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‘A Living Customary Law of Commercial Contracting in South Africa: Some Law-Related Hypotheses’

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*A LIVING CUSTOMARY LAW OF COMMERCIAL CONTRACTING
IN SOUTH AFRICA: SOME LAW RELATED HYPOTHESES**

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Abstract: Inspired by calls to ‘decolonise’ South African law and legal education, this paper will posit some hypotheses as to the nature of a living customary law of commercial contracting from the perspectives of two South African contract law teachers. An account of the commercial format of customary contracting is largely absent from the law reports and leading legal textbooks in this country. The dominant narrative in existing legal sources, however, (which may be stereotyped), is of African communalism prevailing in customary contract practice. This is reflected (for example) in the discourse on ‘ubuntu’, which is being used at present as a vehicle for the constitutional transformation of the South African common law of contract. Other existing empirical accounts from discourses such as economics and anthropology also suggest, however, that contracting in indigenous African communities rests on notions of trust and community. This is reinforced by the existence of informal township dispute resolution structures. We will thus posit a central hypothesis that customary commercial contracting is relational in nature, using an inter-disciplinary literature review and drawing on the lived experiences of the authors. Other related hypotheses will also be developed. Ultimate truth here is a matter for future empirical study.

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I INTRODUCTION

Calls for ‘decolonisation’ of (contract) law and (contract) legal education in South African universities present a bit of a conundrum to us as local contract teachers. In this country, decolonisation, in the technical sense of throwing off the yoke of a foreign colonial power, happened decades ago.¹ Of course, white minority rule only ended long after that, however, and racialized economic inequality remains a feature of the South African landscape despite the emergence of a black middle class.² Hence, ‘decolonisation of law and the legal curriculum’ as concepts used by our students must be taken to have a more figurative and symbolic meaning.

As scholars in a discourse which is framed largely by historical and comparative scholarship on contracting, often grounded in European ‘parent’ legal systems, one could perhaps be forgiven for not having before pondered the issue of what is ‘African’ about contracting in South Africa, since this is not a topic traditionally covered in university legal education, or indeed in the academic discourse on contracts. Indeed, when one finally wakes up and demands an answer to this question, it is remarkably difficult to dig up appropriate study materials. Progressive private law is largely concerned at present with how to ‘constitutionalise’ the common law; while customary law remains for the most part confined to the traditional ‘ghettos’ of family law, the law of succession, traditional leadership, and land rights.³ What about commercial transactions? What is the governing legal regime for stokvels, burial societies, loan sharks (mashonisa), reciprocal loans between friends and family, or sales

¹ South Africa experienced Dutch colonialism from 1652 until 1795, whereafter it fell under English colonial power (except for a brief period between 1803 and 1806). Substantial independence was achieved by the ruling white authorities following the promulgation of the Statute of Westminster in 1931, however. In 1948, the newly elected nationalist government introduced a policy known as ‘Apartheid’. This Apartheid government declared South Africa to be a fully independent republic in 1961 and left the British Commonwealth the same year under pressure from Britain.

² The transition to fully democratic government under the African National Congress commenced formally on 27 April 1994. For an economic history of Apartheid South Africa, followed by an analysis of inequality in contemporary post-Apartheid South African society, see J Seekings & N Nattrass *Class, Race and Inequality in South Africa* (2005). For a discussion of the relationship between law and poverty, see J Modiri ‘Law’s Poverty’ 2015 (18) *PELJ* 224.

³ Compare on customary law, the leading texts of C Himonga & T Nhlapo (eds) *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* (2014); and TW Bennett *Customary Law in South Africa* (2004).

of immovable property in our informal settlements? Most would probably immediately refer to the ‘law on the books’, including specific pieces of legislation and indeed the residual common law of contract. Such a response would no doubt add that there is in fact only one system of South African law and that is law under the Constitution.⁴ While this is possibly true, at least in a formal, positivist sense, what about in the de facto sense (‘law in action’)? And where does that leave the theory of law known as legal pluralism, which has adherents all around the world, including most customary lawyers in South Africa, who have probably been thinking all along: what is the living customary law of commercial contracting in South Africa?⁵

In this article, we the present authors, two South African-educated contract lawyers with an interest in (inter alia) legal theory, legal history, legal and economic anthropology, the constitutionalisation of contract law, and the future of African customary law, would like to posit some hypotheses about what a living customary law of commercial contracting in South Africa might look like. Of course, a reader may protest that a concept of a living customary law of any kind should only be put forward after extensive empirical research. This, we acknowledge is true. For now, our method will be to draw on the work of others in establishing a context in which customary commercial contracting could operate. Nkanyiso Sibanda, one half of the present authorship, is a member of the indigenous African community in Cape Town. In places we will use his lived experience to supplement our written sources. Most of the details related using this method are fairly trite and are common knowledge in South African indigenous circles: we hope that the reader will excuse the resultant absence of referencing where this occurs. Where possible, we rely on published accounts.

This paper will proceed as follows: in part II, we will briefly situate our study using prevailing contract and legal theories. In part III we will set out some of the relevant aspects of the established legal discourse on customary law. First hereunder, we will address

⁴ *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC), para 44; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), para 22.

⁵ Himonga & Nhlapo (note 3 above) define ‘legal pluralism’ at 45. See further: TW Bennett, ‘African Customary Law’ in M Reimann & R Zimmermann (eds) *Oxford Handbook of Comparative Law* (2006) 641, 666-671. For discussion of the concept of ‘living customary law’ in particular, see: TW Bennett ‘“Official” v “Living” Customary Law: Dilemmas of Description and Recognition’ in A Claassens & B Cousins (eds) *Land, Power, Custom* (2008) 138.

conceptual issues as to the nature of ‘African’ customary law. We will then move to the accounts of customary contracting by other writers on customary law – our version will remain general, here, however, without describing specific transactions.⁶ We introduce the published material subject to the same proviso above that the customary law scholar should be careful not to get trapped in the epistemological snare of relying on written accounts of customary law as being sacrosanct. We use these materials merely as a textbook style illustration of some of the literature available and subject to the caution that what we may be representing is ‘official’ customary law. Using the same methodology, we will also discuss customary law dispute resolution in a more traditional setting, since we feel that this is relevant to our theoretical claims which we will develop in what follows. In part IV, we will move our concept of customary contracting out of the traditional narrative’s milieu, into the so-called ‘popular economy’, an economic context described by South African social scientists and by which we intend to refer in this study to South Africa’s urban townships. This popular economy will serve as a new narrative site for discussion of ‘customary commercial contracting’, for which we will rely on the previously published empirical studies of others. We will draw on such sources to posit some hypotheses about the nature of a (modern, urbanised) living customary law of commercial contracting. Part V will summarise our central hypotheses as introduced in the preceding parts. Part VI will conclude.

A final caveat before we continue: the term ‘African’ is employed in this article subject to notional ‘scare’ quotation marks. We don’t intend to generalise or to stereotype here. We are responding to calls for contract law and contract legal education to better speak to the ‘African’ context, as well as Constitutional Court dicta to this effect.⁷ We hope that we do not fall into the trap of setting up an African exceptionalism: rather we explicitly work from certain universal assumptions, particularly the economic laws of the market place and the commonality of personal and business needs in a commercial context. Indeed, it is in this regard that we acknowledge that the previously stated business reasons may underlie much of the universality of contract laws around the world, which requires a normative response from us as to what the

⁶ For specific types of traditional customary law contracts, see: Himonga & Nhlapo (note 3 above) 188-195.

⁷ The clearest dictum to this effect is to be found in the minority judgment of Yacoob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), para 23. See also: the majority judgment of Ncgobo J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 51; the majority judgment of Moseneke J in *Everfresh*, para 72. Compare the sentiment expressed by Madlanga J in *Paulsen and Another v Slip Knot Investments* 777 2015 (3) SA 479 (CC), para 66.

potential role of incorporation of a parallel system of customary commercial contract law might be.

II A THEORY OF CONTRACTING

(a) Contract, status and legal theory

In an influential nineteenth century work, Maine posited that: ‘the movement of the progressive societies has hitherto been a movement *from Status to Contract*.’⁸ What Maine argued was that in early societies, one’s role and influence was largely shaped by one’s membership of a traditional social grouping, particularly one’s family.⁹ Maine’s thesis was that as society progressed, parties achieved a greater measure of personal autonomy and were able to associate with one another and allocate resources by agreement, so that one might bargain for a better deal and improve one’s status in society through contracting.¹⁰ This theory fits in nicely with ideas like freedom of contract, laissez-faire economics, and (political) social contractarianism, which would have characterised the British social context in which Maine wrote.¹¹ Indeed, ideas such as the ‘civilising mission of contract’, much reviled in certain modern circles, could be thrown in here.¹² A movement towards a monetised economy and wage labour, and away from hereditary social hierarchies underpin this type of philosophy. It also works well in

⁸ HS Maine *Ancient Law* cheap ed (1905 [1861]) 151.

⁹ *Ibid*, see in particular chapter 5.

