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South African Contract Law: The Need for a Concept of Unconscionability

LYNN BERAT*

I. INTRODUCTION

Despite a decade of economic difficulties, caused in part by the imposition of sanctions, South Africa remains the economic powerhouse of southern Africa.¹ Now, as the ruling National Party and major opposition groups such as the African National Congress² ("ANC") seek to arrive at a new dispensation of the country's wealth, the future shape of the economy is a vexing issue.³ South Africa's escape from its downward economic spiral requires economic growth. Such growth is especially important if Africans, who for decades have occupied an inferior position in South African society, are to participate fully in South Africa's economic life. To achieve this goal, contract law will have to be altered. In particular, the courts should develop a doctrine of unconscionability to safeguard the interests of the millions of Africans entering into contracts and other business transactions for the first time. As many Africans are disadvantaged by little or no education,⁴ and are daunted by the prospect of dealing with an unfamiliar legal system,⁵ it is imperative that such a doctrine exist to protect their rights. Currently, South African contract law contains no specific concept of unconscionability. The concept's posi-

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1. See Lynn Berat, *Undoing and Redoing Business in South Africa: The Lifting of the Comprehensive Anti-Apartheid Act of 1986 and the Continuing Validity of State and Local Anti-Apartheid Legislation*, 6 CONN. J. INT'L L. 7 (1991).

2. The African National Congress is described in TOM LODGE, *BLACK POLITICS IN SOUTH AFRICA SINCE 1945* (1983).

3. See Berat, *supra* note 1, at 9-11; Lynn Berat, *The Courts and the Economy in a New South Africa: A Call for an Indexation Model*, 15 B.C. INT'L & COMP. L. REV. 1 (1992).

4. See generally FRANCIS WILSON & MAMPHELA RAMPHELE, *UPROOTING POVERTY: THE SOUTH AFRICAN CHALLENGE* (1988).

5. The future of customary law, as opposed to the western-based South African national system, remains unresolved. For a discussion of this problem, see Lynn Berat, *Customary Law in a New South Africa: A Proposal*, 15 FORDHAM INT'L L.J. 92 (1991).

tion is the same as that in the United States in 1952, when jurist Arthur Corbin wrote:

There is sufficient flexibility in the concepts of fraud, duress, misrepresentation, and undue influence, not to mention differences in economic bargaining power, to enable the courts to avoid enforcement of a bargain that is shown to be unconscionable by reason of gross inadequacy of consideration accompanied by other relevant factors.⁶

Indeed, these doctrines, which reflect South Africa's hybrid legal heritage, form the South African analogue to unconscionability. It now seems imperative that a more explicit concept of unconscionability similar to that found in the United States' Uniform Commercial Code⁷ ("U.C.C.") be developed in a transformed South Africa. This Article examines South Africa's hybrid legal heritage. It provides an overview of contract formation in South Africa and discusses the concepts of fraud, duress, and undue influence. Finally, this Article suggests that South Africa adopt a commercial code, giving special attention to formulating a concept of unconscionability.

A. *The South African Legal Heritage*

Scholars have characterized South African law as a hybrid or mixed legal system,⁸ consisting mainly of Roman, Roman-Dutch, and English law.⁹ Roman law evolved over twelve centuries, from around 753 B.C., the traditional date of Rome's founding, to A.D. 565, the date of Emperor Justinian's death.¹⁰ Continuing through medieval times, Roman law had a major influence upon European institu-

6. ARTHUR CORBIN, CORBIN ON CONTRACTS 188 (1952).

7. Section 2-302 provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making its determination.

U.C.C. § 2-302 (1990).

8. Imre Zajtay & W.J. Hosten, *The Permanence of Roman Law Concepts in the Continental Legal System and South African Law*, 2 COMP. & INT'L L.J. S. AFR. 181, 197 (1969).

9. See JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 8 (1978).

10. See W.J. HOSTEN ET AL., *INTRODUCTION TO SOUTH AFRICAN LAW AND LEGAL THEORY* 132 (1983) (discussing South Africa's mixed system of law).

tions.¹¹ The late thirteenth century through the end of the sixteenth century marked the period of reception of Roman law into the law of the Netherlands.¹² The resulting Roman-Dutch law "is a conglomerate of Roman law, Germanic customary law, feudal law, canon law," and natural law concepts.¹³ It enjoyed its classical period from the sixteenth century to the late eighteenth century.¹⁴

The Dutch East India Company brought this classical Roman-Dutch law to the Cape of Good Hope in 1652, when it took possession of the Cape and founded a station there for its ships traveling the Netherlands to the Dutch East Indies route.¹⁵ Roman-Dutch law continued as the Cape's common law during the period of Dutch East India Company rule from 1652 to 1795. In 1795, Great Britain occupied the Cape, fearing that the French Republic would seize it.¹⁶ The Dutch East India Company formally capitulated to the British on September 16, 1795.¹⁷ The Articles of Capitulation empowered the Raad van Justitie, renamed the Court of Justice, to administer Roman-Dutch law in civil and criminal matters.¹⁸ In 1802, Britain entered into a truce with Napoleon, and, in March of that year, signed the Treaty of Amiens, restoring all of its recent colonial conquests except Ceylon and Trinidad.¹⁹ Thus, Great Britain ceded its authority to the Netherlands, which had become the Batavian Republic by that time.²⁰ The British, however, remained cautious of Napoleon's colonial designs, and by 1806 again controlled the Cape.²¹

British rule did not signal the end of Roman-Dutch law at the Cape. The Cape Articles of Capitulation of January 10 and 18, 1806, provided that "the Burghers and Inhabitants shall preserve all their Rights and Privileges which they have enjoyed hitherto."²² Some scholars claim this provision ensured the perpetuation of Roman-

11. WOLFGANG KUNKEL, AN INTRODUCTION TO ROMAN LEGAL AND CONSTITUTIONAL HISTORY 168-78 (1966). For more on Roman law, see FRITZ SCHULTZ, HISTORY OF ROMAN LEGAL SCIENCE (1946).

12. See DUGARD, *supra* note 9, at 8; HOSTEN ET AL., *supra* note 10, at 175.

13. HOSTEN ET AL., *supra* note 10, at 174.

14. DUGARD, *supra* note 9, at 8; HOSTEN ET AL., *supra* note 10, at 175.

15. LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 41-43 (1990).

16. *Id.* at 43.

