

UBUNTU: AN AFRICAN EQUITY

TW Bennett*

1 Introduction

The end of apartheid and the introduction of a democratic constitution provided the occasion for taking South Africa's indigenous systems of customary law more seriously. Although early calls to "Africanise" the country's legal system were not heeded, one small concession was made to the country's African legal heritage. For the first time in the history of South African law, a typically African concept was adopted into the general law of the land. This was ubuntu.

In many ways, it has been an exceptional event. Since the colonial conquest of Africa, indigenous customary laws have been treated as inferior, scarcely deserving recognition as true laws. At best, they were tolerated in terms of such monitoring devices as a repugnancy clause.¹ There was, of course, a traffic of ideas between the two systems, but always from the received Roman-Dutch law to customary law. Although South Africa's new constitutional dispensation had the effect of elevating customary law to the same status as that of the common law,² the flow of terms and concepts remained unidirectional. The reception of ubuntu into the common law reversed this process.

This paper concerns the meaning of ubuntu. Much of the discussion in academic circles about the concept has involved a search for its proper meaning, or at least a translation that will render the word comprehensible to a wider audience. The most obvious translations were the calques³ "humanity", "personhood" or "humaneness",⁴

* T Bennett. BA LLB (Rhodes) PhD (Cape Town). Professor in the Department of Public Law, University of Cape Town. (Thomas.Bennett@uct.ac.za). My grateful thanks are due to Jacques Jacobs for his invaluable assistance in preparing this article.

¹ Which, in South Africa, was formerly s 11(1) of the (now repealed) *Black Administration Act* 38 of 1927, and is currently s 1(1) of the *Law of Evidence Amendment Act* 45 of 1988.

² In terms of s 211(3) *Constitution of the Republic of South Africa*, 1996 which obliged the courts to apply customary law when it is 'applicable' and is not contrary to the *Constitution* or any legislation specifically aimed at customary law.

³ A calque or translation implies that the meaning is borrowed rather than the foreign word itself, which would be a "loanword".

but none has been especially helpful. They cannot convey the many connotations in ubuntu nor, of course, its cultural implications.

The search for definition has, unfortunately, proceeded on an assumption that ubuntu refers to some core abstract concept or an actual way of behaving.⁵ This paper suggests, however, that a better path to understanding ubuntu is to consider the ways and contexts in which the word is being used. An analysis of this nature assumes that we should pay less attention to predetermined, essentialised meanings and more to the way in which past and current users are constructing meanings.

At the outset, we need to be aware that ubuntu is a loanword in English. Such a word

is highly susceptible to change, not only because it is novel, but also because it is isolated. Its links with the language from which it was borrowed are broken, and it has no semantic connections with other words in the language into which it has been absorbed.⁶

As a newcomer in a strange environment, it must fit in with existing legal terms and concepts. Even more importantly, it will be exploited by a range of new users to serve ends of their own. All of this assumes that the relationship between words, their users and meanings is dynamic and changing.

2 **Uses of ubuntu**

An obvious place at which to start the quest for the meaning of ubuntu is the history of its usage. It must be recognised at the outset, however, that it is impossible to trace the exact denotation of the word in its vernacular origins. Ubuntu is said, in a famous metaphor, to be shrouded in a "kaross of mystery".⁷

⁴ *S v Makwanyane* 1995 3 SA 391 (CC) para 308.

⁵ Mokgoro 1998 *Buff Hum Rts L Rev* 15, who says that the Western use of abstractions "defies the very essence of the African world-view", which describes ideas through real contexts.

⁶ Ball "Lexis" 182-183.

⁷ Mutwa *Indaba* 555-556. See also Mokgoro 1998 *Buff Hum Rts L Rev* 15.

Nevertheless, we do know that ubuntu has always been a word in everyday usage. It seems first to have been co-opted into a nation-wide public discourse in South Africa during the 1920s, when the Zulu cultural movement, Inkatha, used it as a slogan in its programme to revive respect for traditional Zulu values.⁸ From there, ubuntu migrated into the discourses of theology and business management, where it was used - as cynics put it - to package decision-making in the appearance of traditional African values.⁹

Ubuntu then entered the law in a small but telling "postamble" to the 1993 Interim *Constitution*. The deeply divided society that emerged from apartheid bore a "legacy of hatred, fear, guilt and revenge". These divisions were now to "be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation".¹⁰ With no solid legal foundation, apart from this aspirational clause, ubuntu was then absorbed into the mainstream of legal discourse by a series of judgments in the Constitutional and High Courts.

2.1 *Public law*

2.1.1 *Constitutional law*

Ubuntu has played its most prominent role in public law. Not only did the Interim *Constitution* provide the foundation for a new South African society, but it was also the first official document to use an African term. The single word ubuntu thus provided a gateway for African ideas and values to infuse South African law. In *Albutt v Centre for the Study of Violence and Reconciliation, and Others*,¹¹ for example, Froneman J commented that South Africa's participatory democracy, although apparently something quite novel, was in fact an ancient principle of traditional African methods of government.¹²

⁸ Bhengu *Ubuntu* 10.

⁹ English 1996 SAJHR 645-646.

¹⁰ *Constitution of the Republic of South Africa Act 200 of 1993*.

¹¹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 90 citing *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 121; *Matatiele Municipality v President of the RSA (No 2)* 2007 6 SA 477 (CC) para 40.

¹² *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 91.

Notions of participation and reconciliation were reasons for the success of South Africa's constitutional revolution, and a critical institution facilitating this process was the Truth and Reconciliation Commission.¹³ Ubuntu was expressly referred to in the preamble to the Commission's constitutive instrument, the *Promotion of National Unity and Reconciliation Act*.¹⁴ When discussing the TRC's extraordinary achievements, the Canadian philosopher John Ralston Saul concluded that a strong contributory factor was the outlook of the chair, Archbishop Desmond Tutu, who had "very consciously evoked pre-European African concepts such as *Ubuntu*" to "establish a personal and national sense of justice".¹⁵

One of the primary means for securing a political settlement was the amnesty offered to perpetrators of apartheid offences, provided that they confessed the truth of their deeds.¹⁶

By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a narrative truth. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless.¹⁷

In *AZAPO and Others v TRC and Others*,¹⁸ however, the applicants argued that the removal of civil and criminal liability was unconstitutional and infringed their right of access to the courts. The Constitutional Court held that the amnesty procedure had been specifically chosen, because without it there would have been no incentive for offenders to disclose the truth and, as the truth unfolded, so would the processes of reconciliation and reconstruction. The Court noted, further, that amnesty was a

¹³ The TRC "was conceived as part of the bridge-building process designed to help lead the nation away from a deeply divided past to a future founded on the recognition of human rights and democracy". (Truth and Reconciliation Commission Report chap 4, 48).

¹⁴ *Promotion of National Unity and Reconciliation Act* 34 of 1995.

¹⁵ Saul *Equilibrium* 94.

