through law to realise transformational change[38] - provided, however, that there is a shared understanding of the risks to mitigate, mutual trust between the regulating authority and industry actors, and open communication to reach the objectives set by the government (for a better and fairer outcome for consumers from their dealings with the financial sector).[39]

Business processes and practices that existed under traditional laws and had been complied with without promoting substantively fair outcomes that transform society, are affected by the change in regulatory approach when outcomes-based regulation takes full effect. Yin explains that the process of complying with outcomes-based regulation requires, as a vital step, the analysis of the regulation to bring about logical reasoning through semantic analysis, which creates the rights, obligations and constraints so imposed by the language of the regulation.[40] Outcomes-based regulation sets the target for what is expected to be achieved and inverses the relationship in the logic of analysis. One is to work back from the expected outcome and then specify how to achieve it and thus comply with the law. The inversion exemplifies the alternative approach to traditional command and control regulation, placing the figuring-out and the application of the requisite logic of the process of complying with the law, at the door of the persons so required to comply. The uncertainty created in this system has been regarded as a positive feature of outcomes-based regulation, as businesses will be encouraged to develop their systems and processes, provided the end objective meets regulatory expectations.[41]

The considerable change to outcomes based regulation, which upends an entire system of law in the financial sector, is so dramatic and audacious that, had it not been an expectation of global markets, it might've been regarded as an admission of the outright failure of previous laws and its ability to espouse fairness between the financial sector and consumers. Popular sentiment about the move toward outcome based regulation is that industry is no longer forced to adopt a one-size-fits-all approach and can instead be open and innovative regarding their

[38] Julia Black 'Principles-based Regulation: Risks, Challenges and Opportunities' (2007) available at https://eprints.lse.ac.uk/62814/1/__lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Black,%20J_Principles%20based%20regulation_Black_Principles%20based%20regulation_2015.pdf, accessed 25 July 2025.
[39] Ibid.
[40] Supra note 35 at 20.
[41] Marwane El Kharbili 'Policy-Based Semantic Compliance Checking for Business Process Management' (2008) *Proceedings of MOBIS Workshops* 178. See also Y. Liu 'A Static Compliance-checking Framework for Business Process Models' (2007) 46 *IBM System Journal* 2 335.

stance to tailor solutions likely to achieve the objectives of fair client treatment and the protection of consumers' and society's interests.

However, poorly articulated outcomes remain the biggest risk to effectiveness of outcomes based regulation. In addition, the repeatability of fair outcomes is tricky as what is fair changes from context to context. Ensuring standardisation of fair outcomes calls for underlying rationale, data, analysis and application on a case-by-case basis to be recorded and reapplied equally and fairly with due regard to client and market impact in the case of every decision to support and grow the body of decisions at a rate much faster than the common law.[42] I argue below that potential for the emergence of a parallel form of common law exists in this regard, which will oblige the financial sector to support every decision with evidence that its rationale promotes the substantive achievement of fair outcomes that transform society.

The outcomes-based regulatory order that is being introduced in South Africa, as outlined below, is closer to a system of co-regulation as opposed to self-regulation as there is an increased expectation for businesses to ensure the expected fair outcomes.[43] This, therefore, requires that the industry act in accordance with, and be mindful of, the public interest concerns espoused in the government's policy position in realising consumer protection. The seemingly contradictory role of business – as both a profit-generating entity and a protector of public interest, responsible for ensuring fair treatment of individuals and society, whether through pricing or balanced contract terms – poses a significant challenge in the context of global regulatory trends that increasingly demand fairness and penalise unfair practices. One issue in this regard, highlighted by the OECD, is that when the interests of the community and the interests of business are not congruent, it is not clear (and there is little guidance in the laws thus far in terms of) which of those interests should prevail.[44]

This chapter now turns to explore the new trajectory of financial service regulation being introduced in South Africa.

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[42] David McNulty, Andrea Miglionico, and Alistair Milne 'Data Access Technologies and the "New Governance" Techniques of Financial Regulation' (2023) 9 *Journal of Financial Regulation* 2 225.

[43] Outcomes-based regulation necessitates a change in the relationship that businesses observing the financial sector laws have with their clients and the fairness aspect in all dealings of the business and the consequent subjective impact of their actions and omissions. At all times, under the outcomes-based regime financial services businesses are to assess their adherence to the principle led legal framework and adapt its rules, practice, form and manner of adherence without requiring legislative or regulatory intervention, thus placing the outcomes-based model of regulation to have, I argue, at least one foot of the financial services industry in the realm of co-regulation. For further discussion on co-regulation and self-regulation see Chapter 1 Literature Review Section 5.1.2.

[44] Supra note 17 at 9.

3. A New Regulatory Agenda for South Africa's Financial Services Sector

The second period of regulatory reform officially kicked off in 2011 with clear signalling from the South African government to re-create the financial sector to serve South African society.[45] The ineffectiveness of the existing laws and their mechanisms to protect consumers were foundational to, and seemingly necessitated, the second, much larger wave of consumer-focused regulation.[46] A key concern in this regard is whether there was language within the South African legal discourse to address poor client outcomes, the lack of consumer protection, and inequities, thereby meeting the expectations of global institutions and improve South African society through the financial sector's products and services. This section discusses an overview of the key aspects of this new regulatory frontier.

The rise of retail consumer rights came to the fore in a significant way with the introduction of the Consumer Protection Act of 2008 (herein after 'CPA').[47] The CPA recognised the changing dynamics of the market brought about by new trading methods and technologies, highlighting great opportunities and challenges.[48] The historical context of many South Africans and the socio-economic hurdles the country faced are set out in the preamble to the CPA, making consumer protection a key objective of the national government and one to be protected through consumer legislation.[49] However progressive and major the impact of the CPA would be in advancing consumer rights it did not apply to insurance products and non-banking financial services.[50] Despite this, the CPA brought about a shift in South African

[45] Supra note 10. The first period of regulatory reform is discussed in Chapters 3A and B of this thesis.
[46] Juan Carlos Izaguirre 'Making Consumer Protection Regulation More Customer-Centric' (2020) *Working Paper, CGAP World Bank.*
[47] The Consumer Protection Act 68 of 2008,
[48] Ibid at *Preamble*.
[49] Ibid.
[50] Supra note 47 at 1. See exclusion under definition of 'Service' in CPA:

> **''service''** includes, but is not limited to—
> *(c)* any banking services, or related or similar financial services, or the undertaking, underwriting or assumption of any risk by one person on behalf of another, except to the extent that any such service—
> (i) constitutes advice or intermediary services that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002); or
> (ii) is regulated in terms of the Long-term Insurance Act, 1998 (Act No. 52 of 1998), or the Short-term Insurance Act, 1998 (Act No. 53 of 1998).

regulation in favour of consumers, laying the foundation for laws that followed and the introduction of principles of equity and fairness into the legal rhetoric.[51]

An overview of the key aspects of this new regulatory frontier in South Africa's financial sector follows.

3.1. Fairness Enters the Financial Sector Lexicon

While the global movement for regulatory reform began in 2008 with the Great Recession as discussed later under Sections 2 and 3 of this Chapter, the first official policy step in South Africa only took place in 2011 with National Treasury's policy titled 'A Safer Financial Sector to Serve South Africa Better'.[52] A discussion document on the same theme was published one year earlier,[53] and the Treating Customers Fairly Roadmap was published in 2011.[54] Together, they bring about the dawn of the Treating Customers Fairly regime (hereinafter 'TCF regime'). The TCF regime put into motion the government's plan to accede to commitments it had made to stabilise and improve confidence in the financial services industry following the global economic crisis.[55] South Africa's National Treasury followed the United Kingdom in embarking on the TCF approach to financial services.[56] It acknowledged that fairness in contracts for financial services and products would not be reached via education alone and that a new regulatory paradigm was required.[57] This new paradigm, initially touted as a principle-based approach,[58] was eventually described as an outcomes-based approach,[59] with the ultimate mission to improve the outcome for the financial sector, its integrity and its consumer society.[60]

[51] Tjakie Naude 'The Consumer's' Right to Fair, Reasonable and Just Terms' Under the New Consumer Protection Act in Comparative Perspective' (2009) 126 *South African Law Journal* 3 505.
[52] Supra note 10.
[53] Financial Services Board 'Treating Customers Fairly, A Discussion Paper Prepared for the Financial Services Board' (2010).
[54] Financial Services Board 'Treating Customers Fairly. The Roadmap' (2011).
[55] See also the commitments made by President J Zuma at the G20. G20 'Declaration on Strengthening the Financial Systems – London Summit, 2 April 2009' available at https://www.fsb.org/wp-content/uploads/london_summit_declaration_on_str_financial_system.pdf, accessed on 3 May 2024.
[56] Supra (Schmulow 2022a) at note 12 at 25.
[57] Lydie Louis and Frederic Chartier 'Financial Inclusion in South Africa: An Integrated Framework for Financial Inclusion of Vulnerable Communities in South Africa's Regulatory System Reform' (2017) 1 *Journal of Comparative Urban Law and Policy* 1 13.
[58] Supra note 53 at 2.
[59] Ibid.
[60] Ibid.

The expectation from national government was that the financial sector and regulators were to treat customers fairly and sympathetically to benefit society as a whole.[61]

The TCF regime called for, and would bring about, a structural reconstitution of the financial regulatory architecture (discussed later in this Chapter), specific market conduct regulation and new ways to protect consumers.[62] The market assumption on which these interventions was premised, was that they would bolster financial stability significantly.[63] These endeavours, consumer protection especially, were not completely new in the South African financial services context, as highlighted in the two parts of Chapter 3. However, as presented in the previous chapters, the existing laws did not adequately enable the undertakings that the South African government had given to instil consumer confidence, protect consumers and improve society as the primary outcomes of regulation.[64] Had the existing laws covered in Chapter 3 been sufficient or adaptable and deemed appropriate, there would not have been a need for a project of near-total reform and the agenda outlined in the National Treasury TCF positioning and policy papers between 2010 and 2011. However, the primary hindrance as it appears from the rhetoric in favour of reform, is the rules-based and tick-box methods of regulation upon which the existing laws were founded.

At the outset of embarking on the project to address poor market conduct, attain fairness and protect consumers, law-makers recognised that regulatory effort beyond the existing laws was necessary.[65] In the earlier years of the reform (and into the present, as covered later in this Chapter), discussion documents and papers from the Financial Services Board (hereinafter 'FSB') and National Treasury all consistently echoed a common message: *treat(ing) customers fairly*. Fairness became a mantra of the FSB as it imagined its future as the custodian of fairness and good market conduct for the benefit of consumers and society.[66]

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[61] Supra note 53 at 20. See also: Jacky Huma 'Treating Customers Fairly' (2010) Insurance Industry Regulatory Workshop, available at https://www.fsca.co.za/Regulatory%20Frameworks/Archived%20Documents/2010%20-%20Treating%20Customers%20Fairly.pdf, accessed 24 July 2025; Financial Services Board 'Treating Customers Fairly: An Introduction to the Process and the Road Ahead' (2010) available at https://www.moonstone.co.za/upmedia/uploads/library/Moonstone%20Library/MS%20Compliance/Treating%20customers%20fairly%202011-05.pdf, accessed 24 July 2025; and Financial Services Board 'Are Financial Institutions Treating Customers Fairly?' (2010) *Bulletin First Quarter*.

[62] These new ways to protect consumers, I argue in Chapter 6, breaks with the traditional legal and doctrinal logic.

[63] Howard Chitimira and Sharon Munedzi 'An Overview of the Role and Functions of Selected Financial Role Players to Protect Financial Stability and Promote Market Integrity in South Africa' (2024) 27 *Potchefstroom Electronic Law Journal (PELJ)* 1 1.

[64] A critique of the shortcomings of the rules-based order were covered in Chapters 3A and B of this thesis.

[65] Andrew Schmulow 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 11 *Law and Financial Markets Review* 4 at 163.

[66] Thabo Msimango 'Rewiring of South Africa's Financial Industry Sector' (2023) 13 *International Journal of Scientific and Research Publications* 7 2250.

The language of the TCF regime went directly to the root of what was understood to be the main problems in South Africa's financial services industry.[67] Chief among those problems was the fragmented and overlapping nature of laws that regulated different types of financial products and services.[68] Additionally, financial services businesses were not expected to prioritise equity and consumer protection. They lacked, for instance, effective methods for complaints management and thereby left consumers largely helpless when unfair practices and outcomes ensued.[69] There was a lack of transparency in relation to product designs and fee structures were opaque, making it difficult for consumers to understand the terms, risks and costs.[70] Other problems identified early in the TCF regime included inadequate fit and proper practices that enabled conduct which harmed the reputation of the financial sector as well as society and limited consumer awareness in the context of ineffectively designed regulation that left room for regulatory arbitrage.[71]

To address these problems, the TCF regime set six focus areas in its sights: 1) the culture of organisations; 2) the products and product design processes; 3) the accuracy of information and marketing; 4) the advice provided to clients; 5) product performance and delivery on undertakings; and 6) post-sale barriers, including complaints management.[72] The focus areas branched out into several sub-outcomes, effectively becoming the objectives that the financial services regulatory reforms were set to achieve. These objectives would also constitute the basis of the new outcomes-based regulatory order. The outcomes under the focus areas were:

Outcome 1: Consumers are confident that they are dealing with firms where the fair treatment of customers is central to the corporate culture.

[67] Justine Van Vuuren *A Historical Analysis of the Origins, Development and Nature of Market Conduct Regulation: A study of Four Insurance Markets* (unpublished Masters thesis, University of the Witwatersrand, 2017) at 13.
[68] National Treasury 'Treating Customer Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa' (2014) available at https://www.treasury.gov.za/public%20comments/fsr2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf? accessed 9 December 2024.
[69] Financial Services Board 'Treating Customer Fairly: Complaints Management Discussion Document' (2014) available at https://www.fsca.co.za/Regulatory%20Frameworks/Documents%20for%20Consultation/TCF%20Complaints%20Management%20Discussion%20Document.pdf accessed 11 December 2024.
[70] Supra note 38 at 17.
[71] Supra note 38 at 17 and 19.
[72] Supra note 54.

Outcome 2: Products and services sold in the retail market are designed to meet the needs of identified consumer groups and society.

Outcome 3: Consumers are always provided with clear information and are always kept informed.

Outcome 4: Where advice on a financial product is given, it takes into account all circumstances of the client.

Outcome 5: Products and services are performed to the client's expectations.

Outcome 6: There are no unreasonable post-sale barriers to complaining, claiming, terminating or switching to a new provider or product supplier.[73]

This outcomes-based approach was heralded by the National Treasury as the ideal way to bring about results to achieve consumer protection and improve market conduct.[74] It constituted a major shift away from the rules-based order and was encapsulated in the idea that '[r]egulated institutions should be evaluated on the customer outcomes rather than just through a tick-box compliance approach'.[75] This commitment to outcomes-based language would later morph practically into a mix of rules, abstract principles and moral aspirations written into the new laws. As the law developed on the basis of the TCF papers, the financial sector increased the focus to realise trust-inducing fair outcomes for clients and society.[76]

'Ultimate fairness' (a concept this thesis returns to in Chapter 5) was introduced as part of the rhetoric of the TCF regime.[77] It is a powerful concept that is ostensibly aimed at breaking through all barriers that inhibit the achievement of fair and equitable outcomes.[78] The TCF regime accepted that unfair outcomes may yet occur under the most robust of regulatory frameworks.[79] Accordingly, it established a practice where regulations, laws, established business practices, contract clauses, and even the TCF framework itself could be overridden by the ultimate fairness concept. Getting to ultimate fairness for consumers was made possible

[73] Ibid.
[74] Supra note 54 at 18.
[75] Supra note 54 at 17.
[76] Supra Schmulow (2022a) at note 12.
[77] Supra note 53 at 25.
[78] Supra note 54 at 29.
[79] Supra note 54 at 29.

via simple and effective means, such as the alternative dispute mechanisms offered by statutory and voluntary Ombud offices.[80]

3.2. Toward the Twin Peaks Supervisory Model - A Structural Change

In conjunction with the building blocks of the outcomes for fairness set out under the TCF regime, the structure of financial service regulatory bodies was regarded as another area that simultaneously required improvement.[81] The long-standing role of the FSB was regarded as ineffective in a world where the focus had shifted to gaining public trust through financial stability, better market conduct, fairness and consumer protection.[82] On this premise, the National Treasury set about a new path of oversight and regulatory focus structured by the Twin Peaks model.[83] Under this model, it was envisaged that the role of the unitary FSB would be split into two dedicated regulators independent of one another. The one would be focused on prudential matters and aligned to the objective of financial stability. It would be known as the Prudential Authority.[84] The other, named the Market Conduct Regulator (later officially titled the Financial Sector Conduct Regulator (hereinafter 'FSCA')) was to focus substantially on fairness, the fair treatment of clients and realising consumer protection and education.[85] The introduction of the Twin Peaks model would render the FSB defunct.[86]

The Financial Regulatory Reform Steering Committee, under the direction of the Ministry of Finance,[87] was formed to charter the new course of regulatory oversight and supervision and it endorsed the Twin Peaks model, which culminated in the publication of the Steering Committee's discussion paper on the implementation of a twin peaks model of

[80] Supra note 54 at 29.
[81] Andrew Godwin, Timothy Howse and Ian Ramsey 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 134 *South African Law Journal* 665.
[82] Supra note 10 at 28.
[83] Financial Stability Board 'Peer Review of South Africa' (2013) available at https://www.fsb.org/2013/02/r_130205/, accessed on 3 May 2024; and supra note 5. See also, supra note 81.
[84] Republic of South Africa, National Treasury 'Explanatory Policy Paper accompanying the Conduct of Financial Institutions Bill' available at https://www.treasury.gov.za/twinpeaks/cofi%20bill%20policy%20paper.pdf, accessed on 3 May 2024. See also, Supra Schmulow (2022a) at note 12 at 25.
[85] Financial Stability Board, ibid.
[86] The Prudential Authority had existed in some form since 1870. However, the Market Conduct Peak was considered a new institution with less certainty on how it will execute its mandate. See,supra Van Vuuren at note 67 at 13.
[87] The Financial Regulatory Reform Steering Committee was co-chaired by senior officials from the South African Reserve Bank, the Financial Services Board, and the National Treasury.

financial regulation in South Africa.[88] The same financial regulatory oversight model was pioneered by Australia in 1998 and adopted by the United Kingdom after the 2008 financial crisis.[89] Many other jurisdictions followed suit in the aftermath of the 2008 crisis, in the course of which they dispelled the widespread belief until then that a single regulator could effectively regulate prudential matters and ensure fair treatment and protection of consumers.[90] At the same time, principle-led regulation, which the United Kingdom already relied on to regulate misconduct before the crisis and rules-led regulation, which represented the regulatory state of affairs in South Africa, were dismissed as ineffective methods of regulation to prevent misconduct.[91]

The two peaks necessarily implied and held that each regulator's status and importance as well as respective remit, allowed it to execute its mandates separately, without financial stability overshadowing fairness and consumer protection, as had been the case when one regulator (the FSB), held sway.[92] The intention therefore, is that the new South African regulators must support and enable the contemporary regulatory trajectory of outcomes-based laws that promote the realisation of the TCF regime's envisaged favourable impacts on the relationship between the financial sector and consumers, including the contractual undertakings that underlie that relationship. The new trajectory accordingly stepped away from tick-box command-and-control methods of financial regulation under a rules-based order.

Due to the scope of this thesis being on regulation that governs fairness, conduct and the relationship between consumers and the financial sector, only aspects relevant to the research question will be expanded on in what follows. Thus, the creation of laws for the prudential peak will not receive much attention, while the market conduct peak will be closely considered. I will aim to understand the regulation of conduct and fairness and how these are addressed with a view to increase confidence in the retail financial services industry. Furthermore, given South Africa's unequal past and the goal of societal improvement, I will

[88] Republic of South Africa, National Treasury 'Implementing a Twin Peaks Model of Financial Regulation in South Africa' (2013) available at https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%203%20roadmap.pdf, accessed on 3 May 2024.
[89] Supra note 12.
[90] Belgium, New Zealand and Ireland are other notable jurisdictions to implement the Twin Peaks model after 2008, whilst the Netherlands reinforced the separation of their two regulators following the global crisis. See Andrew Godwin, Timothy Howse and Ian Ramsay 'A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation' (2017) 18 *Journal of Banking Regulation* 2 103.
[91] Gauri Sinha 'Post-Crisis Regulation and Prosecutions in Financial Crime: Progress or Paradox?' in Nicholas Ryder, Umut Turksen and Jon Tucker (eds.) *The Financial Crisis and White Collar Crime-Legislative and Policy Responses* (2017) 243. See also, Chapters 3A and 3B of this Thesis.
[92] Supra note 12 (2015).

explore the rhetoric of the new regulatory architecture directed at improving South African society - a focus that continues in the chapters that follow.

3.3. The Financial Sector Regulation Act and the Market Conduct Peak

Following several years of industry engagement and consultation, in August 2017 then President of the Republic of South Africa, Jacob Zuma, assented to the Financial Sector Regulation Act (hereinafter 'FSR Act').[93] It was to be a significant step in the realisation of the TCF regime and the 2011 policy position adopted by the South African government, which led to the split into two regulators of the FSB, considered no longer fit for purpose in an era that demanded dual regulatory attention. The Prudential Authority as a dedicated financial safety and soundness regulator operating under the oversight and authority of the South African Reserve Bank, was accordingly established, while the other regulator was the FSCA, tasked with overseeing fairness, consumer protection and education and developing conduct standards that would apply to all actors and agents operating in the financial sector. The splitting of the FSB into two thus created a separate, dedicated market conduct regulator apart from monitoring and regulating the financial soundness and risk of failure of industry firms, or systemic failures, impacting the financial markets.[94] Effective 1 April 2018, the FSB transformed to the FSCA – the dedicated market conduct regulator that marked the end of the FSB.[95]

Both regulators would be accountable to the Financial Stability Oversight Committee, and the powers conferred on it via the FSR Act set the structural and operational roles of the two regulators.[96] The split of the oversight structure followed international trends that separated quantitative elements of financial stability from the concern for consumer sentiment and confidence (in financial institutions), via the regulation of the conduct of financial institutions in relations with their individual clients.

The FSR Act legislates what specifically is sought to be addressed via active regulation of 'conduct'.[97] Section 106 of the FSR Act introduces the concept of 'conduct standards', which the FSCA has the duty and power to develop. The FSR Act categorises conduct standards as 'regulatory instruments' and, via the FSR Act, the FSCA is empowered to develop law through

[93] Financial Sector Regulation Act 9 of 2017.
[94] Supra note 11.
[95] Supra note 93.
[96] Ibid.
[97] Supra note 93 at s106.

regulatory instruments in accordance with the Act's principles.[98] Although this thesis does not traverse this issue in detail, a question can be raised regarding whether public interest concerns,[99] which the FSCA is obligated to consider in its development and enforcement of regulatory instruments, are adequate and whether the language of public interest may be interpreted as intended to mean the realisation of imperatives for the protection and advancement of the consumer society.[100] The development of regulatory instruments through a consultative process has, in the early years of the FSR Act, involved financial sector industry actors as the primary consulting partners and commentators, with the regulator acting as the champion of the people, assuming the role of protecting the consumer and the developing laws in the public interest.[101]

The FSR Act, then, is considered a regulatory framework.[102] The main objectives of the FSR Act and of the two regulators are to:

> Achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth…by establishing…a regulatory and supervisory framework that promotes –
>
> (a) financial stability;
> (b) the safety and soundness of financial institutions;
> (c) the fair treatment and protection of financial customers;
> (d) the efficiency and integrity of the financial system;
> (e) the prevention of financial crime;
> (f) financial inclusion;
> (g) transformation of the financial sector; and

[98] Supra note 93 at s56, s57, and s58.
[99] Under the FSR Act the FSCA must consider the public interest when developing, supervising and enforcing the regulation it is empowered to develop. Supra note 93 at s58, s104, s153, and s251.
[100] See, Julia Black 'Forms and Paradoxes of Principles Based Regulation' (2008) *LSE Law, Society and Economy Working Papers* 13. In this article, Black highlights the paradoxes that come with alternative forms of regulation (discussed later in this Chapter) and promotes the notion of the 'interpretive community', which includes consumers, to make sense of the direction in which principle and outcomes led laws should pull when enforcing contemporary laws. See also, Erika Botha and Daniel Makina 'Financial Regulation and Supervision: Theory and Practice in South Africa' (2011) 11 *The International Business & Economics Research Journal* (2011) 27.
[101] Barry Panulo and J. Van Staden 'Understanding South African Development Finance Institutions to Promote Accountability' (2022) *Bertha Centre: Cape Town, South Africa* 66.
[102] Howard Chitimira and Sharon Munedzi 'An Overview of the Role and Functions of Selected Financial Role Players to Protect Financial Stability and Promote Market Integrity in South Africa' (2024) 27 *Potchefstroom Electronic Law Journal (PELJ)* 1 1.