17. HOSTEN ET AL., *supra* note 10, at 194.

18. *Id.*

19. *Id.* at 195-96.

20. *Id.* at 194.

21. *Id.* at 195.

22. Cape Colony, Articles of Capitulation, Nos. 11, 12 (1806).

Dutch law.²³ The well-established principle of English law that "the laws of a conquered country continue in force, until they are altered by the conqueror" also protected Roman-Dutch law.²⁴ However, the legal system at the Cape did not escape English influences. Indeed, the British government envisioned English law gradually assimilating Roman-Dutch law.²⁵ In 1823, the British government appointed a commission to review colony affairs.²⁶ Reporting in 1826 on judicial matters at the Cape, the commission suggested that the existing procedure should assimilate English procedure, future legislation should follow principles of English jurisprudence, and the courts should gradually adopt English common law.²⁷

In the years after 1826, this policy engendered numerous legislative changes that greatly affected procedure, evidence, and succession. For example, Ordinance No. 40 of 1828 restyled Cape criminal procedure in the manner of English criminal procedure.²⁸ Ordinance No. 72 of 1830 adopted the English law of evidence with minor modifications.²⁹ Civil procedure also experienced a remodeling along English lines, although some Roman-Dutch procedures remained. In 1833, Ordinance No. 104 replaced the Roman-Dutch law of universal succession of heirs with the English system of executorship.³⁰ In 1845, Ordinance No. 15 established the English underhand form of will.³¹ Additionally, the Law of Inheritance Amendment Act³² and the Succession Act³³ removed various restrictions on testamentary transfers.

The English legal system greatly influenced mercantile law, company law, and insolvency law. Cape statutes adopted English statutes verbatim by reference or by repromulgation. These included the Merchant Shipping Act of 1855;³⁴ the General Law Amendment Act of 1879, governing maritime and shipping law, fire, life, and marine

23. See, e.g., H.D.J. Bodenstein, *English Influences on the Common Law of South Africa*, 32 S. Afr. L.J. 337, 339 (1915); N.J. De Wet, *Die Romeins-Hollandse Reg in Suid-Afrika no 1806*, 21 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 239, 239 n.2 (1958).

24. *Campbell v. Hall*, [1774] 1 Cowp. 204, 209 (Eng. K.B.); see DUGARD, *supra* note 9, at 8.

25. HOSTEN ET AL., *supra* note 10, at 199.

26. See *id.* at 199-202.

27. *Id.*

28. Cape Colony, Ordinance No. 40 (1828).

29. Cape Colony, Ordinance No. 72 (1830).

30. Cape Colony, Ordinance No. 104 (1833).

31. Cape Colony, Ordinance No. 15 (1845).

32. Cape Colony, Act No. 26 (1873).

33. Cape Colony, Act No. 23 (1874).

34. Cape Colony, Act No. 13 (1855).

insurance, stoppage in transit, and bills of lading;³⁵ the Joint Stock Companies Limited Liability Act of 1861;³⁶ and the Companies Act of 1892.³⁷

English law also had a non-legislative impact. The English language dominated the courts, English judges occupied the bench, and English legal training was required for advocates.³⁸ The use of the English system of government also meant the introduction of English principles of constitutional law.³⁹ Although Roman-Dutch law remained the basic common law of the Cape, by the end of the nineteenth century, it had been thoroughly infused with English law.⁴⁰

Meanwhile, in the nineteenth century, Roman-Dutch law spread from the Cape to the Afrikaner republics of the Transvaal and the Orange Free State and to the British colony of Natal.⁴¹ All three adopted the Roman-Dutch system, but English law, operating through the law of the Cape Colony, soon modified it.⁴² After the 1899-1902 South African War,⁴³ in 1910, the two former Afrikaner republics and the two British colonies formed the Union of South Africa,⁴⁴ which remained until the Union transformed itself into the Republic of South Africa in 1961.⁴⁵ The pronouncement about the common law notwithstanding, the South African legal system had clearly become a "three-layer cake" of Roman, Roman-Dutch, and English law.⁴⁶ These influences continue to manifest themselves in

35. Cape Colony, Act No. 8 (1879).

36. Cape Colony, Act No. 23 (1861).

37. Cape Colony, Act No. 25 (1892).

38. HOSTEN ET AL., *supra* note 10, at 198; *see also* Bodenstein, *supra* note 23.

39. HOSTEN ET AL., *supra* note 10, at 198-99.

40. *Id.* at 200.

41. For a constitutional history of the Afrikaner republics, see Leonard Thompson, *Constitutionalism in the South African Republics*, BUTTERWORTH'S S. AFR. L. REV. 49 (1954).

42. HOSTEN ET AL., *supra* note 10, at 201-03.

43. *See* Lynn Berat, *Constitutionalism and Mineral Law in the Struggle for a New South Africa: The South African War Revisited*, 15 SUFFOLK TRANSNAT'L L.J. 61 (1992).

44. *See* LEONARD THOMPSON, *THE UNIFICATION OF SOUTH AFRICA 1902-1910*, at 459 (1960).

45. THOMPSON, *supra* note 15, at 188.

46. Zajtay & Hosten, *supra* note 8, at 197. One judge wrote:

Our country has reached a stage in its national development when its existing law can better be described as South African than Roman-Dutch. . . . No doubt its roots are Roman-Dutch, and splendid roots they are. But continuous development has come through adaptation to modern conditions, through case law, through statutes, and through the adoption of certain principles and features of English law. . . . The original sources of the Roman-Dutch law are important, but exclusive preoccupation with them is like trying return the oak tree to its acorn.

Ex parte de Winnaar, [1959] 1 S.A. 837, 839 (S. Afr. N.P.D.).

modern South African contract law.