¹⁶ In *AZAPO v TRC* 1996 4 SA 562 (C) 570, the Court noted that "the new dispensation requires 'reconciliation between the people of South Africa and the reconstruction of society'. In order to achieve this, according to the post-amble, amnesty is required".

¹⁷ Truth and Reconciliation Commission Report 112, cited by *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 58 per Ngcobo CJ.

¹⁸ *AZAPO v TRC* 1996 4 SA 671 (CC).

crucial component of the negotiated settlement itself, without which the Constitution could not have been enacted. As Mahomed DP (as he then was) observed, the TRC sought to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past".¹⁹

2.1.2 *Criminal law*

While ubuntu was one of the keys to the political settlement, it has played a more important, long-term role in the criminal justice system. Here, African ideas of dispute resolution had (even earlier) been introduced to a sentencing policy under the label of "restorative justice". This concept was also central to the TRC process: although those who committed crimes of apartheid deserved punishment, peace and national unity dictated reconciliation (which has come to be seen as synonymous with restorative justice).²⁰

In this sense, ubuntu made its debut in the jurisprudence of the Constitutional Court in *S v Makwanyane*.²¹ Here the word was given its first full exposition by the courts. Mokgoro J held that:

Metaphorically, [ubuntu] expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.²²

Justice Langa continued:

It is a culture, which places some emphasis on communalism and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of. It also entails the converse, however. The person has a

¹⁹ *AZAPO v TRC* 1996 4 SA 671 (CC) para 677.

²⁰ Truth and Reconciliation Commission Report 414 citing Peter Biehl, who describes how ubuntu substantiates restorative justice; Gobodo-Madikizela *A Human Being Died* 127-132.

²¹ *S v Makwanyane* 1995 3 SA 391 (CC).

²² *S v Makwanyane* 1995 3 SA 391 (CC) para 308.

corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.²³

Social harmony lies at the heart of ubuntu and, when applied to criminal justice, it completely upends the common-law system which, generally speaking, aims at retribution. Restorative justice seeks to promote cohesion²⁴ by inducing reconciliation between the offender, the victim and the community at large, thereby requiring the participation of all interested parties in the proceedings.²⁵

Restoring social harmony is now one of the central aims of South Africa's sentencing policy. For example, in *M v S (Centre for Child Law Amicus Curiae)*,²⁶ which dealt with correctional supervision, the court commended the fact that restorative justice places crime control in the hands of the community rather than criminal justice agencies. As a result, the offender has a better chance of social rehabilitation without suffering the negative effects of a prison sentence, loss of a job and possible destruction of family networks.²⁷

Reconciliation and restorative justice also feature (predictably perhaps) in the reconfiguration of traditional courts. The *Traditional Courts Bill*, which was tabled on 9 April 2008, makes much of the need to "affirm the values of the traditional justice system, and to align the goals of restorative justice and reconciliation with the Constitution".²⁸ The South African Law Commission has also proposed this policy for the community tribunals it recommends be established in the townships.²⁹

An even more decisive goal of restorative justice appears in the Child Justice Act.³⁰ In the "Aims" part of this enactment, a declaration is made to "expand and entrench

²³ *S v Makwanyane* 1995 3 SA 391 (CC) para 224.

²⁴ On the aim of reconciliation in traditional courts, see Dlamini 1985 *Speculum Juris* 6 and Gluckman *Ideas in Barotse Jurisprudence* 94-97.

²⁵ As noted in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 60.

²⁶ *M v S (Centre for Child Law Amicus Curiae)* 2007 12 BCLR 1312 (CC) para 63.

²⁷ The court cited, in this respect, Pinnock 1995 web.uct.ac.za.ezproxy.uct.ac.za; Maepa 2005 www.iss.co.za.

²⁸ Clause 2(a) *Traditional Courts Bill* B15-2008.

²⁹ South African Law Commission 1997 www.justice.gov.za paras 3.45-3.46.

³⁰ *Child Justice Act* 75 of 2008.

the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed". Thereafter reconciliation and restorative justice appear frequently, as, for instance, in the "Objects of the Act"³¹ and the policy of diverting juvenile offenders from the penal system.³²

Ubuntu has made only a brief appearance in the substantive criminal law. *S v Mandela*³³ involved a plea of compulsion. The accused, however, could prove no immediacy of life-threatening compulsion. The court held that, if lower standards were accepted for this defence, too little would be required of people who now live in a society based on freedom, dignity, ubuntu and respect for life. It was implicit in the idea of ubuntu that every person deserved equal concern and respect.

2.1.3 *Administrative law*

The porous concepts of administrative justice have given the courts better opportunities to invoke ubuntu in this branch of the law. *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others*,³⁴ for instance, was a case concerning the refusal to allow refugees from African countries to take up employment in the security industry. Sachs J considered a blanket refusal to be unfair discrimination.³⁵ In his reference to ubuntu he spoke of "[t]he culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves".³⁶ Although these words had been used in relation to homeless South Africans, Sachs held that they should be a reminder that we are not islands

³¹ Section 2(b)(iii) *Child Justice Act* 75 of 2008.

³² Section 51(g) *Child Justice Act* 75 of 2008.

³³ *S v Mandela* 2001 1 SACR 156 (C).

³⁴ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 145.

³⁵ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 147.

³⁶ Citing, in this respect, Hammond-Tooke *Roots of Black South Africa* 99, who said that, in traditional society, "the hospitality universally enjoined towards strangers, [is] captured in the Xhosa proverb: *Unyawo alunompumlo* ("the foot has no nose"). Strangers, being isolated from their kin, and thus defenceless, were particularly under the protection of the chief and were accorded special privileges".

unto ourselves³⁷ and, on the basis of this metaphor, proceeded to apply the principle to the state's relationship with foreigners.³⁸

The courts have also derived the values of civility and trust from ubuntu. *Masetsha v President of the RSA and Another*,³⁹ for instance, was a case concerning the President's termination of the applicant's position as head of the National Intelligence Agency. The Constitutional Court held that, although the act of termination was not in itself unfair, three ancillary issues were: the due compensation; the manner in which the news was publicly communicated;⁴⁰ and the general public interest.⁴¹ The Court held that fairness and civility were inseparable from ubuntu. Civility was described as:

more than just courtesy or good manners.... It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. In this sense, civility was connected to ubuntu, and was said to be "deeply rooted in traditional culture", and "widely supported as a precondition for the good functioning of contemporary democratic societies".⁴²

In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another*,⁴³ ubuntu was described as a relationship of mutual respect. The case involved an urgent application for leave to appeal from a judgment of the Cape High Court. Harms JA held that the delay was so unreasonable as to be tantamount to a refusal.

³⁷ "Today the concept of human interdependence and burden-sharing in relation to catastrophe is associated with the spirit of *ubuntu-boho*." Here Sachs J cited *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37: "We are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

³⁸ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 150.

