

## Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa

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### Summary

*From time immemorial the cultural value which epitomises togetherness and 'caring for each other' in a community has been a way of life in various African communities, including that of South Africa. According to this value one is his or her brother's or sister's keeper. This philosophy, which developed into a way of life, was expressed before the period of Enlightenment in Europe, considered as foregrounding a human rights discourse. In other words, a human rights discourse in the form of caring for one another was a lived reality and experience in Africa in terms of the ubuntu philosophy. The aim of this article is to examine the emerging trends of the ubuntu jurisprudence in South Africa. The South African model is chosen as a case study for several reasons. The country peacefully transited the apartheid era to democracy, arguably under the guidance of ubuntu. The ubuntu philosophy possibly is part of a South African jurisprudence. Unlike Western philosophy expressed in abstract terms and focused on individualism, the uniqueness of ubuntu rests upon the need to secure social equilibrium, compassion, humaneness and a strong consideration of the other's humanity.*

**Key words:** *ubuntu; cultural values; jurisprudence; South Africa*

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## 1 Introduction

The concept of human rights in the period of the Enlightenment (in Europe and America) was characterised by individualism and the application of rights to abstract subjects.<sup>1</sup> Prior to the Enlightenment, many parts of the world, including Africa, had civilisations in which caring for each other was a common feature. In Africa, and South Africa in particular, such a philosophy of caring for one another is known as 'ubuntu' in the Sotho and Zulu languages, in which the following are notable: *motho ke motho ka batho ba bang* (Sesotho intonation) and *umuntu ngumuntu ngabantu* (Isi-Zulu intonation), which literally mean that a person is a person only through others.<sup>2</sup> The notion of ubuntu is an expression of a harmonious African community way of life in which one's happiness is linked to the group's happiness. It epitomises a legal notion as reflecting a lived experience and is responsive to context.<sup>3</sup> According to Cornell and Van Marle, 'ubuntu in a profound sense, and whatever else it may be, implies an interactive ethic, or an ontic orientation in which who and how we can be as human beings is always being shaped in our interaction with each other'.<sup>4</sup> The philosophy of ubuntu is embedded in the African human rights system in the African Charter on Human and Peoples' Rights (African Charter) which provides for peoples' rights, or collective rights,<sup>5</sup> and also ensures that everyone has a duty towards the community,<sup>6</sup> as well as individual rights.

Although the current 'global' human rights architecture is informed by Enlightenment ideas, ancient African values may still be significant in decoding some national legal systems. Echoing Mazrui, Mbigi writes: 'Africa can never go back completely to its pre-colonial starting point but there may be a case for re-establishing contacts with familiar landmarks of modernisation under indigenous impetus.'<sup>7</sup> It is against this backdrop that this article explores the value of ubuntu in South African law. South Africa is chosen as a case study as its Constitution is considered a model<sup>8</sup> and, in addition, the country achieved the miracle of peaceful transition from the apartheid era to democracy and its jurisprudence has made significant strides in transforming society into an egalitarian one.<sup>9</sup> The article seeks to understand the

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1 MB Ramose *African philosophy through ubuntu* (2005) 83-84.

2 L Mbigi & J Maree *Ubuntu: The spirit of African transformation management* (1995) 1-7.

3 Ramose (n 1).

4 D Cornell & K van Marle 'Exploring ubuntu: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 205.

5 In the title of the African Charter.

6 Arts 27-29 African Charter.

7 Mbigi & Maree (n 2) 5.

8 JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2004) 71.

9 M Langford 'Domestic adjudication and economic, social and cultural rights: A socio-legal review' (2009) *Sur International Journal on Human Rights* 90.

role of ubuntu as a source of law in this development. To be specific, in terms of contribution, it seeks to explore whether there is an emerging ubuntu jurisprudence in South Africa and, if so, what the trends of such jurisprudence are and to what extent they differ from traditional Western approaches. To answer these questions, the article will examine decisions of the courts to unveil the place of ubuntu and to explain the specificity of ubuntu jurisprudence.

The article is divided into four parts including this introduction. The second part unpacks the concept of ubuntu by engaging with theorists' views as well as its role in the Truth and Reconciliation Commission (TRC). The third part examines the value of ubuntu in South African law and its emerging trends. In this part the article explores the ubuntu jurisprudence in the South African legal landscape and unveils its distinctiveness. The fourth and final part summarises the article in the form of concluding remarks.

## 2 Unpacking ubuntu

Although the word 'ubuntu' is regularly spoken of in Southern Africa, it is not simple to define as it has numerous meanings in different contexts. The reason why it is difficult to provide a clear definition of ubuntu in scholarly texts can be that it is rather challenging to transpose its meaning directly into English or other Western languages.<sup>10</sup> For the purpose of this article, given the context, ubuntu may be interpreted to mean

a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where [people have to rely on each other to survive].<sup>11</sup>

The above definition places a specific emphasis on notions of social harmony, love, togetherness and tolerance. For Ramose, ubuntu is the essence of African philosophy. He writes:<sup>12</sup>

Ubuntu is the root of African philosophy. The being of an African in the universe is inseparably anchored upon ubuntu. Similarly, the African tree of knowledge stems from ubuntu with which it is connected indivisibly. Ubuntu then is the wellspring flowing with African ontology and epistemology. If these latter are the bases of philosophy, then African philosophy has long been established through ubuntu. Our point of departure is that ubuntu may be seen as the basis of African philosophy. Apart from a linguistic analysis of ubuntu, a persuasive philosophical argument can be made that there is a 'family atmosphere', that is, a kind of

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10 Y Mokgoro 'Ubuntu and the law in South Africa' Paper delivered at the first Colloquium Constitution and Law held at Potchefstroom, South Africa, on 31 October 1997, <http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/98v1mokg.pdf> (accessed 18 January 2018).

