

# CONSTITUTIONALISING CONTRACT LAW: IDEOLOGY, JUDICIAL METHOD AND CONTRACTUAL AUTONOMY

## ABSTRACT:

This thesis develops a conceptual framework which represents a systematic, integrated approach to the constitutionalisation of the common law of contract. Although it is beyond doubt that the Bill of Rights must apply horizontally to contract law, there is still considerable debate about the *manner* in which the system of contract law should be constitutionalised. The thesis begins with an analysis of the respective roles of ss 8 and 39 of the Constitution and finds that they call for the constitutional development to take place within the common law framework, though with constitutional adjustments as required. Whilst the entire body of contract law must be constitutionalised incrementally over time (within the common law tradition), constitutional justice must be done simultaneously in every contract case too. The thesis interrogates the substance, form and attending legal mechanics of operation of contractual autonomy; the idea being that a constitutionalisation of contractual autonomy would in effect constitutionalise or, at the very least, set the stage for the constitutionalisation of contract law in its entirety. The thesis proceeds to unpack the classical liberal underpinnings of contractual autonomy and to tease out its internal (content) and external (reach) dimensions. It highlights contractual autonomy's preference for an atomistic, independent conception of the contracting self as bolstered by strongly individualist values, and explains that this is out of step with the constitutional vision of a more contextual, interdependent, conception of the self as grounded in collectivist values. Rather, a fluid triage comprising the foundational constitutional values of freedom, dignity and equality, which is cognisant also of the rights enumerated in the Bill of Rights, must now form the basis of contractual autonomy. Moving to the legal methodology employed in the common law of contract, the thesis shows how the extant contract law machine ensconces the classical liberal conception of freedom of contract and thereby mostly frustrates bona fide efforts to constitutionalise the contract law. It thus argues that the legal methodology must be adjusted so that it dovetails likewise with the foundational constitutional triage's basis of contractual autonomy. Finally, the thesis considers the practical implications of its argument by applying the triage in a number of concrete contexts. Focusing on the economic right to freedom of trade, occupation and profession, the civil-political right to freedom of religion, belief and opinion and the socio-economic right of access to health care services, it shows how a proper (substantive and methodological) invocation of the triage in relation to the internal and external dimensions of contractual autonomy can resolve much of the uncertainty surrounding the question of how precisely to approach the process of constitutionalising contract law.