³⁹ *Masetsha v President of the RSA* 2008 1 SA 566 (CC).

⁴⁰ Thereby affecting the applicant's reputation as high profile incumbent of a public post. See *Masetsha v President of the RSA* 2008 1 SA 566 (CC) para 236.

⁴¹ *Masetsha v President of the RSA* 2008 1 SA 566 (CC) para 237: those exercising public power should avoid acting in a way that could disturb "public confidence in the integrity of the incumbents of these institutions".

⁴² *Masetsha v President of the RSA* 2008 1 SA 566 (CC) para 238.

⁴³ *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 3 SA 238 (SCA) para 38 per Harms JA.

He noted a reference by the Judge President of the court *a quo* to the spirit of ubuntu in interpreting statutes, and said that this term

ought to apply to the relationship between courts and the respect required of organs of State and courts towards citizens and towards each other... Delays in giving judgment give the impression of an imperious judge, and undermine public confidence in the judiciary, since "justice delayed is justice denied".⁴⁴

In similar vein, *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*⁴⁵ again associated ubuntu with a general obligation to treat people with respect and dignity, to avoid undue confrontation and, more specifically, to give reasons for administrative decisions. The case dealt with the removal of residence permits from non-South Africans, and it raised questions about just administrative action. Mokgoro J held that declaring a person an illegal alien has serious implications, *inter alia*, being compelled to leave the country and thereafter suffering an international stigma that can be used to deny entry into other countries.⁴⁶ In addition, the Judge linked the principles of fairness, accountability and transparency with the policy of *Batho Pele* (meaning "People First" in seSotho), a slogan used in local government to indicate that the best interests of the public must be put first.⁴⁷

In *Joseph and Others v City of Johannesburg and Others*⁴⁸ the Constitutional Court also linked fair and respectful administrative action to *Batho Pele*. Skweyiya J said that: "Batho Pele gives practical expression to the constitutional value of ubuntu, which embraces the relational nature of rights". Calling upon courts to "move beyond the common-law conception of rights as strict boundaries of individual entitlement", he remarked in a footnote that *Batho Pele* indicated an equivalence of "citizen" and

⁴⁴ *Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 3 SA 238 (SCA) para 39.

⁴⁵ *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 4 SA 327 (CC) per Mokgoro J.

⁴⁶ Hence, the Court said (para 61) that the person concerned would be naturally anxious to know why the declaration was made, especially if it had been based on a misunderstanding or incorrect information.

⁴⁷ *Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 4 SA 327 (CC) para 62. The Court referred to *Van der Merwe v Taylor* 2008 1 SA 1 (CC) para 71.

⁴⁸ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC).

"customer" for the purposes of the public service (especially because the customers have no choice in service provider).⁴⁹

Joseph's case concerned termination of the electricity supply to the applicants' residence, because the landlord had failed to pay the bills. The applicants sought reconnection of the electricity, as well as an order that they were entitled to procedural fairness (in the form of notice and an opportunity to make representations to the service provider, City Power). As tenants, however, the applicants had no contractual nexus with City Power. The Court nonetheless held that the company had to comply with the requirement of procedural fairness,⁵⁰ since

government [must] act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens.⁵¹

*Albutt v Centre for the Study of Violence and Reconciliation, and Others*⁵² involved unfinished business of the TRC, ie a form of amnesty for those who had not participated in the process. To that end the President announced a special pardon for those who had committed politically motivated offences. The question was whether victims were to be given a voice in this special dispensation or not. The Constitutional Court held that their participation was essential not only in order to establish the truth, but also to achieve the objectives of nation-building and national reconciliation.⁵³

The notion of participatory democracy is also an African one. Victim participation was the norm in deciding the proper "punishment" for offenders in traditional African society.... this remarkable tradition of participation and

⁴⁹ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46, fn 39. See the *Batho Pele Handbook*: Department of Public Service and Administration [date unknown] www.dpsa.gov.za. See also Cloete and Mokgoro *Policies for Public Service Transformation* 7-8.

⁵⁰ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 47.

⁵¹ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46.

⁵² *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

⁵³ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) paras 56, 59 per Ngcobo CJ. Froneman J noted (para 90) that our constitutional democracy was not merely representative, but also participatory (citing *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 121 and *Mataatile Municipality v President of the RSA (No 2)* 2007 6 SA 477 (CC) para 40, a principle that determined even the executive function.

capacity for forgiveness in African society also underlay, at a deeper level, the amnesty process.⁵⁴

Although s 33 of the 1996 *Constitution* and the *Promotion of Administrative Justice Act*⁵⁵ have formalised administrative decision-making, the technicalities of determining administrative action have left significant loopholes. In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*,⁵⁶ the Court was concerned with budgetary resolutions, which were clearly not "administrative actions", because the Council had acted as a legislative body. The Constitutional Court nonetheless held that the exercise of public power was subject to a principle of legality.⁵⁷

This principle provides a new area of discretion and potentially another occasion for asserting ubuntu. Legality has subsequently been invoked with regard to the President's power to appoint a commission of inquiry,⁵⁸ prematurely proclaiming a statute in force,⁵⁹ the dismissal of the head of the National Intelligence Agency,⁶⁰ and the exercise of the power of pardon.⁶¹

2.2 *Private law*

2.2.1 *Property*

Ubuntu has been far less welcome in the field of private law than public law.⁶² The concept has most often been asserted in relation to the *Prevention of Illegal*

⁵⁴ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 91.

⁵⁵ *Promotion of Administrative Justice Act* 3 of 2000.

⁵⁶ *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC).

⁵⁷ *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council* 1999 1 SA 374 (CC) para 58: "It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". In other words, the exercise of public power was to be properly sourced in the law: *Minister for Justice and Constitutional Development v Chonco* 2009 6 SA 1 (SCA) para 27.

⁵⁸ *President of the RSA v SARFU* 2000 1 SA 1 (CC) para 148. In this context these were implicit constitutional constraints.

⁵⁹ *Pharmaceutical Manufacturers Association of SA: in re President of the RSA* 2000 2 SA 674 (CC) paras 85, 89, 90.

⁶⁰ *Masetsha v President of the RSA* 2008 1 SA 566 (CC) paras 78, 81.

⁶¹ *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) esp paras 68-69.

⁶² *Davis* 2008 SAJHR 329.

Evictions from and Unlawful Occupation of Land Act (hereafter PIE),⁶³ legislation that aims to address the plight of the homeless and those forced to seek shelter on property owned by another. In order to achieve a just and equitable settlement, the Act requires the courts to consider the lawfulness of the squatters' occupation, their interests and their circumstances, together with broader constitutional values. Hence, although claims are based on sound legal grounds, they may be refused in order to realise higher norms. These have been variously described as justice, equity, fairness, grace and compassion.⁶⁴

The leading case relating to PIE is *Port Elizabeth Municipality v Various Occupiers*.⁶⁵ In response to a petition signed by 1600 people in the neighbourhood, the Municipality sought an eviction order against 68 people who, for a number of years, had been occupying shacks on privately owned land within the Municipality. Sachs J put the Constitutional Court's approach in the following terms:

PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern.⁶⁶

The next few sentences are redolent of the language of ubuntu:

The *Constitution* and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.⁶⁷

Sachs J then indicated that, while PIE emphasises justice and equity, these values are to be seen as "interactive, complementary and mutually reinforcing" with equality

⁶³ *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act* 19 of 1998.