(h) confidence in the financial sector.[103]

The two apex regulators brought about by the FSR Act,[104] were, it appears, intended to create an equal focus in the bifurcated supervisory model.[105] Yet the relationship between the two regulators and their respective focus areas is expected to be symbiotic and cooperative.[106] Failing this, the financial system becomes susceptible to lopsidedness and expensive maintenance, with potentially harmful consequences for society (unfairness) and the economy.[107] Effective 1 April 2018 the FSB was legally replaced by the FSCA as the 'dedicated market conduct regulator for the South African financial services sector',[108] marking the official introduction of the twin peaks model of financial sector regulation - at least in name.

As a regulatory framework, the FSR Act did not only confer powers on the two regulators in isolation of the rest of the industry. Instead, it is better charaterisable as having architected a new 'system of financial regulation'[109] that overarches all incumbent financial sector laws[110] and is centred on financial stability,[111] to, it states, achieve sustainable economic growth in South Africa whilst being appropriately concerned for the interests of financial customers.[112] The FSR Act would cover all financial institutions, products and services – the Long-Term Insurance Act[113] and FAIS Act, covered in Chapter 3, would be subordinated to the FSR Act and under the new dispensation they are regarded as such subordinated financial sector laws.[114] Amendments to the operations of the FAIS Ombud, the FAIS tribunal's powers, licensing provisions and conditions, and its procedures to determine codes of conduct, became necessary.[115] Further, oversight duties on conduct matters in terms of the FAIS Act, were assigned to the FSCA which split the duties of oversight over insurance businesses, such as those covered in the Long-term Insurance Act, between the Prudential Authority and the

[103] Supra note 93 at s7.
[104] Supra note 93.
[105] Supra note 81 and supra note 84.
[106] Supra note 84.
[107] Supra note 88.
[108] Financial Sector Conduct Authority, 'Stakeholder Letter' (2018) available at https://www.masthead.co.za/wp-content/uploads/2018/04/FSCA-stakeholder-letter-002.pdf, accessed 24 July 2025.
[109] Supra note 93 at Preamble.
[110] Supra note 93 at Schedule 1.
[111] Supra note 93 at Chapter 2. See also, 'Financial stability' defined by the IMF as 'the ability of the financial system to facilitate and enhance economic processes, manage risks, and absorb shocks'. See Garry J. Schinasi 'Defining Financial Stability' (2004) *IMF Working Paper*.
[112] Supra note 93 at s7.
[113] Long-Term Insurance Act 52 of 1998.
[114] Supra note 93 at Schedule 1.
[115] Supra note 93 at Schedule 4.

FSCA.[116] Consequent amendments to the Long-term Insurance Act were extensive and largely procedural, subordinating the Long-term Insurance Act to the overarching FSR Act as well.[117] Curiously, however, none of the amendments brought the language of market conduct, fairness or transformation into the existing laws. This deficiency, no doubt, delayed the impact of the new regulatory dawn and opened the regulators to criticisms about double speak (on the one hand asking industry to achieve fair outcomes and better society through improved market conduct, but not instituting that expectation clearly in the amendments to the laws that firms spend capital and resources on to comply with).

The regulatory and supervisory framework that came into being through the FSR Act is also to advance transformation (in the South African historical context), promote financial inclusion and confidence in the financial system and protect consumers.[118] The will of the South African government to reach the objectives of the FSR Act was so strong that the authority assigned to the regulators to achieve its objectives is, the Act states, 'unconstrained'.[119] Under the FSR Act, action, without constraint is especially pertinent to the FSCA's duty to protect financial customers and encourage fairness.[120] Indeed, promoting the achievement of fairness is the primary function of the FSCA and the ability of the products, services and financial system more generally, to attain fair outcomes , that met the reasonable expectations of consumers is its primary regulatory target.[121]

In light of the objectives set forth as the main objectives of the TCF regime – the hindering of which can cause harm to individuals, financial systems, and consumer confidence – removing obstacles and constraints, this thesis concurs, is necessary. However, the conflict that arises from such unconstrained authority leaves traditional legal development behind in its wake and arguably lacks the necessary jurisprudential grounding that is necessary for the development of the law.[122] The evolution to outcomes-based regulation leading to a new system of financial regulation is meant to radically improve the financial system and to meaningfully achieve its objectives.[123] Yet the reasonable expectation of South African society

[116] Supra note 93 at Schedule 2.
[117] Supra note 93 at Schedule 4.
[118] Supra note 93 at s7. See also, Andrew Schmulow 'Consumer Financial Well-Being in South Africa's Twin Peaks Regulatory Regime: From Measurement, to Confidence in Outcomes' (2020) 5 *The International Review of Financial Consumers* 2 11.
[119] Supra note 93 at s7(2) and s71. The Conduct of Financial Institutions Bill covered at Section 2.5 further embeds the language of regulatory power to achieve the regulatory objectives in an unconstrained manner.
[120] Ibid.
[121] Supra note 93 at s58(1)(i).
[122] These issues are discussed further in Chapters 5 and 6 of this thesis.
[123] Supra Schmulow (2022b) at note 12 at 393.

in achieving fairness remains a muted voice in the regulatory rhetoric (a matter explored further in Chapters 5 and 6 of this thesis).[124] Despite it being a primary function of the FSCA and the new regulatory system, the FSR Act curiously does not define 'financial inclusion'. This omission, academics suggest, is due to a lack of competence and planning at a regulatory oversight level to realise consumer inclusion.[125] Indeed, financial inclusion is the tallest of the orders that the FSCA is expected to deliver, which I suggest is also the most critical to get right, due to the legacy of apartheid in relation to the standard of education of the average South African (highlighted later in this Chapter).

The regulatory and supervisory framework of the FSR Act is therefore expected to promote and facilitate transformation, which the FSR Act references as the transformation outlined in the Codes of Good Practice for Broad-Based Black Economic Empowerment[126] (Amended Financial Sector Code (hereinafter 'AFSC')).[127] The AFSC says of transformation that its efforts should be aimed at the 'establishment of an equitable society by providing accessible financial services to black people'.[128] Although this is the true meaning of transformation that the FSR Act sets as one of its primary objectives, the more direct and explicit language of the AFSC is not found in the FSR Act or the Conduct of Financial Institutions Bill (hereinafter 'COFI Bill') discussed later and is seemingly an omission or obfuscation of the intent of the TCF regime's ambitions to serve South African society through transformation in the financial sector.

The advancement of transformation set out in the AFSC also concerns itself with the representation of black people in the financial sector and making available products and services that uplift previously disadvantaged groups. Most importantly, the AFSC recognises that action is required to address economic and income inequality faced by South Africa's black

[124] Under principles- and outcomes- led regulation, Julia Black (supra note 66) highlights the paradox that emanates from this mode of regulating wherein the flexibility of the law upends common law doctrinal logic and requires new forms of law to address the interpretation and enforcement paradox. For the former she suggests that an interpretative community is required to guide outcomes toward to the regulatory intention for fair outcomes and not to the legal doctrine that has been used in the past to, as Kennedy puts it, protect economic and political actors who benefit usually. Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1975) 89 *Harv. L. Rev.* 1685.
[125] Phemelo Magua 'The Regulatory Nexus Between the Promotion of Financial Education and Financial Inclusion in Enhancing Consumer Protection in South Africa' (2023) 56 *De Jure Law Journal* 1 220.
[126] Hereinafter 'BBBEE'.
[127] Codes of Good Practice on Broad-Based Black Economic Empowerment, Amended Financial Sector Code (2017) available at https://www.thedtic.gov.za/wp-content/uploads/Amended_Financial_Sector_Code.pdf, accessed 24 July 2025.
[128] Ibid at Preamble.

population due to apartheid.[129] Six years after the promulgation of the FSR Act, the FSCA and the Department of Trade and Industry (the custodian of the BBBEE), in 2024 entered into a memorandum of understanding which one would expect was concluded in order to work more collectively to meet the responsibility of transforming the financial sector for the betterment of society by improving the lives of previously disadvantaged and vulnerable clients and communities.[130]

However, disappointingly, the memorandum of understanding is limited only to tackling non-compliance by industry actors who fail to submit the scorecards expected under the FSC Code. The scorecards relate to the number of employed black and previously disadvantaged groups and is entirely silent on the working relationship and actions that might be required for the transformation of South Africa's financial sector to the advantage of the society and particularly its previously disadvantaged groups. This meek attempt to realise transformation signifies the lack of progress in the financial sector towards transforming South African society and can be said to diverge significantly from what the legislature had boldly envisaged at the outset to the regulatory turn toward fairness. It appears that the transformational progress for the FSCA hinges on the implementation of the COFI Bill (discussed later), which will empower it to develop conduct standards and new laws that promote transformation. Once more, the new dawn of the fairness imbuing financial sector that serves transformative South African society, appears to be a hugely drawn-out affair and it would appear that a watered-down version of the initial intention that animated the regulatory turn, covered earlier in this chapter, is set to be implemented.

What is missing from the lexicon of reform, but was present in the initial policy stance and positioning papers, and in adjacent regulation such as the CPA and AFSC, is an understanding of the starting positions of those who are expected to help grow the sector, but who find themselves in wholly unfair and disparate circumstances due to the structural legacy of apartheid. This thesis holds the view that the initial aspirations to transform the financial sector in order to serve the best interests of society, with the aim of promoting financial inclusion and confidence in the financial system and protecting consumers, may not be

[129] Supra note 127.

[130] MoU reported in Webber Wentzel 'Partnership between the FSCA and B-BBEE Commission in pursuit of transformation in the financial sector' (2024) available at https://www.lexology.com/library/detail.aspx?g=bf4271ff-d3dc-4e86-8395-d6bc8b6c9715#:~:text=On%205%20March%202024%2C%20the%20Financial%20Sector%20Conduct%20Authority%20(FSCA), accessed 24 July 2025.

achieved solely through the provision of products and services perceived as fair.[131] I suggest that what is most needed is a framework and approach directed at correcting the structural imbalance. As a start, the imbalance must be recognised, which the laws promulgated thus far in the reform project have neglected to do, let alone attempt to address.[132] Without the acknowledgement of the past and clarity to address the disparities for which it is largely responsible, the regulatory reform may be no more than a case of what David Levi-Faur calls 'regulatory capitalism', where the ambitions of capitalism to grow and sustain itself become institutionalised with regulatory instruments used as a patchwork to plug the holes that adversely impact on its growth.[133]

Human conduct is invariably bounded up with business practices that are ethical and beneficial or unethical and destructive to individuals and society.[134] Under the FSR Act the duty and authority to develop conduct standards is assigned to the FSCA.[135] The objective of the conduct standards was to bring about an efficient financial sector that operated with integrity.[136] The conduct standards are expected to regulate the relationship between industry product and service providers and consumers in ways that (better) promote fairness and just outcomes.[137]

Moreover, the FSR Act assigns to the FSCA the objective to provide financial education and promote financial literacy programs to existing and prospective clients of the financial sector.[138] The education programmes are expected to reduce knowledge asymmetries and the risk of product and service provider conduct contributing to unequal, unethical and predatory actions, since the logic holds that financially literate clients will most likely be more aware and knowledgeable about the inner workings of the products and services that are offered to

[131] Supra note 57.
[132] Once more illustrating the watering down of the rhetoric in a similar fashion to the debate between Socrates and Polemarchus that this thesis started with, and which I revisit in Chapter 5, around the narrowing of abstract ideals when it is implemented in the legal realm in a utilitarian version.
[133] In David Levi-Faur's concept of 'regulatory capitalism', regulation becomes a tool to stabilise and sustain capitalism itself, and as markets expand and generate crises, inequalities, or failures, regulatory instruments are deployed not to challenge capitalism, but to patch its weaknesses and keep it functioning. The ambitions of capitalism (growth, accumulation, and expansion) become institutionalised through a web of oversight and laws designed to manage the side effects without disrupting the core logic. See: David Levi-Faur 'Regulatory Capitalism' in Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (2017) 289.
[134] David Messick and Ann Tenbrunsel (eds) *Codes of Conduct: Behavioral Research Into Business Ethics* (1996) 1.
[135] Supra note 93 at s106.
[136] Ibid.
[137] Ibid.
[138] Supra note 93 at s57.

them.[139] However, this logic, I argue, misplaces the duty for financial education on the FSCA and not on industry actors and is as such a step away from the initial the TCF discussion document's intent to regulate the conduct of industry actors by appealing, inter alia, to the better nature of senior management who lead and oversee the activities of entities operating in the financial sector.[140] The mandate of the FSCA to educate financial consumers, written into the second part to the tandem clause under Section 57(b), is a daunting task – one that is directed toward improving the trust of consumers and addressing the issue of information asymmetry between financial institutions and clients (which contributes significantly to the unequal bargaining power in the relationship).[141]

As is clear, much reliance on the new system of regulation is dependent on educating the consumer and the consumer community about how to assert their rights in the new dispensation, even if at times such rights are already concurrent vis-à-vis the preceding system.[142] The education of consumers was not a primary concern of the FSB and the FSCA's task to educate, have education programs for financial customers and promote financial literacy, however laudable, confronts a complex problem in South Africa.[143] It is the position of this thesis that imparting knowledge of the financial system, its products and processes, and educating members of the public to make sound financial decisions, may address information asymmetry in the conclusion of transactions, but it does not necessarily follow that this intervention will incline the market on the whole towards substantively fair outcomes (though it is admitted, at the same time, that it *might* improve the *likelihood* of fair outcomes to a limited extent).

It is not simply the assumptive performative language of the educative objective that is of concern, it is the socio-economic and circumstantial position of parties to a transaction and the state of education and inequality in South Africa generally that may make the achievement of fairness a remotely realisable responsibility of a supervisory body (which I discuss further

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[139] Ibid.
[140] Supra note 53 at 20.
[141] Konstantinos Gkillas, Dimitrios I. Vortelinos and Tahir Suleman 'Asymmetries in the African Financial markets' (2018) 45 *Journal of Multinational Financial Management* 72.
[142] Howard Chitimira and Phemelo Magau 'A Legal Analysis of the Use of Innovative Technology in the Promotion of Financial Inclusion for Low-Income Earners in South Africa' (2021) 24 *Potchefstroom Electronic Law Journal* 1. See also, Mduduzi Biyase and Carolyn Chisadza 'Symmetric and Asymmetric Effects of Financial Deepening on Income Inequality in South Africa' (2018) *Development Southern Africa* 1; and Howard Chitimira and Menelisi Ncube 'Legislative and Other Selected Challenges Affecting Financial Inclusion for the Poor and Low Income Earners in South Africa' (2020) 64 *Journal of African Law* 3 337.
[143] Sibongile Sibanda and Tawanda Sibanda 'Financial Education in South Africa' (2016) *International Labour Office* 6.

in chapter 5).[144] Indeed, education and information have the potential to achieve fairness, build consumer confidence and lead to informed decisions by consumers.[145] However, it also places the consumer at the centre of what stands and falls as fairness. In this regard, education and information do not on their own necessarily dispel vast collections of individual convictions, desires, sentiments and biases potentially at least, at odds with normative reason, logic, and jurisprudence.[146] This, as the result of new forms of regulation, Black highlights as the of outcomes and principle-based regulation that I cover later in this chapter.[147]

As communicated to industry in its first written address, the FSCA via the FSR Act has a broad mandate and scope 'to ensure improved market outcomes in the South African finance sector'.[148] In realising and discharging its mandate, the FSCA has set as its objectives to:

- protect financial customers by promoting their fair treatment by financial institutions, providing financial education programs, and promoting financial literacy;
- Enhance and support the efficiency and integrity of financial markets
- Assist in maintaining financial stability.[149]

Under section 70 of the FSR Act the FSCA is to set a regulatory strategy to meet the obligation assigned to it through the FSR Act.[150] In its first regulatory strategy the FSCA states:

> As a market conduct regulator, our primary responsibility is to the financial customer. We are not a consumer watchdog, but will achieve our mandate by ensuring that financial institutions treat their customers fairly.[151]

[144] Vanessa Tchamyou 'Education, Lifelong Learning, Inequality and Financial Access: Evidence From African Countries' (2020) 15 *Contemporary Social Science: Journal of the Academy of Social Sciences* 2 7.
[145] Supra note 46.
[146] Maria Cecilia Paglietti 'Enhancing Fairness in Banking and Financial Dispute Resolution' (2019) 8 *Journal of European Consumer & Marketing Law* 108. See also Guido Noto La Diega *Internet of Things and the Law: Legal Strategies for Consumer-Centric Smart Technologies* (2022).
[147] Supra note 25.
[148] Supra note 93.
[149] Ibid.
[150] Supra note 93 at s47.
[151] FSCA 'Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September' (2018) available at https://www.fsca.co.za/Documents/FSCA_Strategy_2018.pdf, accessed 24 July 2025.

Disclaiming the role of a consumer watchdog is the FSCA's way of indicating that it only intends to work on the periphery, as is consistent with its objectives under s 57, to protect consumers by offering financial education and promoting fair treatment with financial institutions to achieve the outcomes of the TCF regime. The narrowness of this approach is a narrowing of the initial objectives set at the commencement of the regulatory turn.

The change expected from industry was encapsulated at the start of the reregulating project as a change from the 'self-interest approach' to the 'benevolence approach'.[152] This distinction is intended to highlight the transformation expected and a warning was issued that 'firms and persons who do not treat their fellow citizens fairly can be punished'.[153] The regulator, however, states that it wants to encourage people to do good rather than punish them for bad.[154] At the outset of reregulating, the self-interest outlook was accepted as the dominant market attitude, one that seeks to maximise profits.[155] Navigating past self-interest would be recognised as not being possible without punitive measures for non-compliance if a firm or industry's conduct led to an exacerbation of unfair and unequal outcomes in society.[156] This change in mindset – to achieve equitable outcomes through better (benevolent) conduct – was not reduced to anything simple, superfluous, or without costs and sacrifices.[157]

Indeed, the example of legal reform in the United Kingdom presented South Africa with a recent experience from which it could learn. A key comparative point was the responses from industry firms in the United Kingdom, which resisted the change in mindset and organisational culture, seeking clarity and certainty about what was to be implemented. Industry providers considered the ensuing uncertainty a threat to existing business practices. It was evident that regulating a change in mindset and corporate culture had to be cross-cutting, intensive and

[152] Supra note 53 at 19.
[153] Supra note 53 at 20.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Duncan Kennedy's critical legal scholarship suggests that such purported change in mindset to fairness and benevolence in legal or regulatory reform often masks ideological functions. He argues that calls for altruism and equitable outcomes frequently obscure the structural asymmetries of power and the unequal distribution of the burdens of sacrifice as it is demanded of the poor and vulnerable to sacrifice security, safety, and even dignity, whilst the elites and the well-heeled are merely asked to sacrifice leisure. Therefore, what may appear as a moral evolution in legal thinking is, in his view, a recurring oscillation within liberal legalism between formal, rule-based autonomy and the contextual, often paternalistic forms of justice imposed on weaker subjects. In this sense, the invocation of sacrifice is not neutral as it tends to be unevenly imposed and ideologically justified, reinforcing rather than dismantling entrenched hierarchies, inequality and unfair outcomes. Supra note 124. See also, Duncan Kennedy 'Structure of Blackstone Commentaries' (1979) 28 *Buffalo Law Review* 2 209.

strongly interventionist and that it should not merely be a rewriting of laws, nor an ad-hoc fix to gain positive market sentiment.[158]

As discussed earlier, two apex regulatory bodies (the FSCA and Prudential Authority) are expected to develop their due process to create regulatory instruments which occur outside of the legislature with, at least up to now, seemingly insufficient regard for the community or public interest. Indeed, consumer communities are not, this thesis posits, sufficiently represented in developing conduct standards geared toward fair outcomes in the same way as industry actors are represented. Consumers are not an organised unit capable of commenting on conduct standards and regulatory instruments in a unified manner, nor would it be feasible for this to occur. The role of the FSCA, this thesis argues, must thus be to represent the consumer by standing in their shoes and thinking from their position.[159]

However, the paradox I identify above is that it is also expected that the FSCA will sustain and grow the financial sector.[160] The altruistic sympathies and benevolence expected of the FSCA to regulate the industry, I argue, are likely at odds with the arguably conflicting mandate to both grow the sector and protect and deliver better outcomes for consumers. Indeed, the history of capitalist enterprises, the profit incentive and the need for certainty and expediency to promote its maximisation, do not accord with subjective and substantively fair outcomes on a mass scale.[161] The practical reality, I argue, is that the regulators' processes in developing new instruments to supposedly serve South African society better, are largely insufficiently cognisant of prevailing public sentiment and needs. Jurisprudential concepts like uBuntu, good faith, public policy and the boni mores, which are normative altruistic concepts, or for that matter, constitutional imperatives, feature little in the consideration and development of conduct standards.[162]

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[158] Supra note 53 at 52.
[159] See Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).
[160] Supra note 68. See also, Keamogetse Motlogeloa and Howard Chitimira 'A Statutory Analysis of the Role of the South African Reserve Bank and Other Role-Players in the Promotion of Financial Inclusion Through the Regulation and Use of Central Bank Digital Currencies in South Africa' (2025) 44 *EuroEconomica* 1 99.
[161] Pat O'Malley 'Uncertain Subjects: Risks, Liberalism and Contract' (2000) 29 *Economy and Society* 4 460.
[162] In Chapter 5, this thesis discusses the role of normative practices and the role it plays in the contracts entered for financial services and products. It is a task outside of this thesis to understand how the reasonable expectations of society influence the design and development of conduct standards and the cultural practices of firms in the financial sector. An interrogation of the FSCA's role as the champion of consumer interest and its effectiveness in this role is not within the remit of this thesis but is a facet of the regulatory turn that is underexplored in the literature. However, the Ganas case discussed in the chapter highlights the significant disconnect between industry practices, the legal frameworks they rely on, the laws they are expected to follow, and the expectations of the consumer community — as well as the complex role of the regulator in determining what constitutes a good and fair outcome.

3.4. Regulatory Capture as the Risk of a Stillborn New Dawn

A key question, which is hard to answer at this early stage of South Africa's regulatory reform, is whether the monumental shift in the regulatory landscape toward twin peaks is necessary and whether it will meet South African consumers' needs and expectations better and ultimately gain trust and favour that could boost the growth of the sector. Looking at the experience of the pioneer of the twin-peaks model, Australia (who implemented twin-peaks in 1998), reveals that warnings have arisen that the model is susceptible to 'regulatory capture'[163] by the financial industry. So high is the risk of regulatory capture that policymakers and academics have proposed 'a regulator to regulate the regulators'.[164] Proposals such as those of Andy Schmulow and others, similar to those suggested in this thesis, call for a novel interdisciplinary methodology that encompasses a contemporary doctrinal perspective (like outcomes-based laws), an economics and finance perspective, and an organisational psychology perspective that would represent a new frontier in financial regulation.[165]

Schmulow points out that the twin peaks model is hailed as the optimal model for financial regulation, but in its current form and legal dispensation, it is insufficient to prevent and address prolonged and systemic misconduct in the financial sector.[166] This criticism of the twin peaks model has led to the establishment of the Assessment Authority in Australia and work has already commenced on 'twin peaks 2.0' where regulators are less susceptible to influence that adversely affects the achievement of fairness, better conduct and consumer protection.[167] Schmulow believes that any regulatory system should adopt an interdisciplinary approach that relies on contemporary forms of regulation – like subjective judgment-based laws such as outcomes-based ones – and organisational psychology to understand better and

[163] Andrew Schmulow explains regulatory capture as a process where regulatory agencies, instead of acting in the public interest, become dominated by the industries they are supposed to regulate, leading to decisions that favour private interests over consumer protection or systemic integrity. See: Andrew Schmulow, Paul Mazzola and Daniel de Zilva 'Combatting Regulatory Capture: Australia's New Financial Regulator' (2022) available at https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/02/combatting-regulatory-capture-australias-new-financial-regulator#:~:text=Regulator%20Assessment%20Authority%E2%80%94A%20Regulator%20to%20Regulate%20the%20Regulator&text=Twin%20Peaks%20regulators%2C%20ASIC%20and%20APRA%2C%20had%20succumbed%20to%20such%20capture.

[164] Ibid.

[165] Ibid.

[166] Ibid.