11 Mokgoro (n 10) 2.

12 Ramose (n 1) 35.

philosophical affinity and kinship among and between the indigenous people of Africa. No doubt there will be variations within this broad philosophical 'family atmosphere'. But the blood circulating through the 'family' members is the same in its basics. In this sense, ubuntu is the basis of African philosophy.

This vigorous theorisation of ubuntu defines the nature of relationships among Africans. It highlights the significance of being humane in Africa. It shows how humanism encompasses a strong consideration of the other through whom one defines oneself. This emphasis differs from a cultural interpretation in which, in the words of Shutte,

the self [is] something private, hidden within our bodies', in African settings 'the self is outside the body, present and open to all. [It] is the result of the expression of all the forces acting upon us. It is not a thing, but the sum total of all the interacting forces. So we must learn to see ourselves as outside, in our appearance, in our acts and relationships, and in the environment around us.<sup>13</sup>

In this context, the existence of individuals is defined by the interplay between one another.<sup>14</sup> Zwart<sup>15</sup> observes that ubuntu symbolises the need to secure 'collective survival, rather than pursuing individual self-interest, and therefore relies on cooperation, interdependence, and collective responsibility'.

Ramose and others describe ubuntu as an exclusively African way of being. The legal scholar Cornell, however, links ubuntu to human dignity in line with the transformative attributes<sup>16</sup> of the South African Constitution, which seeks to move society away from the wrongs of the past and build an egalitarian society. In Cornell's approach to ubuntu, it is important to forgive the wrongs of the past and live together as one human family where respect for dignity is essential.

This approach is criticised for being false ubuntu, as echoing the 'nation building' or rainbow nation agenda which followed the end of apartheid. Under this agenda the interim Constitution's objective was to provide

a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex ... These can now 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.<sup>17</sup>

13 A Shutte *Ubuntu: An ethic for a new South Africa* (2001) 22-23.

14 Shutte (n 13) 23.

15 T Zwart 'Using local culture to further the implementation of international human rights: The receptor approach' (2012) 34 *Human Rights Quarterly* 555.

16 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

17 Constitution of the Republic of South Africa 200 of 1993; epilogue after sec 251 (my emphasis).

The consequence could have been a mere amnesty for the perpetrators of apartheid; it was not ubuntu that insists on reparation. Nevertheless, the epilogue above led to the adoption of the policy to establish the TRC,<sup>18</sup> and informed the decision of the courts to grant amnesty to the perpetrators in the AZAPO case.<sup>19</sup> Scholars such as Ramose, reject this as a misinterpretation of ubuntu.<sup>20</sup> Ramose is of the view that the implementers of apartheid strategically relied on ubuntu to avoid taking responsibility for their crimes. They tapped into the African philosophy of humanness to shield themselves against having to repair the wrongs of the past. In this register ubuntu, which is loaded with the notions of patience, kindness and communal cohesion, and cultural uniqueness and interpretive challenges are undermined to make room to advance the notion of a joint and manageable project to be completed under the notion of 'nation building'.<sup>21</sup> In this context, ubuntu is not a precise cultural tradition, but is the result of false and 'bloodless historiography', to quote Ramose.<sup>22</sup>

Furthermore, in the misinterpretation of ubuntu for a specific agenda, there was reliance on a prescription as if wrongdoings of the past were no longer relevant because they occurred a long time ago. This approach ignores the fact that under African law, prescription does not matter, as time cannot delete the truth.<sup>23</sup> In this vein, as correctly argued by Driberg, 'a debt or a feud is never extinguished till the equilibrium has been restored, even if several generations elapse ...'<sup>24</sup>

In an effort to restore equilibrium the TRC was established under the Promotion of National Unity and Reconciliation Act.<sup>25</sup> Anchored in ubuntu, 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'.<sup>26</sup> According to Archbishop Desmond Tutu, the Chairperson of the TRC, the latter underlines the importance of forgiveness and harmony for a better South Africa. This view was crafted in his book *No future without forgiveness*.<sup>27</sup> While calling for forgiveness on the part of the victims, Tutu is of the view that the perpetrators also must take responsibility for the harm caused and

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

19 *Azanian Peoples Organization (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 (4) SA 671 (CC) para 19.

20 MB Ramose 'The ethics of ubuntu' in PH Coetzee & APJ Roux (eds) *Philosophy from Africa* (2002) 324.

21 MO Eze *Intellectual history in contemporary South Africa* (2010) 109-121.

22 R Mogobe 'The ethics of ubuntu' in Coetzee & Roux (n 20) 329.

23 JH Driberg 'The African conception of law' in E Cotran & NN Rubin (eds) *Readings in African law* (1969) 172.

24 As above.

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

26 *Truth and Reconciliation Commission Report* (1998) ch 4 48.