⁶⁴ *Wine v Zondani* 2009 JOL 24358 (SE), citing *Port Elizabeth Municipality* below.

⁶⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC). The court approved *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 1074 (SECD), which in turn was quoted with approval by Olivier JA in *Ndlovu v Ngcobo; Bekker v Jikka* 2003 1 SA 113 (SCA) para 65.

⁶⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.

⁶⁷ In *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 62 per Jahbay J quoting Judge Sachs at para 37.

and the rule of law.⁶⁸ In another context he said that: "[o]ur Constitution requires a court ... to weave the elements of humanity and compassion within the fabric of the formal structures of the law ... and to promote ... a caring society based on good neighbourliness and shared concern".⁶⁹

In order to achieve justice and equity, the courts have been obliged to adopt a variety of innovative approaches.⁷⁰ In *Transnet t/a Spoornet v Informal Settlers of Good Hope and Others*,⁷¹ for example, the court ordered the applicant to conduct a survey so that it could properly assess "the needs and the rights of the persons presently illegally occupying the Rail Reserve and the prospect, if any, of relocating the communities to a safer and healthier site".

⁶⁸ However, "[t]he necessary reconciliation can only be attempted by a close analysis of the actual specifics of each case": *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 35.

⁶⁹ *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 62; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.

⁷⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 36.

⁷¹ *Transnet t/a Spoornet v Informal Settlers of Good Hope* 2001 4 All SA 516 (W) 524.

2.2.2 Family law

Aside from the *Child Justice Act* mentioned earlier, ubuntu has featured in only three cases in this branch of the law. The first was *Ryland v Edros*,⁷² which concerned recognition of a Muslim marriage. Previously, such marriages had been considered contrary to South African public policy and *boni mores*. On the basis of the postamble to the Interim *Constitution* and Langa J's exposition of ubuntu in *S v Makwanyane and Another*,⁷³ however, the court held that the values of equality and tolerance demanded a new approach.

In *Badenhorst v Badenhorst*,⁷⁴ a married couple's claim to the husband's parents' farm was found to be an abuse of the parents' generosity. The court spoke of the wife's claim as "an irresistible temptation of greed", and added that "her attitude undermined ubuntu, that godly value with which all human beings are ordained".

Bhe and Others v Magistrate, Khayelitsha and Others,⁷⁵ a case dealing with the constitutionality of the customary law of succession, considered ubuntu in an *obiter dictum*. The Constitutional Court described the valuable features of customary law, its inherent flexibility, consensus-seeking in family meetings for the prevention and resolution of disputes, the unity of the family structures, the "fostering of co-operation, a sense of responsibility in and of belonging to its members", and "the nurturing of healthy communitarian traditions such as ubuntu".⁷⁶

2.2.3 Delict

Although the law of delict leaves itself open to ubuntu via such open-ended concepts as reasonableness, the duty of care, and the largely discretionary process of assessing damages, the concept has had little effect.

⁷² *Ryland v Edros* 1997 2 SA 690 (C) 708.

⁷³ *S v Makwanyane* 1995 3 SA 391 (CC) para 224.

⁷⁴ *Badenhorst v Badenhorst* 2005 JOL 13583 (C) para 24.

⁷⁵ *Bhe v Magistrate, Khayelitsha* 2005 1 BCLR 1 (CC) para 45.

⁷⁶ Citing Mokgoro J in *S v Makwanyane* 1995 3 SA 391 (CC) paras 307-8.

An opportune moment to assert ubuntu arose in the case of *Carmichele v Minister of Safety and Security*,⁷⁷ when the court was called upon to determine if the state owed the applicant a duty of care. The Constitutional Court, however, did not decide this question. It held, instead, that adjustments to the common law should be based on an "objective normative value system" reflecting underlying constitutional values,⁷⁸ without deciding the content of that value system.⁷⁹

*Dikoko v Mokhatla*⁸⁰ is the only case in which ubuntu played a significant role. Here Mokgoro J held that monetary compensation for defamation diverted attention away from two basic considerations in this aspect of the law: that the reparation represents injury to dignity and reputation, not necessarily to the pocket, and that courts should attempt to re-establish a respectful relationship between the parties. An old remedy of *amende honorable* (apology) was therefore revived to acknowledge a sense of ubuntu and to emphasise restorative rather than retributive justice.

2.2.4 Contract

Contract, too, has proved resistant to ubuntu, although a possible reception of the concept in this area is a more complex matter. It could well be argued that contract law already has specific mechanisms to deal with the type of problems which ubuntu addresses.

Formerly, one such mechanism was the *exceptio doli generalis*. This remedy could be invoked as a defence to the enforcement of unfair or unconscionable terms in contracts.⁸¹ In *Bank of Lisbon v De Ornelas*,⁸² however, the former Appellate Division decided that the *exceptio* did not form part of our law. According to Joubert

⁷⁷ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54.

⁷⁸ Davis 2008 SAJHR 321.

⁷⁹ The matter was then referred back to the High Court to reconsider in light of the claimant's constitutional rights. In *Carmichele v Minister of Safety and Security* 2003 2 SA 656 (C) para 16, Chetty J confirmed the "strictly" common-law position on the matter, and then considered the effect of the Constitution. He emphasised that the criterion for wrongfulness - the legal convictions of the community - was now "to be found in the Constitution and not in some vague notion of public sentiment or opinion". See Van der Walt 2003 SAJHR 522-523,525.

⁸⁰ *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 69 per Mokgoro J.

⁸¹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 292-3.

⁸² *Bank of Lisbon v De Ornelas* 1988 3 SA 580 (A) 607.

JA, it had disappeared in the middle ages and, as a "superfluous defunct anachronism", should be laid to rest.

Notwithstanding the elimination of the *exceptio doli*, the courts still had available principles of good faith and public policy, together of course with the Bill of Rights, to correct unfair contracts. Good faith has always been a fundamental principle of our law,⁸³ but its role is limited.⁸⁴ In *Brisley v Drotsky*⁸⁵ the Supreme Court of Appeal held that good faith could not be used as an independent ground for setting aside or refusing to enforce contractual provisions. While the abstract idea of *bona fides* was a foundation and justification for legal rules⁸⁶ and could "perform creative, informative and controlling functions through established rules of contract law", it could not be used directly to intervene in contractual relationships. The courts should refer instead to rules of hard law. In this way, legal certainty could be preserved.⁸⁷

At first sight, public policy would seem to embrace the ideas of ubuntu and justice, for it stands for "the general sense of justice of the community, the *boni mores*, manifested in public opinion".⁸⁸ And shortly after the *Bank of Lisbon* case, *Sasfin (Pty) Ltd v Beukes*⁸⁹ invoked public policy to have a contract declared unenforceable. Nevertheless, this principle does not have an unlimited scope of operation. Van der Merwe *et al* contend that "simple justice between man and man" in the parties' individual capacities cannot alone determine the public interest, because the idea is too simplistic and could lead to arbitrary decisions.⁹⁰

⁸³ Brand 2009 SALJ 73.