[167] Andrew Schmulow, P Mazzola and D de Zilva 'Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority' (2021) 49 *Federal Law Review* 4 505.

manage better the innate behaviours that lead to misconduct and consequently hurt consumers and the image of the financial sector.[168]

South Africa's context and challenges relative to its peers, 80% of whom had adopted a new form and structure of oversight since 1998, are not the same as those of Australia.[169] The challenge for the FSCA, I argue, is not only resisting regulatory capture and maintaining independence from societal and political pressure. Given the expectation for South Africa's economic transformation post-apartheid, societal disparities and supporting the sector's need for sustainable growth are matters that the FSCA should contend with.[170] These issues need to be prominent considerations when developing new laws, particularly as tussles for influence ensue over what outcomes under outcomes-based regulation are important, either to protect and advance consumers or to protect and advance economic activity.[171] Outcomes-based regulation and the new 'judgement-based approach' are subjective, malleable and open to market and political pressure to serve interests not necessarily consistent with those of a fairness-inducing financial sector.[172]

3.5. Conduct of Financial Institutions Bill: Fundamentally Flawed?

Once enacted, the COFI Bill becomes the juridical mechanism to deliver on significant parts of the new system of regulation, including the transition to the new ways of regulating the sector overall.[173] Furthermore, it will dismantle the system of oversight, administration (bureaucracy) and regulation that was created in terms of the FAIS Act (covered in Chapter 3) and other financial sector laws aimed at regulating the financial services industry.[174] It will also be the first industry-wide law to introduce the six TCF outcomes into law.[175]

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[168] Ibid.
[169] Statistic cited in Daniella Padula, 'Regulating the Regulator: Dr. Andy Schmulow Compares Global Financial Systems in the Aftermath of the GFC' (2015) available at https://blog.scholasticahq.com/post/regulating-the-regulator-dr-andy-schmulow-compares-global-financial-systems-in-the-aftermath-of-the-gfc/, accessed 24 July 2025.
[170] Menelisi Ncube 'South Africa Aims to Increase Financial Inclusion to 90 Percent by 2030: Plausible or a Mere Ideal?' (2024) 27 *Potchefstroom Electronic Law Journal* 1.
[171] Supra note 12.
[172] Andrew Schmulow 'The Four Methods of Financial System Regulation: An International Comparative Survey' (2015) *Journal of Banking and Finance Law And Practice* 26 151.
[173] Vivienne Lawack and Lynette Visagie-Swart 'An Overview of the First Draft of the Conduct of Financial Institutions Bill and the Potential Impact on the National Payment System in South Africa' (2020) 31 *SA Mercantile Law Journal* 1 129.
[174] Ibid.
[175] Alexandra Pesci and Michel Koekemoer 'The FSCA Conduct Standard for Banks as a Means to Reform the Internal Financial Consumer Complaint Resolution Mechanisms of South African Banks' (2023) 44 *Obiter* 2 254.

In line with the objective set in the FSR Act, COFI sets up a consolidated, comprehensive, activity-based, and consistent regulatory framework.[176] Unlike the system of regulation under the FAIS Act, COFI does not require the role of the Compliance Officer to be a sub-officiator of regulatory matters.[177] It states in section 8 that arrangements should be in place to comply with the Act, and should there be a reasonable belief on the part of the FSCA that the arrangements are ineffective, the FSCA may ask for an independent review at the expense of the financial institution.

Based on Schmulow's work, South Africa should take heed that the language used in the COFI Bill and all standards, codes or laws that stem from the regulatory overhaul must be written in ways that enable and do not hinder the achievement of fairness. Indeed, the rules-based and prescriptive methods of developing and applying laws are historically antagonistic to consumer protection and to the underlying intent (to achieve fairness and serve South African society).[178] Plain language, even if abstracted, should live up to the general promise of the Constitution of South Africa for a 'better life for all' post-Apartheid. Clarity about the mission in plain terms enlivens the principles-based, outcomes-determined regulatory regime, in which norms of behaviour are enforced, whereas overly prescriptive, black-letter, rules-based – and less effective – legislative regimes are promoted by the currently historic approach.[179] The norms that Schmulow refers to will be unpacked in Chapters 5 and 6, where normative practices and their importance for the democratic, pluralistic South African legal landscape are partially accounted for. The use of language in the COFI Bill and other legal developments cannot ignore the transformative commitment of the apex law of South Africa and indeed the policy stance of the regulator to improve South African society. I argue in Chapter 6 that the normative concept of uBuntu should be the ethical paradigm through which legal actors in the industry

[176] Conduct of Financial Institution Bill (first introduced 2018) available at https://www.treasury.gov.za/twinpeaks/Conduct%20of%20Financial%20Institutions%20Bill.pdf, accessed 25 July 2025 at s 3.
[177] Ibid at s8.
[178] Andrew Schmulow 'Empowering Australian Financial Consumers through Plain English Legislative Drafting' (2024) 9 *The International Review of Financial Consumers* 1 43. While rules-based and prescriptive approaches have often been criticized for their rigidity and formalism, scholars like Tjakie Naude and Jacques Du Plessis have consistently argued that rules can be intentionally designed to promote fairness, especially in contexts marked by inequality and informational asymmetry. They point to the Consumer Protection Act (68 of 2008) as an example of a regulatory framework that uses detailed rules to secure substantive fairness and protect vulnerable consumers. Naude, in her work promotes unfair contract terms legislation with a view that substantive fairness does not have to be left to judicial discretion (on a case by case basis) and that it can be achieved via prescriptive statutory rules that set minimum standards for fairness in contracts. See, Tjakie Naude 'Unfair Contract Terms Legislation: The Implications of Why we need it for its Formulation and Application' (2006) 17 *Stellenbosch Law Review* 3 361. Tjakie Naude 'The consumer's' Right to Fair, Reasonable and Just Terms' under the New Consumer Protection Act in Comparative Perspective' (2009) 126 *SALJ* 3 505. Jacques Du Plessis 'Giving Practical Effect to Good Faith in the Law of Contract' (2018) 29 *Stellenbosch Law Review* 3 379.
[179] Ibid.

are to arrive at appropriately satisfactory versions of what is good, fair and expected from South African society.

In his work Schmulow praises the COFI Bill, the product of more than six years of drafting by South Africa's National Treasury, as a 'comprehensive piece of legislation that governs market conduct and consumer protection in a G20 economy with a highly developed, first-world, large and sophisticated financial industry, serving the needs of some 55 million consumers, subject to a Twin Peaks regulatory architecture, like that used in Australia.'[180] However, this thesis points to what it considers as a key flaw of the COFI Bill: it is not aspirational in terms of the values and ideals espoused in the Constitution and the promise of a post-apartheid South Africa that 'belongs to all who live in it', the achievement of equality and the advancement of persons disadvantaged historically and presently by unfair discrimination.[181] Although the COFI Bill uses accessible language and presents a clear vision for reform, it arguably undermines the very trust it seeks from society and may weaken the financial sector's renewed commitment to serve and uplift South Africa - an aim central to its original policy intent.

The major justificatory rationality that supports this argument is that absent in the rhetoric of the COFI Bill is contemplation in terms of what fairness may mean in the context that it addresses and to what end such fairness is sought. A lack of explicit linguistic consideration of the role that the financial sector should play in rectifying the starkly asymmetrical and economic disparities of South African society may, I argue, render the entire reform project little more than dead in the water.

The CPA, the law that protects retail consumers outside of financial services, sets in its preamble that 'laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy, and other forms of social and economic inequality'.[182] The CPA goes on to set aspirations that its objectives are not only to sustain the economy and improve market performance – rhetoric that is duplicated almost verbatim in the COFI Bill. However, the fatal flaw in the COFI Bill concerns the extent of the legal reform it envisages, at worst paying mere lip service to fairness, by limiting its application to: product development; a cognition of fair dealings when rendering services; and the setting of impermissible contract terms only as those that are lopsided (and lack express language that it should favour consumers).

[180] Ibid.
[181] Constitution of the Republic of South Africa Act 108 of 1996, Ch 1 s1 and C 2 s9.
[182] Consumer Protection Act 68 of 2008, Preamble.

The COFI Bill is entirely silent on, and therefore does not expect, the responsibility of firms in the financial sector to consider communal or simply relational normativity and work toward fairness in a substantive, social and economic sense. Nor does it require industry actors to understand socio-economic factors in the markets that they target or whether their product should ultimately benefit society as a whole. Such expectations are of course entirely antithetical to the normative expectation of, for example, insurance products, as will be addressed in Chapter 5. In all fairness, it is true that other aspects of the COFI Bill do align with the culture of consumer rights promoted in the CPA, such as, promoting innovation and improving market performance (and its contribution to the South African economy).[183] However, it is not a matter of course and therefore still stands to reason how and under what circumstances these aspects can be said to promote the overall bold regulatory commitment to fairness.

2.5.2 Salient Provisions Promoting Fairness

In the COFI Bill, anyone providing financial products or services is required to identify what is termed but not defined as the 'material risk' of products or services not performing to consumers' expectations as they should, including where an unfair outcome resulting from the product or service is experienced.[184] Indeed, the risk of not performing to the expectation of a contract counterparty, in this case, the consumer, ventures once more into the field of contract law and will be discussed again in Chapter 6. Nevertheless, under the COFI Bill, however, the legal expectation is placed on the financial institution to remedy the risk wherever it may arise and that includes overriding terms to a contract entered freely and voluntarily, an affront, no doubt, to long-held contract law policy and its principles.[185]

Another area where the COFI Bill instils fair outcomes into law is in respect of post-sale processes, where it makes it incumbent upon a financial institution to have systems in place to record and manage 'conduct risks' and to prevent poor client outcomes.[186] As seen, the focus on fairness continues beyond the contracting point between a client and financial institution and is covered as a principal matter in the COFI Bill.[187] After a contract is concluded,

[183] Phemelo Magau 'The Regulatory Nexus Between the Promotion of Financial Education and Financial Inclusion in Enhancing consumer protection in South Africa' (2023) 56 *De Jure Law Journal* 1 220-240.
[184] Supra note 176 at s26(3).
[185] Ibid.
[186] Supra note 176 at s33.
[187] Supra note 176 at s32.

there is a continued obligation on the financial institution not to impose any post-sale barriers which may prevent the fulfilment of contractual obligations. Further, it is to avoid not meeting expectations that have been created as well as any unfair treatment due to the financial product or service's impact(s) on an individual.[188]

Although the COFI Bill is silent on the retrospective application of the fairness principles, the wide ambit of the principles it relies on, considering fairness in the evaluation of the products and services, is far-reaching and arguably indeed applicable to undertakings made in the past.[189] This would mean that all action and contracts in the sector are reviewable in terms of considerations relating to fairness. Regardless of the extent of the retrospectivity, the COFI Bill unquestionably introduces 'fairness' as a contractual requirement of a financial service or insurance contract and in respect of the actual performance in terms of such a contract (which performance may not necessarily be in line with the undertakings made during the contracting process). As such, it represents a decisively clear legislative upending of the traditional (liberal individualist) application of the general principles and policy of the South African law of contract.[190]

With the implementation of the COFI Bill, mandatory roles established under the FAIS Act, such as the Compliance Officer and Key Individuals, are affected. The Compliance Officer does not appear in the COFI Bill and a Key Person replaces the Key Individual. However, the role of the Representative as created by the FAIS Act, is carried forward into the COFI Bill regulatory order, together with Fit and Proper Requirements applicable to both the representatives and key persons.

On the whole, throughout the COFI Bill, broad principles-based laws are introduced to give effect to the intended outcome of the laws and subordinate laws in keeping with the promise of outcomes-based regulation. The supervisory approach under the COFI Bill is also intended to be 'intensive and intrusive',[191] stating the principles expected to be adhered to in financial institutions, setting its sights on matters of principle related to organisational

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[188] Ibid.

[189] Supra note 173. See also Daleen Millard D 'The Impact of the Twin Peaks Model on the Insurance Industry' (2016) 19 *Potchefstroom Electronic Law Journal* 20.

[190] There had also been previous attempts to introduce fairness into the contract law discourse, through legislating unfair contract terms into law. Case law in this regard is covered in Chapter 6. See also J. P. Sutherland 'Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier 2007 5 SA 323 (CC)-Part 2' (2009) 20 *Stellenbosch Law Review* 50; and Jonathan Lewis 'Fairness in South African Contract Law' (2003) 120 *South African Law Journal* 330.

[191] FSCA 'Financial Sector Conduct Authority 'Regulatory Strategy 2021-2025' available at https://www.fsca.co.za/News%20Documents/FSCA%20Regulatory%20Strategy%202021-2025.pdf, accessed on 3 May 2024.

culture,[192] financial products and services,[193] advertising,[194] and, post-sale barriers and post-sale obligations.[195] The 'Explanatory Policy Paper accompanying the COFI Bill' states:

> A focus on principles should see a shift in both industry and the regulator toward ensuring that their actions and processes are geared toward driving the attainment of certain desired outcomes in the financial sector, not only on technical compliance with the law.[196]

Furthermore, the COFI Bill gives effect to the authority conferred on the FSCA (by the FSR Act) as a supervisory body (either independently or together with the Prudential Authority) to issue 'Conduct Standards'.[197] The seemingly wide scope granted to the FSCA to issue conduct standards as subordinate regulations, affords the FSCA the ability to regulate the financial sector dynamically.[198] It enables the FSCA to implement the new regulatory system in an unconstrained way to promote the achievement of fairness and build consumer confidence.[199]

The widespread impact that will come with the introduction of the COFI Bill can be considered a systematic process of legal reform to reorganise the financial sector and it's most significant actors, those being the insurance industry, financial services and banking sectors.[200] When the COFI Bill becomes effective, it will repeal the Financial Advisory and Intermediary Services Act and the Long-term Insurance Act (covered in Chapter 3). Additionally, it will repeal the Friendly Societies Act,[201] Short-term Insurance Act,[202] Financial Institutions (Protection of Funds) Act and Credit Rating Services Act.[203] Significant amendments will also be effected to prevailing laws such as the Pension Funds Act,[204] Collective Investment Schemes Act,[205] Insurance Act,[206] and the Financial Markets Act.[207]

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[192] Ibid at s17.
[193] Supra note 191 at s26.
[194] Supra note 191 at s29.
[195] Supra note 191 at s32.
[196] Supra note 84 at 11.
[197] Supra note 93 s106; and supra note 176 at s 67.
[198] Supra Schmulow (2018) note 12 at 41; and FSCA *Regulatory Strategy 2021–2025* at 11-13.
[199] Supra note 176 at s 67.
[200] Michel Koekemoer 'An Analysis of Aspects of the Proposed Reform of the Financial Consumer Complaint Resolution Mechanisms in the South African Banking Sector' (2021) 42 *Obiter* 336.
[201] Friendly Societies Act 25 of 1956.
[202] Financial Institutions (Protection of Funds) Act 53 of 1998.
[203] Credit Rating Services Act 28 of 2001.
[204] Pension Funds Act 24 of 1956.
[205] Collective investment Schemes Act 45 of 2002.
[206] Insurance Act 18 of 2017.
[207] Financial Markets Act 19 of 2012.

Together, the FSR Act, a regulator-facing law, and the COFI Bill, an industry-facing law, create the new regulatory system punted in the discussion document 'Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa'[208] where it is noted that a new Market Conduct Regulator alone would not improve consumer outcomes.[209] Through effecting amendments and the repealing of laws, which have served as the bedrock of the financial sector, a promise of simplicity is ushered in under principle-based regulation focussed on outcomes.

However, the abstracted concepts of fair outcomes as the primary aim lifted out of the law to supersede all other outcomes are meant to allow financial institutions the ability to introduce their methods of achieving fairness and save the FSCA the time to set unduly prescriptive requirements.[210] One may term this a programme of deregulation, affording the financial industry the ability to set its path for fair conduct and outcomes. One concern with the new regulatory order and the laws that this thesis raises, is that the principle-based expectations and injunctions are unclear about what is impermissible and permissible action, leaving industry actors and clients with what might be different understandings of what a fair outcome is in the context of a legacy (that remains in the present) of often grossly unequal bargaining power which is as often abused through exploitation.

4. Conclusion

Between 2010 and 2013, much work had gone into framing the future of the financial services sector in South Africa. As seen in this chapter, strides have been made toward introducing regulation to better support fair consumer and societal outcomes. This chapter highlighted key aspects of the second wave of reform, specifically with regard to the TCF regime and the introduction of the Twin-Peaks model, with the roles of the FSCA and Market Conduct Peak, as well as the introduction of the COFI Bill. The second wave of regulatory reform introduced not just a new set of legal instruments, but a an entirely novel regulatory approach: principle and outcomes-based regulation.

While these new laws and instruments were designed to better protect consumers and ensure market stability for the South African financial and insurance sector, the reforms were

[208] Supra note 68.
[209] Ibid.
[210] Supra note 53 at 12.

also directly aligned to global discussions (and indeed pressure) following the Great Recession of 2008. While pursuing global standards is important – particularly for so-called 'developing states' like South Africa – the country also stands to gain from regulation that is better designed to support substantially fairer socio-economic outcomes that contribute to addressing South Africa's unequal past. This, however, has featured less in the language of the law, yet was a critical policy motivator for the regulatory project discussed in this chapter and the new trajectory in law created by the second wave of reform.

The incoming regulatory system, which flows from the policy positions of the South African government, gave rise to the regulatory turn, and concerns itself with the expected conduct and regulation thereof to promote the achievement of fair outcomes in all client interactions and set the fair outcome as a legal expectation. Setting codes of good practice as professional bodies and non-state actors / regulators, which are non-binding guidelines, is less purposeful than a system where the guideline/principle/outcome is binding and regulated as a matter of compliance.

The next chapter explores the jurisprudential implications of outcomes-based regulation in the financial services and insurance sector for the possible meanings of fairness when we abstract from the normatively ethical ideal to the concrete context of its juridical application in the form of binding law.

CHAPTER 5: ACHIEVING FAIRNESS? AT THE LIMITS OF LAW

'Nothing obscures our social vision as effectively as the economic prejudice'. [1]

Karl Polanyi

1. Introduction

In principle, fairness is an abstract concept at the level of ideal expression.[2] Prior to its substantive entry into the financial sector in the second round of post-apartheid reform (discussed in the previous Chapter), it was used as an enabler of just administrative and procedural fairness.[3] However, the substantive roots of the system introduced in the second round of reform (which are currently in play or incoming) are aspirational and, ostensibly at least, grounded in the achievement of ethical commercial and consumer relationships in forms quite similar to those that protestors in Amsterdam demanded during the burgeoning years of merchant capitalism and global trade, traversed in Chapter 2 of this thesis. This chapter explores the concept of fairness jurisprudentially alongside other abstract, 'ideal-typical'[4] concepts in the South African legal order, such as justice and equality. I consider the justification for the incorporation of fairness in the laws[5] set to regulate the South African financial sector henceforth and the implications for its meaning in terms of the contextual application of the concept as a legal standard to which the financial sector is now subject.

The chapter suggests that within the context of reform (or even transformation[6]) of financial services and insurance laws in South Africa, the close economic and jurisprudential relationship between justice, fairness and equality is deserving of close scrutiny. A key question

[1] Karl Polyani *The Great Transformation: The Political Origins of Our Time* (2002).
[2] Fiona Dobbie, Sue Arthur and Naomi Jones *Building Understanding of Fairness, Equality and Good Relations in Scotland* (2010).
[3] Viwe Mrwebi, Viwe 'Assessing Possible Outcomes Regarding Organisational Justice in the Financial Services Industry' (2019) 3 *Corporate Governance* 1 51. See also, Financial Services Board 'Treating Customers Fairly, A Discussion Paper Prepared for the Financial Services Board' (2010); and Financial Services Board 'Treating Customers Fairly. The Roadmap' (2011).
[4] Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1976) 89 *Harv. l. rev.* 1685. See also, Alfred Jacobus Barnard Naude *A Critical Legal Argument for Contractual Justice in the South African Law of Contract* (unpublished LLD thesis, University of Pretoria, 2007) 211.
[5] As indicated in previous chapters, the key incoming law is the Conduct of Financial Institutions Bill. Conduct of Financial Institution Bill (first introduced 2018) available at https://www.treasury.gov.za/twinpeaks/Conduct%20of%20Financial%20Institutions%20Bill.pdf, accessed 25 July 2025.
[6] On the difference between reform and transformation in the South African legal sense, see Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 1 146.

that emerges in the course of such scrutiny is: What might the actualisation of fairness entail in this juridical context?

Before exploring possible answers to this question, the chapter looks first at ways in which abstract terms like fairness, equality and justice are typically relied upon in law. Thereafter, I explore the thematic meanings of fairness in its conceptual form and in relation to other concepts, such as equality and justice. How might critique make sense of its logic and its meaning in principle and outcomes-based laws such as those now coming into operation in the financial services sector in South Africa? The consideration also includes the possible application of existing tests for fairness, with which an individually fair outcome could be standardised by repetition across the sector.

A key argument presented in this chapter is that it is both necessary and appropriate in the context that existing legal texts and juridical doctrine be challenged by alternative constructions and interpretations of the relevant law and the legal reasoning underpinning it, since many such alternative constructions and interpretations more effectively support the realisation of substantive fairness in the financial sector. This alternate, parallel, marginal or minorist[7] juridical reasoning and legal logic, selectively leaning on the common law as it does, represents a movement away from the prevailing and dominant formal rule of law in the financial sector economy, to a rule of law that seeks the realisation of truly substantive moral ends.[8] In this sense, the juridical politics of the latter are far more candid than the deliberately veiled and obfuscated politics of the 'neutral', 'formal' rule of law,[9] routinely associated with (neo)liberalism. It is argued here that the dominant mechanisms' capacity for the achievement of substantive fairness came to be determined by the lawmakers and regulators as on the whole insufficient and, in some respects, it may even be regarded reasonably as having actively suppressed the realisation of a more substantive concept of fairness for the sake of the expediency associated with the promotion of exclusively commercial ends such as the maximisation of profit. Finally, this chapter as a whole lays the foundation for the analysis that follows in Chapter 6, where I squarely consider the possible impact of community conviction and communally normative values for the meaning and application of 'fairness' in the financial services sector of the future.

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[7] Jaco Barnard-Naudé 'Contract from the Margins: The Becoming of a Minor Jurisprudence in the Minority Judgment of Froneman, J in Beadica 231 CC v Trustees for the time being of the Oregon Trust 2020 5 SA 247 CC' (2024) 27 *Potchefstroom Electronic Law Journal (PELJ)* 1 1.
[8] Bradley W Wendel 'Truthfulness and the Rule of Law' (2021) 35 *Notre Dame JL Ethics & Pub. Pol'y* 795.
[9] Supra note 6, where Klare discusses the candor as a legal obligation in South Africa at 150.

The system of apartheid and the history of its post-modern[10] demise (introduced in Chapters 1 and 2) as the (perhaps eternal) becoming of the 'post'-apartheid order, may have been overcome through legal and political reform and transformation, but what is patently clear is that its systemic character persists stubbornly in structures less overt.[11] This legacy is apparent in the socio-economic circumstances and starting positions of many South Africans, including the born-free generation (who have never been formally subject to oppressive, authoritarian rule) and today's youth (a cohort amongst which the unemployment rate remains alarmingly high[12]). How, then, as one of the overarching questions of this chapter and of the thesis as a whole, might the global agenda to incorporate fairness as a juridical mechanism with which to sustain the global financial system, serve the improvement of the patently unjust postcolonial condition in South Africa, if at all?

2. The Pursuit of Fairness: Law and Equality

Thomas Aquinas seminally defined law as '[a]n ordinance of reason for common good, made by him who has care of the community, and promulgated'.[13] I cast Aquinas' definition of law as essentially compromising the jurisprudential backdrop that animates the change in the operation of financial law globally and in South Africa. In other words, these legal changes are arguably a significant contemporary part of the moral effort to seek the common good through reason and care for the consumer community. The exercise of authority and the laws ordained into being in South Africa's reform of the financial sector do not originate in the typical regalian duties of the State.[14] Rather, financial regulation has historically focused on markets and capital, prioritising commercial interests and largely reflecting dominant economic systems that have developed over centuries, including the merchant capitalism discussed in Chapter 2.[15]

[10] As argued by D Goosen, post-apartheid in a sense is post-modernism, and there is a case to promote pre-modernism systems in South Africa to imbue progressive change (whether temporal or persisting) and enable an ideological shift of significant proportions. See: Danie Goosen 'Tradition, Modernism, and Apartheid' (2017) *Acta Theologica* 37 1. See also, Norman Etherington 'Postmodernism and South African History' (1996) *New Contree* 40 14.

[11] Subtle structures include access to basic services, career opportunities which require education and skills, access to markets, and economic opportunity.

[12] Department Statistics South Africa 'Media Release: Quarterly Labour Force Survey 2024' available at https://www.statssa.gov.za/publications/P0211/Media%20Release%20QLFS%20Q4%202024.pdf, accessed 26 July 2025.

[13] SJ Henle and Thomas Aquinas *Treatise on Law, The Summa Theologiae, I-II* (1993).

[14] Thomas Piketty *Capital in the Twenty-first Century* (2014).

[15] Keith Hart and Vishnu Padayachee 'A History of South African Capitalism in National and Global Perspective' (2013) 81 *Transformation: Critical Perspectives on Southern Africa* 1 55. See also, Sam Ashman and Ben Fine

Like Aquinas', Roman-Dutch Law Jurist Johannes Voet believed in the importance of synthesising natural reason with received law, both crucial bases of the South African common law.[16] Voet's *Commentarius*[17] suggests that humans have always lived under laws – rules that arise from our inherent nature. These laws are, in Voet's view shaped by our natural tendency to seek justice and fairness through the exercise of 'right reason'.[18] Yet, his work on law and justice, although highly relevant to the regulatory turn in South Africa's reform of the financial sector, which seeks to adapt legal reasoning to achieve just and fair outcomes, has not been overtly situated as a possible jurisprudential basis for it previously, nor is it today, in the legal discourse that claims for itself the achievement of better treatment for South African financial sector consumers.[19]

I propose that the arrival of the ideal of fairness in the financial sector cannot but necessitate serious discursive consideration of the Thomistic idea that right action, fairness and care must be determined in relation, or with reference to, the consumer community in the financial sector.[20] This framing, however, stands in fairly stark contrast to the regulatory reforms discussed in earlier chapters which set for themselves the task of protecting and improving market activity (and resilience in trying times) through the apparatus of state involvement in the economy – like prudential and capital management, or more recently, through consumer protection directed at the regaining of public trust. While the above framing may admittedly overlap incidentally from time to time with consumer protection law directed at the regaining of public trust, in its effective – and I argue, right – form, the principle of fairness in the new laws, if it is to be determinedly tethered to the community of consumers, requires in the first place that sectoral actor judgements, treatment of consumers consistent with such judgments and institutional adjudication take the proper measure of the customer or citizen's personal circumstances within the overall legal context.[21] It is in this specific way that the determination of fairness can take place with reference to the community of consumers that

'Neo-liberalism, Varieties of Capitalism, and the Shifting Contours of South Africa's Financial System' (2013) 81 *Transformation: Critical Perspectives on Southern Africa* 1 144.