27 D Tutu *No future without forgiveness* (2000).

apologise profusely. Subsequently, responsibility and forgiveness prepare the ground for harmony and transformation in terms of reparations in the form of compensation and a change in socio-economic conditions.

Critics of Tutu are of the view that it is almost impossible to apply his theory, which focuses on reconciliation between individuals at the state level, whereas there are several actors, including groups, and numerous other stakeholders.<sup>28</sup> From this perspective, individual reconciliation is not necessarily the panacea of political reconciliation. Nevertheless, it can be argued to Tutu's credit that the state, groups and communities are made up of individuals, and reconciliation between individuals will filter down to society where the personal and political often intertwine. As observed by Oelofsen, Tutu's theory of ubuntu is crafted 'on an Afro-communitarian metaphysics and ethics' which goes beyond 'the private sphere of intimate personal relationships' to cover the community as whole.<sup>29</sup> In this vein, Tutu writes:<sup>30</sup>

A person is a person through other persons. None of us comes into the world fully formed. We would not know how to think, or walk, or speak, or behave as human beings unless we learned it from other human beings. We need other human beings in order to be human. I am because other people are.

Building on the African communitarian way of life or ubuntu, the TRC was a platform to interrogate and unearth the human rights atrocities of the past, through reflection, within a reconciliatory process that aimed to establish the truth, and with perpetrators being encouraged to take responsibility for past deeds. All stakeholders relied on ubuntu to unearth the truth, and to promote reconciliation and healing for both the victims and the perpetrators. Swanson observes that in this context ubuntu as an African philosophy was used beyond the 'forensic' functions of fact – arriving at a finding with regard to the atrocities committed by the former regime.<sup>31</sup>

As well as revealing the truth, the harmony ethos of ubuntu enabled people to understand that they were linked and had to live together under the same sky, hence the need to heal as a society. Describing the TRC, Henebury writes:<sup>32</sup>

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28 D Moellendorf 'Reconciliation as a political value' (2007) 38 *Journal of Social Philosophy* 211-12.

29 R Oelofsen 'Afro-communitarianism and the nature of reconciliation' PhD thesis, Rhodes University, 2013 49.

30 D Tutu (introduced by) *Peace: The words and inspiration of Mahatma Gandhi* (2007) 3.

31 D Swanson 'Ubuntu: An African contribution to (re)search for/with a "humble togetherness"' (2007) 2 *Journal of Contemporary Issues in Education* 55.

32 A Henebury 'Review of Cornell, Drucilla, *Law and revolution in South Africa: Ubuntu, dignity, and the struggle for constitutional transformation*' *H-Socialisms, H-Net Reviews* 2, June 2015, <http://www.h-net.org/reviews/showrev.php.id=Y2394> (accessed 2 December 2018).

The act of testimony – which was a central pillar of its proceedings and was a precondition for amnesty – was not only for the sake of the victims who heard the truth about the fate of their loved ones and gained a public acknowledgment of the pervasive human rights violations under apartheid. However, as a shared space of communal mourning, it was also supposed to allow the perpetrators to restore their own human beings.

In other words, the ubuntu philosophy was the healing source upon which every South African needed to rely to be able to recover from the horrors of the past. The building blocks for the miracle in the transition to democracy as a peaceful process were found in 'the pre-European African concept [of] ubuntu [to] establish a personal and national sense of justice'.<sup>33</sup>

Nevertheless, for many the TRC was a travesty of justice as the general perception of unaccountability for harms caused remains a reality. Many perpetrators of human rights violations were granted amnesty and let off the hook or receiving a minimum sentence not proportional to the crime committed in the name of 'restorative justice'. Echoing the South African TRC,<sup>34</sup> Oelofse and Oosthuizen write:<sup>35</sup>

The TRC did not make enough efforts towards ensuring reconciliation in the end. People believed that reconciliation would occur automatically after the TRC processes had taken place, but this was not the case.

In reality, the high level of emotional pain caused by the truth hinders reconciliation.<sup>36</sup>

Reflecting on the issue Mamdani argues that reconciliation is unachievable without reparations which are essential for social reconciliation.<sup>37</sup> For it to be achieved, to protect the violators of human rights or beneficiaries of the violations, they in return must pay compensation to their victims, and this should be enforced through legislative means.<sup>38</sup> This suggests that '[r]eparations need to be drawn from perpetrators and beneficiaries, in order to level the societal inequalities'.<sup>39</sup> As this did not happen the claim is that for many the TRC was simply a 'denial of justice'. In similar vein, Khulumani (a non-governmental organisation (NGO)) noted that in spite of the 'complexity of the process that the government is faced with', the process of reparations was an integral 'part of the healing of the

33 JR Saul *On equilibrium* (2001) 94.

34 Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* 306.

35 M Oelofse & A Oosthuizen 'The knowledge and perceptions of history students of South Africa's Truth and Reconciliation Commission (TRC)' (2014) 10 *The Journal for Transdisciplinary Research in Southern Africa* 260.

36 As above.

37 M Mamdani 'When does reconciliation turn into a denial of justice?' Sam Nolutshungu memorial lecture (1998); M Mamdani *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996).