II. CONTRACTS AND THEIR LEGAL EFFECTS

In Roman law, only four types of agreements constituted enforceable contracts. These were (1) *contracts re*, in which a party delivered a thing (*res*) to the other and could, therefore, claim redelivery or counterperformance from the other; (2) *contracts literis*, in which a creditor made an entry in his or her domestic account books relating to a debt owed to the creditor and that entry made the debt enforceable; (3) *contracts verbis*, in which the agreement was made orally in the form of question and answer; such a contract was called a *stipulatio* and was enforceable because of its form; and (4) *contracts consensu*, in which agreement was enough to make a contract of sale, partnership, hire, or mandate binding.⁴⁷

Roman law required agreement and *causa*, or cause, to constitute a valid contract.⁴⁸ *Causa* could be found in *contracts re* by delivery of the thing; in *contracts literis* by the entry in the books; in *contracts verbis* by the form of words used; and in *contracts consensu* by the agreement itself. An agreement that did not fall into one of these four classes was not enforceable and was called a *nudum pactum*.⁴⁹ The rule appeared in the maxim, *Ex nudo pacto non oritur actio*, meaning no action arises from a bare agreement. Not enforceable by action, a *nudum pactum* gave rise to a natural obligation and could be used as a defense.

The *causa* requirement grew increasingly meaningless because of a European-developed rule that made all serious agreements actionable. By the seventeenth century, this had become the rule in Holland.⁵⁰ Nevertheless, some writers still followed the older terminology and insisted that *causa* was necessary for contracts to be valid.⁵¹ In England, the courts did not require *causa* for a valid contract.⁵² However, except with regard to sealed covenants, the courts demanded that there be consideration, a counterperformance, or quid pro quo.⁵³ By the nineteenth century, English ideas had so influenced legal thought at the Cape that many believed Roman-Dutch refer-

47. KUNKEL, *supra* note 11, at 168-78.

48. *Conradie v. Roussouw*, 1919 A.D. 279 (S. Afr.).

49. *Id.* at 290.

50. *Id.*

51. *Id.*

52. *Id.* at 294.

53. *See Conradie*, 1919 A.D. at 294.

ences to *causa* meant the same thing as consideration did to the English.⁵⁴ The courts in the Transvaal dismissed this view.⁵⁵ The issue remained controversial until 1919, when the Appellate Division of the South African Supreme Court ("Appellate Division") accepted the Transvaal view.⁵⁶

Under modern South African law, a contract is an agreement between or among persons that gives rise to personal rights and corresponding obligations.⁵⁷ Although a contract is an agreement legally binding on the parties,⁵⁸ not all agreements bind the parties. Rather, an agreement is a contract only if it has a number of essential elements: (1) the agreement is for future performance or non-performance by one or more of the parties;⁵⁹ (2) the parties have the legal capacity to contract;⁶⁰ (3) the parties seriously intend to bind themselves;⁶¹ (4) with few exceptions, the agreement is executed with some formality and in writing;⁶² and (5) the agreement is not contrary to statutory law, public policy, or good morals in its formation, performance, or purpose.⁶³

If these five elements are present, the agreement becomes a legally binding contract.⁶⁴ However, "legally binding" does not mean that the law inevitably compels the parties to perform their promises or undertakings, because the law cannot or will not compel certain types of performance.⁶⁵ Each party to a contract acquires a right against the other party for the agreed upon performance, as well as

54. *See id.*

55. *See, e.g.,* Rood v. Wallach, 1904 T.S. 187, 209 (S. Afr.).

56. *Conradie*, 1919 A.D. at 317.

57. J.C. DE WET & A.H. VAN WYK, *DIE SUID-AFRIKAANSE KONTRAKTEREG EN HANDELSREG* 4 (1978).

58. However, parties can sometimes be bound by a contract even though they are not really in agreement. *George v. Fairmead (Pty) Ltd.*, [1958] 2 S.A. 465 (S. Afr. App. Div.).

59. *Conradie*, 1919 A.D. at 317. *See generally* J.W. WESSELS, *THE LAW OF CONTRACT IN SOUTH AFRICA* 12-24 (1951); I.G. FARLAM & E.W. HATHAWAY, *A CASE BOOK ON THE SOUTH AFRICAN LAW OF CONTRACT* 9-64 (1979).

60. *Conradie*, 1919 A.D. at 288. *See generally* WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

61. *Conradie*, 1919 A.D. at 288. *See generally* WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

62. *Conradie*, 1919 A.D. at 287. *See generally* WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

63. *Conradie*, 1919 A.D. at 288. *See generally* WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

64. *See Conradie*, 1919 A.D. at 288. *See generally* WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

65. *Conradie*, 1919 A.D. at 301-02. *See generally* WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

for a corresponding obligation.⁶⁶ Each party has a duty to perform this obligation, which gives the other party a cause of action for specific performance when the party fails to perform.⁶⁷ Should the other party not comply with court-ordered specific performance, then the plaintiff has a cause of action for damages.⁶⁸ However, a court will not order specific performance for certain types of contracts, such as unenforceable contracts, contracts void *ab initio*, and voidable contracts.

An unenforceable contract is one on which no action can be brought.⁶⁹ No legal obligation may be imposed, but a natural obligation remains.⁷⁰ Since 1969, when the South African government passed the Prescription Act,⁷¹ only wagering contracts or bets have constituted unenforceable contracts.⁷²

A contract is void *ab initio* if it lacks one or more of the elements necessary to the formation of a contract.⁷³ Such an agreement has no legal effect from its inception.⁷⁴ An agreed upon performance prohibited by law is an example of this type of contract.⁷⁵ Others include contracts lacking a definite agreement on the terms of performance, or contracts involving an insane party.⁷⁶ These agreements give no legal rights to either party.⁷⁷ One or both of the parties cannot later ratify these agreements.⁷⁸ In addition, registration will not validate an agreement that is void *ab initio*.⁷⁹ A court order is not necessary to set it aside because the agreement is deemed to be worthless.⁸⁰ Although a void contract gives neither side a cause of action, if one party has performed the terms of the agreement, the court may some-

66. *Conradie*, 1919 A.D. at 301-02. See generally WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

67. *Conradie*, 1919 A.D. at 304. See generally WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

68. *Conradie*, 1919 A.D. at 304. See generally WESSELS, *supra* note 59, at 12-24; FARLAM & HATHAWAY, *supra* note 59, at 9-64.

69. See generally PHILIP MILLIN & GEORGE WILLE, WILLE AND MILLIN'S MERCANTILE LAW OF SOUTH AFRICA 29-58 (J.F. Coaker & D.T. Zeffertt eds., 18th ed. 1984).