[16] Andrew Domanski 'Fundamental Principles of Law and Justice in the Opening Title of Johannes Voet's Commentarius ad Pandectas' (2013) 19 *Fundamina: A Journal of Legal History* 2 251.

[17] Ibid. See also, N Cloete 'The Jurisprudence of Customary Law P. Voet on the Concourse of Statutes' (1985) 10 *Journal for Juridical Science* 2 183.

[18] Percival Gane (ed) *The Selective Voet: Being the Commentary on the Pandects* (1955).

[19] Supra note 17. See also, Albie Sachs *Justice in South Africa* (1973). Vernon Palmer 'Living Off Translations: The Survival of Civil Law in South Africa and Other Mixed Jurisdictions' (2023) 23 *Tulane Public Law Research Paper* 1.

[20] Thomas Aquinas *Summa Theologica* (1981). See also, Christopher Todd Meredith 'The Ethical Basis for Taxation in the Thought of Thomas Aquinas' (2008) 11 *Journal of Markets & Morality* 1.

[21] Manuel Velasquez and Claire Andre 'Justice and Fairness' (1990) 3 *Issues in Ethics* 2 1.

is constituted in a highly plural and diverse way. In other words, consideration of individual personal circumstances in the process of determining fairness amounts to an affirmation of the singularity of each member of the consumer community and is as such simultaneously premised upon the recognition of their constitutional right to have their dignity 'respected and protected'.[22]

Further, it is the position of this thesis that it is only when legal application has evolved sufficiently to meet the aims of fairness thus conceived, that it becomes much more likely that broad-based societal trust in the reforms of the financial sector will exist. Currently, the reforms are being treated with considerable scepticism.[23] From the scholarly legal community in South Africa, continuing concerns are that dominant global economic forces are establishing new formations of hegemony[24] of which the ultimate aim is less the achievement of substantive consumer fairness, and (much) more directed at sustaining the financial sector market economy, now in the context of its need to reinvent the juridical mechanisms through which it secures its hegemonic reach.[25] Further (and later in this chapter), I argue that the legislature should have proffered just or equitable treatment, instead of appending fairness and fair treatment, as the decisive coercive abstract terminology in the South African financial sector regulatory overhaul. It is, after all, squarely within the structures of government that consideration should be given to seeking *justice* for historically disadvantaged persons, which conceptually goes hand in hand in the South African context with advancing a more equal society.[26] I suggest that justice conceptually linked to the achievement of (more) equality in South Africa, not only amounts to a formulation far more compelling than the present discourse in relation to an abstractly vague 'fairness' and fair treatment, but also that the proposed version of the abstract ideality of justice delimited by the achievement of equality, aligns much better

[22] Constitution of the Republic of South Africa Act 108 of 1996, Section 10.
[23] Harjit Singh Sekhon, Sanjit Kumar Roy and James Devlin 'Perceptions of Fairness in Financial Services: An Analysis of Distribution Channels' (2016) 34 *International Journal of Bank Marketing* 2 171. See also, Gareth Stokes 'Yes, the Problem is Overregulation' (2023) FA News, Available at: https://www.fanews.co.za/article/compliance-regulatory/2/general/1082/yes-the-problem-is-overregulation/36969.
[24] Joseph Femia 'Hegemony and Consciousness in the Thought of Antonio Gramsci' (1975) 23 *Political Studies* 1 29.
[25] Joel M Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal* 2 261. See also, Richard A Posner 'From the New Institutional Economics to Organization Economics: With Applications to Corporate Governance, Government Agencies, and Legal Institutions' (2010) 6 *Journal of Institutional Economics* 1 1; and David Gerber *Global Competition: Law, Markets, and Globalization* (2012); and Svetozar Steve Pejovich 'Capitalism and the Rule of Law: The Case for Common Law' (2007) *Entrepreneurial Economy* 7.
[26] Evadne Grant and Joan G. Small 'Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court' (2000) *N. Ir. Legal Q.* 51 174. See also, Constitution of the Republic of South Africa Act 108 of 1996 at Preamble.

with constitutional – and therefore, ultimately foundational – imperatives of the 'new' legal order.

One approach to advancing justice delimited by equality is the Aristotelian one, for it is Aristotle who boldly contends that 'justice considers that persons who are equal should have assigned to them equal things' and that 'there is no inequality when equals are treated in proportion to the inequality existing between them'.[27] Grant and Small suggest that within the framework provided by Aristotle's view of equality, the execution of two cognitive steps is essential.[28] The first is to differentiate between individuals, which essentially names a process of stratification.[29] The second is to treat those who are unlike in ways that reflect their differences[30] and it is only at this point that 'fairness' and 'fair treatment' starts to form part of the analytical juridical picture. According to Grant and Small, neither of these steps violates the principle of equality.[31] However, they point out that this approach remains formal rather than substantive: it offers no normative criteria for determining what constitutes appropriate differential treatment.[32] It is at this second step, namely at the point of deciding what fair treatment entails for those who are not alike, that South Africa's financial sector regulatory reform project fails to offer the necessary clear guidance.

The transformation of South African financial laws with a view to promote fairness therefore clearly should entail taking individual circumstances into account. In this framework, consumers' interaction with financial services offers a chance to ameliorate previous injustices and promote more equitable outcomes. Fair treatment, like drawing distinctions as offered by Grant and Small, will require in-depth knowledge of persons' personal circumstances. However, this raises questions about an individual's right to the privacy of their personal information, an issue which is in a state of unprecedented flux in the present digital age.[33] There is also a crucial tension between the pursuit of equality as a determinant of justice, and the limits placed upon its actualisation by the neoliberalism of our global economy, long

[27] Aristotle *Nichomanchean Ethics* (n.d.) V. See also, William Lambert Newman *The Politics of Aristotle: Introduction into the Politics* (1887).
[28] Supra note 26.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Shoshana Zuboff *Surveillance Capitalism* (2019). Note that it is outside of this thesis to fully examine the implications on the right to privacy of the new regulatory turn in South Africa's financial services industry.

recognised in critical circles as a system that exacerbates rather than diminishes inequality.[34] There is a clear friction, then, between these major concepts – fairness and equality on the one hand, neoliberal market imperatives on the other that stem from Western post-Enlightenment rationality, and with its characteristic free market ideology excludes the problem of economic inequality from the sphere of political redress.[35] It is, therefore, no coincidence that the reform of the financial sector laws stops short, in its rhetoric of improved consumer education, inclusion, consumer protection – or, treating customers fairly, of dealing head-on with the critical levels of inequality in South Africa.[36]

We turn next to examine more closely how an abstract ideal like fairness, and like equality, can be pursued through the law.

2.1. Use of Abstraction

At the dawn of Western political philosophy as we know it, Plato's *Republic* offers a useful illustration of how concepts move across different levels of abstraction, particularly through the dialogue between Socrates and Polemarchus on the nature of justice.[37] In this exchange, Socrates systematically rejects each definition of justice proposed by Polemarchus, arguing that they are overly broad, encompassing too many instances and operate at an excessively abstract level.[38] Through successive refinements, the discussion narrows the definition, introducing more specific criteria such as distinguishing between actions toward friends versus enemies when assessing whether justice or injustice is present. In doing so, the abstract idea of justice becomes more particularised, concretised and applicable to fewer, more defined situations.

This progression from general to specific – from high abstraction to concretely grounded application – mirrors what I argue may yet occur in the current shift toward principle-

[34] See Maurizio Lazzarato 'Neoliberalism in Action: Inequality, Insecurity and the Reconstitution of the Social' (2009) 26 *Theory, Culture & Society* 6 109; and Vicente Navarro *Neoliberalism, Globalization, and Inequalities* (2007).
[35] See Tuomo Tiisala 'Foucault, Neoliberalism, and Equality' (2021) 48 *Critical Inquiry* 1 23; Alexander W Wiseman and Petrina M. Davidson 'Institutionalised Inequities and the Cloak of Equality in the South African Educational Context' (2021) 19 *Policy Futures in Education* 8 992; and Ran Hirschl '"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-liberal Economic Order' 22 (2000) *Hum. Rts.* 1060.
[36] Supra note 15.
[37] Plato *Republic* (n.d.).
[38] Discussed in Michael Even Gold 'Levels of Abstraction in Legal Thinking' (2017) *S. Ill. ULJ* 4 120.

and outcomes-based regulation in law. While the approach aims ostensibly in the letter of the legislation to advance fairness, it may, in practice, regress to a reductionist framework that does no more than posit the demands of expediency and market certainty as necessitating and thus determining the more concrete and predictable interpretations. In other words, in the course of the necessary movement from the abstract language to the concrete interpretation and application of that language, there is a considerable risk that the emancipatory potential of the abstract ideals underpinning the regulatory paradigm, will be collapsed to serve ultimately operational efficiency. Let's examine this more closely.

In his article on levels of abstraction in legal thinking, Michael Evan Gold concludes that modern philosophy, history, and economics all utilise methods of abstraction.[39] Gold sets criteria to warrant the varying levels of abstraction, which must consider the following:

- the number of persons and transactions that generate an issue,
- the number of persons and transactions of which a piece of evidence is true,
- the number of persons and transactions to which an argument applies, and
- the number of persons and transactions affected by an issue's resolution.[40]

In determining the level of abstraction using the above criteria, the inference is that the greater the issue at hand, the higher the level of abstraction may be. Gold's abstraction criteria help unpack and address complex societal and legal problems. To assess the case for abstraction in the financial sector, I consider the number of persons and transactions that generate an issue, let's say, unfair outcomes. The number of persons and transactions for which the evidence is true is a further test, and focusses in this context, then, on unfair client outcomes as the measure of generated issues that are widespread While 'unfair client outcomes' remain at the level of abstraction,[41] it is possible to deduce from the type and volume of disputes referred for adjudication to tribunals, ombudsman offices, and the judiciary, that there are business

[39] Ibid.
[40] Ibid.
[41] For abstract and metaphorical concepts like justice and fairness, where their moral attributes need defining, a useful definition comes in defining the concept negatively or indirectly in terms of the opposite, such as 'unfairness'. It is useful to identify these negative forms so that the antithetical equalising force can find application and operability. See here John Stuart Mill 'Utilitarianism' in Steven M. Cahn (ed) *Exploring Philosophy: An Introductory Anthology* (2000). See also the seminal work of linguist Ferdinand de Saussure who developed a theory for the structure of language which included that words were understood in relation to what they were not. Ferdinand de Saussure *Course in General Linguistics* (1916).

practices entrenched in the financial services and insurance sector which leave clients unhappy, with a sense that they have been treated unjustly or unfairly, and in some cases may even punitively exacerbate their circumstances in cases where improper professional advice or predatory and exploitative corporate practices have led directly to financial loss.[42] The above is borne out in the National Financial Ombud (NFO) Annual Report 2024, wherein firstly, it cements principles and ideals as central to how it discharges its duty, and, secondly, states that 85% of the complaints they've resolved had at least one unfair outcome (which they addressed).[43]

The financial sector is one of the largest sectors in South Africa and globally.[44] The insurance sector alone, according to the IMF, accounts for nearly 20% of the value in the financial services sector, which is regarded as one of the main contributors to the country's GDP.[45] Between 2019 and 2020, a total of 18.5 million new recurring premium products alone were sold to retail clients in South Africa.[46] This number is nearly half the total adult population of South Africa.[47] Over the same period, approximately 1 million policyholders lodged claims against recurring premium policies and in 2020 half a billion Rand in benefit payments were made.[48] As a result, the amount of transactions justifies, based on Gold's criteria, the continued application of abstract legal concepts such as fairness in the financial sector legislation..

That being said, comprehending the impact of unjust or unfair outcomes requires the analyst to turn back to the historical picture of South Africa where knowledge asymmetry, power imbalances, poor financial literacy, as well as the adverse conduct of institutions

[42] In 2024, over 35,000 cases claiming unfairness were lodged with the Financial Sector Ombud alone, and awards or outcomes in excess of R300 million were granted in favour of consumers.
[43] National Financial Ombud Scheme South Africa 'Annual Report 2024' (2024) available at: https://nfosa.co.za/docs/nfo-annual-report-2024/, accessed 25 July 2025. See also, Katherine Gibson 'Case Study: Strengthening Consumer Protection the South African Microinsurance Market' (2011) *Finmark Trust*.
[44] Athenia Bongani Sibindi and Ntwanano Jethro Godi 'Insurance Sector Development and Economic Growth: Evidence from South Africa' (2014) 11 *Corporate Ownership & Control* 4 530.
[45] International Monetary Fund 'South Africa Financial Sector Assessment Program Technical Note on Insurance Sector Regulation and Supervision' (2022), available at https://www.imf.org/en/Publications/CR/Issues/2022/06/16/South-Africa-Financial-Sector-Assessment-Program-Technical-Note-on-Insurance-Sector-519728, accessed 25 July 2025.
[46] Quoted in Asisa 'Life Insurers Pay More than Half a Trillion Rand to Policyholders and Beneficiaries' (2020) available at: https://www.asisa.org.za/media-releases/life-insurers-pay-more-than-half-a-trillion-rand-to-policyholders-and-beneficiaries-in-2020/, accessed 25 July 2025. Note that many new products are sold in an industry that is also rife with attrition, churn, and unethical sales practices. See Thabiso Sthembiso Msomi and Masibulele Phesa 'Nexus of Fraud Mitigation Practices and Profitability of Insurance Companies in South Africa' (2024) 13 *International Journal of Research in Business and Social Science* 7 379.
[47] Despite the perceived high number it is reported that South Africans are underinsured by over 28 trillion Rand. See: Palesa Shipalana 'Digitising financial services: A tool for financial inclusion in South Africa' (2019) *South African Institute of International Affairs* 1-38.
[48] Supra at 46.

(business, proprietors, and oversight bodies) were confined in terms of legal consequences to the innate limitations of restrictive legal liability doctrine in the codified laws, and how the application of these laws contributed to the vulnerability and susceptibility of many South Africans to poor and unfair client outcomes.[49] This historical detail, then, warrants a high level of abstraction in relation to the issues of fairness, justice, mistrust, misuse, miss-selling, improper conduct and the other ills apparent, which has been claimed and constructed as crucial to the rhetoric of the regulatory reform project.

The next section turns to examine the relation between the lodestar of 'fairness' in the new regulatory turn and the objectives of the South African Constitution to serve a more equal society.

2.2. Post-apartheid constitutionalism and 'the achievement of equality'[50]

As highlighted in Chapter 2 of this thesis, the 1996 South African Constitution was the product of a long and wide-ranging consultative process taking account of the best constitutional and rights-based systems to develop what was believed, at the time, to be the most appropriate for the country following the end of apartheid.[51] The 1996 Constitution is the second constitutional text which was drafted after the Interim Constitution,[52] and in accordance with the procedures that the latter stipulated for the drafting and adoption (including Constitutional Court certification) of the former. The Constitution offers, therefore, a refinement of the values of the Republic of South Africa two years after the first democratic elections.[53] The 'Rainbow Nation', as the country came to be known, was a term used to exemplify the rich tapestry of cultures, race, ethnicities, and sexes, who, although singularly individual, live a collective experience as citizens and residents of a country (which famously opted for a relatively non-violent transition to co-existence as equals before the law).

As for the preceding regime of apartheid, many had resisted and stood against it, but not all. Yet, all were affected and impacted in one way or another, positively or negatively,

[49] In contrast to the roots of insurance in South Africa as addressed in Chapter 2 – where finance and insurance bloomed and leaped to the saving of an economically ailing White South African population – recent outcomes to consumers of finance and insurance, as is the cause for regulatory reform is less prosperous, neither delivering clients from economic social strife nor unfairness and indignity.
[50] Supra note 22 at Preamble.
[51] Supra note 22 at s2.
[52] Interim Constitution of the Republic of South Africa Act 200 of 1993.
[53] Supra note 22.

under the immoral and discriminatory laws. An expanding inequality gap endures as the major adverse social legacy of this oppressive system, which officially ended some 30 years ago.[54] The system marginalised and discriminated through a corpus of laws, legislated by the political class to segregate the country on racial grounds and to provide economic opportunity for particular groups (white and European) while excluding the majority (non-white) from equal economic and political opportunity.[55] It is these histories of inequality, unfairness and injustice that this thesis proposes *should* be central in the interpretation and application of the abstract notion of fairness and fair outcomes in the new regulatory turn of the South African financial sector.

'The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'[56] So reads one of the supremacy clause of the South African Constitution. This supremacy of the Constitution is significant in post-apartheid South Africa. As cited above, all laws – regardless of the different branches, namely, legislation, customary law, and the common law – are subordinate to the Constitution.[57] Furthermore, the reference to 'conduct' in the opening quotation includes the conduct of public officials, private individuals, and institutional bodies, requiring all to act according to the codified morality of the Constitution.[58] Indeed, the Constitution applies to all aspects of life in South Africa, including business relationships and private matters.[59] This means that the (lawful morality of the) Constitution reigns supreme within the financial sector and in relation to its actors, and its practices must therefore be aligned to constitutional imperatives. There is, of course, a limitation clause in the Constitution which holds that the human rights enshrined in the Bill of Rights can be limited only in the terms of law of general application which is required to be reasonable and justifiable in a society based on human

[54] Sergio Fernandez 'Addressing the Legacy of Apartheid' (2020) *Representative Bureaucracy and Performance: Public service transformation in South Africa* 69-111.
[55] Looking at the system of laws under the Apartheid project, the mechanism of law and its legal and state substructures, like courts, legislators, and other state-affiliated commentators and institutes, systemised and legitimised the apartheid order. It was a legally oppressive system enforced by state-affiliated institutions and actors of the state, to which economic actors and businesses abided in return for preferential economic status and treatment. It is in part for this reason that, in this thesis, understanding the roots of the socio-economic disparity among Soth Africans is contextualised within the constitutional project first, and then within the reform of the financial sector, a sector intended to provide financial protection, wellness, welfare and prosperity. Rebecca Hamilton 'The Role of Apartheid Legislation in the Property Law of South Africa' (1987) *Nat'l Black LJ* 10 153. See also Joel M Modiri 'The Colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 3 405; Joel M Modiri 'Law's Poverty' (2015) 18 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2 229.
[56] Supra note 22.
[57] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC).
[58] Ibid.
[59] Johan D Van der Vyver 'The Private Sphere in Constitutional Litigation' (1994) 57 *THRHR* 378.

dignity, equality and freedom.[60] The limitation clause furthermore sets out relevant factors that should be considered in the process of determining the reasonableness and justifiability of a law of general application that contain limitation(s). Amongst these features the compulsory consideration of 'less restrictive means to achieve the purpose'[61] of the limitation.

On the other hand, the Constitution establishes an onus on the judiciary to develop the common law to give effect to the rights it seeks to protect or promote.[62] This means, inter alia, that the letter of the Constitution itself (which affords rights in abstract terms like justice and equality) is often not self-fulfilling on its own and it clearly relies on the development of the subordinated common law in order to come into its own more fully in terms of the concretisation of its abstract idealism. In understanding how both the historical forces of South Africa and the imperative to align the common law with the Constitution, should play out in the application and development of the former, the Constitutional Court's judgement in the matter of *Mighty Solutions*, is relevant.[63] The facts of the *Mighty Solutions* case involved the question whether a licensed fuel retailer could resist eviction from a service station after its lease had expired, by relying on its statutory licence and alleged rights to continue operating - an argument that the Constitutional Court ultimately rejected.[64] However, in the judgement handed down by the Court, Justice Van der Westhuizen offers a powerful description of the development and role of the common law in relation to the Constitution:

> Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law – like customary law – to accord with the Bill of Rights.
>
> […]

[60] Supra note 22 at s36.
[61] Ibid.
[62] Supra note 22 at s8.
[63] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) (*Mighty Solutions (CC)*) para 36-7.
[64] Ibid.

> [T]he mere fact that common law principles are sourced from pre-constitutional case law is not always relevant. Age is not necessarily a reason to change. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time. The Constitution indeed recognises the existing common law and customary law. […] Furthermore, legal certainty is essential for the rule of law – a constitutional value.
>
> Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.[65]

The judgment in *Mighty Solutions* underscores that while legal continuity and certainty remain important legal considerations, they cannot be preserved at the expense of realising constitutional values. The responsibility of courts is not only to apply the law but to interrogate it - critically and contextually - ensuring that inherited doctrines are only preserved where they align with the transformative vision of the Constitution.

Because apartheid entrenched inequality through law, any assessment of contemporary financial-sector reform must be framed by that history.[66] Although the stated objective of the new regime is fairness, we must ask whether the new statutes, regulatory methods, and legal language merely preserve inequality in a new guise – whether intentionally or as collateral damage – or whether they promote transformation in an authentic way. If transformation is the goal, the Constitution's commitments, which bind the state and its regulators (including the Financial Sector Conduct Authority (hereinafter 'FSCA') and Prudential Authority), cannot amount to lip service or be confined to procedural fairness alone in the financial sector reform legislation. Reform, then, must explicitly confront the lived experiences and concrete present circumstances of historically disenfranchised people and their past and present relationships

[65] Supra note 63 para 36-38.
[66] Supra note 55.

with formal finance.[67] This means that informational asymmetries, the confines of orthodox contract law, and the legacy of despotic economic rule are all relevant considerations in the determination of the sector's new commitment to fairness. Failure to seriously account for these factors, risks reproducing unequal practices, undermining sustainable growth and stability, and eroding the already diminished public trust in the financial sector's capacity to be fair and improve social conditions.

As inequality deepens, eliminating predatory business practices and fostering sustainable economic activity in the financial sector becomes increasingly difficult. Simply applying notionally 'fair laws' without serious regard for consumers' individual financial hardships – and the structural causes of those hardships – will not create a financial sector that is genuinely beneficial or sustainable for the public.[68] However, the re-regulation of the financial sector through principles-based and outcomes-based regulation, opens a novel aperture for change. This emerging regulatory lens offers a pathway to better societal and economic outcomes if the aspirational language of the new regime is aligned with and hermeneutically tethered to the constitutional ideals of justice, equality, and dignity. Yet, to achieve this, regulatory efforts must move beyond the abstraction and begin concretely to close the gap between the utopian legal rhetoric and the lived realities of South African consumers.

This chapter turns now to look more closely at the implications of the turn to fairness in contract law as the paradigmatic legal component of financial service transactions.

2.3. Contract Law: Fair?

Contractual undertakings sit at the heart of the relationship between industry actors and consumers.[69] If contract law does not adequately address the wealth inequality problem delineated above as a central constitutional concern of transformation, the new regulatory reforms could create confusion about the meaning and significance of contractual commitments. The binding power of contracts, under concepts like *pacta sunt servanda,*[70] on the one hand, ensures adherence to the terms of a contract (let's say, paying a premium to accumulate funds) and, within the context of financial services, provides policyholders with

[67] Supra Modiri (2015) at note 55.
[68] Supra Modiri (2015) at note 55 at 245- 246. See also, Butler J *Precarious Life: The Powers of Mourning and Violence* (2004).
[69] Peter Vincent-Jones 'Contract and Business Transactions: A Socio-Legal Analysis' (1989) 16 *JL & Soc'y* 166.
[70] Coenraad Visser 'The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade' (1984) 101 *SALJ* 641.

the confidence that the terms of their contract (to pay for insurance or save for retirement) are secure, enabling the financial services or product provider to in turn channel these funds into productive investments in a globally connected market.[71] However, critics have warned for decades that strict enforcement in accordance with the maxim inhibits the ability to achieve fair outcomes.[72] This is an especially acute consideration in the present legal context of outcomes-based regulation.

Regulating to achieve better client outcomes is not exclusive to South Africa's financial sector. Indeed, legislation to protect consumers from unfair practices and contract terms was fervently called for at the end of the 20th century, but calls were made even earlier when in the mid-20th century, Turpin's article on Contract and Imposed Terms challenged the notion of freedom of contract and called for legal scrutiny to protect fairness and justice in contractual relationships, in particular for contracts of adhesion which he termed 'mass contracts'.[73] At that stage, the proposed focus of the regulation was to develop contract law through statute (instead of exclusively through the common law) in the form of express unfair contract terms legislation.[74] This had become a common legislative intervention in non-Roman Dutch jurisdictions.[75] In her assessment of unfair contract terms, and unfair contract terms legislation jurisdictions, Tjakie Naude states:

> In my view, common law mechanisms and judicial control cannot sufficiently address the problems in this area, regardless of how wide judges would be prepared to interpret their powers under the Constitution or the common law. Legislative control in the form of unfair contract terms

[71] This is observable as the expediency benefit discussed in this thesis as having an association with a rules-based financial order. See Chapters 3A and 3B. Sergio Mittlaende 'Theories of Contract and Contract Law' (2022) *Equity, Efficiency, and Ethics in Remedies for Breach of Contract: Theory and Experimental Evidence* 19-59.