⁸⁴ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (A) 312-31, especially the minority judgment of Olivier JA at 323F-326G.

⁸⁵ *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 16, 22.

⁸⁶ See also *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Tuckers Land and Development Corp v Hovis* 1980 1 SA 645 (A).

⁸⁷ *South African Forestry Co Ltd v York Timbers* 2005 3 SA 323 (SCA) para 27.

⁸⁸ *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 73.

⁸⁹ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

⁹⁰ Van der Merwe Contract 219.

Rather than relying on public policy alone to deal with contractual unfairness, the courts seem to prefer linking it to the Bill of Rights.⁹¹ Thus, in *Barkhuizen v Napier*,⁹² the court said that:

the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them.⁹³

In general, the courts' approach to ubuntu in the private law sphere has been conservative. Except for PIE related matters, they seem unwilling to incorporate new ideas. While mention has been made of ubuntu and/or equity in contract,⁹⁴ the courts have been reluctant to develop these norms any further.⁹⁵ Davis has therefore remarked that principles of legal certainty and private autonomy seem to have prevailed over the transformative, communitarian power of the "constitutional values of freedom, equality and dignity"⁹⁶ - a sad reflection on the law that provides ground rules for the economic structure of South Africa's fragmented and unequal society.⁹⁷

3 Objections to ubuntu

Ubuntu sceptics criticise the concept on many grounds. For a start, they say that it is too vague to be of any use.⁹⁸ This objection, however, can be immediately refuted. As a metanorm, ubuntu is necessarily generalised. The concept cannot be described as a rule or even a principle.⁹⁹ It has a much broader scope suggesting that it is

⁹¹ Christie *Law of Contract* 16-17. See also *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 95; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *South African Forestry Co Ltd v York Timbers* 2005 3 SA 323 (SCA).

⁹² *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 30.

⁹³ See also *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) paras 73, 85.

⁹⁴ See, for example, *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 30; *Pharmaceutical Manufacturers Association of South Africa: in re Ex Parte President of the Republic of South Africa* 2000 3 BCLR 241 (CC) para 44; *Brisley v Drotsky* 2002 4 SA 1 (SCA) para 95; *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) para 25.

⁹⁵ Cf *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA). See Davis 2008 SAJHR 323.

⁹⁶ Davis 2008 SAJHR 328.

⁹⁷ Van der Walt 2003 SAJHR 539.

⁹⁸ Klug *Constituting Democracy* 164.

⁹⁹ See also Keevy 2009 *Journal for Juridical Science* 34-35, who argues that ubuntu is not a "philosophy" in the Western sense.

closer to a value or, better still, a representation of the right way of living.¹⁰⁰ In this sense, it is akin to the Hindu notion of *dharma*.¹⁰¹

It is senseless to object to the ambiguity of such terms, for precision cannot be expected of concepts that must play such multifarious roles in society. This point is especially true for a legal system such as South Africa's, when the country is in the process of forging new values. To demand an exact definition of *ubuntu* would be to impose a premature restriction on its function.¹⁰²

Another objection claims that the communal ethic of *ubuntu* denies individual autonomy, and that the "appeal to cohesion privileges dangerous hierarchies [and] corrupt tribal authorities". Because *ubuntu* is associated with an African tradition it is backward-looking and can have little to offer to the modern world. Drucilla Cornell, however, one of the foremost scholars working on dignity jurisprudence, would contest these objections on the ground that both *ubuntu* and the related concept of dignity are banners of a high ethical endeavour.¹⁰³

Whatever the truth of the sceptics' allegations, we need to be aware that we are not bound by a single (or traditional) conception of *ubuntu*. New meanings have been - and still are being - shaped by courts and writers, and they are concentrating on realising certain values critical to South Africa's changing social order. To this end the courts have emphasised such connotations in *ubuntu* as civility, respect, dignity, harmony and compassion, as well as compatibility with the Bill of Rights.

Yet another objection to *ubuntu* is redundancy. Is *ubuntu* necessary when we have a right to dignity enshrined in the Constitution?¹⁰⁴ Indeed, the Constitutional Court has often talked of dignity and *ubuntu* as analogous concepts.¹⁰⁵ Any exact correlation,

¹⁰⁰ Ramaose *African Philosophy* 40.

¹⁰¹ Which can be variously translated as "righteous duty, law, morality or religion": Menski *Hindu Law* 98.

¹⁰² Hence Cornell and Van Marle 2005 *Afr Hum Rts LJ* 205 argue that the generality of *ubuntu* is its strength.

¹⁰³ Cornell 2009 www.isthisseattaken.co.za.

¹⁰⁴ Section 10 *Constitution of the Republic of South Africa*, 1996: "Everyone has inherent dignity and the right to have their dignity respected and protected".

¹⁰⁵ See, for example, *S v Makwanyane* 1995 3 SA 391 (CC) para 225: "An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme

however, must be countered. The Western conception of dignity envisages the individual as the right-bearer, whereas ubuntu sees the individual as embedded in a community.¹⁰⁶ Those exploring dignity jurisprudence in South Africa, would concede that:

dignity in Ubuntu thinking is not rooted in reason because of an ethical concern shared with many feminists that this would deny dignity to too many human beings. Thus, such a ground for dignity runs foul of the virtues of inclusiveness and acceptance. Instead dignity is rooted first and foremost in our singularity and uniqueness, and at the same time in our embeddedness as part of a human community.¹⁰⁷

4 Ubuntu: a modern African version of equity?

How, then, are we to assess the function of ubuntu in our law? We should be aware that it started life as the product of an oral, not a written, culture. The written word has the effect of objectifying thought. It distances the word from the speaker, thereby facilitating a self-reflective, critical form of analysis characteristic of Western philosophy.¹⁰⁸

Ubuntu, on the other hand, is a *lived* system of norms. (This should not be taken to imply that it is chaotic, arbitrary or wholly irrational. From what we know of the concept, ubuntu is a coherent and reasoned system.)¹⁰⁹ It is now being used,

of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*".