70. *Id.*

71. Republic of South Africa, Prescription Act No. 68 (1969).

72. *See id.*

73. *See* MILLIN & WILLE, *supra* note 69, at 91.

74. *See id.*

75. *Id.*

76. *See id.* at 71, 91.

77. *See id.* at 91.

78. *Id.*

79. *See id.*

80. *See id.*

times grant the party redress by restoring the property or by granting monetary compensation.⁸¹

Unlike contracts void *ab initio*, voidable contracts contain all of the essential elements of an agreement. However, some flaw exists at the time the agreement was made, which entitles the parties to repudiate the contract and ask that both parties be restored, if possible, to their original positions.⁸² Such reinstatement is termed *restitutio in integrum*.⁸³ A flawed contract is voidable at the option of the prejudiced party.⁸⁴ Yet, unless and until the prejudiced party justifiably repudiates it, the contract is *prima facie* valid and binding on the parties.⁸⁵ A court order declaring the contract rescinded is not necessary, as it only determines that party's right to end the contract.⁸⁶ The flaws that make a contract voidable are of three types: fraudulent or non-fraudulent misrepresentation, duress, and undue influence. These three flaws form the South African equivalent of the doctrine of unconscionability as applied in the United States and elsewhere. The interplay between duress and undue influence evidences the continuing tensions between Roman-Dutch and English law present in South Africa's mixed legal heritage.

III. UNCONSCIONABILITY SOUTH AFRICAN-STYLE: MISREPRESENTATION, DURESS, AND UNDUE INFLUENCE

A. Misrepresentation

In the formation of contracts, a party's mistaken motive is irrelevant and does not prevent the parties to the contract from reaching an agreement.⁸⁷ However, an action may lie if the mistake was caused by misrepresentation.⁸⁸ A party who has been persuaded by misrepresentation to enter into a contract or to accept terms to which he or she otherwise would not have agreed is entitled to relief if the representation was intentional, negligent, or innocent.

81. See *id.*

82. FARLAM & HATHAWAY, *supra* note 59, at 214.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. For example, X buys a 1966 Ford Mustang from Y. Both believe the car has a V8 engine, but later determine that it has a V6 engine.

88. See H.R. HAHLO & ELLISON KAHN, *THE UNION OF SOUTH AFRICA: DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 463 (1960).

1. Fraudulent Misrepresentation

Fraudulent misrepresentation is a precontractual false statement of fact intentionally made by one party to a contract, that induces the other party to enter into the contract or to agree to terms to which he or she would not have agreed had the truth been known.⁸⁹ Fraudulent misrepresentation requires five elements. First, there must be a precontractual false statement of fact. This statement can include the expression of an opinion that is not honestly held.⁹⁰ The statement need not be explicit, and conduct can suffice,⁹¹ as can silence, if the silence fails to rectify an incorrect impression.⁹² Second, the misrepresentation must be wrongful, meaning unlawful. A fraudulent misrepresentation is a tort, called a *delict*, in South Africa.⁹³ For tort liability, the act complained of must have been wrongful. Thus, if the misrepresentation was unlawful under the circumstances, liability arises. However, the courts pay particular attention only to cases where the misrepresentation was based on a wrongful omission.⁹⁴ Wrongfulness is assumed where misrepresentation by words or other positive conduct induced the contract or led a party to accept terms to which he or she otherwise would not have agreed.⁹⁵ Third, the misrepresentation must be made fraudulently. Misrepresentations are made fraudulently when the maker does not honestly believe the truth of his or her statement and intends the other party to act on it.⁹⁶ Fourth, the misrepresentation must induce the other party to conclude the contract or to agree to its terms. A court will not find liability for fraudulent misrepresentation unless there is proof of a causal

89. *Id.*

90. A.J.C. Copeling, *Copyright in Ideas?*, 28 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 3 (1965).

91. Displaying a used car among new ones is an example of conduct constituting fraudulent misrepresentation.

92. M.A. Millner, *Fraudulent Non-Disclosure*, 74 S. AFR. L.J. 177, 179-80 (1957).

93. *Trotman v. Edwick*, [1951] 1 S.A. 443 (S. Afr. App. Div.); *De Jager v. Grunder*, [1964] 1 S.A. 446 (S. Afr. App. Div.); *Ranger v. Wykerd*, [1977] 2 S.A. 976 (S. Afr. App. Div.).

94. Failing to speak is wrongful if there was a duty to speak. On the duty to speak, see *Bodemer v. American Ins. Co.*, [1961] 2 S.A. 662, 669 (S. Afr. App. Div.) (a contract *uberimae fidei* imposes a duty to speak); *Glaston House (Pty) Ltd. v. Inag (Pty) Ltd.*, [1977] 2 S.A. 846, 867-69 (S. Afr. App. Div.) (duty to speak if seller knows of latent defects in item sold).

95. The misrepresentation must be related to the material facts. *Karoo v. Farr*, 1921 A.D. 413, 415 (S. Afr.). Puffing alone is not actionable. DIG 4.3.37 (Ulpian, Sabinus, bk. 44); Voet Commentarius 21.1.3.

96. *Rex v. Myers*, [1948] 1 S.A. 375, 382 (S. Afr. App. Div.).

link between the misrepresentation and the act of the misled party in concluding the contract or agreeing to certain terms.⁹⁷ Fifth, the misrepresentation must be made by the other party to the contract or by a third party acting in collusion with, or as an agent of, one of the parties to the contract. A fraudulent inducement from an independent third party does not affect the contract.⁹⁸

The parties to a contract cannot agree between themselves to exclude remedies for fraudulent misrepresentation.⁹⁹ Furthermore, the misrepresenting party cannot claim that the aggrieved party, as a reasonable person, should not have been misled.¹⁰⁰ A contracting party who has been the victim of a fraudulent misrepresentation has a choice of two remedies: The party may accept the contract or rescind it and receive *restitutio in integrum*.¹⁰¹ The right to choose a remedy is clear where the party would not have entered into the contract without the misrepresentation. This is *dolus dans causam contractum*, or causal fraud. Incidental fraud, or *dolus incidens in contractum*, is found in situations where no causal fraud occurred. Instead, the party agreed to terms to which he or she otherwise would not have agreed. The South African law regarding incidental fraud is unclear.