¹⁰ *Ibid* 149-151. See also chapter 9.

¹¹ PS Atiyah *The Rise and Fall of Freedom of Contract* (1979) part II describes the period of British history between 1770 and 1870 as ‘the age of freedom of contract’. Atiyah’s history of the concept of freedom of contract (and related philosophical and economic trends) ends at the time of writing (the late 1970s), where he reflects that the ‘wheel had come full circle’ and that freedom of contract as a concept had ‘fallen’ in his contemporary British epoch. In this conclusive chapter 22 (at 716) he makes the observation that in his contemporary Britain, there had been a ‘reversion from “contract” to “status”’, citing Maine. While the British political economy was to take a turn to the right shortly thereafter, this observation by Atiyah is an interesting one. Indeed it is useful exercise to similarly reflect on the contract/status theme in our own contemporary South Africa: the conclusion in part VI below will return to this theme.

¹² This concept is discussed critically with reference to the literature in L Siliquini-Cinelli ‘Reflections on the Pactum in the Public and Private Spheres’ in L Siliquini-Cinelli & A Hutchison (eds) *The Constitutional Dimension of Contract Law: A Comparative Perspective* (2017) 289. In South Africa, this terminology is linked with colonialism, rather than liberalism per se, see for example: Himonga & Nhlapo (note 3 above) 6.

conjunction with a liberal free-market economy and prevailing (contemporary British) notions of capitalism.

What the ‘status to contract’ progression does not account for, however, is the social nature of humans, particularly with regard to contracting. Although first discussed as a theory of contracting over a century after Maine wrote, relational contract theory has demonstrated the ever-present significance of human relations and networks in contracting, particularly in repeated or ongoing transactions.¹³ There is a strong inter-personal element to business, which can manifest as co-operation as well as competition. Indeed, norms such as trust and reciprocity are as much a part of business as adversarialism and opportunism. Inter-personal relations are also among the reasons why negotiation remains the most prevalent form of dispute resolution in business, regardless of what the law of contract in a given location might be.¹⁴ To the extent that a given site for contracting is in a community (read: localised market) where the role players are known to each other, it is likely that contracting will adhere to the tenets of relational contract theory.

This is not to say, of course, that there is no element of individualism to contract practice. Writing from a United States point of view, Fried’s argument that contracting is based on individual determinism and that issues of distributive justice are best left to the public law realms of taxation and welfare, hold water, at least in the setting of formal, liberal, Westernised contract law.¹⁵ What this theory rests on of course, are the dual notions of personal autonomy and private property.¹⁶ Much of the conventional narrative on ‘African’ social norms holds that ‘African’ society is more communal in nature than ‘Western’ society, and that the interests

¹³ For the seminal texts, see (for example): IR Macneil ‘The Many Futures of Contracts’ (1974) 47 *Southern California LR* 691; IR Macneil *The New Social Contract: an Inquiry into Modern Contractual Relations* (1980); S Macaulay ‘Non-contractual Relations in Business – A Preliminary Study’ (1963) 28 *American Sociological Rev* 55. For secondary discussion of relational contract theory, see for example: D Campbell (ed) *The Relational Theory of Contract: Selected Works of Ian Macneil* (2001); J Braucher, J Kidwell & WC Whitford (eds) *Revisiting the Contracts Scholarship of Stewart Macaulay* (2013); D Campbell, L Mulcahy & S Wheeler (eds) *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (2016). For a different take on relational contract theory see: H Collins *Regulating Contracts* (1999).

¹⁴ For contract sources, the seminal text is: Macaulay (note 13 above). From an alternative dispute resolution point of view, see: R Fisher, W Ury & B Patton *Getting to Yes: Negotiating an Agreement Without Giving In* 3 ed (2012); J Brand, F Steadman & C Todd *Commercial Mediation: A User’s Guide* (2012) chapter 2.

¹⁵ C Fried *Contract as Promise* (1981).

¹⁶ *Ibid*, see in particular the foundational chapter 2.

of the individual are often sub-ordinated to that of the group.¹⁷ Gyekye, a Ghanaian, describes how this type of argument was employed by post-colonial leaders in several African countries in order to found a system of government based on ‘African socialism’.¹⁸ Gyekye and other African philosophers argue against this type of narrative: in their view, there is no opposition to individualism, or individual interests in most African cultures.¹⁹ One need not be entirely altruistic or selfless in one’s behaviour. Rather, Gyekye convincingly puts forward a notion of ‘moderate communitarianism’, in which there is space for individual interests, provided these are tempered with social responsibility.²⁰ This is a fascinating conception of the political economy, which resonates with (for example) the special protection given to socio-economic rights under the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).²¹ Gyekye’s account leaves room for basic principles of autonomy and private property, which underlie liberal theories of contracting, such as Fried’s. We submit, however, that Gyekye’s moderate communitarianism is possibly closer to the South African model of a constitutionally circumscribed model of contracting, than to other systems (such as Fried’s model) which recognise a greater role for freedom of contract.

For our account below, we do not wish to take issue with either contractual autonomy or private property, both of which are at the heart of most market-based systems of contract law, which would include South Africa. Our approach to contract theory will be from a different angle, focussing on the socially embedded nature of contractual relations and legal pluralism. We hope to provide a new South African angle on the status to contract claim: our view is that there is a strong relational element to all contracts, including customary ones (that is, a ‘status’); and that if one accepts legal pluralism theory, this status element is very much a part of contract law, especially in the modern South African customary context. Hence status

¹⁷ In South Africa, the literature on ubuntu refers: Mokgoro, ‘Ubuntu and the Law in South Africa’ (1998) 4 *Buffalo Human Rights LR* 15; D Cornell & N Muvangua (eds), *Ubuntu and the Law* (2012); F Diedrich (ed) *Ubuntu, Good Faith & Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011); H Keep & R Midgley ‘The Emerging Role of ‘Ubuntu-Botho in Developing a Consensual South African Legal Culture’ in F Bruisma & D Nelken (eds), *Explorations of Legal Cultures* (Elsevier 2007) 29; C Himonga ‘The Right to Health in an African Cultural Context: The Role of Ubuntu in the Realization of the Right to Health with Special Reference to South Africa’ (2013) 57 *J of African Law* 165; L Praeg *A Report on Ubuntu* (2014).

¹⁸ K Gyekye *Tradition and Modernity: Philosophical Reflections on the Africa Experience* (1997) chapter 5.

¹⁹ *Ibid*, chapter 2. See further: DA Masolo *Self and Community in a Changing World* (2010) 245-250.

²⁰ Gyekye (note 18 above) chapter 2.

²¹ For an Afrocentric defence of socio-economic rights in South Africa, see: Himonga (note 17 above).

and contract exist contemporaneously and are both vital parts of modern customary commercial contracts.

(b) Legal pluralism and contracting in South Africa: existing texts

Where then does one begin with a literature review to investigate the living African customary law of contracting in South Africa? Existing signposts in written sources include the following:

- i. Textbook accounts of customary law in South Africa;²²
- ii. Judgments of South African courts, particularly the apex Constitutional Court, on contracting;²³ and
- iii. Published empirical studies of the popular economy.²⁴

Of these three possible avenues of inquiry, textbook accounts (category (a)) represent (in our view) a largely pre-commercial vision of society, which Himonga and Nhlapo warn may be a distorted and outdated picture.²⁵ Indeed, we have our doubts about the methodology of presentation of certain accounts of African customary law, particularly those on contracting, since the terminology and categorical excursus is sometimes closely based on Roman law. We feel that this is a key epistemological error in customary law analysis as it assimilates customary law to the European discourse. Our view in this paper is that contracting, as a process, is indeed a universal cultural phenomenon based on consensual exchange, but that that alien terminology should not be imposed on it. In our view, some accounts thus represent the material better than others. These traditional sources will nevertheless be discussed in the following part III.

Then, the dicta from the Constitutional Court (category (b)) present a potentially idealised vision of society, which, at least in the cases dealing with contracts, is seldom backed up by empirical evidence, relying rather on a judge’s own personal world view, or a nominally

²² Himonga & Nhlapo (note 3 above); TW Bennett (note 3 above); C Rautenbach & JC Bekker (eds) *Introduction to Legal Pluralism* (2014); JC Bekker ‘Law of Contract’ in WA Joubert (ed) *The Law of South Africa* Vol 32 ‘Indigenous Law’ 2 ed (2009) paras 230-243.

²³ There is a growing list of these cases. In addition to the *Barkhuizen*, *Everfresh* and *Paulsen* cases cited in note 6 above, see in particular: *Botha v Rich NO* 2014 (4) SA 124 (CC); *Makate v Vodacom Ltd* 2016 (4) 121 (CC). Omitted here are several cases on specific consumer law regimes, such residential leases and consumer credit.

²⁴ These sources will be discussed in part IV below.

²⁵ Himonga & Nhlapo (note 3 above) 195, citing RB Mqoke *Customary Law and the New Millennium* (2003) 118.