¹⁰⁶ Cf Keep and Midgley "Emerging Role of Ubuntu-boho" 34, who reply that dignity can be interpreted as "beyond respect in an individualistic sense by incorporating an attitude of communalism and inclusiveness: in other words, respect for dignity requires one not only to respect each member of society, but also to behave with dignity in ensuring that every member is given an opportunity to exercise his or her right to dignity to the full". Nevertheless, the authors say (at 33) that, although communalism is not unique to ubuntu, "a feature of Western legal thought is its use of concepts like rationality, reasonableness and equity and a strong emphasis on individualism and on freedom".

¹⁰⁷ Cornell 2009 www.isthisseattaken.co.za.

¹⁰⁸ Goodrich *Reading the Law* 21. The science of jurisprudence is born only when law is written, because written texts facilitate reflection and abstract analysis. Professionalism and jurisprudence then contribute to the development of a "high-register" language for use in legal contexts. This language is marked by differences in vocabulary and structure from the ordinary "low-register" variety. See Danet 1980 *Law & Soc Rev* 465ff; Goody *Interface Between Written and Oral* 263ff.

¹⁰⁹ It is probably best described as a repertoire of norms, a loose collection of principles and values of similar, though varying types. See Comaroff and Roberts *Rules and Processes* ch 3 (esp 70).

however, in a written legal discourse that is working inexorably to shape its meaning. What can we now reasonably expect of ubuntu?

The English-law doctrine of equity presents itself as a good indicator. Like equity, ubuntu is functioning as a metanorm to correct injustices resulting from the application of abstract rules of the common law, or even, on occasion, the Bill of Rights. In fact, in *Port Elizabeth Municipality* Sachs J linked ubuntu to PIE and, through that means, to justice and equity. As a result,

[t]he court is called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.¹¹⁰

The parallels between ubuntu and equity are compelling. The latter allowed English judges discretion to work out fairer results in particular factual scenarios, thereby serving as a counterweight to inflexible, albeit certain, rules of the common law.¹¹¹ In this manner the doctrine of equity was invoked "to regulate the conscience of defendants so that they act[ed] with propriety in situations where, by following the letter of the common law, they could act unconscionably".¹¹²

As the latter quote indicates, the history of equity in English law had a close connection with good conscience. In fact, courts of equity were originally presided over by the Lord Chancellor, the chief Minister of the King's Court.¹¹³ As the number of petitions seeking equitable remedies to the Chancellor increased, a separate system of courts was created, known as the Courts of Chancery.¹¹⁴

¹¹⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 36. He went on to say (para 38) that: "The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails".

¹¹¹ *Hudson Equity and Trusts* 5.

¹¹² *Allen Law in the Making* 406-407. See also *Westdeutsche Landesbank Girozentrale v Islington LBC* 1996 AC 669.

¹¹³ During the fourteenth century, the Chancellor's powers expanded to hear matters and make decrees on his own authority: *Petit Equity* 2.

¹¹⁴ *Hudson Equity and Trusts* 12.

Early Chancellors - known as "keepers of the King's conscience"¹¹⁵ - were clerics, who obviously had a particular knowledge of canon law.¹¹⁶ Hence, the development of equity in English law owed much to canon law, which drew, in turn, from the principles of natural law, as espoused by St Thomas Aquinas, and even earlier by Greek and Roman philosophy.¹¹⁷ The origins of equity in religion have a clear resonance with ubuntu, which also finds its ultimate sanction in a spiritual realm: the departed ancestors who stand as guardians of the African moral order.¹¹⁸

As it happened, the English doctrine of equity was not received into South African law.¹¹⁹ Purists engaged in the *bellum juridicum* argued that an alien concept such as this would pollute Roman-Dutch law. Aside from which, equity was considered the unique product of a particular judicial system, with no place in our civil-law system,¹²⁰ which was already amply equipped with equitable remedies.¹²¹

Indeed, several institutions of Roman-Dutch law played the role of equity: unjust enrichment, public policy, good faith, the Bill of Rights (and, formerly, of course, the *exceptio doli generalis*). The rules of enrichment, for example, were there to correct situations of injustice caused by strict application of the common law.¹²² They differed from equity, however, in focusing on the specific enrichment of a defendant before determining whether it was unjust, and offering mainly compensation as opposed to a broader range of equitable remedies.¹²³

Just as the enrichment remedies have a fairly limited role to play in our law, so too do good faith and public policy. As we have seen above, in the context of contract, their range is not as pervasive as equity.¹²⁴ Ubuntu, on the other hand, is being used to perform functions that go beyond both of the latter concepts. While public policy is

¹¹⁵ Hudson *Equity and Trusts* 11.

¹¹⁶ Kiralfy *Historical Introduction* 570; Zweigert and Kötz H *Introduction to Comparative Law* 194.

¹¹⁷ Allen *Law in the Making* 388ff.

¹¹⁸ Keevy 2009 *Journal for Juridical Science* 30-32; Bennett and Patrick "Ubuntu" section 3.

¹¹⁹ Van der Walt 2003 SAJHR 530.

¹²⁰ See Christie *Law of Contract* 521.

¹²¹ Douthwaite 1960 *Acta Juridica* 52.

¹²² Hudson *Equity and Trusts* 15. See also Du Plessis 2003-04 *Tulane LR* 242.

¹²³ Lotz "Enrichment" paras 208, 243.

¹²⁴ Although the argument in favour of good faith is favoured by Zimmermann *Law of Obligations* fn 192 at 667. See also Du Plessis 2003-04 *Tulane LR* 238.

informed by ubuntu, the converse is not necessarily true.¹²⁵ Similarly, although ubuntu no doubt contains good faith, it can be realised in situations where the courts would refuse to invoke good faith.¹²⁶

The supreme source of South Africa law, the Bill of Rights, has itself been mediated by ubuntu (as in the *Port Elizabeth Municipality* case).¹²⁷ Mokgoro J said in *S v Makwanyane*:

These values underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 - where the right to life and the right to respect for and protection of human dignity are embodied in sections 9 and 10 respectively.¹²⁸

5 Conclusion

It therefore seems as if the South African courts have a metanorm, similar to equity. If this is the case, we need to take care that we are not too quick to develop ubuntu in the same manner as equity.

In 1529 the post of the Chancellor was secularised, after which lawyers began to develop equity jurisdiction in the same casuistic manner as the common law.¹²⁹ When these decisions came to be regarded as binding precedents - a process assisted by publication of the Chancellor's decisions - equity was treated in much the same way as the common law.¹³⁰ It became a self-standing system, with its own rules and technicalities.¹³¹

¹²⁵ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 51.

¹²⁶ In order to achieve simple justice between individuals. Cf Van der Merwe *Contract* above.

¹²⁷ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37, where Sachs J affirmed that the spirit of ubuntu-boho "suffuses the whole constitutional order", combining individual rights with a communitarian philosophy and providing "a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern". Previously, with reference to the interim *Constitution*, Madala J expressed similar sentiments: *S v Makwanyane* 1995 3 SA 391 (CC) para 237.

¹²⁸ *S v Makwanyane* 1995 3 SA 391 (CC) para 307.