38 Mamdani (1998) (n 37).

39 Oelofsen (n 29) 111.

nation'.<sup>40</sup> This view is shared by the Apartheid Debt and Reparations Campaign, Jubilee South Africa, which said that 'the issue of accountability for reparations for apartheid human rights violations was still unresolved and vowed to continue its fight for compensation for survivors'.<sup>41</sup> From this standpoint, it was argued that the TRC was a bridge that enabled whites to map out a cynical deal to transfer political power to blacks and keep economic power and privileges in a context where transformation remains a myth.<sup>42</sup> These views clearly underline the importance of reparations in the reconciliation process, even though it could be argued that the adoption of policies of affirmative action which prioritise the previously-disadvantaged groups in various spheres of society is an attempt to advance distributive justice and foster structural changes in order to transform the society into an egalitarian one.<sup>43</sup> In a similar vein, some critics of the concept argue that ubuntu has been 'elevated into a central element of a new cultural nationalism'<sup>44</sup> in the name of nation building, but unfortunately disenfranchised dissidents.<sup>45</sup> Swartz writes that

while ubuntu provides a basis for civic virtue, moral renewal and public-spiritedness, like so much else in the aftermath of apartheid, it conceals the need for redistributive justice and silences those who call attention to it – all in the name of public-spiritedness.<sup>46</sup>

However, restorative justice is more about securing social harmony 'to build partnerships to re-establish mutual responsibility for constructive responses to wrongdoing within [broken] communities'.<sup>47</sup> This approach to justice is not retributive and is not based on punishment but on the need to redress the damage in a fractured society, and is centred on the African communitarian way of life, and has informed the TRC. According to Tutu, it is important to distinguish the 'African understanding of justice' from the Western approach. Tutu observes.<sup>48</sup>

I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern

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40 K August 'Reconciliation in the South African political context: A challenge to the church for community building' (2005) 88 *Scriptura* 18.

41 As above.

42 P-J Salazar *An African Athens: Rhetoric and the shaping of democracy in South Africa* (2002); KH Wilson 'Is there an interest in reconciliation?' (2004) 7 *Rhetoric and Public Affairs* 367.

43 Oelofsen (n 29) 121.

44 C Marx 'Ubu and ubuntu: On the dialectics of apartheid and nation building' (2002) 29 *Politikon* 52.

45 C Himonga, M Taylor & A Pope 'Reflections on judicial views of ubuntu' (2013) 16 *Potchefstroom Electronic Law Journal* 5.

46 S Swartz 'A long walk to citizenship: Morality, justice and faith in the aftermath of apartheid' (2006) 3 *Journal of Moral Education* 560.

47 L Walker 'Restorative justice: Definition and purpose' in K van Wormer & L Walker *Restorative justice today: Practical applications* (2013) 8.

48 Tutu (n 27) 51.



is not retribution and punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture of relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation.

This statement highlights Africanness or an ubuntu source of forgiveness which informed the TRC. However, the TRC also had the flavour of 'theological demands for confession, repentance and, most importantly, forgiveness'<sup>49</sup> as found in the Christian faith.<sup>50</sup> Accordingly, the perpetrator of the violence or the sinner confesses his or her sin to the victim who forgives, and the matter is resolved. According to Hatch, the forgiveness of the sin by the victim provides a platform on which 'the spiritual reality of ubuntu is released in reconciliation'.<sup>51</sup> This suggests that ubuntu and the Christian faith are linked, hence the pertinence of the view that the 'TRC incorporated restorative justice and was based on the Christian concept of "forgiveness" and the African view of "ubuntu"',<sup>52</sup> or that its reconciliation agenda was 'a theologically developed expression of ubuntu, the much-heralded, traditional African notion of social harmony'.<sup>53</sup> As well, the reference to Tutu's approach to reconciliation as an 'African-Christian vision of ubuntu'.<sup>54</sup>

Notwithstanding the link between the Christian faith and the African value in seeking reconciliation and social harmony, it could be argued that the African reality is more tangible because, as correctly observed by Smit,<sup>55</sup>

[The new] South Africa is not the kingdom of God ... The logic of Christian confession of guilt and forgiveness is not the logic of the public, political and economic world. The grammar of Christian contrition, confession and absolution is not the grammar of public jurisprudence.

In other words, the South African community is real and does not depend only on faith for its existence, but is regulated by norms, social and traditional institutions in which ubuntu is crafted. Bishop

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49 August (n 40) 21.

50 TS Maluleke 'National unity and reconciliation in South Africa' in M Guma & L Milton (eds) *An African challenge to the church in the 21st century* (1997) 14.

51 J Hatch 'Between religious visions and secular realities: (Dia)logology and the rhetoric of reconciliation' 1 2, [http://global.wisc.edu/reconciliation/library/papers\\_open/hatch.pdf](http://global.wisc.edu/reconciliation/library/papers_open/hatch.pdf) (accessed 16 June 2017).

52 Oelofse & Oosthuysen (n 35) 257.

53 For a thorough explication of Tutu's ubuntu theology, see MJ Battle *Reconciliation: The ubuntu theology of Desmond Tutu* (1997).

54 Hatch (n 51); see also Salazar (n 42); Wilson (n 42).

55 DJ Smit 'The Truth and Reconciliation Commission: Tentative religious and theological perspectives' (1995) 90 *Journal of Theology for South Africa* 12; see also August (n 40) 24.

Tutu, the Chairperson of the TRC, was resolute in using and permanently referring to the term ubuntu in his conclusions and related statements.