‘African’ world-view.²⁶ While the Constitutional Court’s jurisprudence on contracting has demonstrated a desire to introduce greater fairness, and particularly distributive (‘social’) justice through transforming the common law, there has been very little attempt to develop a living customary law of contracting. (This is probably best explained, in a precedent based system, by a lack of appropriate cases.) A database search of South African case precedents from all levels of the judiciary and going back several decades also reveals little of use here.²⁷ We will not dwell too long on an analysis of the constitutional dimension of contract law in South Africa, or the concomitant notion of ‘ubuntu’. This has been done elsewhere by ourselves and others.

Avenue (c) presents potentially the most productive avenue of inquiry, although the material here is largely not the work of lawyers, but rather economic anthropologists and economic sociologists. It is from category (c) empirical studies that the most can be learned (in our view) about how indigenous African people who may today reside in urban settings, but who still observe certain customary law practices, go about the business of commercial contracting.²⁸ This context will be set out part IV. The result will be a set of hypotheses about the living customary law of contracting in South Africa from which to work in possible future empirical studies.

Of course, we also require a reason for this perceived gap in the representation of African customary law. We believe that there are historical reasons for this, particularly in the South African context of a prior system of white minority rule and black sub-ordination and disenfranchisement. A useful source for this type of argument would be Chanock’s alternative history of the formative early twentieth century period of South African law and society.²⁹ Chanock argues that South African law was systematically segregated during this period into one branch (‘common law A’), which served the needs of the white population (here, of course, we mean the Roman Dutch/English law mixture); and another (‘common law B’) which served the African population (customary law, but as applied and distorted by white government

²⁶ Compare the passages cited in note 7 above.

²⁷ There are exceptions, see for example: *Mndi v Malgas* 2006 (2) SA 182 (EPD), a case on stokvels.

²⁸ Indigenous African people who reside in urban areas have a unique mode of social ordering, which has resulted in them observing customary law in a manner which takes into cognisance the needs of urban life.

²⁹ M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001).

officials).³⁰ Supervening on these two systems of law were choice of law rules which favoured ‘common law A’ in most commercial types of contract, particularly where one of the parties was white, or a white-owned juristic person.³¹ This led to the side-lining of the development of a ‘common law B’ of commercial contracting – leaving this branch of the law to operate largely in a familial setting.³² Central to Chanock’s argument is that this process was not about (contract) law at all, but rather about race and specifically African capacity to partake in the South African economy.³³

We will argue in what follows that this does not mean that there is no such thing as a customary commercial contract law; Chanock’s history does, however, suggest why there is no ‘official’ version of this branch of the law. Whether the future of contract law in South Africa should hold a reconciliation of ‘common law A’ and ‘common law B’, including in the law of contract, is a question to which we will return in our concluding part VI. De facto, two parallel systems of law continue to operate – this is unlikely to change with regard to a ‘living’ ‘common law B’ (particularly from the point of view of legal pluralism) – but some form of future synthesis may be an option for ‘common law A’, with implications for the law of commercial contracting in South Africa generally.³⁴

³⁰ Ibid, this is the central narrative throughout the book.

³¹ Ibid, again this is central. See in particular part IV, especially chapters 13 and 14.

³² Ibid.

³³ Ibid, see in particular the discussion of the ownership of land in South Africa in chapter 15.

³⁴ For argument to this effect, see A Hutchison ‘Decolonising South African Contract Law: An Argument for Synthesis’ in L Siliquini-Cinelli & A Hutchison (eds) *The Constitutional Dimension of Contract Law: A Comparative Perspective* (2017) 151.

III THE TRADITIONAL AFRICAN CUSTOMARY LAW OF CONTRACTING

In what follows we will set out a largely textbook account of customary law, customary contracting, and customary dispute resolution, as captured in the South African legal discourse. This material may be familiar to those with an interest in customary law, and some of it would be covered in standard LLB courses on this subject in South African universities. We will give a summary of these topics nevertheless, in the interests of presenting a balanced literature review of the available material and in order to contextualise the reader who has a low level of familiarity with textbook accounts of customary law. We also set up this representation, which we will call the ‘traditional’ account, in order to juxtapose it with an edgier social science account of commercial contracting in the ‘popular economy’ of South Africa’s urban townships in the following part IV.

(a) A working definition of African customary law

Many writers have already dealt with the challenges related to having one universally acceptable definition of customary law so we will not repeat this material.³⁵ For our purposes, it will, however, be helpful to propose a working definition of customary law against which our hypotheses may be tested.

Initial definitions of ‘customary law’ explained this concept as those norms and practices which only applied to members of a particular cultural group to the exclusion of others. Hamnett, for example, viewed customary law as ‘a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority’.³⁶ Jobodwana, by contrast, stressed the importance of ‘customs and traditions’ which work to regulate the way community members live.³⁷ In an analogous context, Bennett described

³⁵ See for example: ZN Jobodwana ‘Customary Courts and Human Rights; Comparative African Perspectives’ (2000) 15 *SA Public Law* 26, 30-33; Bennett (note 3 above) chapter 1; TW Bennett *A Sourcebook of African Customary Law for Southern Africa* (1991) chapter 1; C Himonga & C Bosch ‘The application of African Customary Law under the Constitution of South Africa: Problems solved or just beginning?’ (2000) 117 *SALJ* 306; I Hamnett *Chieftainship and Legitimacy: An anthropological study of executive law in Lesotho* (1975) chapter 1; TW Bennett ‘Re-introducing African customary law to the South African legal system’ (2009) 57 *American J of Comparative Law* 1; V Bronstein ‘Reconceptualising the customary law debate in South Africa’ (1998) 14 *SAJHR* 388.

³⁶ Hamnett (note 35 above) 14.

³⁷ Jobodwana (note 35 above) 30.

customary law as deriving ‘from social practices that the community concerned accepts as obligatory.’³⁸

Various pieces of legislation offer additional definitions of customary law: for example, the Law of Evidence Amendment Act³⁹ (‘LEAA’) gave the first statutory definition of customary law in South Africa. At section 1(4), the LEAA defined customary law as ‘the law or custom as applied by the Black tribes in the Republic’. In 1998, a new definition of customary law was introduced by the South African Law Reform Commission,⁴⁰ which was also later incorporated into the Recognition of Customary Marriages Act,⁴¹ as well as the Reform of Customary Law of Succession and Regulation of Related Matters Act.⁴² This definition refers to customary law as ‘the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples.’⁴³

While various definitions of customary law have thus been suggested, these all share common definitional attributes, which assists in bringing some consensus to what the concept of African customary law in South Africa entails. A working definition therefore would thus rest on two notions: first, that such law consists of customs and usages that are traditionally observed by the indigenous African people of South Africa; and secondly, there must be a claim that these practices form part of the culture of those people and hence have normative force. It is important that these customs which should be widely accepted and acknowledged by a traditional indigenous group.⁴⁴ According to Bennett, rules that are not acknowledged by people or that are dictated by outsiders as customary law are invalid.⁴⁵ To this effect,

³⁸ Bennett (note 3 above) 1; see also Bennett (note 5 above) 138.

³⁹ Act 45 of 1988.

⁴⁰ See: South African Law Commission *Project 90: Report on customary marriages* (1998) 43.

⁴¹ Act 120 of 1998.

⁴² Act 11 of 2009.

⁴³ See the definition of ‘customary law’ provided in section 1 of both Acts.

⁴⁴ In *Van Breda v Jacobs* 1921 AD 330, the court held that for a custom to be acknowledged in law, it must meet four requirements, namely: it must be long established; reasonable, uniformly observed; and certain. Himonga & Nhlapo (note 3 above) 30-31 distinguish, however, the nature of living customary law from the Roman Dutch concept of custom. Nevertheless, in *Shilubana v Nwamitwa*, 2007 (2) SA 432 (SCA), the court reiterated the fact that for a practice to be regarded as a custom, it should have been observed immemorially.

⁴⁵ Bennett (note 5 above) 138.

Jobodwana reiterates that it is important for a traditional community’s members to actually accept the body of rules as binding on themselves.⁴⁶

There are two forms of customary law that co-exist and are acknowledged in South Africa: ‘living’ customary law and ‘official’ customary law:⁴⁷

Living customary law consists of the actual rules and practices which govern the indigenous people whose law is being considered.⁴⁸ It comprises unwritten practices that regulate the day-to-day lives of a traditional community or a person who belongs to such a community. These social practices, however, are continually changing in accordance with the evolving practices of the community.⁴⁹ Bekker and Rautenbach echo this sentiment, arguing that an important attribute of living customary law is its perpetual adaptation to the evolution of a community: it is not static.⁵⁰ Commenting on the changing nature of living customary law, Bennett wrote:

‘Systems of custom therefore have the remarkable ability to allow forgotten rules to sink into oblivion, while simultaneously accepting new rules to take their place, always on the understanding that the new is old.’⁵¹

This dynamic characteristic of living customary law has also been acknowledged by the courts: for example, the majority judgment in *Bhe v Magistrate, Khayelitsha* referred to living customary law as a ‘dynamic system of law which is continually evolving to meet the changing

⁴⁶ Jobodwana (note 35 above) 30.