¹²⁹ Zweigert and Kötz *Introduction to Comparative Law* 195.

¹³⁰ Petit *Equity* 2.

¹³¹ Petit *Equity* 2; Mason 1994 *LQR* 238-239. See also Zweigert and Kötz *Introduction to Comparative Law* 197.

As a result, the doctrine of equity is no longer accepted as a wholly beneficial adjunct to the common law.¹³² Although its strength lies in its flexibility and the possibility of achieving justice on a case-by-case basis,¹³³ equity jurisprudence has hardened into an institution sharing the same inflexibility as its common-law partner.¹³⁴ Ironically, it can even result in inequitable outcomes.¹³⁵

We should, therefore, hesitate before defining ubuntu and circumscribing its area of operation too soon. If we concede that meaning is not fixed in a primordial past, but that it is in the process of being shaped by courts, law-makers and scholars, ubuntu may be allowed free play to provide a new set of values and principles for our law.

These values and principles, however, are distinctively African. It must be remembered that ubuntu is a "loan word" in English, which suggests that it was adopted to signify a phenomenon that was never before expressed in its new environment.

A new word is a solution to a problem. Often the need is obvious, but sometimes it is unseen or barely felt, and then it is only in finding something to plug the gap that we actually realise the gap was there in the first place.¹³⁶

Ubuntu involves more than entitlements to equal treatment or fair play. It also obliges the individual "to give the same respect, dignity, value and acceptance to each member of [the] community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all".¹³⁷

Keep and Midgley observe that there is "very little in the Bill of Rights that is ostensibly "African" or a reflection of African values". The response could be that we have "no need to look for such characteristics, for the Bill of Rights reflects universal

¹³² Allen *Law in the Making* 425, for one, doubts whether the doctrine was of benefit to English law in general.

¹³³ Zweigert and Kötz *Introduction to Comparative Law* 196.

¹³⁴ Kiralfy *Historical Introduction* 569.

¹³⁵ Allen *Law in the Making* 425.

¹³⁶ Hitchings *Secret Life of Words* 5.

¹³⁷ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 224-225.

values and ideals, of which African values form an integral part". All values are "essentially the same, even though they might be expressed in different idiom".

Whether embracing a different set of values or simply expressing universal values differently, ubuntu is being deployed to give voice to something distinctively African, and we may concur with the attempt to incorporate that quality "into the legal system so as to form a cohesive, plural, South African legal culture".¹³⁸ This culture will be one characterised by such ideas as reconciliation, sharing, compassion, civility, responsibility, trust and harmony.

¹³⁸ Keep and Midgley "Emerging Role of Ubuntu-botho" 30.

Bibliography

Allen *Law in the Making*

Allen CK *Law in the Making* 7ed (Clarendon Press Oxford 1964)

Ball "Lexis"

Ball CJE "Lexis: The Vocabulary of English" in Bolton WF and Crystal D (eds) *The English Language* (Sphere Books London 1987) 165-197

Bennett and Patrick "Ubuntu"

Bennett TW and Patrick J "Ubuntu: The Ethics of Traditional Religion" in Bennett TW (ed) *Traditional African Religions in South African Law* (UCT Press Cape Town 2010) (in press)

Bhengu *Ubuntu*

Bhengu MJ *Ubuntu: The Essence of Democracy* (Novalis Press Cape Town 1996)

Brand 2009 SALJ

Brand FDJ "The role of good faith, equity and fairness in the South African law of contract: the influence of the common law and the Constitution" 2009 SALJ 71-90

Christie *Law of Contract*

Christie RH *The Law of Contract in South Africa* 5th ed (LexisNexis Butterworths Durban 2006)

Cloete and Mokgoro *Policies for Public Service Transformation*

Cloete F and Mokgoro J (eds) *Policies for Public Service Transformation* (Juta Kenwyn 1995)

Comaroff and Roberts *Rules and Processes*

Comaroff JL and Roberts S *Rules and Processes: The Cultural Logic of Dispute in an African Context* (Chicago University Press Chicago 1981)

Cornell and Van Marle 2005 *Afr Hum Rts LJ*

Cornell D and Van Marle D "Exploring ubuntu: tentative reflections" 2005 *Afr Hum Rts LJ* 195-220

Danet 1980 *Law & Soc Rev*

Danet B "Language in the Legal Process" 1980 *Law & Soc Rev* 445-564

Davis 2008 *SAJHR*

Davis D "Private law after 1994: progressive development or schizoid confusion?" 2008 *SAJHR* 318-329

Dlamini 1985 *Speculum Juris*

Dlamini CRM "Whither lay justice in South Africa?" 1985 *Speculum Juris* 1-11

Douthwaite 1960 *Acta Juridica*

Douthwaite G "South Africa and the Law" 1960 *Acta Juridica* 219

Du Plessis 2003-04 *Tulane LR*

Du Plessis JD "Common law influences on the law of contract and unjustified enrichment in some mixed legal systems" 2003-04 *Tulane LR* 219-256

English 1996 *SAJHR*

English R "Ubuntu: the quest for an indigenous jurisprudence" 1996 *SAJHR* 641-648

Gluckman *Ideas in Barotse Jurisprudence*

Gluckman M *The Ideas in Barotse Jurisprudence* (Manchester University Press Manchester 1972)

Gobodo-Madikizela *A Human Being Died*

Gobodo-Madikizela P *A Human Being Died that Night - a Story of Forgiveness* (David Philip Claremont 2003)

Goodrich *Reading the Law*

Goodrich P *Reading the Law* (Blackwell Oxford 1986)

Goody *Interface between Written and Oral*

Goody J *The Interface between the Written and the Oral* (Cambridge University Press Cambridge 1987)

Hammond-Tooke *Roots of Black South Africa*

Hammond-Tooke WD *The Roots of Black South Africa* (Jonathan Ball Johannesburg 1993)

Hitchings *Secret Life of Words*

Hitchings H *The Secret Life of Words* (John Murray London 2008)

Hudson *Equity and Trusts*

Hudson A *Equity and Trusts* 3rd ed (Cavendish London 2003)

Keep and Midgley "Emerging Role of Ubuntu-boho"

Keep H and Midgley R "The Emerging Role of Ubuntu-boho in Developing a Consensual South African Legal Culture" in Bruinsma F and Nelken D (eds) *Recht der Werkelijkheid* (Reed Business BV Gravenhage 2007) 29-56

Keey 2009 *Journal for Juridical Science*

Keey I "Ubuntu versus the core values of the South African Constitution" 2009 *Journal for Juridical Science* 34(2) 19-58

Kiralfy *Historical Introduction*

Kiralfy AKR *Potter's Historical Introduction to English Law and its Institutions* 4th ed (Sweet & Maxwell London 1958)

Klug *Constituting Democracy*

Klug H *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press Cambridge 2000)

Lotz "Enrichment"