A party may choose rescission as a defense against the other party's action on the contract or upon filing an action.¹⁰² Whether he or she accepts or rescinds the contract, the aggrieved party has an action in tort for any loss suffered.¹⁰³ A party must elect to rescind within a reasonable time after the party learns of the misrepresentation, or lose the right.¹⁰⁴ Once a party elects a remedy, he or she must abide by it.¹⁰⁵ If a party chooses rescission, he or she must restore to the other party that which he or she received under the contract.¹⁰⁶ However, the court may decline to follow this rule if justice

97. *Geldenhuys v. Beuthin*, 1918 A.D. 426 (S. Afr.).

98. *Principal Immigration Officer v. Bhula*, 1931 A.D. 323, 330 (S. Afr.).

99. *Wells v. S.A. Alumenite Co.*, 1927 A.D. 69 (S. Afr.).

100. *See generally* Copeling, *supra* note 90.

101. *Bowditch v. Peel*, 1921 A.D. 561 (S. Afr.); *Frost v. Leslie*, 1923 A.D. 276 (S. Afr.).

See generally Wouter de Vos, *Skadevergoeding en Terugtrede weens Bedrog by Kontraksluiting*, 1964 ACTA JURIDICA 26.

102. *Karoo*, 1921 A.D. at 413; *Schultz v. Meyerson*, 1933 W.L.D. 199 (S. Afr.).

103. *Bowditch*, 1921 A.D. at 561.

104. *Id.*

105. *Id.*

106. *Marks Ltd. v. Laughton*, 1919 A.D. 12 (S. Afr.); *Van Schalkwyk v. Prinsloo*, [1948] 1 S.A. 460 (S. Afr. T.P.D.); *Van Heerden v. Sentrale Kunsmis Korp (Edms.) Bpk*, [1973] 1 S.A. 17 (S. Afr. App. Div.).

requires.¹⁰⁷

The measure of the injured party's damages is the difference between the party's current financial situation and the financial situation he or she would have been in had the misrepresentation not been made.¹⁰⁸ If the party chooses rescission and restitution, damages are usually calculated on the basis of wasted costs. However, if the contract is upheld, calculation becomes more difficult, with the method depending upon the circumstances.¹⁰⁹ The court always endeavors to determine the detriment suffered by the aggrieved party because of the misrepresentation.¹¹⁰ Nevertheless, two generalizations may be made. First, in a causal fraud case, the court typically determines damages by subtracting the value of the performance made by the misrepresenting party from the value of the performance made by the aggrieved party.¹¹¹ The court then adds any consequential loss suffered by the aggrieved party.¹¹² Second, in an incidental fraud case, the court often calculates damages by subtracting the price that would have been paid if there had been no misrepresentation from the price actually paid.¹¹³ The court then adds any consequential loss.¹¹⁴

2. Non-Fraudulent Misrepresentation

Non-fraudulent misrepresentation is the negligent or innocent misrepresentation by one party to a contract that induces the other party to enter into a contract or to agree to terms to which the party would not have agreed had he or she known the truth.¹¹⁵ Thus, non-fraudulent misrepresentation has the same elements as fraudulent misrepresentation,¹¹⁶ except that the misrepresentation is made negligently or innocently¹¹⁷ rather than intentionally.

107. *Marks Ltd.*, 1919 A.D. at 12; *Van Schalkwyk*, [1948] 1 S.A. at 460; *Van Heerden*, [1973] 1 S.A. at 17.

108. *Trotman*, [1951] 1 S.A. at 448; see also *De Jager*, [1964] 1 S.A. at 446.

109. *Bowditch*, 1921 A.D. at 562-63; *Frost*, 1921 A.D. at 280-81.

110. *Trotman*, [1951] 1 S.A. at 443; see also *De Jager*, [1964] 1 S.A. at 446. See generally G.A. Mulligan, *Some Remedies for Breach of Contract*, 75 S. Afr. L.J. 391 (1958); de Vos, *supra* note 101, at 26.

111. *Frost*, 1921 A.D. at 280.

112. See *id.* at 279-80.

113. *Trotman*, [1951] 1 S.A. at 448.

114. *Frost*, 1921 A.D. at 280.

115. See *Herschel v. Mrupe*, [1954] 3 S.A. 464 (S. Afr. App. Div.).

116. See *supra* notes 89-98 and accompanying text.

117. According to the South African law of *delict*, negligent misrepresentation gives rise to the *delictual actio legis Aquiliae*, legal action, for damages in the same manner as a fraudulent misrepresentation. *Herschel*, [1954] 3 S.A. at 464.

Under Roman law, a party could plead the *exceptio doli* to a claim on a contract concluded on the basis of an innocent misrepresentation.¹¹⁸ Although Roman-Dutch law accepted this rule,¹¹⁹ neither Roman nor Roman-Dutch law provided a cause of action for innocent misrepresentation. In 1907, South African law departed from this position and allowed the innocent party to sue for rescission and restitution, but did not permit the recovery of damages.¹²⁰ Twenty years later, the Appellate Division determined that the parties can, by prior agreement, exclude remedies for non-fraudulent misrepresentation.¹²¹

In 1959, the Orange Free State Provincial Division held that there was no reason for denying a claim for restitutional damages to a buyer who had entered into a contract of sale as a result of the seller's material, innocent misrepresentation.¹²² The courts in the Transvaal¹²³ and Natal¹²⁴ also adopted this position.

Finally, in 1973, the Appellate Division addressed remedies for non-fraudulent misrepresentation in *Phame (Pty) Ltd. v. Paizes*.¹²⁵ The court established two rules concerning remedies regarding sales contracts. First, a buyer can claim either rescission or restitution with the *actio redhibitoria*.¹²⁶ The buyer can claim restitutional damages, abatement of the purchase price, with the *actio quanti minoris* if he or she has been misled by a seller's misrepresentation that constituted a *dictum et promissum*.¹²⁷ The party to whom the misrepresentation is made may raise the *exceptio redhibitoria* or the *exceptio quanti minoris* as a defense to an action by the seller.¹²⁸ Second, if the seller's representation is not a *dictum et promissum*, or if the representation is made to a party to a contract other than a sales contract, the party to whom the misrepresentation is made may claim rescission and restitution or may raise the *exceptio doli* as a defense to an action by the

118. DIG. 44.4.2.5 (Ulpian, Edict, bk. 76).

119. See Van der Linden Supp. ad Voet 4 3 1.

120. HAHLO & KAHN, *supra* note 88, at 458-70; Ellison Kahn, *Innocent Misrepresentation: No Abiding by Contract and Claiming Restitutionary Damages*, 74 S. AFR. L.J. 133 (1957).