⁴⁷ The co-existence of these two types of customary laws has been acknowledged by the courts. See for example *Mabena v Letsoalo* 1998 (2) SA 1074 (T); *Ramuhovhi and Another v President of the Republic of South Africa and Others* 2016 (6) SA 210 (LT); *Shilubana* (note 44 above); *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (Tks).

⁴⁸ Himonga & Nhlapo (note 3 above) 26.

⁴⁹ See also *Ramuhovhi* (note 47 above) para 51 where the court held that the very nature of customary law is that it is ‘a dynamic, evolving system of values, inherently flexible, and which is practised in a specific community’. In the context of customary contracting, see: S Mancuso ‘Trends on the Harmonization of Contract Law in Africa’ (2007) 13 *Annual Survey of International & Comparative Law* 157, 175.

⁵⁰ JC Bekker & C Rautenbach ‘Nature and Sphere of African Customary Law’ in Rautenbach & Bekker (note 22 above) 29.

⁵¹ Bennett (note 3 above) 2.

circumstances of the community in which it operates’.⁵² In *Alexkor*, the Constitutional Court explained that living customary law refers to a set of traditional rules which have been in existence since time immemorial which have always changed and developed to address the needs of the relevant population.⁵³ The Constitutional Court held further that this system of law would ‘continue to evolve within the context of its values and norms consistently with the Constitution’.⁵⁴ In similar fashion, the same court in *Shilubana* held that the very nature of living customary law is that it is not static but adaptive.⁵⁵

Living customary law is thus not stagnant; rather, it always recognises and acknowledges on-going changes amongst people who are bound by it and who adapt to such changes for the convenience of the community. This means that out-dated customary law rules which are no longer being observed by the community are replaced by new ones, without the need for a formal process of amending the rules. A classic example of such a change is found in *Shilubana*. In this case, the Valoyi Royal Council changed the patriarchal principle of male primogeniture,⁵⁶ which allowed only males to succeed as King, and instead allowed a female to succeed to the throne in line with the equality provision in section 9 of the Constitution. The community’s acceptance⁵⁷ of this change reflects a transformed notion of the African customary law principle of male primogeniture.⁵⁸

Official customary law, on the other hand, stands in direct contrast to living customary law in so far as it is written and hence crystallised and fixed at the time of writing. It is the law

⁵² *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC), para 153.

⁵³ *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC), para 153.

⁵⁴ *Ibid*, para 153.

⁵⁵ *Shilubana v Nwamitwa*, (note 44 above), para 54; SALC Project 90 (note 40 above), para 2.3.2; TR Nhlapo ‘The African Family and Women’s Rights: Friends or Foes’ (1991) *Acta Juridica* 135.

⁵⁶ *Madolo v Nomawu* (1896) 1 NAC 12; *Makholiso and Others v Makholiso and Others* 1997 (4) SA 509 (Tks), 519E. See also AJ Kerr *The Customary Law of Immovable Property and of Succession* 2 ed (1990) 99.

⁵⁷ See *Shilubana* (note 44 above), para 54, where the Court noted that the ‘Valoyi people moved away from any previously existing rule that a woman could never be appointed as a Hosi’. Of course the acceptance was not unanimous, there were dissenting voices.

⁵⁸ Another example that illustrate the fluidity of living customary law is found in *Mabena v Letsolo* (note 47 above) where it became acceptable for a female head to negotiate and accept *lobolo*, a role which had traditionally been always reserved for males.

that is generally applied by the courts as well as other state institutions because it is easy to ascertain.⁵⁹ It is written and codified, and is reflected in textbooks, judicial precedents, and other scholarly publications.⁶⁰ Bennett refers to official customary law as ‘ossified in official code’ on account of this written nature.⁶¹ In *Bhe*, the court held that official customary law exists in textbooks as well as in statutes.⁶² Since the official law captures a living oral tradition in written form, it does not accurately reflect true customary law.⁶³ For this reason, the courts prefer to apply the living version of customary law.⁶⁴

(b) Traditional African customary contracting

The textbook accounts of the African customary law of contract have significant differences from the prevailing common law of contract. Some examples of these differences would be: the types of agreements found within customary law; the nature of the underlying transactions; the requirements for the formation of a contract; the nature of performance; and finally, the nature of contract enforcement and dispute resolution.⁶⁵ By definition, a ‘contract’ entails agreement between parties: this type of transaction is also found in African customary law, usually for a performance (and hardly ever for non-performance), between two adult parties who reach the voluntary consensus that violation of their agreement’s terms should result in legal consequences. Customary law contracts are generally concluded by a simple verbal agreement between parties. This by implication requires there to be at least one witness to a contract who will be able to give evidence about its existence in case of a dispute.⁶⁶ A written document is uncommon. Customary contracts also do not necessarily follow a particular format.

The literature describes the socially embedded nature of African customary contracting, where authority for a particular party to unilaterally enter into a contract is limited.⁶⁷ This is

⁵⁹ Himonga & Nhlapo (note 3 above) 33; Rautenbach & Bekker (note 22 above) 29; *Bhe* (note 52 above), para 87.

⁶⁰ Rautenbach & Bekker (note 22 above) 28.

⁶¹ Bennett (note 3 above) 64.

⁶² *Bhe* (note 52 above), para 86.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, paras 83-95.

⁶⁵ In this regard, see also Mancuso (note 49 above).

⁶⁶ *Ibid.* 174.

⁶⁷ *Ibid.* 174.

because most contracts in customary law affect the entire family or community: while some types of transactions are exempted,⁶⁸ an individual is usually expected to consult with the rest of his or her family before he or she concludes a contract. The male family head usually contracts on behalf of his family, but he is generally expected to consult with the older (mostly male) members of this family before the conclusion of the contract.⁶⁹ He is also ultimately responsible for the fulfilment of the contract.⁷⁰ Bekker and Rautenbach correctly point out that the extent of a contracting party’s duty of consultation depends on the nature of the contract being entered into.⁷¹ Contracts which may affect the entire family will require more extensive consultation than less consequential contracts which may potentially affect only the individual.⁷²

When it comes to contractual negotiations under customary law, sources point towards legal representation of the parties being uncommon.⁷³ In family-centric contracts such as marriage, however, uncles and aunts usually negotiate on behalf of the potential spouses as well as the broader family.⁷⁴ These parties do not negotiate as authorised representatives (in a legal sense), but simply as intermediaries or mouthpieces who act for, and represent the interests of, the potential parties to a contract.⁷⁵ In terms of transmissibility of contractual rights, some accounts of the law report that mechanisms which are the functional equivalents of the common law’s delegation, cession or other related means of transferring the duties of one party to a third party, are generally uncommon in the customary law of contract.⁷⁶ Contractual negotiations are described as being informal and there is usually no technical ritual performed in order to formally create obligations. Most contracting parties will have a good

⁶⁸ For example: small transactions which do not have an impact on the contracting party’s family. There are infinite examples of these everyday transactions such as (for instance) where one party asks for a cup-full of sugar in exchange for some maize porridge.

⁶⁹ Rautenbach & Bekker (note 22 above) 145.

⁷⁰ See: *ibid* 145; M Prinsloo & L Vorster ‘Parties’ in Centre for Indigenous Law (ed) *Indigenous Contract in Bophuthatswana* (1990) 21.

⁷¹ Rautenbach & Bekker (note 22 above) 145.

⁷² *Ibid*.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ *Ibid* 146; Prinsloo & Vorster (note 70 above) 25.

knowledge of the general principles of law involved and hence a legal representative is not required to intermediate between them.

(c) Traditional African customary dispute resolution and contracting

Due to the socially embedded nature of customary contracting described above, performance under such contracts by the parties involved has personal implications for their broader families, with reputation, respect, and honour of the family name at stake. In the event of conflict, traditional communities have their own customary courts and dispute resolution mechanisms, which are deeply rooted in the customs and traditions of each particular group. These traditional platforms and mechanisms operate in a manner aimed at preventing violence, curbing the perpetuation of conflict, and the avoidance of damage to the relationship between the parties involved: all of which could ultimately threaten the social fabric.⁷⁷

The lowest level of traditional court is the family court, which is usually presided over by the male head of the family.⁷⁸ Should such proceedings fail, then the next forum is a hearing before the extended families where the (mostly) male elders of the extended family deliberate on the matter under the guidance of the family patriarch.⁷⁹ The matter could thereafter be taken to the village head and from there ultimately to the Chief’s court.⁸⁰ In some instances, communities have a Paramount Chief who provides the final level of the customary court authority. Chiefs are public officials who have jurisdiction to handle both civil and criminal matters.⁸¹ In the rare instances that the Chief’s court fails to settle a dispute, the matter then

⁷⁷ See also B Ingelaere ‘The Gacaca Courts in Rwanda’ in L Huyse & M Salter (eds) *Traditional Justice and Conflict Resolution After Violent Conflict: Learning From African Experiences* (2008) 25, 33 available at: <http://www.idea.int/sites/default/files/publications/traditional-justice-and-reconciliation-after-violent-conflict-learning-from-african-experiences_0.pdf>; M Cappelletti ‘Access to justice as a theoretical approach to law and a practical programme for reform’ (1992) 109 *SALJ* 22; TW Bennett *A sourcebook of African customary law in Southern Africa* (1991) 54.