Based on the analysis above it can be argued that ubuntu was trumped by the need for nation building in South Africa. Nevertheless, at the same time, the authentic ubuntu which expresses togetherness cannot be dissociated from harmony and nation building. In spite of the shortcomings of the TRC it may be argued that ubuntu is part of the South African landscape and has influenced the country's jurisprudence. In other words, claiming that ubuntu philosophy was significant in the TRC, which kept South African society together, would not be an exaggeration. In addition, in spite of its relatively low usage by the courts, it cannot be argued that it is not part of the South African legal landscape.

The African cultural value of ubuntu was significant from the beginning in laying the foundation of the new South Africa, and cascades down to the 1996 Constitution as it resonates with its value.<sup>56</sup> Himonga, Taylor and Pope write that 'the relevance of ubuntu for South Africa's new order extended well beyond what a narrow reading of its brief appearance in the post-amble of the interim Constitution might have suggested'.<sup>57</sup> Notwithstanding numerous views<sup>58</sup> which extol ubuntu for being a moral theory which 'serves as a cohesive moral value in the face of adversity',<sup>59</sup> the theory had been criticised for being vague,<sup>60</sup> and a threat to individual freedoms,<sup>61</sup> obsolete and anti-gender equality.<sup>62</sup>

As correctly argued by Himonga, the vagueness of the concept is its strength as it provides avenues for an adjustment of customary realities to advance human rights.<sup>63</sup> It is submitted that ubuntu is an

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56 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) para 237.

57 Himonga, Taylor & Pope (n 45) 380.

58 T Metz 'Towards an African moral theory' (2007) 15 *The Journal of Political Philosophy* 321; T Metz & JBR Gaie 'The African ethic of ubuntu/botho: Implications for research on morality' (2010) 39 *Journal of Moral Education* 273; JD Bessler 'In the spirit of ubuntu: Enforcing the rights of orphans and vulnerable children affected by HIV/AIDS in South Africa' (2008) 31 *Hastings International and Comparative Law Review* 33; M Letseka 'Educating for ubuntu/botho: Lessons from Basotho indigenous education' (2013) 3 *Open Journal of Philosophy* 333.

59 M Letseka 'In defence of ubuntu' (2012) 3 *Studies in Philosophy and Education* 4.

60 T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 533; see also P Enslin & K Horsthemke 'Can ubuntu provide a model for citizenship education in African democracies?' (2004) 40 *Comparative Education* 545.

61 GM Nkondo 'Ubuntu as a public policy in South Africa: A conceptual framework' (2007) 2 *International Journal of African Renaissance Studies* 90.

62 D Cornell 'Is there a difference that makes a difference between ubuntu and dignity?' in S Woolman & D Bilchitz (eds) *Is this seat taken? Conversations at the bar, the bench and the academy about the South African Constitution* (2012) 221.

63 C Himonga 'The right to health in an African cultural context: The role of ubuntu in the realisation of the right to health with special reference to South Africa' (2013) 57 *Journal of African Law* 173.

African reality<sup>64</sup> which on every account fosters human rights and social justice, including gender justice. It is an opportunity for the implementation of social justice and equality for the sake of the community as a whole. According to Metz ubuntu is 'fairly precise, as it clearly accounts for the importance of individual liberty, and is readily applicable when addressing present-day South Africa as well as other societies'.<sup>65</sup> The next section focuses on examining ubuntu jurisprudence and the trends in South Africa.

### 3 Ubuntu jurisprudence and its specificity

This section starts with an examination of ubuntu jurisprudence before examining its trends and specificity.

#### 3.1 Ubuntu jurisprudence

This section unpacks aspects of the Constitution and case law to unveil ubuntu jurisprudence.

##### 3.1.1 Ubuntu and the 1996 South African Constitution

Notwithstanding controversial views on ubuntu in the 1993 interim Constitution discussed earlier,<sup>66</sup> the African notion is an indication of what was to be expected in a post-apartheid South Africa. However, the word 'ubuntu' does not feature in the 1996 South African Constitution, which created a perception that the African philosophy was excised from the law of the land. Moosa writes:<sup>67</sup>

The omission of ubuntu must therefore mean that the Constitution was de-Africanised in the re-drafting process. With that the religio-cultural values of African people are also devalued. Thus the desire to formulate a core legal system which encapsulates the multiple value systems in South Africa was not necessarily accomplished in the final Constitution.

The current prevailing perception that ubuntu erroneously was removed from the South African Constitution leads to much criticism. In this regard the Constitution seems to lack the moral strength needed to secure harmony and fight crime in the country and, as such, 'it is a worthless piece of paper which is set to do more harm to us as a people than even the devil-inspired apartheid'.<sup>68</sup> This strong criticism of the Constitution as perceived to be removed from

64 B Chigara 'The *Humwe* principle: A social-ordering *grundnorm* for Zimbabwe and Africa' in R Home (ed) *Essays in African land law* (2011) 113.

65 Metz (n 60) 534.

66 See the epilogue of the 1993 interim Constitution (n 17).

67 E Moosa 'Tensions in legal and religious values in the 1996 South African Constitution' in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000) 131.

68 C Mogale 'We are breeding a generation of scum' *City Press* 25 October 1997, as quoted by Mogkoro (n 10) 6.

'ubuntu(ism)'<sup>69</sup> in itself is indicative of the significance of ubuntu in South African society.