[72] Supra note 4. See also, Gerhard Lubbe 'Taking fundamental rights seriously: the Bill of Rights and its implications for the development of contract law' (2004) 121 *South African Law Journal* 2 395; Jonathan Lewis 'Fairness in South African contract law' (2003) 120 *South African Law Journal* 2 330; S W J van Der Merwe, G Lubbe and L Van Huyssteen 'The Exceptio Doli Generalis: Requiescat in Pace-Vivat Aequitas' (1989) 106 *SALJ* 235; G Lubbe and C Murray. *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988); Deeksha Bhana and Marius Pieterse 'Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited' (2005) 122 *SALJ* 4 865.

[73] C Turpin 'Contract and Imposed Terms' (1956) 73 *SALJ* 144. See also, Tjakie Naude 'Unfair Contract Terms Legislation: The Implications of Why we Need it for its Formulation and Application' (2006) 17 Stellenbosch Law Review 3 361.

[74] South African Law Commission 'Report, Project 47 Unreasonable Stipulations in Contracts and the Rectification of Contracts Project' (1998).

[75] Supra Naude at note 73.

> legislation (which inter alia gives a general power to courts to strike out or amend unfair terms) is necessary.[76]

Comparatively, most Nordic countries have adopted fairness principles into contract law, not through precedent or common law, but rather, expressed in their statutes and stated in certain terms; a measure which has greatly improved client outcomes.[77] From this perspective, it seems a missed opportunity that the South African programme of reform did not encompass contract law and its development in the direction of fairness in a more pointed and deliberate manner. However, with some cynicism, a reason one may proffer to explain this oversight is that it is not the intention of the legal reform in the financial sector to alter the 'deep structure' or 'structuring matrix' of the law that is applicable to it in the first instance, and that the changes observable on the surface of the laws are actually part of a broader agenda to deregulate, thereby reducing impediments to economic growth that constrain rapid innovation under the guise of consumer-centric rhetoric. A less regulated financial sector – one of South Africa's most profitable industries – could mean the financial sector can further its enterprise unbridled by rigid laws that inhibit rapid growth and that have caused disapprobation in the consumer society, with the general principles of contract law being the body of law which is the most rigid of them all. If this is the case, then the 'reform' towards principle and outcomes based law amounts to no more than the latest juridical devices with which to generate the necessary false consciousness on the part of consumers that will hold the hegemony of inequality inducing neoliberal fundamentals in place and thereby legitimate it.[78]

If, however, statutory measures like unfair contract term legislation are truly to come into their emancipatory own, then the position of this thesis is that a multidisciplinary approach directed at improved understanding in relation to both the motivations behind regulation and how it is put into practice, is necessary. While this thesis does not propose specific wording for new, fairness-focused or outcomes-based contracts, it suggests that any new contractual

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[76] Supra Naude at 73 at 362.

[77] Nordic countries has of the lowest wealth inequality in the world. See: Thomas Piketty 'Capital and Ideology: A Global Perspective on Inequality Regimes' (2021) 72 *British Journal of Sociology* 1. See also, Kare Lilleholt 'Application of General Principles in Private Law in the Nordic Countries' (2013) *Juridica Int'l* 20 12; and Frederik Hans Marthinussen 'Unfair Contract Terms' *European Perspectives on the Common European Sales Law* (2014) 93.

[78] Jordana Greenblatt 'The "Yes" Which is Not One: Consent, the Law, and the Limits of False Consciousness Feminism' in Greta Olson, Mirjam Horn-Schott, Daniel Hartley, Regina Leonie Schmidt (eds) *Beyond Gender* (2018) 235.

language that is developed, should challenge the traditional doctrines – especially the traditional reverence for uncritical application of precedent and the jurisprudence that those precedents established and that have long held the rigid enforcement of contracts in place as a matter of contract's law policy position over many decades. Such an inclination for challenge, questioning and critique is essential as a jurisprudential position aimed at ensuring that contractual autonomy benefits everyone, rather than it perpetuating existing disadvantages.

This thesis now turns to explore how egalitarian philosophy and the concept of 'ultimate fairness' inform the evolving regulatory discourse in South Africa's financial sector, positioning fairness, justice, and equality as interconnected tools for achieving transformative legal and social outcomes in the post-apartheid era.[79]

2.4. Why Fairness and not Justice or Equality?

Justice, equality, and fairness are closely related but distinct and complex abstract concepts.[80] Each is, however, rooted in forms of egalitarian ideals that aspire to equal recognition and, ultimately, equality of outcomes.[81] Egalitarianism, then, provides a framework that considers how these values interrelate and how they might be realised in practice.[82] This section draws on egalitarian philosophy to argue that, in the South African context, these values should not be treated as separate or unrelated. Rather, they share a unified emancipatory mission to redress historical and structural inequality through constitutional and democratic means in the post-apartheid era.

The shift toward fairness in the financial sector's regulatory discourse mobilises networks and rationalities to push law beyond its traditional black letter boundaries in order to realise its normative goals.[83] As examined in Chapter 4, this regulatory reform project introduces policy positions and new laws that together mark a turning point in South African

[79] The notion of 'ultimate fairness' is found in the TCF Discussion paper, supra note 3.
[80] Larry Temkin 'Justice, Equality, Fairness, Desert, Rights, Free Will, Responsibility, and Luck' in Carl Knight, and Zofia Stemplowska (eds) *Responsibility and Distributive Justice* (2011) 51.
[81] These are different forms of egalitarian thought: the one is equally affording all rights and the other is ensuring equality of outcome. See Marc Fleurbaey 'Equal Opportunity or Equal Social Outcome?' (1995) 11 *Economics & Philosophy* 1 25.
[82] In his article on justice, equality and fairness Temkin (supra note 73) refers to ex ante and ex post equality seeking, as well as the pursuit of fair outcomes in the context of both procedural and substantive fairness.
[83] Kate Budd et al. 'Metaphor, Morality and Legitimacy: A Critical Discourse Analysis of the Media Framing of the Payday Loan Industry' (2019) 26 *Organization* 6 802. See also, Norman Fairclough 'Technologization of Discourse' in Carmen Rosa Caldas-Coulthard and Malcolm Coulthard (eds) *Texts and Practices Revisited* (2023) 27.

legal development. The prescient features of this new approach untether themselves from traditional legal logic through their emphasis on the substantive outcome of fairness. In so doing, they open a space where societal and commercial interests can converge. By way of this convergence, law assumes dynamic force and no longer functions merely as a formal structure but instead as an operational mechanism to address asymmetries of knowledge and power in the market.

A foundational text in this transition was the 2010 Treating Customers Fairly (TCF) Discussion Paper, which introduced the idea of 'ultimate fairness' (see discussion in Chapter 4).[84] In this document, the authors – drawing on the language of Adam Smith[85] - write:

> The discussion above which sets out the legislative and regulatory landscape of statutory and voluntary institutions suggests that the hand behind the invisible hand is indeed visible. Moreover, this visible hand plays its role in achieving what we may refer to as ultimate fairness.
>
> The concept suggest that there is a time dimension involved in the fairness principle. We can distinguish between what we can for the moment call immediate fairness and ultimate fairness. The concept of ultimate fairness is there to remind us that in the event of a dispute, both parties have recourse to appeal standards of behaviour (which can be enshrined in the law). A customer who thinks she is being treated unfairly has recourse to complain about the behaviour of the firm concerned. The firm, in turn, has the right to respond to the customer's complaint. An independent authority (which can be the Ombudsman or the court) resolves the dispute. In certain circumstances, a decision of the Ombudsman or court may in turn be appealable. The process may take months or years to sort out and there are costs involved.[86]

[84] In the 2010 TCF Discussion Paper explains ultimate fairness to apply a time dimension to the fairness principle, in that, in a dispute both 'parties have recourse to appeal standards of behaviour (which can be enshrined in the law)'. Ultimate fairness, it is considered, will be the subject of institutions and statute to make it so that the 'the hand behind the invisible hand is indeed visible…this visible hand plays its role in achieving what we may refer to as ultimate fairness'. Supra note 3 (2010) at 2, 25 and 69.
[85] Adam Smith *The Wealth of Nations* (1776).
[86] Supra note 3 (2010) at 25-26.

Moreover, in the 2011 TCF Roadmap, the guiding document for implementing market conduct regulation in South Africa's financial sector, the FSB refers to the operationality of "ultimate fairness" as follows:

> Even the most comprehensive and rigorous of regulatory frameworks cannot guarantee that instances of abuse will never occur. Inevitably, some customers will be treated unfairly. It is therefore essential that such customers have ready access to simple and effective alternative dispute resolution mechanisms. In this way, they can be assured of "ultimate fairness", even where the broader TCF framework has failed them.[87]

In this context, 'ultimate' means the end of a process – and with it comes, at least presumably, the arrival of justice through law. This concept, central to outcomes-based regulation, is especially important in the *ex post* evaluation of contracts with its retrospective assessments, such as those undertaken by adjudicative bodies like the Ombudsman. When evaluating whether an outcome is fair, the law must consider the reasonableness of the process, the expectations of the parties, and the structural barriers present in the client–provider relationship.[88] The implications of 'ultimate fairness' deepen the discourse around fairness by raising critical questions about context, perspective, and the normative meaning of fairness in practice.[89] It also squarely links the concept of fairness closely to that of justice, which is in itself an outcome. I turn now to examine more closely the relationship between the two.

2.5. Justice as Fairness

In John Rawls's conception of 'justice as fairness', he proposes that the first virtue of social institutions is fairness.[90] Insurance, as a major part of financial service provision, is by its very nature, a means of protection and social welfare, and is – as such – a social institution. As a

[87] Supra note 3 (2011).
[88] Supra note 3(2011) at 26.
[89] Supra note 3 (2010 and 2011).
[90] John Rawls *A Theory of Justice* (1971). See also John Rawls 'The Idea of Public Reason Revisited' (1997) 64 *The University of Chicago Law Review* 3 765; and John Rawls 'The Law of Peoples' (1993) 20 *Critical Inquiry* 1 36.

social institution, it offers products that provide security, contribute to societal stability, and support government efforts to reduce pressure on public welfare systems by giving financial and other forms of protection to policyholders in need.[91] Rawl's conception of justice as fairness helps us to understand how it applies in an institutional setting such as that of the financial sector, as he proposes a distinct structure for achieving these ideals in such a setting.[92] This structure is outlined below.

Rawls applies *justice as fairness* to social institutions by using a hypothetical contract in what he calls the 'original position' to derive two principles of justice, which are then used to design and evaluate the basic structure of society, ensuring equal basic liberties, fair opportunities, and inequalities that benefit the least advantaged.[93] The first, therefore, is that all persons must attain the most basic rights, liberties and freedoms.[94] In the South African context, these are set out in Chapter 2 of the Constitution, the Bill of Rights.[95] These rights are universal and inalienable.[96] The second component contains two parts which pertain to social and economic inequalities. The first component (which aims to address social and economic inequalities) is that the societal and institutional system of a society is to be arranged in a manner that is 'reasonably expected to be to everyone's advantage'.[97] The second component, which is attached to the first, is that positions and offices are open to all – meaning that the system is indifferent to the diverse specificities of those who need it.[98] Notably, Rawls' caveats that his proposed model is only designed for application in sufficiently advanced Western-style democracies, where individual rights and treatment of citizens and among citizens are, and have historically been, equal. This means that his approach to justice as fairness and the role of social institutions requires corrective revisions to account for the radically unequal starting points of many consumers within South African society.

The next aspect of Rawl's approach, however, is more helpful for the South African context. Rawls puts forward the idea of the 'difference principle' for the actualisation of justice

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[91] OECD 'Developing Life Insurance in the Economies in Transition' (2001) available at https://www.oecd.org/finance/insurance/1857819.pdf, accessed 26 July 2025. See also, Jeffrey W Stempel 'The Insurance Policy as Social Instrument and Social Institution' (2009) 51 *Wm. & Mary L. Rev.* 1489; and Harold D Skipper and Robert W. Klein 'Insurance Regulation in the Public Interest: The Path Towards Solvent, Competitive Markets' (2000) *The Geneva Papers on Risk and Insurance-Issues and Practice* 25 482.
[92] See also, John Rawls 'The Law of Peoples' (1993) 20 *Critical Inquiry* 1 36.
[93] Supra note 90 (1971).
[94] Ibid.
[95] Supra note 22 at ch2.
[96] Louis Henkin (ed) *The Universal Declaration of Human Rights: A Commentary* (1981).
[97] Supra note 90 (1971) at 53.
[98] Supra note 90 (1971).

as fairness, which means that social institutions should be set up to maximise better outcomes for those who represent society's worst-off groups and its most vulnerable.[99] The 'difference principle', therefore, should be a key interpretive guide to financial institutions and regulators seeking to meaningfully and materially realise fair outcomes.[100]

As is suggested above, it is important to recognise that the Rawlsian concept of justice as fairness is applicable to the South African context of vast inequality only by way of setting certain preconditions. We can begin to set such preconditions by noting that Rawls himself argues that justice accepts inequality in the absence of immoral conditions.[101] Indeed, Rawls's theory of justice does not reject all forms of inequality. But for inequality to be just, it must not arise from immoral conditions like unfair discrimination or lack of opportunity, and it must serve to benefit everyone, especially those who are worst off.[102]

How then do we apply the theory of justice as fairness in the socio-economic South African context where the legacy of an immoral system of racial determinism through apartheid, and not through (bad) luck or natural endowment is the cause of grave inequality?[103] Thus, in the South African context, a necessary precondition of applying Rawls's theory requires more than merely tolerating existing inequalities, but rather deliberate redress of past injustice generated by codified 'immoral conditions'.[104] Because the inequality we face stems not from morally arbitrary differences of talent or effort, but from a legally enforced system of racial exclusion, the Rawlsian framework can only be meaningfully applied if the State and its subjects actively work to dismantle the structural legacies of codified immoral conditions. This means that justice as fairness in South Africa must include substantive measures – such as restitution, redistribution, and transformation – to bring about real equality of opportunity and ensure that socio-economic inequalities improve the condition of the worst-off.[105] Thus, while

[99] Supra note 90 (1971). Note again that the proviso associated to this is that the society is to be 'sufficiently developed' which in this context means a modern Western-style democracy.
[100] Supra note 90 (1971).
[101] For an alternative perspective see Astrid Vicas 'Understanding Social Stratification and Organization: Revisiting Hegel and Nietzsche' in Peter Joners and Fu Youde (eds) *Crossing Boundaries: Challenges and Opportunities* (2022) 243; Thomas Nagel 'Rawls on Justice' (1973) 82 *The Philosophical Review* 2 220; and Vinit Haksar 'Rawls' Theory of Justice' (1972) 32 *Analysis* 5 149.
[102] Supra note 90 (1971).
[103] Michael Otsuka 'Luck, Insurance, and Equality' (2002) 113 *Ethics* 1 40. Some scholars, like Richard Dworkin, hold the view that autonomy and individual responsibility should override one's circumstance and opportunity or luck to advance. However, Cohen and Temkin argue that it is immoral when one person is worse off than another through no fault of their own. Seee Gerald A Cohen 'On the Currency of Egalitarian Justice' (1989) 99 *Ethics* 4 906. See also: Larry Temkin *Inequality* (1993).
[104] See Joel M Modiri 'Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence' (2018) 34 *South African Journal on Human Rights* 3 300.
[105] Ibid.

Rawls provides a useful normative ideal, its application in South Africa requires a historically attuned and radically redistributive interpretation.

2.6. Certainty

The phase of transition to a fairness-seeking outcomes-based legal paradigm will entail a time of uncertainty. As the drift toward outcome and principle-based laws occurs, it diminishes the ability to derive immediate meaning and applicability from the legal text, save to accede to the certainty in the underlying principles.[106] However, abstract and idealistic concepts (without directed normative practices) will not clearly guide those expected to abide by the laws. By comparison, the rule-based systems offer certainty. The institutions of procedural and administrative fairness, freedom of contract, *pacta sunt servanda*, and the binding nature of the terms so agreed to, no longer reside preferentially in the assessment of a lawful outcome.[107] Instead, the lawful outcome under the new legal order is expected to be individually, procedurally and substantively fair, with the client's interest weighted accordingly to attain ultimate fairness with reference to the evidence on record. Reasons for and ways to deliver according to, what clients and society might expect as a fair outcome, are to be pursued vigorously.[108]

If 'traditional methods'[109] are considered limiting and ineffective or inefficient due to the rule-based legal text and what is constructed therein, then there is a significant gap to bridge where interpretation is concerned. Meeting the aims set out in the policies that shape the TCF

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[106] Julia Black 'Constitutionalising Self-Regulation' (1996) *Modern Law Review* 59 24. See also, Julia Black 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3 *Capital Markets Law Journal* 4 425.

[107] Philip J Sutherland 'Ensuring Contractual Fairness in Consumer Contracts After *Barkhuizen v Napier* 2007 5 SA 323 (CC)' (Part 1 2008 and Part 2 2009) *Stell LR* 391 and *Stell LR* 50. See Daleen Millard 'Through the Looking Glass: Fairness in Insurance Contracts-A Caucus Race' (2014) *THRHR* 77 547; and *Barkhuizen v Napier* 2007 (5) SA 323 (CC) SPECIFIC PARAGRAPHS OF THE JUDGMENT HERE.

[108] The convictions and expectations of fairness by the consumer community is covered in more detail under the role of the *boni mores* in shaping new legal logic in the insurance and financial services sector in Chapter 6.

[109] As discussed in Chapter 3, traditional regulatory methods helped establish structural order in the financial sector but ultimately failed to prevent harm to clients. In contrast, the shift toward principle- and outcome-based regulation – which can be understood here as a post-structural project (Robert Young *Untying the Text: A Post-Structuralist Reader* (1990)) - challenges the underlying assumptions of the previous regulatory paradigm. It interrogates the notion of 'reason' embedded in the old system and contends that the persistent unfairness and poor outcomes for clients were not incidental, but rather a product of the discursive logic of those laws. Within this framework, clients and industry actors are shaped by the social and linguistic constructs embedded in the financial services and insurance industries and their governing legal frameworks. As explored in Chapter 4, the transition to a new regulatory paradigm entails not only a rethinking of regulatory structure but also a deeper questioning of the rationalities that informed it. This includes examining whether less prescriptive, more adaptive strategies are necessary to achieve what the previous structure could not: the realisation of fairness and improved outcomes for clients.

outlook requires new logic, process and practice to create the interpellation for fairness.[110] Open-ended laws with undefined end points in relation to fair outcome, thus without measures of the kind of fairness to be worked toward, can result in a skirting of the intentions of the regulatory reform in less overt ways.[111] Individuals encountering unfair outcomes due either to their economic and social starting positions as a result of apartheid, or other degenerating circumstances, will undoubtedly have a hard time navigating through the uncertainty faced by the sector. Critically, clarity to consumers in terms of what is deemed fair, from an individual consumer perspective, is not present in the regulatory discourse. Yet, the service and performance of products under the new agenda expects a financial sector that serves and cares for the well-being of society.[112]

The role of normative values and practices, I argue, can help shape what's fair to society and should be interjected into the logic of outcomes-based regulation, as a jurisprudential mechanism. Without this, and without clear normative – and indeed, ethical – guidance to the sector, uncontrolled and uncertain ways that pursue fairness between two parties, for example, in an insurance agreement, can result in confusion and consumers demanding outcomes which are unreasonable to the nature of the insurance contract (and potentially unfair to an insurer). Although the financial sector carries greater bargaining power than consumers (in an asymmetrical relationship), the outcomes-based model considers clients as weaker parties whose reasonable expectations must be met. This counterweight to the power held over consumers is necessary, but it also makes the system susceptible to whimsical logic that seeks to placate individuals who assert an unfair or unjust outcome as the result of a relationship with a financial sector actor.

Drafter of the United States Unified Commercial Code (a set of laws governing commercial transactions), Karl Llewellyn, says codes of commercial rules serve only as a

[110] Interpellation, a term coined by Louis Althusser, is here interpreted as a call on social institutions and practices to transform abstract ideals (like 'fairness') into outcomes willed upon individuals (fair outcomes) through the force of the State apparatus. Interpellation is also present in marketing products and services – you are willed into buying an idealised version of the benefit of the advertised product or service to you. See Louis Althusser *Lenin and Philosophy and Other Essays* (1971). See also, Warren Montag 'Althusser's Empty Signifier: What is the Meaning of the Word "Interpellation"?'' (2017) 30 *Mediations: Journal of the Marxist Literary Group* 2 63; and Nicole Gross and Mikko Laamanen '"Hey, You There! Marketing!" On Ideology and (Mis) Interpellation of the Marketing Educator as Subject' (2022) 38 *Journal of Marketing Management* 3-4 309.

[111] In this context, the uncertainty leaves open the door to lobbying regulators and regulatory capture (as discussed in Chapter 4). Corporations will dedicate resources to researching and presenting arguments and data that suit the commercial aims, which threaten the achievement of the constitutional and regulatory end-goal, to attain a fair outcome.

[112] Supra note 3 (2010).

backstop to the private conclusion of contracts between two parties in the financial sector. [113] Llewellyn critiqued law as a fixed system and advocated for a dynamic and flexible process that depended on the facts and outcomes, and the social context.[114] The emphasis of legal realists, like Llewellyn, shifts to regulating the conduct rather than relying on theories and doctrine.[115] While a dynamic system and operation of law under outcomes-based law can be supported by legal realism, the risk of the uncertainty generated by casuistry is perhaps too great.[116]

2.7. The Emergence of Fairness in a New Age

Contemporary positions and law in the financial sector do away with applying a cookie-cutter approach to assess fairness and consumer protection.[117] South Africa's National Treasury in their 2011 policy document 'A Safer Financial Sector to Serve South Africa Better' do not take into account the impact of financial deregulation or re-regulation on individuals or domestic actors, but rather solely considers the macroeconomic value of the changes.[118] This raises questions around the real intention animating the overhaul of laws and bears the question of whether a move toward alternative forms of regulating is appropriate.[119] Nonetheless, it is the reading of this thesis that the principled and outcomes-based laws that will come into force, require that those applying the law prioritise fairness in the substantive and procedural senses as the primary objective of the new laws and that the methods that they have recourse to when interpreting and applying the law should be based on the individual circumstances of each party or situation. Although still in its infancy, the overt intentions of the South African government, the FSCA and the Ombud offices, all of whom assess fairness in the financial sector, are to commit themselves to following a principle-led, (ultimately) fairness seeking approach, with a

[113] Karl N Llewellyn 'Problems of Codifying Security Law' (1948) *Law & Contemp. Probs.* 13 687.
[114] Kenneth M Casebeer 'Escape From Liberalism: Fact and Value in Karl Llewellyn' (1997) *Duke LJ* 671. See also, Danielle Kie Hart 'Cross Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation' (2011) *Nev. LJ* 12 54.
[115] Joseph William Singer 'Legal Realism Now' (1988) *Calif. L. Rev.* 76 465. See also, Brian Leiter 'Legal Realism and Legal Doctrine' (2014) *U. Pa. L. Rev.* 163 1975.
[116] Ryan Mitchell 'Sovereignty and Normative Conflict: International Legal Realism as a Theory of Uncertainty' (2017) *Harv. Int'l LJ* 58 421.
[117] Catherine Boone 'State, Capital, and the Politics of Banking Reform in Sub-Saharan Africa' (2005) *Comparative Politics* 401; and Jerry Buckland 'The State: Regulating, Nudging, and Educating for Financial Inclusion' in Jerry Buckland *Building Financial Resilience: Do Credit and Finance Schemes Serve or Impoverish Vulnerable People?* (2018) 189.
[118] Supra note 3 (2011).
[119] Seeraj Mohamed (ed) *The South African Financial System* (2017).

low tolerance test set to assess the conduct of industry actors and their leniency to consumers.[120] In the assessment, knowledge, skill and care are used to determine to what extent a party or parties had addressed possible imbalances that affect the achievement of fairness – this is what this thesis terms an 'equalising moment'.[121] Due to the resources and the knowledge available to corporations, the retail consumer is, to a degree, absolved of their duty to act with circumspection, to read the agreement that they enter into. It is, however, incumbent on financial sector actors to disclose and point out what the agreement is about and the salient clauses.[122] However, where complexity of product or method of disclosure is for whatever reason regarded as ineffective then regardless of the duty on either party to enter into the agreement free of influence and on their own authority (in line with the principle of 'freedom to contract') the agreement may still be considered unfair and a counterbalance is required to tilt the transaction in favour of the client and achieve a fair outcome.[123]

In *Pillay v South African National Life Assurance*,[124] Didcott, J reconsidered the previous judgment in *Mutual and Federal v Oudtshoorn Municipality*.[125] In both cases, the court was faced with a material non-disclosure and misrepresentation of information provided by the consumer to the insurer. Didcott, J held that the former judgment on the matter would not necessarily lead to a fair and equitable outcome for the consumer.[126] He held that in the

[120] Supra note 3 (2010 and 2011) and supra note 5.