⁷⁸ Himonga & Nhlapo (note 3 above) 255-256; Bennett (note 3 above) 142

⁷⁹ Himonga & Nhlapo (note 3 above) 256; Bennett (note 3 above) 142

⁸⁰ Himonga & Nhlapo (note 3 above) 256; Bennett (note 3 above) 142

⁸¹ Himonga & Nhlapo (note 3 above) 259-260; Bennett (note 3 above) 143-145.

progresses to the formal court system, beginning with the Magistrate’s Court and from there following the usual hierarchy upwards.⁸²

Traditional courts are largely informal institutions which do not have rigid rules of procedure.⁸³ The presiding officials there usually have no formal training. There is no legal representation or recording of proceedings and the courts rely solely on the traditions and customs of the parties to the dispute. Where a matter has gone beyond the bounds of the family court, the entire community may become involved in resolving the dispute.⁸⁴ On the day of the court hearing, for example, the community will gather at a designated place and the contending parties are then given the opportunity to present their cases.⁸⁵ Each of the community members in attendance is allowed to examine any of the evidence presented by either of the litigants.⁸⁶ There is typically no specified order of examining or cross-examining the witnesses or parties to the dispute.⁸⁷ The presiding officer, who may be the traditional leader, usually then makes a determinative order that reflects the views of the majority of the community members.⁸⁸

Since most contracts in African customary law involve the interests of an entire family or tribe, remedies for breach of contract are usually aimed at preserving the social ties between the families of the parties involved, in addition to ensuring the proper fulfilment of the contract. On a more general note, Bennett argues that the dealings of customary courts tend to be reconciliatory.⁸⁹ This contrasts with the formal courts’ method of dispute resolution, which is more adversarial, usually with a clear winner and loser.⁹⁰ A further difference relates to the

⁸² Section 12(4) Black Administration Act 38 of 1927. Himonga & Nhlapo (note 3 above) 256. Bennett (note 3 above) 147,

⁸³ Bekker & Rautenbach (note 22 above) 242. See, however, HWO Okoth-Ogendo ‘The nature of land rights under indigenous law in Africa’ in A Classens & B Cousins *Land, Power & Custom* (2008) 95, 96-97 who argues that description of customary law as ‘informal’ was one of a number of ‘juridical fallacies’ regarding customary law.

⁸⁴ Himonga & Nhlapo (note 3 above) 257.

⁸⁵ Bennett (note 3 above) 166.

⁸⁶ Himonga & Nhlapo (note 3 above) 257. Bennett (note 3 above) 166.

⁸⁷ Bennett (note 3 above) 166.

⁸⁸ Himonga & Nhlapo (note 3 above) 257. Bennett (note 3 above) 167.

⁸⁹ TW Bennett ‘Human rights and the African cultural tradition’ (1993) *Transformation* 22.

⁹⁰ See also B Goldin & M Gelfand *African Law and Custom in Rhodesia* (1975) 245; A Ladley ‘Changing the Courts in Zimbabwe: The Customary Law and Primary Courts Act’ (1982) 26 *J of African Law* 103.

fact that in the formal court system, the ‘male elders’ are substituted for relatively younger judicial officers, whose number may include female officers. The net result of these differences is that most customary disputes are resolved within the confines of the families of the parties involved, rather than in the formal courts. The same male elders who were consulted during the formation of the contract are usually asked to play a role in the negotiations toward the peaceful and conciliatory resolution of any contractual disputes. Kariuki argues that this method of African dispute resolution exists even in societies which do not formally recognise the ‘institution’ of male elders and that this system continues to operate outside the influence of the State.⁹¹

In sum: traditional courts operate in a highly relational community context, where disputes are viewed as embedded within the context of broader society. This leads to a process of dispute resolution more focused on inter-personal relationships than clear legal rights.⁹² The result is that customary contracting cannot be viewed as divorced from the relationship between the parties and their respective families, pointing toward an intersection between relational contract theory and traditional customary contracting and concomitant dispute resolution processes. An important unanswered question, however, is as to whether the account thus far in part III(b) and (c) has represented ‘official’ or ‘living’ customary law, particularly since most of the sources drawn on above are written library sources, particularly the works of customary law scholars, legislation, and judicial precedent. The reader may further ask whether the above representation holds true in the heterogeneous and (sometimes) transient populations of South Africa’s urban townships. In the following part IV we move to this latter context, but we will introduce a new economic element into our own narrative, setting out the concept of a ‘popular economy’.

⁹¹ F Kariuki ‘Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities’ available at: <<https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/francis-kariuki.pdf?sfvrsn=0>> 1.

⁹² Bennett (note 5 above) 138, 138-141.

IV AFRICAN COMMERCIAL CONTRACTING IN THE POPULAR ECONOMY

The South African economy is a market-based one, with freedom of economic activity enshrined as a fundamental right in the Constitution.⁹³ This capitalist feature is balanced with other entrenched socio-economic rights, however, and is backed up by a system of government-sponsored social assistance.⁹⁴ While public services – particularly healthcare, education, and policing – are frequently criticised, the social grants paid on a monthly basis to a large number of recipients provide a source of welfare and basic income to many South Africans who are not in formal employment. The grants in question represent a meagre, yet steady, income stream, but are not universally available and need to be supplemented by South Africa’s poor and unemployed in order to survive.⁹⁵ These gaps left in the economic framework, provide the context for the so-called ‘popular economy’, a notional space where traditional African culture and contemporary (South African) existence intersect.⁹⁶

In the social sciences, a distinction is sometimes drawn between the ‘formal’ and the ‘informal’ sectors.⁹⁷ In the South African context, this could be used to distinguish between those in salaried employment, and those who make a living based on their entrepreneurial talents, outside of the mainstream economy reflected in tax records.⁹⁸ Scholars working on the popular economy have shown the formal/informal dichotomy to be misleading, however.⁹⁹ This is because ‘formal sector’ wages may be employed as capital for ‘informal sector’ entrepreneurship, or as a means of support (through remittances) for third parties who are

⁹³ Section 22 of the Constitution of the Republic of South Africa, 1996.

⁹⁴ Social Assistance Act 13 of 2004. See generally: M Olivier ‘Social Security: Framework’ in WA Joubert (ed) *The Law of South Africa* Vol 13(2) 2 ed (2012).

⁹⁵ There are various categories of social grant available, including ‘Grants for Older Persons’ and ‘Child Support Grants’. The relevant government website is: <<http://www.sassa.gov.za/index.php/social-grants>>. To give ballpark figures: the 2017 budget speech announced that the grant for older persons (state pension) would be increased to R1 600 per month that year.

⁹⁶ For a clear defence of the popular economy concept, see: E Hull & D James ‘Introduction: Popular Economies in South Africa’ (2012) 82 *Africa* 1. For further context see: J Seekings ‘Taking Disadvantage Seriously: the “Underclass” in Post-Apartheid South Africa’ (2014) 84 *Africa* 135.

⁹⁷ Keith Hart is usually credited with having first defined this dichotomy in the 1970s, see: K Hart ‘Informal Income Opportunities and Urban Employment in Ghana’ (1973) 11 *Journal of Modern African Studies* 61.

⁹⁸ See the sources cited in note 96 above.

⁹⁹ Hull & James note 96 above at 7-10. See further: the other articles in this special edition of *Africa* (2012); Seekings & Natrass (note 2 above).

engaged in ‘informal’ economic activities.¹⁰⁰ The term ‘popular economy’ thus captures the broader social context in which South Africans live and operate, particularly at the fringes of the mainstream economy.

The popular economy is a common context for empirical studies by economic anthropologists or sociologists, but it is not often considered by doctrinal lawyers; certainly not by mainstream contract lawyers. We believe that it is a good setting in which to base our discussion of the living customary law of commercial contracts. Of course, this is not to say that many who live by the tenets of customary law in some aspects of their lives are not engaged in mainstream economic activities. Clearly there is a black middle class, many of whom engage in blue chip commercial contracting as both principals and agents. Our argument is rather that if we are looking for the living customary law of commercial contracting, which we suggest is possibly different from the mainstream common law of contract and (as of yet) is largely un-amalgamated with this version, a good place to begin is in the contract practices which are occurring amongst the African population outside of the mainstream economy. This approach assumes a plural concept of contract law.