Nevertheless, the perception as to the removal of ubuntu from the Constitution is perhaps ill-founded. Although the Constitution did not expressly mention ubuntu, a teleological interpretation or an investigation of its intent reveals that the Constitution carries within it the spirit of ubuntu. In this respect it calls for equality, dignity, non-discrimination and all other fundamental rights recorded in the Bill of Rights.<sup>70</sup> Its ability to reconcile the people of South Africa under the equality tenets of the Constitution has led to a characterisation of this Constitution as 'transformative'.<sup>71</sup> The transformation objective of the Constitution is a way of carrying forward the ubuntu(ism) without which society cannot become equal. Letseka correctly observes that '[u]buntu has a critical role to play in enabling South Africans to achieve a common understanding vis-à-vis the constitutional values [revolving] around equality and respect for human rights in general'.<sup>72</sup> Sharing this view, Himonga, Taylor and Pope argue that '[s]ince *S v Makwanyane*, ubuntu has become an integral part of the constitutional values and principles that inform the interpretation of the Bill of Rights and other areas of law'.<sup>73</sup>

Furthermore, ubuntu is elevated by the Constitution which unequivocally recognises customary law applicable by 'the courts subject to the Constitution'.<sup>74</sup> This development illustrates the vital location of ubuntu in the South African legal landscape. It could be argued that subjecting customary law to the Constitution seeks to expunge negative features of customary law from the national law and, more importantly, to prevent marginal development of customary law principles. In this regard, the Constitution expressly requests that '[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.<sup>75</sup> This requirement clearly suggests that the Constitution is paramount and is the benchmark with which all other laws should comply. In reality there is no divergence between the value of the Constitution and ubuntu which is implied in it. On the contrary the two are linked and although South African law in general is under 'the scrutiny of the Constitution, [t]he values of ubuntu can therefore provide it with the necessary indigenous impetus',<sup>76</sup> in the words of Mokgoro.

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69 As above.

70 See Ch 2 of the South African Constitution.

71 KE Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

72 Letseka (n 59) 48.

73 Himonga, Taylor & Pope (n 45) 370.

74 Sec 211(3) of the Constitution of the Republic of South Africa, 1996.

75 Sec 39(2) (my emphasis).

76 Mokgoro (n 10) 10.

As far as the application of customary law by the courts is concerned, the Constitution remains the benchmark for legislation (including customary law). From this perspective the patriarchal element in customary law, for example, depriving women of the right to property and inheritance, does not comply with the principle of equality enshrined in the Constitution. This was confirmed by the Constitutional Court in the *Bhe* case<sup>77</sup> where the male primogeniture rule under customary law was declared unconstitutional. This example clearly explains the application of customary law 'by the courts subject to the Constitution'.<sup>78</sup>

Nevertheless, the value of customary law cannot be ignored. The significance of customary law was underlined by the *Bhe* Court which noted its flexibility as needed for the resolution of conflicts and preserving the cohesion and harmony in families and 'the nurturing of healthy communitarian traditions such as ubuntu'.<sup>79</sup> Highlighting the importance of customary law, Langa J noted that it

provide[s] a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu.<sup>80</sup>

Similarly, in *Mayelane v Ngwenyama*<sup>81</sup> the Constitutional Court reiterated the value of customary law 'as one of the primary sources of law under the Constitution'. According to the Court,<sup>82</sup> this means *inter alia* recognising that

the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution in family and clan meetings, of disputes and disagreements; and ... [that] these aspects provide a setting which contributes to the unity of family structures and the fostering of cooperation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like ubuntu.

Furthermore, while mindful of the need to ensure the constitutionality of customary law, courts are expected to apply customary law<sup>83</sup> whenever such law is applicable to a specific case in a particular

77 *Bhe & Others v Magistrate, Khayelitsha & Others* (2004) AHRLR 212 (SACC 2004).

78 Sec 211(3) of the Constitution.

79 Citing Mokgoro J in *S v Makwanyane* (n 56) paras 307-308.

80 *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) para 45.

81 *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

82 *Mayelane v Ngwenyama* (n 81) para 24.

83 Sec 211(3) of the Constitution requires 'the courts to apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. See also sec 39(2), which requires the courts to promote the spirit and purport of the Bill of Rights when interpreting any legislation or developing common or customary law.

context. Prior to the *Mayelane* case,<sup>84</sup> customary law was validated in the *Gumede* case<sup>85</sup> where it was held that customary law issues

should not be seen through the prism of marital property regimes under common law or divorce legislation that regulates civil marriages ... but to be understood within their own setting which does not place a premium on the dichotomy between marriages in and out of community of property.<sup>86</sup>

These examples clearly demonstrate that ubuntu, which echoes customary law, has an important place in South African law. In summary, the fact that the Constitution does not mention ubuntu specifically does not mean that this notion is discarded in the supreme law of the land. On the contrary, ubuntu is the source and the inspiration which converts the Constitution into a transformative document. Importantly, customary law, which echoes ubuntu, explicitly was given the force of law by the Constitution<sup>87</sup> and has been given effect to by the Constitutional Court.<sup>88</sup>

### 3.1.2 Ubuntu and the South African courts

This section demonstrates how the courts have shown that ubuntu is a source of law, and it further assists in understanding the meaning or significance of this concept. Claiming that ubuntu is a source of law suggests that a judge cannot simply rely on the Constitution to render judgments without reference to his or her environment, or the local culture and value embedded in society. This reality was recognised outside Africa when Walsh J of the European Court of Human Rights wrote:<sup>89</sup>

In a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below it or too far above it, the law is brought into contempt.