121. *Wells*, 1927 A.D. at 69.

122. *Hall v. Milner*, [1959] 2 S.A. 304 (S. Afr. O.P.D.).

123. See, e.g., *Van Schalkwyk v. Prinsloo*, [1961] 1 S.A. 665, 665 (S. Afr. T.P.R.).

124. See, e.g., *Van Niekerk v. Thompson Motors*, [1966] 2 Phip. A70 (S. Afr.).

125. [1973] 3 S.A. 397, 407 (S. Afr. App. Div.).

126. One example is a material statement by the seller to the buyer during the negotiations that bears on the quality of the thing sold and goes beyond mere praise and commendation.

127. *Phame (Pty) Ltd.*, [1973] 3 S.A. at 407.

128. *Id.*

other party.¹²⁹ In such cases, no action for restitution arises.

B. Duress

Duress, which derived from Roman-Dutch law, occurs when a person acts through fear of actual or threatened danger. Three elements must exist to establish a claim of duress. First, there must be a threat of imminent or inevitable harm to the life, person, honor, or property of a person or family member.¹³⁰ Threats of criminal prosecution will suffice.¹³¹ Likewise, threats to destroy or forfeit property, known as duress of goods, permit the property owner to repudiate any contract extorted by the threats.¹³²

The second element of duress is an unlawful threat.¹³³ A threat is unlawful if the threatened conduct is unlawful in itself or the purpose of the threat is unlawful, such as attempting to obtain something to which one is not entitled.¹³⁴ A creditor's threat to institute civil proceedings to enforce his or her rights is not unlawful as long as the creditor does not try to obtain something to which he or she is not entitled.¹³⁵ A party entering into a contract under these circumstances cannot set it aside on the grounds of duress.¹³⁶

It is unlawful to threaten a person with criminal prosecution in order to enforce a private debt if the other party did not commit the crime or if the creditor is using the threat to obtain something to which the creditor is not entitled.¹³⁷ A split of authority exists as to whether the same result occurs if the debtor committed the crime and the creditor seeks only that to which he or she is entitled. For exam-

129. *Id.*

130. GROTIUS, INLEIDING 3.48.6; VAN LEEUWEN, CENS FOR 1.4.41.2-.3; *Broodryk v. Smuts*, 1942 Natal L.R. 47 (S. Afr.); *Jans Rautenbach Produksies (Edms) Bpk v. Wijma* [1970] 4 S.A. 31 (S. Afr. T.P.D.); *Shepstone v. Shepstone*, [1974] 1 S.A. 411 (S. Afr. D. & C.L.D.).

131. See, e.g., *Broodryk*, 1942 Natal L.R. at 47; *Jans Rautenbach Produksies (Edms) Bpk*, [1970] 4 S.A. at 31; *Arend v. Astra Furnishers (Pty) Ltd.*, [1974] 1 S.A. 765 (S. Afr. C.P.D.).

132. *Hendricks v. Barnett*, [1975] 1 S.A. 765 (S. Afr. N.P.D.). For example, if a person in a position of authority unlawfully compels the owner of certain goods to pay or agree to pay him or her money by threatening that failure to pay will result in a forfeiture of the goods, the goods' owner is not bound if he or she protests at the time.

133. VOET 4.2.10; *Broodryk*, 1942 Natal L.R. at 47; *Jans Rautenbach Produksies (Edms) Bpk*, [1970] 4 S.A. at 31; *Arend*, [1974] 1 S.A. at 765.

134. See P.J.J. Olivier, *Onregmatige Vreesaanjaging*, 28 TYDSRIKF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 187, 203 (1965).

135. VOET 2.4.10; *Salter v. Haskins*, 1914 T.P.D. 264 (S. Afr.).

136. VOET 2.4.10; *Salter*, 1914 T.P.D. at 264.

137. See MILLIN & WILLE, *supra* note 69, at 1212-13.

ple, South African jurist Wessels wrote that "[t]he threat to prosecute a person for a crime involving imprisonment unless he enters into a contract is sufficient mortal violence to justify the setting aside of the contract."¹³⁸ In contrast, the Transvaal Provincial Division of the Supreme Court¹³⁹ and the Durban and Coast Local Division of the Supreme Court¹⁴⁰ believe that if the debtor committed the crime and the creditor seeks no more than that to which he or she is entitled, the threat of criminal proceedings is lawful. The Cape Provincial Division has not yet decided the issue, but, should the case arise, the court is likely to determine that the threat of criminal procedure is *contra bonos mores* or against public policy, even if the debtor has committed the crime and the creditor seeks no more than that which the creditor is due.¹⁴¹ All South African courts should adopt this view. It seems inappropriate that the criminal process, aimed at protecting society at large, can be used to enforce private rights. Moreover, irrespective of duress, every threat of criminal prosecution implies that there will not be future prosecution if the desired contract is concluded. All such contracts implicitly are agreements to stop prosecutions or to compound crimes and will be void as against public policy.

The third element of duress is that the threat must have induced the threatened party to enter into the contract or to agree to terms to which he or she otherwise would not have agreed.¹⁴² Hence, the threat and the contract must have a causal link. Many jurisdictions also require the victim's reasonable fear,¹⁴³ although the victim's fear does not make the contract voidable. On the other hand, obtaining the victim's consent by improper means does make the contract voidable.¹⁴⁴ Indeed, it is difficult to imagine how the unreasonableness of the victim's fear has inferential value in deciding whether the threats actually induced the formation of the contract. If reasonable fear were required, any distinction made by courts between threats to an individual and duress of goods where the victim can claim duress only if he or she acted under protest, would also relate to proving a causal link between the threat and the victim's subsequent conduct.