Our inquiry aims to answer this question: if a businessperson contracts in one of South Africa’s large townships, what is the governing legal system? The law on the books (positivist/centralist) answer would probably refer to the mainstream contract law, to be applied through the mainstream court system (including the Small Claims Court), or through recognised alternative dispute resolution tribunals (such as industry Ombuds or the National Consumer Tribunal). A law in action response might acknowledge in contrast, however, that much of this popular economy contract practice occurs outside of the formal contract regime, in the sense that the positive law may not be known to the participants; legal representation may be unaffordable or undesired; and the system of courts viewed with suspicion or as too far removed from the everyday realities of contracting parties.¹⁰¹ This type of response is supported by several studies by South African economists, as well the anecdotal (lived) experience of the two authors of this paper. In what follows, a basic literature review will be given of the sources which led to our thesis; as well as a brief introduction to the world-wide discourse on non-contractual relations and private ordering, which are key features of relational

¹⁰⁰ Hull & James note 96 above at 7-10.

¹⁰¹ See part IV(b) below.

contracting and at the heart of our central argument: namely, that the living customary law of contracting is relational in nature.

(a) The popular economy and contracting

Economics as a field deals with the question as to how scarce resources are allocated in society. Anthropology is the study of culture, and sociology the study of social organisation. Contract law, by contrast deals with the rules and principles which govern (particularly economic) transactions. ‘Contract practice’, in our conceptualisation is a broader area, dealing not only with governing rules and principles, but also with aspects of economics (underlying motivations: wants and needs with regard to resources), as well as anthropology and sociology (what is the business culture in a given group and how is it organised to facilitate commerce?).¹⁰² Using a plural conception of ‘contract law’, whereby norms are generated not only by central government, but also by the practice of communities, we intend to link the living customary law of contract to the descriptions of contract practice by economists, anthropologists, and sociologists. This conceptual progression is the background to how we will derive our core hypotheses about the living customary law of contracting from the contract practice described in accounts of the popular economy.

¹⁰² This broader, socially embedded understanding of contracting is core to the themes in the literature related to relational contract theory, such as ‘contractual relations’; ‘non-use of contract’; and ‘private ordering’. For a discussion of this theory, see IV(c) below.

Several empirical studies have dealt with issues related to contracting like informal credit,¹⁰³ informal risk management,¹⁰⁴ informal trade,¹⁰⁵ village banks,¹⁰⁶ stokvels,¹⁰⁷ and burial societies.¹⁰⁸ All of the above studies were situated in South Africa amongst the indigenous African population, although similar studies have been done in other African countries.¹⁰⁹ Different normative points of view are advanced in this material and different types of questions are asked, using qualitative and quantitative research methodologies. What emerges strongly from all these accounts, however, is that there is vibrant commercial activity

¹⁰³ See for example: D James ‘Money-Go-Round: Personal Economies of Wealth, Aspiration and Indebtedness’ (2012) 82 *Africa* 20; MP Mashigo ‘Social Structures and Financial Service Delivery to Poor Households in South Africa’ (2012) 47 *Journal of Public Administration* 330; D Porteous & E Hazelhurst *Banking on Change: Democratising Finance in South Africa, 1994-2004 and Beyond* (2004) chapters 4-6; CR Cross ‘Informal Credit – Or, How Does a Rural Community Capitalize Itself?’ paper presented at the 17th annual congress for the association of sociology in Southern Africa held at the University of Natal, Durban 1986.

¹⁰⁴ E Bähre ‘The Janus Face of Insurance in South Africa: From Costs to Risk, From Networks to Bureaucracies’ (2012) 82 *Africa* 150; LG Mpedi & D Millard, ‘Bridging the gap: the role of micro-insurance in a comprehensive social-protection system in South Africa’ (2010) 31 *Obiter* 497; A Hutchison ‘A Customary Insurance Law?’ (2017) 29 *SA Merc LJ* 17 (forthcoming).

¹⁰⁵ The Socio-Economic Rights Institute at the University of the Witwatersrand has made this one of their special projects, see the publications on their website, for example: D Webster ‘“The End of the Street?” Informal Traders’ Experiences of Rights and Regulations in Inner City Johannesburg’ (2015) available at: <http://www.seri-sa.org/images/Seri_informal_traders_report_FINAL_FOR_SIGN_OFF_2.pdf>.

¹⁰⁶ E Hull ‘Banking in the Bush: Waiting for Credit in South Africa’s Rural Economy’ (2012) 82 *Africa* 168; GA Jones & A Dallimore ‘Whither Participatory Banking? Experiences with Village Banks in South Africa’ (2009) *European J of Development Research* 344; Porteous & Hazelhurst (note 103 above); P Mashigo & H Kubir ‘Village Banks: A Financial Strategy for Developing the South African Poor Households’ (2016) 11 *Int J on Banks and Bank Systems* 8.

¹⁰⁷ For South Africa see: G Verhoef ‘Informal Financial Service Institutions for Survival: African Women and Stokvels in Urban South Africa, 1930-1998’ (2001) 2 *Enterprise & Society* 259; D James *Money from Nothing: Indebtedness and Aspiration in South Africa* (2015) 118-146; WG Schultze ‘The Origin and Legal Nature of the Stokvel’ (Parts 1&2) (1997) 9 *SA Merc LJ* 18; 153; MP Mashigo & C Schoeman ‘Stokvels as an Instrument and Channel to Extend Credit to Poor Households in South Africa’ (2012) 5 *Jl of Economic and Financial Services* 49. There is also an international literature, see seminally: S Ardener ‘The Comparative Study of Rotating Credit Associations’ (1964) 94 *J of the Royal Anthropological Institute* 201.

¹⁰⁸ RJ Thomson & DB Posel ‘The Management of Risk by Burial Societies in South Africa’ (2002) 2 *SA Actuarial J* 83; Verhoef (note 107 above) 266-269; Schultze (note 107 above) 27-29.

¹⁰⁹ CM Dickerson ‘Promises of Future Performance and Informal Sector Transfers of Personal Property: The Example of Anglophone Cameroon’ (2011) *Acta Juridica* 285; M Fafchamps ‘The Enforcement of Commercial Contracts in Ghana’ (1996) 24 *World Development* 427.

going on in the popular economy, underpinned by economic transactions and hence ‘contract practice’. The picture painted in such sources is different to the types of transaction mentioned in the leading works on customary law, although the community-orientated nature of most of the transactions suggests a continuity of contexts. A tentative view which we venture is that the literature on the popular economy presents primary sources to be used as evidence in the updating of the traditional accounts of customary contracting: rather than a pre-commercial vision of society, where contracts related mostly to marriage, co-operative labour, or arrangements for the care of livestock;¹¹⁰ the popular economy discourse presents a modern, urbanised population, operating in a monetised economy and interacting on various levels with the formal sector economy and law. The appeal of this alternative picture of popular economy contracting is that it is strongly commercial and fills the gaps in the representations offered by more traditional accounts.

For us, this is where the living customary law of commercial contracts is to be found – an empirical study needs to be done which asks questions of a different nature to the concerns of economics, anthropology, and sociology. We need to know how law operates in this sphere. The evidence presented by these empirical studies is incomplete for the purposes of a proper account of contract law, since only contract practice is represented. However, based on popular economy accounts, certain key features emerge about contracting in this sector. For the present authors, these answers can be distilled into a number of broad propositions:

- i. Credit is usually extended to relatives, friends, or other known associates. Credit is seldom extended to strangers – that is the role of conventional banks and micro-lenders. The reason for this feature is the high degree of knowledge about a contracting counter-party, which induces trust and reliance. The problems of adverse selection and moral hazard are reduced by this factor, and knowledge-based trust serves as collateral.¹¹¹
- ii. Executory contracts are thus known to the popular economy: risk is managed as above through symmetrical knowledge structures. Peer pressure also plays a role,

¹¹⁰ Compare: Himonga & Nhlapo (note 3 above) chapter 10; Bekker (note 22 above); Rautenbach & Bekker (note 22 above) chapter 7.

¹¹¹ James (note 107 above) 124; Mashigo & Kubir (note 106 above) 11; MP Mashigo *Extending Credit to the Low-income and Poor Households in South Africa: A System of Principles* unpublished PhD thesis (University of Johannesburg, 2007) chapter 4; Verhoef (note 107 above) 272-278.

- given the ability to do reputational harm to a contracting party through negative gossip.¹¹²
- iii. ‘Ubuntu’, or a communitarian conception of fair dealing, is to be found in the popular economy, and a lack of this quality is sometimes advanced as a criticism of formal sector contracting parties, such as banks and other micro-lenders.¹¹³
 - iv. But, promises are to be kept, in the sense that obligations are viewed as binding and parties as autonomous.¹¹⁴
 - v. Dispute resolution between members of the community is capable of being resolved through non-legal means. Disputes with formal sector partners, particularly financial institutions, can present a problem due to the dictates of the positive law and legal procedure.¹¹⁵

The emergent picture is thus that contracting in the popular economy is community-centred and -centric. A community-based form of contracting means that transactions probably occur between repeat players, who are known to one another. This makes it probable that there is a strong relational element to contracting in the popular economy, at least where contracting is between community members. Before defending this theoretical claim, however, we will, as in the previous part III, explore dispute resolution, this time in the South African urban township milieu.

¹¹² Thomson & Posel (note 108 above) 109-111; Mashigo (note 111 above) chapter 4.