Even though in his context Walsh J was calling for respect for the legislative process, in an African context it amounts to a call for respect to be shown to traditions and social realities on which the law is grounded; to respect the local reality which is also a source of law. In this perspective, Sachs J urges courts to consider 'African law and legal thinking as a source of legal ideas, values and practice' as capable of guiding South African constitutional jurisprudence.<sup>90</sup> He is of the view that the South African legal system will not evolve in an appropriate manner if the courts fail to draw 'from all the streams of justice in the country'; if they do not give 'long overdue recognition'

84 *Mayelane v Ngwenyama* (n 81).

85 *Gumede (born Shange) v The President* 2009 (3) BCLR 243 (CC).

86 *Gumede* (n 85) para 43.

87 Sec 211.

88 See *Mayelane v Ngwenyama* (n 81) and *Bhe* (n 77).

89 *Dudgeon v United Kingdom* (1982) 4 EHRR 149 184.

90 *Makwanyane* (n 56) para 365.

to African legal traditions;<sup>91</sup> or if they do not recognise ubuntu as a source of law. In this vein, as will be demonstrated below, the notion of ubuntu is recognised in numerous examples of South African case law. Judging by the significant place of ubuntu in the jurisprudence of the Constitutional Court, the concept is 'far more important than one might generally tend to assume'.<sup>92</sup> It features in numerous pronouncements of the Constitutional Court,<sup>93</sup> including the following cases:<sup>94</sup> *Makwanyane*;<sup>95</sup> *Port Elizabeth Municipality v Various Occupiers*;<sup>96</sup> *Dikoko v Mokhatla*;<sup>97</sup> *Masethla v President of the RSA*;<sup>98</sup> *Union of Refugee Women v Private Security Industry Regulatory Authority*;<sup>99</sup> *Barkhuizen v Napier*;<sup>100</sup> *Bhe*;<sup>101</sup> *The Citizen v McBride*;<sup>102</sup> and *Koyabe*.<sup>103</sup>

Outside the Constitutional Court, ubuntu was also discussed in *Bophuthatswana Broadcasting Corporation v Ramosa*;<sup>104</sup> *S v Mandela*;<sup>105</sup> *Crossley v The National Commissioner of the South African Police Services*;<sup>106</sup> *Du Plooy v Minister of Correctional Services*;<sup>107</sup> *City of Johannesburg v Rand Properties (Pty) Ltd*;<sup>108</sup> and *Afriforum v Malema*.<sup>109</sup> Although these cases are not of lesser importance, the section focuses on Constitutional Court cases. Ubuntu has informed decisions in various areas of law, including criminal law, private law, eviction law, social security, migrants' rights, contract law and many other fields of law.<sup>110</sup>

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91 As above.

92 K Malan 'The suitability and unsuitability of ubuntu in constitutional law: Inter-communal relations versus public office-bearing' (2014) 47 *De Jure* 232.

93 Although there are some decisions by the High Court on ubuntu, the focus here is on the Constitutional Court. For more on ubuntu at the High Court, and those judgments that may be interpreted as capturing the notion of ubuntu, see in general D Cornell & N Muvangua *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012).

94 For an extensive analysis of some of these cases, see Malan (n 92) 234-239.

95 *Makwanyane* (n 56).

96 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC).

97 2006 (6) SA 235; 2007(1) BCLR 1 (CC).

98 2008 (1) SA 566; 2008(1) BCLR 1 (CC).

99 2007 (4) SA 395; 2007 (4) BCLR 339 (CC).

100 2007 (5) SA 323; 2007 (7) BCLR 691 (CC) para 50.

101 *Bhe* (n 77) paras 45 & 163.

102 *The Citizen 1978 (Pty) Ltd & Others v McBride (Johnstone & Others as Amici Curiae)* 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) paras 164-165, 168, 210 & paras 216-218.

103 *Koyabe & Others v Minister for Home Affairs & Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) para 62.

104 1997 HOL 283 (B).

105 2001 (1) SACR 156 (C).

106 2004 (3) All SA 436 (T).

107 2004 (3) All SA 613 (T).

108 (253/06) [2007] ZASCA 25; [2007] 2 All SA 459 (SCA); 2007 (6) SA 417 (SCA); 2007 (6) BCLR 643 (SCA).

109 *Afri-Forum & Another v Malema & Others* [2011] ZAEQC 2; 20968/2010.

110 See T Bennett 'Ubuntu: An African equity' 2011 (14) *Potchefstroom Electronic Law Journal* 30.

The landmark case which signalled ubuntu as a source of law was *Makwanyane*.<sup>111</sup> In this case capital punishment was declared unconstitutional because of its lack of compassion, respect for dignity and solidarity, amongst other grounds. In this important judgment, Langa<sup>112</sup> and Mokgoro<sup>113</sup> explained that ubuntu was a culture that emphasises community, interdependence, togetherness, respect, conformity to basic norms and collective unity, and denotes humanity and morality. In addition, it is equivalent to duty to the community and sharing of co-responsibility and the mutual enjoyment of rights by all. Even though Justices Ackerman, Didcott, Kentridge, Kriegler and O'Regan, as well as the main order, did not mention ubuntu, nor did they find that the death penalty was inherently incompatible with South African culture, the features of ubuntu, as highlighted by Justices Langa,<sup>114</sup> Mokgoro,<sup>115</sup> Sachs,<sup>116</sup> Madala<sup>117</sup> and Mahomed,<sup>118</sup> were instrumental in abolishing the death penalty which violates the philosophy of compassion, love and caring for each other and, above all, of dignity. Malan in his analysis of the significance of ubuntu in South African jurisprudence writes (correctly in my view) that '[t]he first case where ubuntu featured prominently was in *S v Makwanyane*'.<sup>119</sup> Although ubuntu was not mentioned by all the judges, and did not appear in the main judgment, its essential place in reaching the decision cannot be ignored.