[121] Within this thesis the 'equalising moment' refers to the finding of mechanisms to retroactively achieve fairness in a contractual relationship looking at *ab initio* and consequential events to comply with outcomes-based law. Furthermore, the new market conduct-focused TCF regime sets that 'more complicated products and more vulnerable customers (with less financial education) warrants more regulatory protection'. See National Treasury 'Treating Customer Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa' (2014) available at https://www.treasury.gov.za/public%20comments/fsr2014/Treating%20Customers%20Fairly%20in%20the%20Financial%20Sector%20Draft%20MCP%20Framework%20Amended%20Jan2015%20WithAp6.pdf? accessed 9 December 2024 at 19.

[122] See disclosure frameworks under the Financial Advisory and Intermediary Services Act 37 of 2002, Policyholder Protection Rules and TCF discussed in Chapters 3 and 4.

[123] Supra note 21 at 35, which states that the 'broad scope for the CoFI Act will place financial institutions […] on a level playing field, helping to ensure the protection of financial customers by reducing the potential for regulatory arbitrage or avoidance' and that the '[t]he complexity and impact of the financial sector necessitates governing legislation that can respond to *all* sources of conduct risk, in a way that is flexible, proportionate, complete and consistent, and necessarily proactive and intrusive' and that [t]he law should be applied proportionately to the potential conduct risk and impact of the financial institution, based on (at a minimum) product complexity, customer vulnerability and customer market share.' It will therefore enable the emergence of a system of concession-based value judgments in the attribution of fault, favouring the weaker party in an unbalanced power dynamic that tends toward a despotic relationship between the individual and the corporation. See Larry DiMatteo *Equitable Law of Contracts: Standards and Principles* (2021)); Larry DiMatteo 'Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment' (1996) *SCL Rev*. 48 293; and Larry DiMatteo 'The Norms of Contract: The Fairness Inquiry and the Law of Satisfaction - A Nonunified Theory' (1995) *Hofstra L. Rev.* 24 349.

[124] *Pillay v SA National Life Assurance* 1991 (1) SA 363 (D) 367C E.

[125] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) All SA 324 (A).

[126] Supra note 24.

case of parties to an insurance agreement where material non-disclosure is apparent and would typically be regarded as misrepresentation under the common law of contract, the insurer should reconstruct the policy with the information that was not disclosed at the time of contracting and retroactively enforce this agreement.[127] The approach prescribed by Didcott, J differs markedly from the common law treatment of contracts with this contractual defect, where the misrepresentation is regarded as vitiating the consensus and therefore renders the contract voidable.[128] Additionally, if it is determined – after reviewing the facts – that the non-disclosure or misrepresentation was so significant that neither party would have agreed to the contract in the first place, the Didcott principle requires the agreement to be treated as though it never existed.[129] In such instances, the contract is declared void from the start, and the client is restored to their original position by having all premiums refunded, minus any administrative costs incurred by the insurer.

In these scenarios, the law of contract is adapted to reach what is regarded as a fair and equitable outcome in terms of what has become known as the 'Didcott principle'.[130] In practice, it removes the power placed with the innocent party where material information is withheld, whether innocently or negligently.[131] Insurance contracts, prior to the Didcott principle, followed traditional contract law rules for misrepresentation and would be entitled to void the agreement in its own discretion.[132]

Considering a different approach, in the judgment of *Sherwin Jerrier vs Outsurance,*[133] the court did not take into account the *ratio decidendi* in the Didcott judgment and chose to apply a reasonable person test to answer the question whether the applicant for insurance reasonably understood the importance of the disclosure and the materiality thereof to the

[127] Ibid
[128] The common law practice would be that the innocent party holds the right to enforce or rescind the agreement as it considered it voidable even when the misrepresentation is innocent. See: C J Pretorius 'The basis of common error' (2011) 32 *Obiter* 3 651-664.
[129] M.F.B Reinecke 'Remedies for Misrepresentation Inducing a Long-term Insurance Contract: The Didcott Principle Analyses' (2009) 21 *SA Mercantile Law Journal* 3 387.
[130] Ibid.
[131] M.F.B Reinecke and P. M. Nienaber 'Mis-or-Non-Disclosure: Reconstructing the Policy' (2006) Available at https://www.ombud.co.za/wp-content/uploads/2016/02/MIS-OR-NON-DISCLOSURE-RECONSTRUCTING-THE-POLICY.pdf.
[132] Lotz Van Rensburg and Christie Van Rhijn *The Law of South Africa* (2015) vol 9 at 317. See also, John Stephen Lizamore 'The Relationship Between Mistake and Misrepresentation as Causes of Action in the South African Law' (unpublished Masters thesis University of Johannesburg, 2019) 10-22.
[133] *Jerrier v Outsurance Insurance Company Ltd* 2015 (3) SA 701 (KZP).

insurance contract.[134] Therefore, the question concerned whether the insurance applicant would reasonably have known that the insurer required information to rate the risk of offering insurance cover.[135] The Didcott principle was not applied and the court concluded that a material flaw of the insurance contract exists due to failure by the plaintiff to disclose information material to the insurance agreement and it accordingly found in favour of the respondent.

In a 2018 dispute between Ganas and Momentum Insurance, initially dismissed by the Ombud for Long-term Insurance, and eventually settled outside of a court or other adjudicative body, Mrs Ganas successfully led a charge against Momentum Insurance for rejecting her claim against the life insurance policy the insurer held with her late husband.[136] The rejection of the claim was based on Mr Ganas having failed to disclose medical information which was considered material to the insurer's appetite to accept the risk of entering into the contract.[137] In this matter, Mr Ganas had been murdered and his death was therefore the result of something unforeseen and unrelated to his medical conditions, whether disclosed or not.[138] The non-disclosure of material medical information was accepted as a legally sound reason to void the agreement in this case, even if the Didcott principle was applied.[139]

The 'Momentum debacle'[140] as the Ganas dispute became known in the industry and in the media at the time, quickly received public coverage on television, social media and in the press – largely portraying insurance companies as predatory and unfair to its clients and

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[134] Ibid.
[135] Ibid.
[136] Annalise Kempen 'Insurance Disclosure – The Importance of Revealing the Truth, the Whole Truth and Nothing but the Truth' (2019) 112 *Servamus Community-based Safety and Security Magazine* 2 16-18.
[137] Ibid
[138] Wendy Knowler 'Ganas Case Looms Large in Ombud for Long-Term Insurance Annual Report' (2019) available at https://www.timeslive.co.za/news/consumer-live/2019-05-29-ganas-case-looms-large-in-ombud-for-long-term-insurances-annual-report/, accessed on 5 August 2025.
[139] The insurer applied a retrospective approach to its underwriting of the policyholder. This process, as set forth by the Ombudsman for Long-term Insurance and widely applied and adopted, does not recommend the voiding of the insurance contract ab initio as permitted in contract law when there is misrepresentation (in contract law the misrepresentation need not have any malicious intention for it to avail the remedy of voiding the contract) but instead requires of the insurer to go back in time and re-underwrite the policy with the information so omitted with the aim of either reducing the insurance cover amount in line with the recalculated risk, or, increasing the premium on a retrospective basis and recovering same from the insurance cover amount. Where either is not possible and the effect of going back in time to input the omitted information results in a scenario where the insurer would not have entered into the insurance at all, it may in those circumstances reject the claim with no benefit in favour of any beneficiary or claimant in title. The latter was the case in relation to the Ganas policy. The information not disclosed at the stage of contracting was of such materiality that the insurer would not have agreed to enter into an insurance contract at all. See, Ombudsman for Long-Term Insurance 'Annual Report 2018' available at https://nfosa.co.za/docs/annual-report-2018/, accessed on 5 August 2025.
[140] Jenine Geldenhuys 'The Crown of Peace' (2018) available at https://www.moonstone.co.za/the-crown-of-peace/

claimants.[141] Momentum, in response to the adverse media coverage, issued the following statement, indicating that they would settle the claim. The relevant excerpts from the response is quoted here:

> It is clear from market reaction over the last two days that under certain circumstances, current industry practice creates the impression that insurers are looking for reasons not to pay a claim. Momentum is in the business of paying claims and we have therefore taken the criticism to heart. We have created a solution that will pay an amount equal to the death benefit (limited to a maximum of R3 million) in the case of violent crime, regardless of previous medical history. This will apply to all existing as well as future life cover clients.
>
> […]
>
> The guarantee will apply immediately to all our life cover clients, and will be applied retrospectively. We are identifying clients who were impacted in this way and we will contact their families to arrange payment. This includes Mrs Ganas.
>
> The importance of full and honest disclosure at application stage cannot be overemphasised.
>
> The only time your health status matters, is when you apply for cover. This is when you need to share all your medical and health information. If your health deteriorates after commencement of the policy, there is no need for you to inform Momentum – your claim will be completely valid if the information provided at the start of the policy was accurate.[142]

[141] Patrick Cairns 'So You Treated Me Fairly. Should I Be Grateful?' (2019) *Personal Finance* 456 13.
[142] Momentum 'Statement' (2018) available at https://www.momentum.co.za/momentum/media-centre/victims-of-violent-crimes-solution-created#:~:text=Momentum%20is%20in%20the%20business%20of%20paying%20claims,of%20violent%20crime%2C%20regardless%20of%20previous%20medical%20history. Accessed 26 July 2025.

In response, the FSCA issued the following statement:

> We acknowledge there is often a disconnect between what customers think is fair and what the industry deems fair based on decades of practice and precedent, as the public engagement on this [Ganas and Momentum] case has highlighted.
>
> […]
>
> Notwithstanding Momentum's decision […] this has provided an opportunity for further engagement with the life insurance industry as a whole and a move to a position of fairness that builds confidence in the sector.[143]

The need for a solution like this [where the insurer would pay out the benefit despite not being required to do so] has been clearly highlighted by the overwhelming societal response to the plight of families surviving violent crime, something that is unfortunately very prevalent in South Africa. Payments under this solution will be considered ex-gratia payments and is distinct from any of Momentum's contractual relationship with any party to the insurance contract. It is offered as a gesture of goodwill in worthy instances as determined by Momentum in its sole discretion. The ex gratia payment absolves Momentum of admitting that the outcome is as a result of the application of outcome based regulation, but rather as, one might say, demoting outcomes based regulation to a "gesture of goodwill" at the complete discretion of the insurer. One might say that ultimately there was a benefit that accrued to the claimant, but it would be a stretch to claim that the benefit was due to an appreciation of the outcomes based regulation. It was, if anything, down to the insurer managing its reputational risk.

The apparent power wielded by public opinion in this dispute had become an overriding cause for the stance taken by the insurer (and the FSCA) and the influence of public pressure

[143] FSCA, 'FSCA Press Statement on the Momentum/Ganas Case' (2018) available at https://www.masthead.co.za/wp-content/uploads/2018/12/2018_11_22_FSCA-Press-Release-Momentum-22-11-2018.pdf, accessed 26 July 2025.

should therefore not be discounted.[144] However, public perceptions (of an untrustworthy financial sector) and pressure were not grounded in legal logic, yet the ultimate outcome clearly overcame the constraints of contract law despite having no legal basis for it to do so. The FSCA, by highlighting the disconnect and likely uncertainty which has ensued under outcomes-based market conduct regulation, acknowledges that fairness is an elusive concept whether you're a consumer or financial sector actor. In the absence of clarity, I argue, concessions of this nature, by industry and the authorities meant to oversee outcomes-based market conduct regulation, will likely be frequent and achieving fair outcomes will (also likely) happen in a haphazard fashion. I will return to the Ganas dispute in Chapter 6 where I contrast the current position of the common law of contract in the most recent judgments with the expectation for fair outcomes in financial sector contracts.

There are typically three categories of actors in the marketplace: individuals/households (such as clients, policyholders, or consumers), firms (such as financial institutions, brokerages, and insurers), and the State (represented by government, regulators and legislators). All parties have an interest or a stake in the main aim of the economy – maximising individual income and financial wealth.[145] The relationship between actors is evolving in the market with the introduction of new technologies and shifting perceptions of value, transactions and risks.[146] I argue that the discourse about the role of the public and community-based values in the financial sector, should ultimately acquire the status of a source of law under outcomes- and principle-based laws in the financial sector. As with the widely publicised Ganas dispute (which was dismissed by the Insurer, the Ombudsman for Long-term Insurance and the FSCA for having no basis in law), public perception and sentiment expressed in the virtual realm through digital channels and social media will increasingly become a factor in measuring whether an action and outcome is 'fair'. Eventually, I argue, large volumes of data processed by systems of algorithms, artificial intelligence and automated decisions could lead to new modalities that

[144] Jonathan Faurie 'Momentum: Is it the Right Decision' (2018) available at https://www.fanews.co.za/article/company-news-results/1/momentum/1067/momentum-is-it-the-right-decision/25853, accessed on 5 August 2025.
[145] László Zsolnai 'Economic Actors and the Ultimate Goal of the Economy' in Peter Róna and László Zsolnai (eds) *Economic Objects and the Objects of Economics* (2018) 151. See also, Mehrdad Vahabi 'Janos Kornai and General Equilibrium Theory' (2018) 68 *Acta Oeconomica* 1 27.
[146] Dale Littler and Demetris Melanthiou 'Consumer Perceptions of Risk and Uncertainty and the Implications for Behaviour Towards Innovative Retail Services: The Case of Internet Banking' (2006) 13 *Journal of Retailing and Consumer Services* 6 431. See also, ISM Meijer, MP Hekkert, J Faber and R.E.H.M. Smits 'Perceived Uncertainties Regarding Socio-technological Transformations: Towards a Framework' (2006) 2 *International Journal of Foresight and Innovation Policy* 2 214.

express the influence of communal perceptions on economic activity and decisions.[147] It is not within the remit of this thesis to comparatively assess whether fairness and prosperity for the majority can come from new technology in the same way that other burgeoning periods of capitalism and industrial revolution spurred on better standards of life in Western economies. To date, it has been suggested that these new modalities will instead increase unfair outcomes and inequality.[148]

3. Conclusion

This chapter has critically explored fairness as a legal and moral ideal now embedded – however imperfectly – within South Africa's evolving financial sector regulation. Fairness, as the principal ideal of a reborn financial sector, has expanded into a contested, normatively rich aspiration that seeks to reconfigure the substance of financial relationships, the legitimacy of contracts, and the accountability of economic actors. [149] Tracing its conceptual and historical trajectory from post-apartheid legal reform through Roman-Dutch and natural law traditions, and further to the egalitarian ethics of Rawls and the rhetorical logic of TCF, fairness emerges not as a static legal rule, but as a dynamic and contested site of constitutionally related meaning-making.

This thesis argues that rights based reason, justice and equity in financial sector conduct and contracts should be a primary concern of the new outcomes-based order. The argument that has been advanced here is that fairness must be more than a procedural formality or reputational gesture if it is to have substance. It must engage with the lived experiences of those structurally excluded from economic participation and recognise that formal equality alone cannot redress substantive inequality. The asymmetries of knowledge, bargaining power and access that define South Africa's financial landscape, demand a regulatory paradigm that is both responsive and transformative beyond mere reform – one that is willing to develop legal doctrine, including the law of contract, in line with a transformative approach to the Constitution's founding values. In this regard, we can understand the meaning and content of transformation as articulated by Drucilla Cornell, in her discussion on transformation in the context of South African society.[150] Cornell writes: '[b]y transformation, I mean a change radical enough to so

[147] Rachel Adams *The New Empire of AI: The Future of Global Inequality* (2024).
[148] Ibid.
[149] For an earlier account of the notion of fair outcomes see, Robert Piron 'Fair Outcome/Fair Process' (1985) 75 *The American Economic Review* 4 878.
[150] Drucilla Cornell *Transformations: Recollective Imagination and Sexual Difference* (1993).

dramatically restructure any system – political, legal, or social – that the "identity" of the system is itself altered'.[151] She continues, '[a] system can so later itself that it no longer conforms to its identity, but disconfirms it and, indeed, through its very iterability, generates new meanings which can be further pursued and enhanced by the sociosymbolic practice of the political contestants within its milieu'.[152]

Yet, the promise of fairness is also fragile. It's abstractness risks dilution into marketable compliance rhetoric or ex gratia compromise unless its application is tethered to normative jurisprudence. As the Ganas case illustrates, fairness without clarity, whether conceptual, procedural or distributive, creates inconsistency and undermines trust. The new regulatory regime must therefore resist the pull of technocratic minimalism and instead embrace a principled (critical) legal realism: one that accepts and thus labours with the parameters of the dialectic between the ethico-political obligations of the financial sector to contribute towards a society shaped by historical injustice and continued contemporary deprivation, and the maximisation of the profit imperative that favours certainty, on the other hand. The central claim of this chapter is, then, not merely that fairness should guide financial sector conduct, but that fairness, interpreted through a lens of justice, equality, and human dignity, must be made actionable and reviewable through law. In other words, the ethico-political obligation mentioned above, should either be a decisive feature of the hermeneutics of fairness, or be written explicitly into the fairness legislation. In this way, 'fairness' is provided with a teleology and thus becomes more capable of refinement through adjudication, public discourse, and democratic engagement. In this way, fairness can become a lived jurisprudence, not merely a legislative ambition.

I contend that the critical issues explored in this thesis – such as equality, fairness and certainty – cannot be resolved simply by imposing new rules on financial services and insurance. While regulation can provide a degree of certainty, history shows that even the most established laws and doctrines in the market economy do not necessarily guarantee the kind of certainty needed to achieve broader societal goals envisioned by reform efforts. Genuine progress requires more than just formal regulatory gestures and measures; it demands direct engagement with the values and outcomes that society seeks to realise. Indeed, if the notion of 'better client outcomes' becomes a diluted version of the fairness envisioned by international bodies and South Africa's own policy rhetoric and reform agenda, then the credibility of

[151] Ibid at 1.
[152] Supra note 150 at 2.

fairness in the financial sector will be undermined. This, in turn, risks eroding public trust and the intended sense of comfort and confidence in the financial system.

The following chapter asserts, in conclusion, the importance of communal normativity in shaping and grounding further the jurisprudence of ‘fairness’ in the financial sector legislation. The question of the practical realisation of fairness against the backdrop of communal normativity constitutes the central concern of this next chapter.

CHAPTER 6: FAIRNESS: THE LIMITS OF THE COMMON LAW OF CONTRACT

'The just…is the lawful and the fair, the unjust the unlawful and the unfair.'[1]

Aristotle

1. Introduction

This chapter examines the development of fairness in the common law of contract in South Africa after apartheid, with a focus on the recent landmark judgment in Beadica 231 CC v The Trustees for the Time Being of the Oregon Trust and Others (hereinafter '*Beadica*'),[2] and its implications for disputes and pursuits of fair outcomes in the law of contract.[3] I use *Beadica* as the leading and authoritative case that illustrates how contractual autonomy and freedom of contract principles are developed and how fairness as a consideration that delimits the former, is narrowed by the Constitutional Court.[4] I begin by presenting a review of the *Beadica* case, analysing, in particular, its narrow findings on the notion of 'free-standing fairness'.[5] Thereafter, I explore the oscillation between substance and form in the interpretation of abstract legal ideas that Kennedy and other critical legal scholars have depicted as a fundamental aspect of private law.[6]

[1] Aristotle *Nichomanchean Ethics* (n.d.).
[2] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC)
[3] The achievement of fair outcomes is one of the primary reasons for the re-regulation of the financial sector as outlined by the reforms in the South African financial services sector discussed in chapters 3 and 4.
[4] Leo Boonzaier 'Contractual Fairness at the Crossroads' (2021) 11 *Constitutional Court Review* 1 1.
[5] Supra note 2.
[6] In *A Guide to Critical Legal Studies*, Mark Kelman identifies the oscillation between form and substance as one of the key judicial moves in adjudication and decision making. See Mark Kelman *A Guide to Critical Legal Studies* (1987). In Roberto Unger's article 'The Critical Legal Studies Movement', he shows and critiques how legal doctrines fluctuate between rules and standards, which he calls the 'doctrine of indeterminacy' which he indicates reveals deeper contradictions in legal consciousness within liberal society. See Roberto Mangabeira Unger 'The Critical Legal Studies Movement' (1983) *Harvard Law Review* 561. Duncan Kennedy argues that legal reasoning in private law shifts between rule-bound logic and substantive approaches depending on ideological pressures that serve different political, economic and social ends, meaning that law is not neutral and the shifts are not only methodological but are ideological. See Duncan Kennedy 'Form and Substance in Private Law Adjudication' (1975) 89 *Harvard Law Review* 1685. In South Africa, Cockrell, similar to Kennedy, reflects on the illusion of neutrality, noting that courts, in developing the common law, shifts between form and substance depending on ideological pressure, resulting in legal doctrine littered with contradictions rather than consistent logic. See Alfred Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40.

Throughout this chapter, I discuss how, while constitutional imperatives and substantive considerations should be primary drivers of fairness,[7] the courts have concluded that there is no free-standing fairness jurisdiction in the South African law of contract.[8] Instead, fairness has been reduced merely to a factor that informs the formal requirement that a contract which militates against public policy is unenforceable.[9] While the Constitutional Court held in an earlier matter – *Barkhuizen*[10] – that public policy is 'deeply rooted in the Constitution and the values that underlie it',[11] it has not been enough to shift the policy of the law of contract beyond a routinely strict focus on the hegemonic rule form and its doctrine. As a result, the relationship between fairness and the constitutional value system remains tenuous, with our courts hesitating in the law of contract to allow a progressive reading of constitutional normativity, to play a decisive role in resolving contractual disputes.

Moreover, when comparing the Constitutional Court's disposition on fairness with the notions of fairness that are now being promoted in the financial sector as discussed in previous chapters, it would seem that, despite setting and promoting the achievement of fairness as its purpose, normatively transformative concepts and constitutional imperatives – such as social justice, and others explored below, including *bona fides*, *boni mores* and uBuntu – are lacking in the rhetoric of reregulation in the financial sector.

2. *Beadica*: A Narrowing that Holds Little Promise

The *Beadica* case involved four Black Economic Empowerment (BEE) franchisees who had entered into franchise agreements to operate tool hire businesses.[12] The applicants, after entering into lease agreements with the respondent, a property-owning trust, failed to exercise the renewal clauses in the lease agreement within the period specified in the contract, and the trust refused to renew the leases thereafter, thus leaving the applicants without premises on which to conduct their businesses.[13] The applicants argued that strict enforcement of the

[7] Ibid. See also, Andrew Hutchison 'Good Faith in Contract: A Uniquely South African Perspective' (2019) *Journal of Commonwealth Law* 1 227.
[8] Supra note 2 para 153. See also, Leo Boonzaier 'Contractual Fairness at the Crossroads' (2021) 11 *Constitutional Court Review* 1 1-46. Theophilus Edwin Coleman 'Reflecting on the Role and Impact of the Constitutional Value of uBuntu on the Concept of Contractual Freedom and Autonomy in South Africa' (2021) 24 *PELJ* 1 .
[9] Jacques Du Plessis 'Fairness in the Law of Contract: Reflections on Beadica' (2022) 12 *Constitutional Court Review* 1 197-222.
[10] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[11] Ibid at para 28.
[12] Simon Thompson 'Beadica 231 CC: An End to the Trilogy?' (2020) 137 *South African Law Journal* 4 641.
[13] Supra note 2 para 8.

contract would be unfair and contrary to the tenor of the constitutional value system, given that enforcement would have the effect of continuing in the constitutional era their historical structural economic vulnerability.[14] Furthermore, the applicants claimed that this outcome was unfair, particularly in light of the transformative goals of BEE and the broader constitutional context that seeks to redress historical economic disadvantage, since it would impact adversely in a material sense upon their businesses and economic interests.[15] The applicants challenged the enforcement of the non-renewal clause on the basis that it was contrary to public policy, fairness and constitutional values, including equality and dignity and would be unconscionable given their circumstances.[16]

The primary legal issue before the Constitutional Court was whether a court can refuse to enforce a valid contract term because it is unfair or contrary to public policy, even when the term is unambiguous. This raised two sub-issues which the Court unearthed from the earlier judgment in *Barkhuizen,*[17] which was the first case to authoritatively state that 'public policy, as informed by the Constitution, imports "notions of fairness, justice and reasonableness" and takes account of the need to do "simple justice between individuals" as informed by the concept of uBuntu',[18] and was the pre-eminent authority before the *Beadica* judgement. The first issue questions what the proper role of fairness and constitutional values, such as ubuntu, dignity and equality, is in interpreting and enforcing private contracts.[19] The second issue is whether failure to comply with a strict contractual formality (like a notice requirement) can be excused in light of the broader purpose of the agreement and the socio-economic transformation it was meant to achieve.[20] Therefore, the central legal question before the Constitutional Court was whether the strict enforcement of the agreements was contrary to public policy, and whether the constitutional values such as uBuntu, along with those such as fairness and good faith that, since *Barkhuizen* form part of the interpretive matrix of public policy, could therefore override the principle of *pacta sunt servanda*.

[14] Supra note 2 para 99.
[15] Supra note 2 para 96.
[16] Supra note 2 para 10.
[17] Supra note 10.
[18] Supra note 2 at para 35.
[19] P J Sutherland 'Ensuring Contractual Fairness in Consumer Contracts after Barkhuizen v Napier 2007 5 SA 323 (CC)-part 2' (2009) 20 *Stellenbosch Law Review* 1 50. See also, Hanri Du Plessis 'Human Dignity in the Common Law of Contract: Making Sense of the Barkhuizen, Bredenkamp and Botha trilogy' (2019) 9 *Constitutional Court Review* 1 409.
[20] Ibid (Sutherland).