¹¹³ For use of the term ‘ubuntu’ in this context, see: Verhoef (note 107 above) 273. On the relationship between the ‘community’ and formal sector parties, such as banks, see the general narrative in Jones & Dallimore (note 106 above) (although the tone is sceptical here). See, however, the sceptical view of Erik Bähre *Money and Violence* (2007) at 133-139, who cautions that the concept of ‘ubuntu’ is not comfortable in an anthropological account of the popular economy.

¹¹⁴ This is fundamental to an analysis of contracting in any community. In this article we suggest two alternative means of enforcement (beyond formal sector courts), namely: (1) through relational means as in the text attached to note 121 above; or (2) through dispute resolution platforms, as discussed in part III(c) above and part IV(b) below.

¹¹⁵ Bähre (note 104 above) discusses this key factor at 160-163. In a similar context, see: PM Nienaber & J Preiss ‘Funeral insurance: A perception from the office of the ombudsman for long-term insurance’ (2006) 18 *SA Merc LJ* 291. On township dispute resolution platforms, see the following part IV(b).

(b) Dispute resolution in South Africa’s urban townships

An urban format of customary law is applied through informal dispute resolution mechanisms which are influenced by customary law in order to manage conflict and maintain peace in the townships.¹¹⁶ These courts apply neither traditional (read: ‘textbook’) customary law nor common law, but utilise a mixture of the two, with a strong basis in customary law norms.¹¹⁷ The relevant dispute resolution bodies are the Street Committees or Section Committees who perform the function of urban customary courts.¹¹⁸ These committees form the second tier of informal courts in the townships after the family court and have jurisdiction over a number of streets (a variety of methods is used to determine geographical boundaries). In other communities, Street Committees report to Executive Committees or Ward Committees; thereafter, the matter goes to the police.¹¹⁹ Such committees meet either in community public places or in members’ homes, hearing civil cases which mainly relate to disputes between community members. They also liaise with formal authorities such as the police and municipalities on behalf of the community.

Burman and Schärf argue that these dispute resolution structures in the townships are based on the informal courts of the rural areas.¹²⁰ The township versions resemble customary courts in that they are informal and hence less intimidating than the formal courts: no legal representation is required; no fees are involved for a case to be heard; proceedings are held in familiar surroundings; tribunals apply the basic communitarian principles which people are used to; and proceedings commence at the family level and escalate through various platforms to a formal court, as per traditional customary dispute resolution.¹²¹ These township structures hence provide great utility to inhabitants, since due to the residential layout of these

¹¹⁶ Bennett (note 35 above) 91. See further: J Seekings ‘The revival of “people’s courts”: Informal Justice in Transitional South Africa’ in G Moss & I Obery (eds) *South African Review* 6 (1992) 186; S Burman & W Schärf ‘People’s justice: street committees and people’s courts in a South African city’ (1990) 24 *Law and Society Rev* 693; BDD Radipati ‘Informal dispute resolution in South Africa: A comparative and jurisprudential study’ unpublished LLM dissertation (University of the Witwatersrand, 1993).

¹¹⁷ Bennett (note 35 above) 91.

¹¹⁸ Burman & Schärf (note 116 above) 706.

¹¹⁹ *Ibid* 706 - 707.

¹²⁰ *Ibid* 693.

¹²¹ Bekker & Rautenbach (note 22 above) 246. Bennett (note 3 above) 155, 158.

communities, formal governance and policing achieve only a low level of penetration.¹²² In addition, community members tend to have a lack of confidence in the formal judicial structures, compounding such utility. Great emphasis is usually placed on mediation in order to reconcile parties, with the ultimate goal being settlement. In practice, it is often the case that when parties report a dispute to the police they are advised to first approach a community dispute resolution platform.¹²³

Although the account above is brief, one can see the interplay between formal structures (such as police and governance services) and these informal dispute resolution tribunals in South Africa’s popular economy. The existence of these popular economy platforms also demonstrates the scope for private ordering to govern contractual disputes in this sphere. Hence super-imposed on ordinary party-to-party contractual relations and resultant interpersonal ordering, there is an additional layer of private ordering, through community structures. For us, this second layer of ordering reinforces our argument that contracting in the popular economy is relational, since it is not just the parties’ own relationship which needs to be preserved, but the harmony of the greater community as a whole. In the following section we will build on the findings reached thus far in part IV to construct our own theory of customary commercial contracting in the popular economy.

(c) Legal pluralism and relational contract theory in the popular economy

Moving from a review of the empirical literature to the literature on socio-legal theory, we return to our discussion of the overlap between legal pluralism and relational contract theory, as alluded to above. The genesis of relational contract theory was in the United States, although it has adherents in other countries as well: particularly the United Kingdom, but also in South Africa.¹²⁴ A very clear articulation of the general argument put forward by this movement

¹²² Bekker & Rautenbach (note 22 above) 246.

¹²³ In this regard, see also W Schärf ‘Policy options on community justice’ in W Schärf & D Nina (eds) *The other law. Non state ordering in South Africa* (2001) 39; C Shearing ‘Transforming security: a South African experiment’ in H Strang & J Braithwaite (eds) *Restorative justice and civil society* (2001) 14; J Seekings ‘The changing face of urban civic organization’ (2011) 75 *Transformation* 140; J Froestad & C Shearing *Security governance, policing, and local capacity* (2012).

¹²⁴ See the sources cited in note 13 above for the key US and UK materials. For South Africa, see: L Hawthorne ‘Relational Contract Theory: Is the Antagonism Directed at Discrete Exchanges and Presentation Justified?’ in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 137 and ‘The First Traces of Relational Contract Theory –

could be briefly set out with reference to the work of Hugh Collins.¹²⁵ Using Collins’s analysis, we will argue that a contractual relation (in the sense of an ongoing nexus between two or more parties, underpinning a particular transaction between them) can be viewed as existing on three planes: First, there are terms of the agreement itself, whether written or oral. Second, there are the underlying economic considerations motivating both parties – such as, how does the conclusion of this transaction increase each party’s utility? Finally, there is the human element of the transaction: the inter-personal relationship between the parties. This three-dimensional¹²⁶ analysis allows for a broader perspective on the contractual relation. In particular, it allows for the influence of extraneous circumstances of the non-legal variety on the contractual relationship between the parties. This, we suggest, is a human-centred approach to contracting, which fits well into a community setting with repeat players.

The literature on stokvels, burial societies, and other forms of savings and risk management clubs suggests that transactions in this sphere are enforced through relational means; particularly, using the above analysis, the economic and inter-personal planes. This, we suggest, could be partially explained by the literature on ‘non-contractual relations’.¹²⁷ This school of thought holds that contract disputes are largely resolved by negotiation between the parties: this not only preserves the relationship (and in a community setting, a measure of social harmony), but also avoids transactions costs, particularly in the form of time and money, which are necessitated by a recourse to the formal law or formal legal dispute resolution mechanisms.¹²⁸ A distrust of lawyers and the utility which they add to a contractual relation can be found in several international studies of businessmen.¹²⁹ Similar evidence is also to be

The Implicit Dimension of Co-operation (2007) 19 *SA Merc LJ* 234; T Cohen ‘The Relational Contract of Employment’ (2012) *Acta Juridica* 84-101; A Hutchison ‘Relational Theory, Context and Commercial Common Sense: Views on Contract Interpretation and Adjudication’ (2017) 134 *SALJ* 296.

¹²⁵ H Collins (note 13 above); H Collins ‘The Contract of Employment in 3D’ in D Campbell, L Mulcahy & S Wheeler (eds) *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (2016) 65.

¹²⁶ The ‘three dimensional’ descriptor is borrowed from Collins (note 125 above).

¹²⁷ Macaulay (note 13 above) is the seminal text here. See further: D Campbell ‘What do we mean by the non-use of contract?’ in J Braucher, J Kidwell & WC Whitford (eds) *Revisiting the Contracts Scholarship of Stewart Macaulay* (2013) 159, 164.

¹²⁸ See Macaulay (note 13 above). For an account of transaction cost economics linking this concept to relational theory, see: OE Williamson *The Economic Institutions of Capitalism* (1985).