138. WESSELS, *supra* note 59, para. 1188.

139. See *Jans Rautenbach Produksies (Edms) Bpk*, [1970] 4 S.A. at 31.

140. *Ilanga Wholesalers v. Ebrahim*, [1974] 2 S.A. 292 (S. Afr. D. & C.L.D.).

141. *Arend*, [1974] 1 S.A. at 765.

142. DIG. 4.2.6 (Gaius, Provincial Edict, bk. 4); VAN LEEUWEN, CENS FOR 1.4.41.1; VOET 4.2.11; *Steiger v. Union Gov.*, [1919] 40 Natal L.R. 75 (S. Afr.).

143. See *Steiger*, [1919] 40 Natal L.R. at 79.

144. GROTIUS, DE IURE B AC P 2.11.7; DE WET & VAN WYK, *supra* note 57, at 44.

With regard to remedies under Roman Law, a duress victim could use the *exceptio quod metus causa* as a defense against an action on the contract into which he or she had entered.¹⁴⁵ A victim could also claim *restitutio in integrum* in cases where he or she had already performed the contractual terms.¹⁴⁶ In addition, a victim could obtain damages with delictual *actio quod metus causa*.¹⁴⁷ Roman-Dutch law followed these precedents,¹⁴⁸ and, following its Roman-Dutch heritage, South African law allows the threatened party to accept the contract or have it set aside.¹⁴⁹ In electing to avoid the contract, the threatened party may either raise duress as a defense or claim *restitutio in integrum*. Regardless of whether the threatened party accepts or rejects the contract, the threatened party may receive delictual damages in compensation for his or her negative interest.

C. Undue Influence

Like English common law, South African law holds that a contract made under duress is voidable.¹⁵⁰ However, the English common law is much narrower than its South African counterpart. The English concept comprises only cases of actual or threatened physical violence to, or unlawful constraint of, the contracting party's person.¹⁵¹ The narrowness of the English common law concept of duress resulted in intervention by courts of equity, which, through application of the doctrine of constructive fraud, had broader jurisdiction over contracts made without free consent than did the common law courts.¹⁵² The equity courts developed a doctrine of undue influence, which provided relief in cases where a contract was procured through improper pressure that did not rise to the level of duress.¹⁵³ It also provided relief in cases where a special relationship existed between

145. See *Mauerberger v. Mauerberger*, [1948] 4 S.A. 902, 903-05 (S. Afr. C.P.D.).

146. GROTIUS, INLEIDING 3.48.6; GROTIUS, DE IURE B AC P 2.11.7; VAN LEEUWEN, CENS FOR 1.1.13.5-7; VOET, COMMENTARIUS 4.2.1.

147. GROTIUS, INLEIDING 3.48.6; GROTIUS, DE IURE B AC P 2.11.7; VAN LEEUWEN, CENS FOR 1.1.13.5-7; VOET, COMMENTARIUS 4.2.1.

148. GROTIUS, INLEIDING 3.48.6; GROTIUS, DE IURE B AC P 2.11.7; VAN LEEUWEN, CENS FOR 1.1.13.5-7; VOET, COMMENTARIUS 4.2.1.

149. *Broodryk*, 1942 Natal L.R. at 47; *Jans Rautenbach Produksies (Edms) Bpk*, [1970] 4 S.A. at 31; *Shepstone*, [1974] 1 S.A. at 411; *Ilanga Wholesalers*, [1974] 2 S.A. at 292; *Arend*, [1974] 1 S.A. at 765.

150. G.C. CHESHIRE & C.H.S. FIFOOT, *THE LAW OF CONTRACT* 285-90 (1981).

151. *Id.*

152. *Id.*

153. *Id.*

the contracting parties.¹⁵⁴ The two types of cases are distinguishable. Where no special relationship exists between the parties, the party alleging undue influence must prove that the other party imposed improper pressure on him or her.¹⁵⁵ Where a special relationship does exist, a presumption of undue influence arises, which the alleged undue influencer must rebut.¹⁵⁶ Many relationships give rise to the presumption, including those of parent-child, guardian-ward, religious advisor-disciple, physician-patient, attorney-client, and trustee-*cestui que* trust.¹⁵⁷

After the South African War, the courts in the Cape¹⁵⁸ and Natal,¹⁵⁹ and the Appellate Division¹⁶⁰ first referred to undue influence as a ground for setting aside a contract. Some of the courts accepted unquestioningly the proposition that the doctrine of undue influence formed part of South African law. In 1948, the Cape Provincial Division of the Supreme Court determined that undue influence had a basis in South African law.¹⁶¹ In reaching its decision, the Court drew on previous decisions of South African courts, the writings of several scholars, the views of various writers on the grounds for *restitutio in integrum*, and on the fact that undue influence prevented true consent.¹⁶² Six years later, in *Preller v. Jordaan*,¹⁶³ the Appellate Division accepted the view that undue influence provided a ground for *restitutio in integrum*.¹⁶⁴ That decision marked the unambiguous acceptance in South African law of the rule that a party can avoid a contract if the other party used undue influence to induce him or her to enter into it.¹⁶⁵ The acceptance of this rule diverges from Roman-Dutch practice, which is demonstrated by the minority judgment of Van den Heever in *Preller*, and by the writings of South African jurist De Wet in an examination of the sources the court relied upon in *Preller*.¹⁶⁶

154. *Id.*

155. Such cases fall under the doctrine of duress. For a discussion of the doctrine of duress, see *supra* notes 130-49.

156. CHESHIRE & FIFOOT, *supra* note 150, at 286-90.

157. *Id.*

158. *Yates v. Estate Yates*, [1903] 20 S.C. 35 (S. Afr.).

159. *Stride v. Wepener*, 1903 T.H. 383 (S. Afr.).

160. *Van Pletzen v. Henning*, 1913 A.D. 82 (S. Afr.).

161. *Mauerberger v. Mauerberger*, [1948] 4 S.A. 902 (S. Afr. C.P.D.).

162. *Id.*

163. [1956] 1 S.A. 483 (S. Afr. App. Div.).

164. *Id.* at 499-503.