South African contract law, particularly under the post-apartheid constitutional dispensation, has developed to include constitutional values in the interpretation and enforcement of contracts.[21] The key rules relevant to this case were freedom of contract via its *pacta sunt servanda* principle (a rule that enables certainty)[22] and contractual autonomy, which all remain foundational principles in South African law of contract. With respect to the determination of the legal standard of fairness, *Barkhuizen* had determined that a court is to perform a two-stage enquiry in this regard.[23] The first step is to assess the clause on its own terms to determine whether it is so unreasonable that it violates public policy. If it is, the court will declare it unenforceable. However, if the clause appears reasonable, the court proceeds to a second inquiry about whether, considering all the facts of the specific case, enforcing the clause would nonetheless be contrary to public policy.[24] The burden of proof, as in any case where a contracting party disputes the enforceability, rests with the party opposing enforcement, who must show that, in the circumstances, enforcement would be unfair or unjust and contravenes public policy.[25]

The *Beadica* majority (per Theron J) acknowledge that it was sympathetic to the applicants' situation, but that the courts could not override clear contractual terms simply based on a subjective view of harshness or unfairness.[26] The Court reiterated that public policy does not grant judges a general discretion to invalidate contractual terms just because they produce harsh results.[27] Theron J expressed concern that if courts were to invalidate contracts based on fairness alone, it would undermine the legal certainty on which commercial predictability turns. In this regard, Theron, J writes:

> [C]ontractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other

[21] James Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016).
[22] S Huneberg and K. Berry 'The Dilution of Pacta Sunt Servanda: An Analysis of Recent Case Law' (2023) 86 *THRHR* 62.
[23] This two-step approach was determined in *Barkhuizen*. Supra note 10.
[24] Supra note 2 at para 27. See also, *Magna Alloys & Research* (SA) (Pty) Ltd. v Ellis [1984] ZASCA 116; 1984 (4) SA 874 (A).
[25] Ibid (*Magna Alloys*).
[26] Supra note 2 at para 80.
[27] Supra note 2 at para 79.

> parties for their mutual gain. … It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.[28]

In summary, the majority judgment in *Beadica* held that the renewal clause was clear and agreed upon by the parties, that there was no evidence that the applicants had attempted to comply with the notice requirement and that therefore the balance between fairness and the principle that contracts entered freely and voluntarily should be enforced, lies in favour of the latter.[29] However, the court also expressed its intention to resolve the persistent uncertainty surrounding how fairness should be evaluated in contract law.[30] The majority judgment thus reinforced the historically conservative approach to contractual enforcement. I argue, however, that this impacts the transformative constitutional project negatively, since the expected consciousness in the law to progressively work toward economic justice and a more equal society is in the judgment's effect sacrificed at the hands of the contention that 'our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*'.[31] Yet, rather confusingly, the judgment also claims at the level of its rhetoric, at least, that the 'requirements of public policy are informed by a wide range of constitutional values' and that there is 'no basis for privileging pacta sunt servanda over other constitutional rights and values'.[32]

In the end, the court withheld a meaningful development of the law of contract by not providing clarity as regards the normative weight of constitutional rights and values vis-à-vis *pacta sunt servanda*.[33] The judgment arrived against a backdrop of growing calls in academia for a clear and definitive ruling and charges at the courts for creating more uncertainty than clarity on the subject.[34] At the level of the politics of law, Theron J, on behalf of the majority,

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[28] Supra note 2 at para 84.
[29] Supra note 2 at para 76.
[30] Ibid.
[31] Supra note 2 at para 85.
[32] Supra note 2 at paras 76 and 87.
[33] Supra Cockrell at note 6 at 45.
[34] Supra note 2 at paras 16 – 18. See also, Dale Hutchison 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 99; Hanri Du Plessis 'Human Dignity in the Common Law of Contract: Making Sense of the Barkhuizen, Bredenkamp and Botha Trilogy' (2019) 9 *Constitutional Court Review* 409; Hanri Du Plessis 'Giving Practical Effect to Good Faith in the Law of Contract' (2018) 3 *Stellenbosch Law Review* 379; Alistair Price and Andrew Hutchison 'Judicial Review of Exercises of Contractual Power: South Africa's Divergence from the Common Law Tradition' (2015) 79 *Rabels Zeitschrift* 822; Robert Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction?' (2015) 1 *Mercantile Law Journal* 174; Deeksha Bhana and Anmari Meerkotter 'The Impact of the Constitution on the Common Law of Contract: Botha v Rich NO'

sided with the judgement in *Brisley* 'that public policy, in general, requires parties to honour contractual obligations that have been freely and voluntarily undertaken'.[35] In justification, it was offered that the principle of *pacta sunt servanda* is a 'profoundly moral principle, on which the coherence of any society relies.'[36] The majority judgement further states by way of legitimising justification that this principle 'gives effect to the central constitutional values of freedom and dignity' and '[s]elf autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'[37]

In his minority judgment, Froneman, J cited Cockrell in reply:

> It should be obvious to anyone familiar with the South African law of contract that the privileged position here is occupied by a substantive individualism couched in a rules-based form. Freedom of contract, the sanctity of individual promises, the minimal role for the courts in matters of contractual agreement, the need for certainty in the law – these are the ideas which permeate the surface of the law. But it is important to note that this privileging invariably proceeds on the basis that the preference for individualism and the rules-form is an axiomatic truth rather than a controversial premiss in an ongoing argument.[38]

In his analysis of the majority judgment, Boonzaier echoes that 'ongoing argument' on this topic has indeed been the hallmark of its adjudication after apartheid and that the judgment of Theron, J does no more than increase the very uncertainty which she is at pains to dispel:

> [w]hat is surprising about Theron J's judgment […] is that she professes perfect agreement across all of the two courts' judgments in the constitutional era (and maybe even in the pre-constitutional era). And that conclusion is most implausible. The gap between the approaches is real,

(2015) 132 *SALJ* 494; and Alfred Cockrell 'Substance and Form in the South African Law of Contract' (1992) 109 *SALJ* 40.

[35] Supra note 2 at para 35. See also, *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) para 57.

[36] Supra note 2 at para 35. See also, ibid (Brisley) at para 87.

[37] Supra *Brisley* at note 35 at para 22. See also, supra note 2 at para 35.

[38] Supra Cockrell at note 6 at 45. See also, supra note 2 at para 132.

> and very little that Theron J says helps to bridge it. What she does instead is obscure the gap, through fallacy and equivocation.[39]

On the issue of fairness as a free-standing concept, Froneman J, in his dissenting judgment rejects the view of the majority judgement regarding the decision in Barkhuizen with respect to free-standing fairness, and also the assertion that it cannot determine the validity of a contract that conflicts with constitutional values.[40] For Froneman J and Venter J (the minority judges), fairness is not merely discretionary, the constitution demands a deep transformation of private law to reflect the social context and lived realities of South Africa's people.[41] This divergence between majority and minority illustrates the ongoing jurisprudential tension in South African contract law, whether fairness is an exception to the rule, or whether it should be embedded in the logic of contract itself.

The minority judgments thus offered a radically different view that is grounded in a context sensitive approach of which the hallmarks are relationality, normative value judgement in the context of such relationality, and judicial reliance on the concept of uBuntu.[42] Froneman argued that courts must give meaningful content to constitutional values when interpreting and applying contracts.[43] Furthermore, he held that public policy must be infused with ubuntu, dignity, and equality and that these values should not be treated as abstract ideals but as actionable principles that inform legal interpretation.[44] For Barnard-Naude, the minority judgment does not attempt to produce a jurisprudence that comes radically from outside the province of contract law, but, rather appraises normatively and judges substantively the law of contract's vexed relationship with fairness.[45]

At the same time, du Plessis, in his article 'Fairness in the Law of Contract: Reflections on Beadica' contends that while the Court reaffirmed the importance of public policy—shaped by constitutional values like fairness and reasonableness—as the standard for when judges

[39] Supra note 4.
[40] Supra note 2 at para 155. See also Jaco Barnard-Naude 'Contract from the Margins: The Becoming of a Minor Jurisprudence in the Minority Judgment of Froneman, J in Beadica 231 CC v Trustees for the time being of the Oregon Trust 2020 (5) SA 247 (CC)' (2024) 27 *Potchefstroom Electronic Law Journal (PELJ)* 1.
[41] Supra note 2 at paras 191 and 206.
[42] Ibid.
[43] Supra note 2 at paras 107 and 151.
[44] Supra note 2 at paras 151, 162 and 175.
[45] Supra Barnard-Naude at note 40.

should intervene, this standard remains vague and challenging to apply in practice.[46] Du Plessis identifies two key challenges, first is the call for clearer normative justification for when and why contracts concluding freely and in line with contractual autonomy should not be enforced.[47] In line with this, Du Plessis finds the notion of 'equality in exchange' to be a problematic standard and instead advocates for the value of good faith to serve as the central normative anchor.[48] Secondly, du Plessis highlights the need for more concrete and structured principles when courts engage in 'fairness control', particularly in determining whether a contract term should be upheld.[49] Drawing from comparative systems, du Plessis suggests that good faith can generate more specific doctrinal tools, such as evaluating the weakness of the party seeking relief, the harm they may suffer, the intentions of the enforcing party, and the broader rights and values at stake, to guide courts in enforceability determinations.[50] In sum, du Plessis proposes shifting the conceptual and doctrinal focus from abstract values or symmetry in exchange to a more substantive and structured account of good faith as the normative and practical basis for fairness-oriented contract enforcement.[51] However, du Plessis does not situate satisfactorily his reliance on the common law vale of good faith in the context of the constitutional values such as uBuntu, that are, after all, also in play in the complex.

The Beadica case is a turning point in South African contract law for several reasons. Firstly, it reaffirms the refusal to recognise fairness as a standalone legal principle in private law disputes. The result is that considerations of substantive fairness are now definitively subordinated in the constitutional era to the domination of pacta sunt servanda as a governing rule of the general principles of contract law. Secondly, the decision arguably magnifies the disconnect between constitutional values and common law contract principles and while the Constitution demands transformative reasoning, the majority judgement all but instructs that the courts are not to depart from established commercial norms. Thirdly, Froneman, J's dissent furnishes a normative framework for progressive future development. This has been borne out by the fact that a number of prominent academic commentators have chosen to focus on Froneman, J's minority judgment in their attempts to come to terms with the juridical implications of the majority judgment going forward.[52] Froneman, J's emphasis on uBuntu and

[46] Jacques Du Plessis 'Fairness in the Law of Contract: Reflections on Beadica' (2022) 12 *Constitutional Court Review* 1 197-222.
[47] Ibid.
[48] Ibid.
[49] Ibid.
[50] Ibid
[51] Ibid.
[52] Supra note 40.

the context or lived experiences of parties to contracts arguably offers a template for crafting a more responsive and just law of contract.

Finally, with reference to the subject matter of this thesis, the majority judgment has potentially profound stultifying implications for regulatory initiatives in the financial sector that aim to enforce fairness in contracts concluded with financial sector actors.[53] The new regulatory architecture, its regulators, and Ombud increasingly refer to fairness as the most crucial aspect of contracts and the desired outcome for all agreements, but, as discussed thus far, the courts remain at best reticent in terms of supplying the requisite jurisprudential tools that are needed in order to give to this concept substantive legal force by way of its normative operationalisation in the law. It is the position of this thesis that Froneman J's reasoning invites South African contract law as a whole to evolve beyond its formalist traditions and recognise that contracts are not morally or politically neutral instruments, especially in a society still grappling with structural inequality and economic exclusion.

3. Are Substantial Outcomes Justiciable?

Read with the minority judgments, the majority judgment in *Beadica* thus arguably exacerbated the jurisprudential tension that arises when grappling judicially with contentions of unfairness in South Africa's law of contract.[54] Whilst the majority judgement, as set out in the previous section, concluded that regardless of the debate and calls among academics and judges for a more meaningful role for abstract normative concepts (like uBuntu and fairness) in contract law, the law of contract in South Africa does not recognise the notion of a free-standing justiciable fairness.[55] As such, fairness and similar normative concepts play indirectly only – and mostly as co-determining factors of the doctrine of public policy, which constitutes the established discipline of reasoning with normative concepts in contract's general principles, but is, as the late Deeksha Bhana once suggested, historically 'frontloaded' normatively with

[53] This is discussion raised in Chapters 3, 4 and 5 of this thesis.

[54] One might have expected the Constitutional Court to provide a clear interpretation of the Constitution's requirements, which do not expressly prioritise the preservation of a particular version of public policy as such nor, on the other hand, restrict the progressive development of law aimed at achieving post-apartheid goals of dignity, equality, and social justice. See Constitution of the Republic of South Africa Act 108 of 1996 at Chapter 2. See also, Heinz Klug 'Challenging Constitutionalism in Post-apartheid South Africa' (2016) 2 *Const. Stud.* 41.

[55] 'The extent to which a court may refuse to enforce valid contractual terms on the basis that it considers that enforcement would be unfair, unreasonable or unduly harsh is a burning issue in the law of contract in our new constitutional era […]. This perceived divergence has contributed to a great deal of undesirable uncertainty in our law of contract.' Supra note 2 at para 51. See also, supra note 2 at para 38; and supra *Barkhuizen* at note 10.

pacta sunt servanda[56] as itself a determinant of public policy. The invariable result is that the 'other' co-determinants identified in *Barkhuizen* are from the outset of the interpretive exercise put on the jurisprudential back foot. It is on the basis of this juridical arrangement of the norms within the public policy criterion that courts are now to deduce what is commercially important to society and what is conducive to certainty in the law.[57]

Let us return to the extract from Theron J's judgment cited above in order to critique one reason that was provided for the restrictive and even 'obscuring' approach to fairness in the majority judgment in *Beadica*:

> [C]ontractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. […] It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.[58]

The excerpt reveals a statement which statement, in its rhetoric, is much more a political statement than it is a legal statement, reflecting a very specific (neo)liberal politics of law which is then legitimised judicially by recourse to the status quo position on fairness and the privileging of pacta sunt servanda.[59] It is the position of this thesis that the rational preference of contracting parties and especially of weaker parties, one is hard-pressed to conclude considers the sustaining of laws support to economic development above substantive fairness from the contracts entered into. In support of this view, Froneman states 'the regulation of unfairness in contract law is never simply a "legal" one that can be deduced from supposedly neutral legal principles in a self-executing way…[t]his kind of regulation inevitably involves making an underlying moral or value choice.'[60] Therefore, the stance of Theron J in the majority judgment above, is subtly but powerfully unmasked as reflecting an underlying moral

[56] Supra Bhana and Meerkotter at note 34.
[57] Supra note 2 at para 79.
[58] Supra note 2 at para 84.
[59] Karl Klare 'The Politics of Duncan Kennedy's Critique' (2000) 22 *Cardozo L. Rev.* 1073.
[60] Supra note 2 at para 106.

or value choice about, and interpretation of, what is and is not fair in the law of contract. In effect, the statement signifies that Theron, J's vision of contractual fairness is restricted to that version of fairness which is represented by the *pacta* rule. Even though Theron J recognises that substantive progression toward achieving equality is a constitutional imperative with a humanist normative view that favours that which benefits a post-apartheid society,[61] her conclusion that the failure of a business run by previously disadvantaged individuals (under a BEE supported fund) as a result of non-compliance with a time-bound clause, seems a specious conclusion that may very well undermine the constitutional value and right of substantive equality.[62]

Critical legal theory scholars have long criticised doctrinal formalism for protecting commercial, political, and economic interests.[63] Kennedy, like Foucault, warns that such formalism has become entrenched in the common law of contract and, through power and knowledge, serves an economic agenda, such as the growth of capitalism, and reproduces social injustice in late capitalist societies.[64] Kennedy also asserts that, based on historical patterns (some of which are discussed in this thesis), elites and powerful economies protect their interests by shifting between legal forms depending on what best suits the political context.[65] Critical legal scholars especially, have long raised concerns that doctrinal conservatism tethered to formalism as the dominant mode of legal interpretation, hampers the achievement of substantively fair and reasonable outcomes that involve moral reasoning and are more indeterminate when approached through legal form and procedure.[66] However, as shown in earlier chapters of this thesis, the economic and political drive to reform the financial sector so as to foster greater trust through the language of fairness and a new regulatory and legal

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[61] Supra note 2 at para 73-75.

[62] In this case, the applicants were not commercial equals to the franchisor or the landlord; their contracts were part of a BEE empowerment initiative, designed to achieve social redress. The formalism of denying renewal based on a technicality, when the broader purpose of the contract was to enable economic transformation, defeated the purpose of the agreement. Supra note 2 at paras 100 and 101. See also, *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) at para 20, where the Court stated, unequivocally that 'there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.' *Beadica* itself further highlights that the South African Constitution is a transformative document guiding the constitutional project to achieve a democratic and egalitarian society (Supra note 2 at para 100) and furthermore states that the Constitutional Court has held that 'section 9(2), as an instrument for transformation and the creation of an equal society, is powerful and unapologetic'. See, supra note 2 at para 100. See also, *Minister of Finance v Van Heerden* [2004] 2004 (6) SA 121 (CC) (*Van Heerden*) at para 87.

[63] Duncan Kennedy *The Rise & Fall of Classical Legal Thought* (2006).

[64] Ibid.

[65] Ibid.

[66] Duncan Kennedy 'The Critique of Rights in Critical Legal Studies' (2002) 178 *Left Legalism/Left Critique* 216. See also, Duncan Kenny 'Authoritarian Constitutionalism in Liberal Democracies' in Helena Alviar García and Günter Frankenberg (eds) *Authoritarian Constitutionalism* (2019) 161. See also, supra Unger at note 5.

architecture premised on its advancement, may yet challenge the notion that only 'form' conceals economic and political motives, since the substance that may well be assigned to fairness in the financial sector legislation is capable too of being given a restricted reading by way of which the economic and political interests and motives of the holders of the balance of bargaining power in the sector, are legitimated once more. The position of this thesis is that it is for this reason that the new approaches in the financial sector must, especially against the backdrop of a failure to transform the deep structure of the general principles and policy of the South African law of contract, not only be met with a good degree of scepticism, but should be normatively interrogated from the perspective of transformative constitutionalism.[67]

The concern that the new regulatory discourse of 'fairness' in the financial sector, could also serve to mask the intent of the economic and political system seeking to protect itself from widespread distrust and contagion if it suffers societal disapproval, is amplified by the majority judgment in *Beadica* and the result of a similarly restrictive approach to fairness in the financial sector reform might result in greater unfairness, or, alternatively, disarray in the effective fulfilment and validity of contracts. This would mean that the policy choices of the common law of contract in both form and substance, risk turning it into little more than a tool that entrenches existing power imbalances, enabling economically dominant parties to impose and enforce terms that may be deeply unfair or exploitative.[68] Thus, the rhetoric of fairness alone is not enough to conclude that fairness exists, and the application (or lack of application) of fairness in the common law of contract is at least at the surface level at odds with the rhetorical prominence of the achievement of fairness (above all else) that the regulatory turn purports to, or says that it purports to, bring about.

This thesis suggests that the traditional critique might well have to shift away from the view that it is predominantly form that protects the interests of the elites looking to sustain dominance, since the economic and political motivations globally and in South Africa, now amount to reframing the financial sector as one that is fairness-seeking and protective of the consumer society through revised regulatory architecture with novel legal logic like *ex post* evaluations of contractual relationships through outcomes-based regulation.

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[67] Klare describes transformative constitutionalism as 'a long-term project of constitutional enactment, interpretation, and enforcement committed […] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.' See Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 1 146.

[68] Andre M Louw 'Yet Another Call for a Greater Role for Good Faith in the South African Law of Contract: Can we banish the Law of the Jungle, while avoiding the Elephant in the Room?' (2013) 16 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 5 43.

This approach may, on the one hand, test the resolve of a fairness regime within the post-apartheid legal system where the courts have already narrowed the role of fairness in the law of contract. On the other hand, it may also test how the development of the common law of precedent influences contract law in South African courts. Since the beginning of democracy, the common law has encountered the demand for contractual justice repeatedly and its normativity is yet to fully embrace social justice and fairness as a priority when resolving contractual disputes, especially where one party is weaker due to historical disadvantage and remains in a weaker bargaining position because of the legacy of apartheid.[69] The distinctions between the current state of the common law (as reflected in *Beadica*) and the regulatory focus on fairness in the financial sector is arguably rather stark and as such they highlight the need for urgent rationalisation. Without it, courts risk, at worst, becoming inaccessible and ineffective in terms of giving effect to the substantive goals of the reform in the financial sector, due to the conservatism on fairness issues that it has adopted as the policy of the general principles of the law of contract.

Another alternative may be what may be called a compromise with fairness, namely that the substantive evaluation of fairness will be sector specific, developed separately in the financial sector and applying only within its purview. Such an approach may then lead to greater consumer protection and the realisation of fair outcomes in the sector only and without reliance on the common law where the restrictive approach to fairness will be left intact.

A third possibility, namely that the fairness drive in the financial sector could lead to the transformation of the approach to fairness in the general principles, seems remote at best, since the counter-argument on behalf of the general principles may always be that the fairness aims are precisely sector specific and do not constitute a judicial mandate to transform the approach to fairness in the general principles.

To properly test the commitment to fairness as proclaimed under the new regulatory architecture (discussed in the earlier chapters) may ultimately require its proponents to clarify what type of fairness is being pursued, as was the conclusion of Chapter 5. At this early stage of the new regulatory architecture in South Africa's financial sector, it is, moreover, also not known to what extent actors and regulators in the financial sector will take their cue from the principles and doctrines of the common law, or position themselves in opposition to it.. Whilst

[69] Hanri Du Plessis 'Harmonising Legal Values and uBuntu: The Quest for Social Justice in the South African Common Law of Contract' (2019) 22 *PELJ* 1; supra note 10; and *Afrox Healthcare Beperk v Strydom* 2002 (6) SA 21 (SCA).

there remains a normative argument that both legislation and the common law should play a role to ensure the sustainable development of a contract law that safeguards consumers and promotes fairness, the normative misalignment presently between the two bodies of law suggests that profound tension, irresolution, contradiction, indeterminacy and inconsistency in normative reasoning and the outcomes of its application, are on the cards as likely risks.

It is possible that the rhetoric of fairness and consumer protection that has accompanied the new regulatory architecture since the 2008 financial crisis has effectively served its economic purpose in stabilising global commerce and placating consumer activism that may have grown in the aftermath of the crisis. Should this be the case, the achievement of fairness as a substantive transactional outcome going forward, may be as elusive in the financial sector as it has been in the common law.

The problems in relation to the risks of the normative misalignment identified above, are, moreover, likely to not only become acute, but also ultimately impact detrimentally on the achievement of fairness in the financial sector, as a result of the ultimate adjudicative destiny of disputes in the financial sector. The adjudication is likely to occur in the first instance through a reordered Ombud system established as part of the new regulatory architecture, most likely the National Financial Ombud Scheme created under the Financial Sector Regulation Act.[70] In anticipation of this, the South African government's policy paper 'A Simpler, Stronger, Financial Ombud System' repeats the World Bank Group's recommendation on how to overhaul the ombud scheme structure to become one that is premised on improving client outcomes through effective and efficient design.[71] This, then, seems a well aligned institutional design for the promotion of fairness, since it sets the future ombud as being capable of operating flexibly with limited formality and undercutting courts and formal judicial process by being free and accessible to all, using all appropriate means, with 'automatic jurisdiction' over any licensed institution and with its decisions legally binding and enforceable by exercise of its flexible powers and processes, and through the setting of its own rules.[72]

[70] The new and amalgamated National Financial Ombud Scheme is created by merging the Ombudsman for Banking Services, the Credit Ombud, the Ombudsman for Long-Term Insurance, and the Ombudsman for Short-Term Insurance to create a single body. See s194 of the Financial Sector Regulation Act 9 of 2017.
[71] The paper further states that 'good conduct by financial institutions is encouraged and poor individual consumer outcomes can be better addressed if there is an independent, free, user-friendly, and efficient system for consumers to seek redress if they are treated unfairly.' See: National Treasury 'A Simpler, Stronger, Financial Sector Ombud System' (2024) at 5.
[72] Ibid at 22.

However, on the previous ombud system, Millard argued in 2011 that the Ombud was already empowered and mandated by the FAIS Act to look beyond formal laws.[73] However, the cases reviewed in this thesis illustrate that a break from the normative stricture of the law of contract did not result.[74] Furthermore, Millard highlights that comparatively, in the United Kingdom:

> Ombudsmen are not regulators, a fact doubly obvious when, like this ombudsman, they work alongside bodies that are entrusted with the regulation of the industry […] [a]s such, they are not empowered to create the rules that regulate their industry […] [t]he existing rules and institutional arrangements provide an essential part of the context for any assessment of fairness.[75]

Millard goes on to suggest that certain disputes may raise a significant or novel legal issue with potentially far-reaching consequences and is as such one which is more appropriately resolved by a court of law.[76] In this regard, the Financial Sector Tribunal, the highest statutory office presiding over disputes in the financial sector, in the 2021 case of *Markelaas v van Zyle*,[77] made it clear that 'the Ombud is constrained by the law when exercising her function'.