¹²⁹ In addition to Macaulay (note 13 above), see: S Deakin, C Lane & F Wilkinson ‘Contract Law, Trust Relations, and Incentives for Co-operation: A Comparative Study’ in S Deakin & J Michie (eds) *Contracts, Co-operation,*

found in the sources on the popular economy, along with the obvious point that recourse to the formal law is beyond the financial means of many popular economy participants, even if they wanted to go this route.¹³⁰

If we move beyond formal sector adjudicative platforms to alternative means of contract enforcement based on community relations, what form of coercion is left to the parties to a customary commercial contract? The answer is non-legal sanctions:¹³¹ a refusal to do repeat business (an economic sanction) can shut off a vital avenue of supply, whether of goods, services, or credit. Similarly, adverse comment and social peer pressure (inter-personal sanctions) can motivate contractual compliance in a situation where parties are members of a community where these factors matter. Opportunism, in the sense of selfish exploitation of the vulnerabilities of others under a given contractual matrix, is of course a universal human condition, and explains some of the reported cases of default and fraud. In a normative sense, however, a lack of perfect success for the community-enforcement model does not negate it as a system of ‘private ordering’, by which term we signify that the transactional matrix operates largely without recourse to central law enforcement, through the actions and interventions of players in the market.¹³² In our view, such a system, displaying a system of normative practices allowing for private ordering could also be described as legal pluralism; if one accepts the premise of this legal theory that ‘law’ originates in the practices of a given community, provided these are viewed as binding by that community. Then, assume that this community, which practises private ordering in their contractual relations with each other, also adheres to

and Competition (1997) 105; Hugh Beale & Tony Dugdale ‘Contracts between Businessmen: Planning and the Use of Contractual Remedies’ (1975) 2 *British Journal of Law and Society* 45.

¹³⁰ See the discussion in part IV(a)-(b) above.

¹³¹ See for example: David Charny ‘Nonlegal Sanctions in Commercial Relationships’ (1990-91) 104 *Harvard LR* 373; Collins (note 13 above) chapter 5.

¹³² For an overview of the ‘private ordering’ literature, see: BD Richman ‘Firms, Courts and Reputation Mechanisms: Towards a Positive Theory of Private Ordering’ (2004) 104 *Columbia LR* 2328. For empirical studies, see: RC Ellickson *Order Without Law: How Neighbors Settle Disputes* (1991); L Bernstein ‘Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 *Journal of Legal Studies* 115; L Bernstein ‘Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms’ (1995-96) 144 *University of Pennsylvania LR* 1765; L Bernstein ‘Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms and Institutions’ (2000-01) 99 *Michigan LR* 1724. For an African perspective, see: Fafchamps (note 109 above).

traditional African customary law normative practices, such as the payment of lobola when getting married. On this basis a strong argument could be made that that system of contractual private ordering constituted the ‘living customary law of commercial contracting’, whether applied directly through relations inter partes, or by a more formalised township community platform.

V THE LIVING CUSTOMARY LAW OF COMMERCIAL CONTRACTING: SOME HYPOTHESES

To summarise: the argument thus far in this paper raises four central hypotheses:

- i. Contracting in the popular economy is highly relational, resting on what are described in the world literature as ‘non-contractual relations’; ‘non-legal sanctions’; and ‘private ordering’.
- ii. In a given community transacting amongst each other in the South African popular economy, the resultant contractual relations give rise to a normative order which constitutes the living customary law of commercial contracting. This living law of contracting may involve an interplay between indigenous forms of contract practice and formal sector institutions, particularly banks.
- iii. This interplay is at the heart of the formal/informal sector intersection which typifies the popular economy, making this the key locus in which to study a modern, urbanised living customary law of commercial contracts. The final answer to the question, ‘what is African about contracting in South Africa?’ is thus to be found through empirical research in this context.

VI CONCLUSION

All that remains then is for us to tie up the narrative threads left unresolved by our opening discussion in parts I and II above. This article has suggested some answers to the questions:

- i. ‘What is African about contracting in South Africa?’; and
- ii. ‘What is the role of community in contracting in South Africa’s popular economy?’

Our suggested answers to these questions above show that we interpret the literature as suggesting that ‘community’ remains at the heart of African contracting in the popular economy; and that the same would appear to be true of the traditional discourse. We agree

with Gyekye, however, that this is a moderate form of communitarianism, which accepts a role for individualism and private property, but also imposes a measure of social responsibility. Perhaps, using the Constitutional Court’s own narrative, one could call this philosophy a state of ‘ubuntu’. Is this idealised? Possibly – the empirical sources are replete with examples of the failures of ‘community’: both through the opportunistic exploitation of counter-parts; and through the abuse of customary structures, such as *stokvels*.¹³³ Opportunism and even fraud are to be found in any system of contracting, however, and their similar presence in customary contracting should not necessarily derail our theoretical construct.

Another question is how to deal with the plural nature of our legal system and the balance between the equal sources of customary and common law. For example, having identified a parallel contracting context with its own rules and culture, what is the impact of this to be on the generally applicable common law of contract? The Constitutional Court’s argument appears to be that the underlying ubuntu/community ethos of customary law should inform the common law notion of public policy.¹³⁴ This allows for the protection of weaker parties, which is a good thing, but may have an impact on contractual certainty.¹³⁵ One possible interpretation of the Constitutional Court’s argumentative paradigm is that it is aimed at an ‘amalgam’ of common and customary law in the future,¹³⁶ addressing Chanock’s concerns about the segregation of these two sources, and indeed echoing the sentiments of ZK Matthews, expressed as long ago as 1934.¹³⁷ There may be problems here, however, given the lack of epistemological fit between the oral customary law tradition and the written common law one.

¹³³ A good qualitative example of a source arguing for this position may be found in Bähre (note 113 above).

¹³⁴ See the discussion of public policy in the seminal *Barkhuizen* (note 7 above), para 51.

¹³⁵ This conflict is explored in [Hutchison note 34 above](#).

¹³⁶ *Alexkor* (note 53 above), para 51. While in *Alexkor* the Constitutional Court was careful to stress the separate identity of customary law as a source of law, there is no reason why it should not have an impact on the general South African common law. As past histories of the common law have been at pains to point out, this construct itself has always been a mixture of ideas. The idea of amalgamation is also one possible interpretation of Yacoob J’s statement at para 23 of his minority judgment dealing with the common law of contract in *Everfresh* (note 7 above), as well as the other curial passages cited in that footnote.

¹³⁷ ZK Matthews ‘Bantu Law and Western Civilisation in South Africa: A Study in the Clash of Cultures’ unpublished MA thesis (Yale University, 1934) 354-356. NR Mandela *Long Walk To Freedom* (1994) 42 describes ZK Matthews, one of his law professors during his LLB studies at Fort Hare and part of an earlier generation of ANC leadership, as ‘the very model of the intellectual’, who taught ‘social anthropology and African law and spoke out bluntly against the [Apartheid] government’s social policies.’

The Constitutional Court’s discourse on ubuntu thus far could also be ascribed (on an alternative basis) simply to the international trend towards the constitutionalisation of contract law to protect weaker parties, which uses open norms such as public policy and good faith to incorporate constitutional values, rather than necessarily drawing these from customary law *per se*. This view would open such jurisprudence to the possible criticism of cultural assimilation. Our counterpoint to this argument would be that contracting as a method of facilitating economic exchange is universal to all cultures, resting in large part on economic considerations, rather than only on positive law. Hence conceptual overlap is inevitable and indeed to be encouraged.

Another suggestion as to a possible method of amalgamation could be to recognise yet another parallel contracting regime: in the same way that there are very different regimes of commercial and consumer contract law, there could be a third channel of customary contract law. An appropriate choice of law regime would then have to be worked out, but an ability to choose such a regime would fit nicely with the fundamental premise of contracting as involving the private arrangements of the parties themselves. This second option would preserve the distinct identity of the living customary law of contracting, while allowing for its judicial development.¹³⁸

On status and contract: everywhere there seem to be signs that with the post-constitutional waning of freedom of contract in South Africa, we are reverting from contract to status, echoing Atiyah’s claim (with reference to Britain) in 1979.¹³⁹ Before evaluating a contract, a legal adviser must first ask whether the parties are consumers or commercial entities; or beyond this, whether the context suggests an inequality of bargaining power that may raise constitutional flags. Who the parties to a contract are and the nature of their transaction is highly relevant in the modern South African era. Our literature review above suggests that this is also the case in customary law, but with the ‘status’ element possibly being more community-related. Of course, a community-orientated view of contracting can be found in many ‘Western’ sources as well, the literature on relational contract theory cited above would be a good place to begin such an inquiry. It thus seems fair to argue that in modern South African

¹³⁸ An example of scholarship calling for greater judicial development of customary law as a separate source of law, is: S Sibanda & TB Mosaka ‘*Bhe v Magistrate, Khayelitsha: A Cultural Conundrum, Fanonian Alienation, and an Elusive Constitutional Oneness*’ (2015) *Acta Juridica* 256.

¹³⁹ See the discussion of this source in note 11 above.

contracting, whether in the common law or the customary law context, contracting is all about status. This conclusion allows us to make the claim above that the living customary law of commercial contracting should best be analysed in relational terms. Whether as a separate construct, or as part of a future amalgamated ‘South African law of contract’, customary contract adjudication will be a context sensitive exercise, with the relevant contracting community as the foreground consideration.

Whether the argument in this conclusion, or indeed in this article as a whole, entails a ‘decolonisation’ of contract law, or a means to address our racialised economic inequality, may be debatable. Indeed, one could well ask whether the judicial development of the law of contract is the best tool for effecting economic redistribution, since its effects are immediate to the parties to a particular dispute. Our intention here is merely to start a discussion about the future of South African contract law and to present a review of what we consider to be the relevant literature on customary (commercial) contracting.