165. *Id.*

166. DE WET & VAN WYK, *supra* note 57, at 47-49.

Despite acceptance of the general rule, the specific elements of undue influence remain unclear. The English courts vaguely define undue influence as "some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by" the guilty party.¹⁶⁷ The South African courts have not been more precise. In *Preller*, the court found that the grounds for *restitutio in integrum* were broad enough to include the case

where one person obtains an influence over another which weakens the latter's powers of resistance and renders his will compliant, and where such person then uses his influence in an unconscionable manner to persuade the other to agree to a prejudicial transaction which he would not have concluded with normal free will.¹⁶⁸

Then, in *Patel v. Grobbelaar*,¹⁶⁹ the Appellate Division affirmed the Transvaal Provincial Division's decision requiring a plaintiff asserting undue influence to prove three elements: (1) the defendant exerted influence over him or her; (2) the influence weakened his or her resistance and made him or her compliant; and (3) the defendant used his or her influence unscrupulously to induce the plaintiff to agree to a transaction which was prejudicial to him or her and which he or she would not otherwise have entered.¹⁷⁰

In terms of remedies for undue influence, the injured party may elect to accept the contract or to rescind it and claim *restitutio in integrum*. The courts have not decided whether the party also has an action for damages. However, if undue influence is to be accepted as duress, a plaintiff would have an action for damages.

IV. THE NEED FOR A COMMERCIAL CODE WITH EMPHASIS ON UNCONSCIONABILITY

As South Africa struggles to cast off apartheid's sordid legacy, there is much discussion of a new constitution that will guarantee human rights and equality before the law.¹⁷¹ There is also great debate over whether such a document should guarantee economic

167. *Allcard v. Skinner*, [1887] 36 Ch. D. 145, 181 (Eng. C.A.).

168. *Preller*, [1956] 1 S.A. at 492.

169. [1974] 1 S.A. 532 (S. Afr. A.D.).

170. *Id.*

171. On the constitutional debate, see Lynn Berat, *A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary*, 13 LOY. L.A. INT'L & COMP. L.J. 467, 467-84 (1991).

rights.¹⁷² This debate, however, centers on land and wealth redistribution, and does not involve contract formation or the sanctity of contracts.¹⁷³

Nevertheless, there are pressing reasons for those crafting a new legal order for the country to pay particular attention to contract law. To create a just society, the South African economy will have to expand dramatically. Expanding the economy will require infusions of foreign capital, but such investment alone will not be enough to undo the underlying problems of high unemployment, poverty, and despair.¹⁷⁴ Domestic economic growth will also have to be fueled by greater African participation, primarily through small business creation and heightened presence in the consumer economy. In such an environment, contracts, whether between businesses, between businesses and individuals, or between individuals, will assume a new importance as the foundations facilitating economic change. Inevitably, contract disputes will arise, particularly because middle class South African blacks starting new businesses will not have established advice networks to rely on for assistance in making deals. Consequently, it seems likely that many contract disputes will find their way to court.

Historically, in South Africa, white judges enforced laws created by whites in courts catering to white interests;¹⁷⁵ hence, it will be important for courts to be responsive to those wronged in contract disputes. This is essential not only for economic stability but also for the creation of much needed respect for the rule of law in general. The courts' responsiveness is even more urgent because whites will continue to dominate the economy, the judiciary, and the bar in the foreseeable future.¹⁷⁶ Therefore, both South African courts and those creating a new legal order for the country should make an effort to define a coherent doctrine of unconscionability that favors the rights of victims.

In terms of case law, courts should adopt a concept of unconscionability that seeks to merge, where possible, the existing doctrines of misrepresentation, duress, and undue influence. The success of this merger will partly depend upon the continuing position of Roman-Dutch law in the South African legal order, an issue not yet de-

172. *Id.* at 473-77.

173. *Id.*

174. Berat, *supra* note 1, at 13.

175. Berat, *supra* note 172, at 484-85.

176. *Id.*

cided.¹⁷⁷ Even so, the hybrid legal heritage does not pose too formidable an obstacle to the development of a judicial doctrine of unconscionability.

Looking beyond the case law, any new government should adopt a commercial code, perhaps modeled on the United States' Uniform Commercial Code,¹⁷⁸ that would have explicit provisions on unconscionability. Such provisions, developed in consultation with judges, commercial lawyers, and consumer advocates, would help guide judges in devising their standards. To better serve South Africa's undereducated African population, the code should avoid legal jargon as much as possible. Once adopted, the government should publicize the code by distributing summaries for laypersons published in the official language, which is likely to be English,¹⁷⁹ as well as in Afrikaans and various African languages. The government should mobilize trade unions, consumer groups, and those conducting secondary school street law programs to familiarize people with the code. Both entrepreneurs and consumers alike will then become comfortable with commercial law and enter into transactions that will benefit the economy and, therefore, all South Africans.

V. CONCLUSION

South Africa has a hybrid legal system that combines elements of Roman, Roman-Dutch, and English law. That mixed heritage is readily apparent in South African contract law, which has never developed the concept of unconscionability as found in the law of the United States and other countries, but instead relies upon the doctrines of misrepresentation, duress, and undue influence. As debates rage in South Africa about the post-apartheid legal order, many of the ills besetting the country demand eradication. The post-apartheid order must involve the increased participation of Africans both as business owners and consumers. To encourage that participation, there should be a doctrine of unconscionability that favors the victims of

177. On the future of Roman-Dutch law, see, e.g., ALBIE SACHS, *THE FUTURE OF ROMAN-DUTCH LAW IN A NON-RACIAL DEMOCRATIC SOUTH AFRICA: SOME PRELIMINARY OBSERVATIONS* (1989).

178. U.C.C. (1990).

179. On the language question, see Neville Alexander, *Language Planning in South Africa with Special Reference to the Harmonization of the Varieties of Nguni and Sotho*, Paper Presented at the Southern African Research Program Seminar, Yale University (Feb. 20, 1991); Neville Alexander, *The Sociology of Language: Language Planning for a Democratic South Africa*, Paper Presented at the Southern African Research Program Seminar, Yale University (Oct. 17, 1990).

unconscionable contracts. This should be developed in two ways. First, the courts should harmonize existing doctrines and develop a concept of unconscionability. Second, those responsible for commercial law in any new government should adopt a commercial code that employs a concept of unconscionability; such a code must avoid legal jargon and be explained to laypersons through various education programs. Only by encouraging Africans to feel that the economy belongs to them will the growth so necessary to South Africa's stability and survival be able to occur.