Lotz JG "Enrichment" in Joubert WA and Faris JA (eds) *The Law of South Africa* (LexisNexis Butterworths Durban 2005) Vol 9

Mason 1994 *LQR*

Mason A "The place of equity and equitable remedies in the contemporary common law world" 1994 *LQR* 238-259

Menski *Hindu Law*

Menski W *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press Delhi 2003)

Mokgoro 1998 *Buff Hum Rts L Rev*

Mokgoro YM "Ubuntu and the law in South Africa" 1998 *Buff Hum Rts L Rev* (4) 15-23

Mutwa *Indaba*

Mutwa VC *Indaba, My Children* (Payback Press Edinburgh 1998)

Petit *Equity*

Petit PH *Equity and the Law of Trusts* 9th ed (Butterworths London 2001)

Ramose *African Philosophy*

Ramose MB *African Philosophy through Ubuntu* (Mondi Books Harare 2002)

Saul *Equilibrium*

Saul JR *On Equilibrium* (Penguin Toronto 2001)

Truth and Reconciliation Commision *Report*

Truth and Reconciliation Commision of South Africa *Report* (Government Printer Pretoria 1998) Vol 1

Van der Merwe *Contract*

Van der Merwe SWJ *et al Contract: General Principles* 3rd ed (Juta Lansdowne 2007)

Van der Walt 2003 SAJHR

Van der Walt JWG "Horizontal application of fundamental rights and the threshold of the law in view of the *Carmichele saga*" 2003 SAJHR 517-540

Zimmermann *Law of Obligations*

Zimmermann R *The Law of Obligations* (Oxford University Press Oxford 1996)

Zweigert and Kötz *Introduction to Comparative Law*

Zweigert K and Kötz H *Introduction to Comparative Law* 2nd ed (translated from the original German by Tony Weir) (Clarendon Press Oxford 1987)

Register of cases

Afrox Healthcare Bpk v Strydom 2002 6 SA 21 (SCA)

Albutt v Centre for the Study of Violence and Reconciliation 2010 3 SA 293 (CC)

AZAPO V TRC 1996 4 SA 562 (C)

AZAPO v TRC 1996 4 SA 671 (CC)

Badenhorst v Badenhorst 2005 JOL 13583 (C)

Bank of Lisbon v De Ornelas 1988 3 SA 580 (A)

Barkhuizen v Napier 2007 7 BCLR 691 (CC)

Bhe v Magistrate, Khayelitsha 2005 1 BCLR 1 (CC)

Brisley v Drotsky 2002 4 SA 1 (SCA)

Carmichele v Minister of Safety and Security 2001 4 SA 938 (CC)

Carmichele v Minister of Safety and Security 2003 2 SA 656 (C)

City of Johannesburg v Rand Properties (Pty) Ltd 2007 6 SA 417 (SCA)

Dikoko v Mokhatla 2006 6 SA 235 (CC)

Doctors for Life International v Speaker of the National Assembly 2006 6 SA 416 (CC)

Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman 1997 4 SA 302 (A)

Fedsure Life Assurance v Greater Johannesburg Metropolitan Council 1999 1 SA 374 (CC)

Fourie v Minister of Home Affairs 2005 3 SA 429 (SCA)

Joseph v City of Johannesburg 2010 4 SA 55 (CC)

Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae) 2010 4 SA 327 (CC)

M v S (Centre for Child Law Amicus Curiae) 2007 12 BCLR 1312 (CC)

Masetlha v President of the RSA 2008 1 SA 566 (CC)

Matatiele Municipality v President of the RSA (No 2) 2007 6 SA 477 (CC)

Minister for Justice and Constitutional Development v Chonco 2009 6 SA 1 (SCA)

Napier v Barkhuizen 2006 4 SA 1 (SCA)

Ndlovu v Ngcobo; Bekker v Jikka 2003 1 SA 113 (SCA)

Pharmaceutical Manufacturers Association of SA: in re President of the RSA 2000 2 SA 674 (CC)

Pharmaceutical Society of South Africa v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health 2005 3 SA 238 (SCA)

Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter 2000 2 SA 1074 (SE)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

President of the RSA v SARFU 2000 1 SA 1 (CC)

Ryland v Edros 1997 2 SA 690 (C)

S v Makwanyane 1995 3 SA 391 (CC)

S v Mandela 2001 1 SACR 156 (C)

Sasfin (Pty) Ltd v Beukes 1989 1 SA 1 (A)

South African Forestry Co Ltd v York Timbers 2005 3 SA 323 (SCA)

Transnet t/a Spoornet v Informal Settlers of Good Hope 2001 4 All SA 516 (W)

Tuckers Land and Development Corp v Hovis 1980 1 SA 645 (A)

Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 4 SA 395 (CC)

Van der Merwe v Taylor 2008 1 SA 1 (CC)

Weinerlein v Goch Buildings Ltd 1925 AD 282

Westdeutsche Landesbank Girozentrale v Islington LBC 1996 AC 669

Wine v Zondani 2009 JOL 24358 (SE)

Register of legislation

Black Administration Act 38 of 1927

Child Justice Act 75 of 2008

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Law of Evidence Amendment Act 45 of 1988

Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998

Promotion of Administrative Justice Act 3 of 2000

Promotion of National Unity and Reconciliation Act 34 of 1995

Traditional Courts Bill B15-2008.

Register of internet sources

Cornell 2009 www.isthisseattaken.co.za

Cornell D 2009 Is There a Difference That Makes a Difference Between Ubuntu and Dignity? www.isthisseattaken.co.za/pdf/Papers_Cornell.pdf [date of use 11 Sep 2010]

Department of Public Service and Administration [date unknown] www.dpsa.gov.za

Department of Public Service and Administration [date unknown] Batho Pele Handbook www.dpsa.gov.za/batho-pele/docs/BP_HB_optimised.pdf [date of use 17 Aug 2009]

Pinnock 1995 web.uct.ac.za.ezproxy.uct.ac.za

Pinnock D 1995 What Kind of Justice? web.uct.ac.za.ezproxy.uct.ac.za/depts/sjrp/publicat/whatknd.htm [date of use 16 Aug 2007]

Maepa 2005 www.iss.co.za

Maepa E (ed) 2005 Beyond Retribution: Prospects for Restorative Justice in South Africa - Institute for Security Studies Monograph No 111 www.iss.co.za/pubs/Monographs/No111/Chap2.htm [date of use 13 Sep 2010]

South African Law Commission 1997 www.justice.gov.za

South African Law Commission 1997 Alternative Dispute Resolution (Project 94): Issue Paper 8 www.justice.gov.za/salrc/iphapers/ip08_prj94_1997.pdf [date of use 28 Jun 2011]

List of abbreviations

Afr Hum Rts LJ	African Human Rights Law Journal
Buff Hum Rts L Rev	Buffalo Human Rights Law Review
Law & Soc Rev	Law and Society Review
LQR	Law Quarterly Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Tulane LR	Tulane Law Review