It is at this point that the problem becomes patent: if the courts are themselves barred by the policy of the general principles of contract law from resolving disputes related to fairness as a free-standing concept, it is a likely ramification that the attainment of substantive fairness will be inaccessible in the financial sector as well – and especially in relation to specifically vulnerable South Africans seeking just and fair outcomes from their relationships with the formal financial sector. There is little doubt that the general principles of contract law apply to insurance and other financial sector agreements, as there is no exclusive *lex specialis* created by insurance and financial sector legislation.[78] Thus, while the common law is not limited in its scope and application, the legislation may well have to define its scope more clearly under

[73] Daleen Millard 'Bespoke Justice? On Financial Ombudsmen, Rules and Principles' (2011) 44 *De Jure* 2 232.
[74] Ibid.
[75] R Nobles 'Keeping Ombudsmen in their Place: The Court of Appeal's Decision in *Heather Moor & Edgecomb v Financial Ombudsman Service Ltd*' (2008) 71 *Modern Law Review* 422 at 431.
[76] Supra note 73.
[77] *P.C Marklaars v C J van Zyl & 2 Others* FAB 62/2021 at para 27.
[78] The Supreme Court of Appeal confirmed in the *Ombud for Financial Services Providers v CS Brokers CC and Others* 2021 117 (SCA) at para 19 that ordinary common law principles, including the common law rules that apply to the law of contract and the common law of delicts, are to be applied in the financial sector.

these circumstances, if there is to be improved chances for realising the outcome of fairness as a substantive transactional result in the sector.[79]

4. Conclusion

In this chapter I have reviewed the judgement of the *Beadica* matter to show the tension between doctrinal principles like *pacta sunt servanda* and the courts' consideration of good faith and fairness in relation thereto. In doing so, I demonstrate how public policy and constitutional values are extracted from the judgement to present the common law position, albeit that the court was reluctant to substantively transform the policy of the common law. Furthermore, I reviewed the dissenting minority judgment of Froneman, J and its call for a contextual, relational, communal standard as a critical withdrawal from the majority. Overall, the *Beadica* judgment represents a critical inflection point in the evolving relationship between fairness and the traditions of the South African law of contract.

As this chapter has demonstrated, the majority judgment reinscribes a doctrinal formalism that resists meaningful constitutional transformation by subordinating fairness and related constitutional norms that might circumscribe it better, to the enduring force of *pacta sunt servanda* and an essentially atomistic version of contractual autonomy. While constitutional values are acknowledged, they are in their effect largely proceduralised and denied substantive weight, confined to the domain of public policy understood in a rather narrow and abstract sense. This refusal to treat fairness as a justiciable, stand-alone principle limits contract law's capacity to address South Africa's structural inequalities and historical injustices, where they are manifest in private contractual relations.

By contrast, the minority judgments in *Beadica* – and the scholarship that supports them – gesture toward an alternative jurisprudence, one that is responsive to context, grounded in constitutional values, and committed to substantive justice in the form, ultimately, of the promotion and 'achievement of [substantive] equality'. However, this vision remains aspirational in the current judicial landscape and the fact that it remains as a 'minor'

[79] D Millard and B Kuschke 'Transparency, Trust and Security: An Evaluation of the Insurers Precontractual Duties' (2014) *PELJ*.

jurisprudence,[80] undoubtedly impacts adversely upon the legal possibilities of justice[81] that will be accessible upon the completion of the regulatory reforms in South Africa's financial sector.

This chapter has argued that the divergence between the common law's resistance to free-standing fairness and the financial sector's regulatory turn toward outcomes-based fairness reveals a deeper conceptual and institutional dislocation. Courts remain tethered to a formalist tradition that favours predictability over equity, while the financial sector increasingly relies on regulatory mechanisms that promise fair outcomes, particularly through the development of Ombud schemes and statutory oversight. Yet, the extent to which these regulatory bodies can deliver substantive justice through legal means,[82] remains uncertain, especially where the common law continues to cast a long shadow over their adjudicative frameworks.

Ultimately, unless the courts – and the broader legal order and structures – reckon more directly (and within the ambit of the general transformative mandate of the South African legal system[83]), with the normative content of the ethico-political concepts like fairness, good faith, and ubuntu that are already inscribed into the law, the financial sector's ostensible commitment to 'fairness' will remain a rhetorical aspiration alone, rather than a lawful reality. As South Africa continues its journey toward a more just society, it is the position of this thesis that the reform in relation to the promotion and achievement of fairness should not be limited to the financial sector, but should also be the basis for the transformation of the law of contract in general. This transformation will undoubtedly require a move beyond the comfort of formalism and a more meaningful engagement with the substantive demands of the constitutional order, of which the achievement of equality remains the paramount aspiration.

[80] Supra Barnard-Naude at note 40.
[81] Derrida *Force of Law* (1990).
[82] The impotence of the law in this regard was evident in the discussion of Ganas in Chapter 5 of this thesis.
[83] Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stell LR* 3 351.

CHAPTER 7: CONCLUSION - AN ALTERNATIVE FAIRNESS

1. Introduction

This thesis has critically examined South Africa's commercial history and the transformation of financial sector regulation through the lens of fairness, tracing the shift from a rigid, rules-based regime to one premised on principle- and outcomes-based regulation. This transformation, while normatively ambitious, remains conceptually and institutionally contested – particularly in light of the enduring formalism within South African contract law and the legacy of structural inequality that characterises the country's socio-economic landscape.

In this concluding chapter, I return to the key research questions set out in Chapter 1, synthesising the major insights of my research and assessing the broader implications of the regulatory turn in South Africa's financial sector. This thesis set out to answer the following questions:

1. What are the principal laws governing financial services and insurance in South Africa, and what is the rationale behind recent reforms?
2. Why did the rules-based regulatory regime fail to embed fairness, and what are the conceptual hallmarks of the new paradigm?
3. Can fairness be realistically achieved through legislative reform alone - or does this require deeper engagement with common law, consumer expectations, and constitutional values?
4. How has contract law been impacted by the new regulatory demands, particularly in relation to fairness as a binding standard of validity?
5. How does the new focus on fairness in financial sector regulation, as introduced by these legal reforms, compare to the established approaches to fairness in South African contract law and legal precedent? Furthermore, how coherent and effective is this new interpretation of fairness within the context of South African contract law doctrines?
6. What new avenues to work towards the ideals of the post-apartheid mission are being opened for South African society by these reforms that are changing financial sector regulation substantively by requiring fairness?

Each of these questions has been explored through historical, regulatory, jurisprudential and philosophical inquiry across the thesis. In what follows, I review these questions in turn.

I have argued in this thesis that while the reorientation toward fairness marks a significant shift in the theory and rhetoric of financial sector regulation, its juridical status remains fragile – suspended between aspiration and enforceability, policy and doctrine, global compliance and local justice. For fairness to become substantially actualised within South Africa's vastly unequal society,[1] it must be anchored more firmly in common law and constitutional principles, interpretive culture, and institutional practice. Following the discussion of the key insights for each research question, this concluding chapter turns to make some remarks on practically how the realisation of substantive fairness can be achieved.

2. Thesis Overview

2.1. Historical Conditions of Financial Services and the Genealogy of Inequality in South Africa

Chapter 2 set out the critical historical, legal, and economic conditions that have shaped South Africa's unequal society and provided the genealogical context for contemporary regulatory reform. I drew on Michel Foucault's notion of 'genealogy' as a historical tool for critiquing the presence of the past in the present.[2] The chapter traced how centuries of colonial and apartheid-era legal systems entrenched structural disadvantage, and how commercial and financial relations – particularly in the insurance and credit sectors – were shaped by racialised exclusion and paternalistic control.

The chapter argued that the regulatory shift toward fairness cannot be understood in isolation from these historical injustices. Instead, it must be seen as part of a longer arc of attempted legal transformation. Drawing on thinkers from legal history and critical economic thought, it showed that contemporary calls for fairness in financial services echo – and seek to resolve – longstanding tensions between commercial certainty and social justice.

[1] A Chatterjee 'Wealth Inequality in South Africa 1993 – 2017' (2022) 36 *The World Bank Economic Review* 1 19.

[2] Michel Foucault 'Nietzsche, Genealogy, History' in Paul Rabinow (ed) *The Foucault Reader* (1984). See also Adam Sitze *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission* (2013).

It also introduced the idea of *the history of the present,* suggesting that post-apartheid legal reforms must contend with both the inherited legal logics of Roman-Dutch contract law and the normative aspirations of the Constitution.[3] Chapter 2 thus laid the conceptual foundation for understanding the regulatory turn not as a rupture, but as a continuation of South Africa's broader project of constitutional and economic redress.

2.2. The Rules-Based Paradigm and Its Discontents

Chapters 3A and 3B outlined the architecture and limitations of the first post-apartheid wave of financial sector regulation. This regime centred on the Long-Term Insurance Act (LTIA)[4] and its subordinate Policyholder Protection Rules (PPR),[5] the Financial Advisory and Intermediary Services Act (FAIS) [6] and its subordinate law, the General Code of Conduct (GCOC).[7] The Financial Services Board (FSB) was the key institutional oversight authority.[8] While this regime provided a necessary formal framework, its proceduralist and formalist ethos failed to address the relational asymmetries at the heart of consumer–provider interactions. It was structurally ill-equipped to protect consumers substantively, particularly in a context marked by deep inequality and limited access to financial literacy, bargaining power, or redress.

In Chapter 3B, I discussed how the professionalisation of compliance, and the creation of legislative barriers to entry for industry practitioners – through the fit and proper requirements set out in FAIS[9] – inadvertently excluded marginalised actors while doing little to correct harmful practices. As argued in Chapter 3B, the rules-based order's emphasis on technical compliance and checklist governance displaced more substantive considerations of justice, fairness and community expectations.

2.3. The Regulatory Turn: From Form to Outcome

[3] Constitution of the Republic of South Africa Act 108 of 1996.
[4] Long-Term Insurance Act 52 of 1998.
[5] GNR 1129 of 30 September 2004, promulgated under s 62 LTIA.
[6] Financial Advisory and Intermediary Services Act 37 of 2002.
[7] BN 80 GG 25299 of 8 August 2003, promulgated under s 14 FAIS.
[8] Financial Services Board Act 97 of 1990.
[9] Supra note 5 at s6A and 8.

Chapter 4 analysed the second wave of reform, and the regulatory turn toward principle and outcomes-based regulation. This second wave is inaugurated through the Treating Customers Fairly (TCF) framework,[10] the Financial Sector Regulation Act,[11] and the Conduct of Financial Institutions (COFI) Bill.[12] These instruments reflect an ambitious shift away from prescriptive rules toward legal standards intended to enable contextual, ethical, and consumer-centred judgment.

However, while rhetorically aligned with constitutional ideals, these reforms are also entangled in global post-crisis regulatory trends. This dual lineage - part global compliance, part local transformation - introduces conceptual tensions. On the one hand, fairness is positioned as a regulatory imperative and indicator of market integrity. On the other, its expression in law remains indirect, relying on regulatory discretion and institutional interpretation. The COFI Bill, while promising, still operates in the shadow of uncertain enforcement boundaries and unresolved doctrinal questions about fairness's juridical status, and remains – of course – in draft.

2.4. Fairness as a Normative Ideal: Between Promise and Fragility

Chapter 5 situated fairness within a broader philosophical and legal genealogy. Drawing on Rawlsian egalitarianism and Aristotelian virtue ethics, this chapter argued that fairness in financial regulation must be substantively tethered to justice, equality, and dignity - not merely procedural regularity or reputational repair. It contended that fairness must be *lived*, justiciable, and reviewable - capable of shaping contracts, adjudication, and public engagement.

Yet the chapter also warned of fairness's fragility. Without conceptual clarity or doctrinal grounding, fairness risks devolving into soft law rhetoric – invoked by regulators and firms alike but never fully enforceable or transformative. This concern was illustrated through

[10] Financial Services Board 'Treating Customers Fairly, A Discussion Paper Prepared for the Financial Services Board' (2010); and Financial Services Board 'Treating Customers Fairly. The Roadmap' (2011).

[11] Financial Sector Regulations Act 9 of 2027.

[12] Conduct of Financial Institution Bill (first introduced 2018) available at https://www.treasury.gov.za/twinpeaks/Conduct%20of%20Financial%20Institutions%20Bill.pdf, accessed 25 July 2025.

the Ganas case, which revealed both the capacity and limits of regulators – and the courts – to depart from contractual formalism in the pursuit of equity.

2.5. The Beadica Dilemma: Contract Law's Doctrinal Resistance

Chapter 6 returned to the doctrinal arena of the common law, focusing on the Constitutional Court's judgment in *Beadica 231 CC v Trustees for the Time Being of the Oregon Trust*. The majority judgment reaffirmed *pacta sunt servanda* and contractual autonomy as central to South African contract law, subordinating fairness to a narrow proceduralised reading of public policy. The minority judgment, by contrast, signalled an emergent – but as yet unrealised – relational jurisprudence grounded in context, community, and constitutional values.

This chapter illustrated the tension between the regulatory drive toward fair outcomes and the courts' ongoing resistance to recognising fairness as a free-standing legal standard. The disjunction between these two modes of legal reasoning points to a deeper institutional contradiction: even as the FSCA, ombuds offices, and the COFI Bill elevate fairness as a central expectation, the judiciary continues to deny it binding force in private law disputes.

3. Contributions to Knowledge

In all, this thesis makes several contributions to academic and regulatory literature. I highlight these below:

- **Genealogical critique and framing of key financial sector laws:** this thesis traces the intellectual and legal evolution of fairness in law across epochs, from Roman-Dutch foundations, through apartheid-era legal formalism, to contemporary post-constitutional reform efforts, contextualising the present regulatory moment as part of a longer historical struggle between law as a force for the creation of inequality during Apartheid, to law as an intended force for the redress of inequality in the new constitutional and democratic dispensation.

- **Doctrinal and regulatory exegesis:** this thesis exposes the gap between regulatory intention and juridical reality, arguing that without doctrinal development and a

egalitarian jurisprudential basis, particularly in the law of contract, the fairness agenda in the new regulatory reforms of the financial sector risks being stalled or diluted.

- **Constitutional and common law interpretation:** this thesis advances a constitutional reading of fairness that draws on the values of dignity, equality, and common law principles of ubuntu and good faith, to challenge libertarian readings of freedom of contract and advance the substantive realisation of fairness.

- **Interdisciplinary review:** this thesis incorporates critical legal theory, economic history, ethics, and public policy analysis to show how the meaning and role of fairness must be understood not only through law but also through the broader historical, global, social and economic conditions that structure legal relations.

4. Unresolved Tensions in the Idea and Meaning of Fairness

This thesis has surfaced a number of tensions that lie within the new regulatory paradigm of the South African financial services sector. Understanding these tensions – how they manifest, and what their effects and impacts are – is a crucial step to developing stronger approaches to more actively and substantively realise fairness, as the true outcome of a post-Apartheid constitutional dispensation. These tensions are summarised in brief below.

The first tension that this thesis demonstrated was the disjunction between the global and the local that is deeply woven into the history of law making in South Africa. While Chapter 2 traced a longer history – back to South Africa's colonial roots, the recent regulatory reforms were prompted by the global outcry to the financial crisis of 2008. At the same time, the reforms were duly needed to correct the limitations of the strictly rules-based regulatory order of the first wave of regulatory reforms in the financial services sector following the dawn of the new democratic dispensation, and their failure to create a fair and sustainable sector (discussed in Chapters 3A and B of this thesis). In all, South Africa's reforms borrow from international models and institutions whose priorities and structure may not align with the country's transformational constitutional mandate, and need to redress historical inequities. This tension between regulatory convergence and socio-economic redress remains unresolved.

The second major tension explored in this thesis concerns the coexistence of fairness as a central regulatory ideal and the continued entrenchment of doctrinal formalism within

South African private law, and particularly contract law. While the regulatory reforms of the past decade, including the Treating Customers Fairly (TCF) framework,[13] the Financial Sector Regulation Act,[14] and the pending COFI Bill[15] elevate fairness as a normative standard against which market conduct must be assessed, South African courts have persistently refused to recognise fairness as a freestanding legal principle. As the analysis of the *Beadica* case in Chapter 6 demonstrates, judicial fidelity to *pacta sunt servanda* and contractual autonomy continues to marginalise fairness, good faith, and public policy to the periphery of legal interpretation, treating them as background values rather than binding norms. This refusal to engage fairness as substantively justiciable undermines the coherence of the broader reform agenda, creating a disjunction between the legal reasoning applied by courts and the regulatory expectations enforced by bodies such as the FSCA and industry ombuds. The result, as argued throughout Chapters 5 and 6, is a fragmented legal landscape in which the promise of fairness is advanced through policy instruments and quasi-judicial forums, but denied robust legal grounding in the common law itself. Until this jurisprudential divide is addressed, the regulatory turn toward fairness will remain institutionally fragile and doctrinally insecure, vulnerable to judicial retrenchment and regulatory capture alike.

The third tension explored in this thesis is the enforceability gap that arises under outcomes-based regulation which seemingly enables an alternative ability, outside of the formal juridical structures, to achieve fairness. Moreover, while the reform agenda seeks to promote fairness as a central outcome of financial sector conduct, it does so through largely discretionary mechanisms of enforcement. Regulatory bodies such as the Financial Sector Conduct Authority (FSCA)[16] and the various financial ombud schemes play a pivotal role in interpreting and applying fairness standards, yet they operate in a space of normative uncertainty, without explicit legislative or judicial thresholds that define what fairness concretely requires. As discussed in Chapters 4 and 5, this absence of substantive legal codification renders fairness highly contingent on institutional discretion, which can vary across forums and over time, and can be hard to reproduce – and reproduce fairly. Without a clear doctrinal anchor in either statute or common law, fairness becomes a pliable standard, effective only insofar as it is embraced by regulators and accepted by industry actors. This weakens both legal certainty and public accountability. As the analysis of the Ganas dispute

[13] Supra note 10.
[14] Supra note 11.
[15] Supra note 12.
[16] Supra note 5 at s6A and 8.

illustrates, even when regulatory bodies intervene in favour of equitable outcomes, the lack of precedential authority or clear normative guidelines undermines the system's predictability and coherence. In effect, fairness risks functioning more as a moral exhortation than a binding legal obligation. Unless clearer interpretive frameworks and legally reviewable standards are developed, the power of outcomes-based regulation to transform market conduct will remain limited by its own juridical indeterminacy.

Finally, this thesis has emphasised the deep tension inherent in the dual identity of financial regulation in South Africa. On one hand, regulation is tasked with securing market stability, investor confidence, and institutional solvency, objectives inherited from global financial governance norms, especially in the wake of the 2008 financial crisis.[17] On the other hand, in the South African context, financial regulation is also burdened with an urgent constitutional mandate to support social justice, equality, and transformation. As detailed in Chapters 2 and 4, this dual mandate gives rise to conceptual contradictions: while fairness and inclusion are framed as policy goals, the underlying logics of financial regulation remain rooted in neoliberal rationalities that privilege efficiency, capital mobility, and reputational risk management. These priorities do not always align. Indeed, the emphasis on prudential regulation and the harmonisation of market conduct standards with international best practices often crowds out the transformative ambitions set by South Africa's Constitution. Regulatory bodies and policymakers are thus required to walk a precarious tightrope, trying to deliver equitable outcomes for historically marginalised communities while simultaneously maintaining global financial credibility and institutional stability. As argued in Chapter 5, this contradiction is not merely technical but ideological: the project of using market-based instruments to pursue social justice goals is fraught with limitations, particularly when those instruments are themselves designed within a framework that is structurally indifferent to distributive equity. The resulting regime risks diluting fairness into a technocratic compromise, rather than a transformative legal commitment.

5. Toward Substantive Fairness: Interdisciplinary Governance and the Boni Mores

[17] Cristie Ford 'Principles-based Securities Regulation in the Wake of the Global Financial Crisis' (2010) 55 *McGill Law Journal* 2 257.

The analysis set out in this thesis points to a series of developments and reforms which, if enacted and realised, could better support the success of the regulatory fairness project. The first are fairly straightforward. There is a need for doctrinal review of the common law of contract to give normative and legal force to fairness, good faith, and public policy grounded in constitutional values. There is also a need for institutional alignment between courts, regulators, and ombuds offices, to avoid jurisprudential dissonance and foster coherent application of fairness across forums.

At a more substantive level, the turn to fairness presents within a new outcomes- and principles-based regime, offers an opportunity to reformulate a more democratically engaged and interdisciplinary approach to financial services governance. One of the most profound findings of this study has been that the law alone cannot regulate for the achievement of fair outcomes. To make fairness actionable will require a mode of governance that goes beyond the law. On the one hand, this can encompass the intersection of ethics, behavioural economics, and – with the advent of AI - data science, with legal reasoning. The financial sector, empowered with large hordes of data and algorithmic capabilities, could use its capacity to model risk not only for profit but for equity. Fairness could be coded - not in the sense of rigid formulas, but as a living standard embedded in automated decision-making and customer journeys. The challenge here will be to measure what is seemingly incalculable: trust, dignity, justice.[18] And to do so in a way that reflects community consensus, not just actuarial probability.

On the other hand, there is an immense and important opportunity to engage more closely with the public the financial sector seeks to serve, not only as passive consumers, but as individuals and communities with a democratic demand for a just, fair and equal society, and their role as fair economic agents. Crucially here, the role of financial institutions in addressing the knowledge asymmetries and raising financial literacy becomes a key component of meaningfully seeing forward the realisation of fair outcomes for the industry.[19]

However, while outcomes-based law creates space for this new interdisciplinary and publicly engaging form of governance, without moral or constitutional grounding, it risks being hijacked by market logics. In response, a normative architecture - rooted in constitutional

[18] Diane Coyle *The Measure of Progress: Counting What Really Matters* (2024).
[19] See Chapter 3B for a critique of the knowledge asymmetries between consumers and financial authorities, and financial literacy constraints in South Africa.

values and common law principles such as Ubuntu – may, I suggest, provide a crucial steer for the way forward with the regulatory project of fairness. I turn briefly to lay out some suggestions for what this might entail, and the key foundational principles.

Ubuntu, boni mores, and bona fides offer legal vocabularies for operationalising fairness in a manner aligned with South Africa's constitutional and cultural heritage. While this thesis did not explore these values in detail, their relevance is surfaced through the analysis presented here, particularly in Chapters 5 and 6. Ubuntu, long treated with ambivalence in contract law,[20] is a constitutional value that reflects the community's moral compass.[21] Though its integration into the common law remains limited, this thesis implies that it may be a central value under an outcomes-based regime. Rather than being relegated to soft law or rhetoric, uBuntu can guide the fairness of decisions in product design, claims management, and dispute resolution in ways that centre a fair outcome for communities and society more broadly, as well as the individual.

Similarly, the common law principles of boni mores, with its Roman roots, reflects public morality and social consensus. While historically more prominent in the law of delict,[22] it holds potential in contract law to serve as a test of societal acceptability, particularly in asymmetrical financial relationships. Finally, bona fides, or good faith, completes the triad – and was discussed, in part, in Chapter 6. It calls for reciprocity, trust, and prudence - qualities essential to restoring confidence in financial institutions.[23] Its use as a norm in Roman and Roman-Dutch law, and its latent presence in fiduciary standards, justifies its reintroduction as a core interpretive tool in assessing fairness. Together, these concepts form a normative infrastructure for a transformative and values-based regulatory order.

7. Conclusion

South Africa's financial sector reform represents a bold attempt to reimagine consumer-centric commercial relationships through the lens of fairness. It departs from a tradition rooted in formality, autonomy, and market discipline to embrace a vocabulary of equity, justice, and

[20] D Hutchison 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' (2019) *Acta Juridica* 99.

[21] See Interim Constitution of the Republic of South Africa Act of 1993 at Preamble; and *S v Makwanyane* 1995 3 SA 391 (CC) para 302.

[22] T Mayer-Maly 'The Boni Mores in Historical Perspective' (1987) 50 *THRHR* 76.

[23] M J Schermaier 'Bona Fides in Roman Contract La' in R Zimmermann and S Whittaker (eds) Good Faith in European Contract Law (2000) 83.

dignity.[24] Yet, as this thesis has shown, that departure is incomplete. While new laws and institutions gesture toward transformation, the legal culture remains tied to older habits of reasoning. The promise of fairness risks becoming a floating signifier, invoked often, but seldom enforced.

This thesis has argued that fairness must be more than a policy objective or ethical aspiration. It must become a legal reality: one that shapes contract, guides adjudication, and anchors market regulation in the lived experience of South African society. And more ambitiously, this thesis has argued that the turn to fairness can be the basis for the real transformation toward a just and equal society that is so critically needed, and which fair financial services can meaningfully contribute. To do so, fairness must be grounded not only in statute and policy, but in the deeper jurisprudential traditions of the Constitution,[25] the values of ubuntu, and perhaps too, the moral claims of the community. Only then can South Africa's financial regulation genuinely serve its post-apartheid promise: to create a legal and economic order that is not merely efficient or predictable, but just.

To return to Aquinas: law is an ordinance of reason for the common good.[26] That good must now be understood not just as efficiency or predictability, but as equity, dignity, and communal thriving.

[24] Supra note 10.
[25] Supra note 3.
[26] Thomas Aquinas *Summa Theologica* (1981).

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