The other interesting constitutional law case where the nature and aim of ubuntu were clarified is *AZAPO v TRC*.<sup>120</sup> In this case a black consciousness movement questioned the constitutionality of the amnesty provided to culprits of apartheid era crimes by the TRC. According to the applicant such amnesty was unconstitutional as it prevented the victims of apartheid seeking a remedy for the violations of their rights provided for by the Constitution. The Court disagreed with the applicant on the ground that the aim of the TRC was to 'promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past'.<sup>121</sup>

Although this decision is controversial, as shown earlier, it can be argued that it infused the South African legal system with the African culture of understanding, tolerance and reconciliation. Henebury observes that the *Azapo* decision 'amount[s] to a dismissal of retributive in favour of restorative justice, bringing to the fore the

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111 *Makwanyane* (n 56).

112 *Makwanyane* (n 56) para 224.

113 *Makwanyane* para 308.

114 *Makwanyane* para 224.

115 *Makwanyane* paras 307, 308, 309, 311 & 313,

116 *Makwanyane* paras 374-380.

117 *Makwanyane* paras 237, 241, 243, 244, 245, 250 & 266.

118 *Makwanyane* para 263.

119 Malan (n 81) 235.

120 *AZAPO & Others v TRC & Others* 1996 (4) SA 671 (CC).

121 *AZAPO v TRC* (n 120) para 677.



aspirational character of ubuntu'<sup>122</sup> which seeks social harmony to transform the society for the good of all.

In relation to the rights of migrants, another insightful case in which the Constitutional Court relied on ubuntu to protect a non-South African citizen's right to social security<sup>123</sup> is *Khosa*.<sup>124</sup> A group of permanent residents in South Africa challenged the constitutionality of some provisions of the Social Assistance Act 59 of 1992 and the Welfare Laws Amendment Act 106 of 1997. These provisions limited access to social security to South African citizens. The provisions also excluded primary caregivers from accessing the Child Support Grant for children in their care, especially where these children are non-South African citizens. Foster-care parents did not have to comply with the requirement of citizenship; children of non-citizens would have been separated from their families to join a foster family in order to benefit from the Child Support Grant.

The Court acknowledged the vulnerability of permanent residents and held that refusing them the benefit of social security was inconsistent with section 27(1)(c) of the Constitution which entitles 'everyone' to access to social security. The Court further held that excluding permanent resident children from social grants constituted unfair discrimination and, taking into account the need of care of everyone, including permanent residents, it concluded that 'everyone's right to access social security encompasses permanent residents in the country'. This ruling is another application of ubuntu.

This type of reasoning also informed the decision of the Court in another case dealing with migrants, namely, that of *Union of Refugee Women*.<sup>125</sup> At the centre of this case is the prohibition upon refugees taking employment in the security industry in South Africa. The Court per Sachs J held that this prohibition constituted unfair discrimination.<sup>126</sup> Relying on ubuntu, Sachs J emphasised that '[t]he culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves is not something new in our country'.<sup>127</sup>

In a similar vein, in *Koyabe*<sup>128</sup> the issue before the Constitutional Court was to find whether or not certain constitutional and statutory rights of some Kenyan nationals living in South Africa had been violated by an administrative action (amounting to the withdrawal of residence permits) taken by the Department of Home Affairs. The Court unanimously found that it was illegal or inappropriate to

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122 Henebury (n 32) 2.

123 See sec 27(1)(c) of the Constitution.

124 *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

125 *Union of Refugee Women* (n 99) para 145.

126 *Union of Refugee Women* (n 99) para 147.

127 *Union of Refugee Women* para 145.

128 *Koyabe* (n 103) (my emphasis).

declare foreigners illegal inhabitants in the country without providing reasons behind the decision: The Court held:<sup>129</sup>

In the context of a contemporary democratic public service like ours, where the principles of *batho pele*, coupled with the values of *ubuntu*, enjoin the public service to treat people with respect and dignity and avoid undue confrontation, the Constitution indeed entitles the applicants to reasons for the decision declaring them illegal foreigners. It is excessively over-formalistic and contrary to the spirit of the Constitution for the respondents to contend that under section 8(1) they were not obliged to provide the applicants with reasons.

This is a clear injunction to the state to respect the dignity of all people in reaching a decision affecting people whether they are foreign nationals or not. This decision by the Court demonstrates that ubuntu is a source of law. Sharing this view, Himonga, Wilson and Pope write that '[w]ere it not able to call on the principles of ubuntu, one wonders how the Court would have substantiated its position'.<sup>130</sup>

The importance of ubuntu in the law of contract was highlighted by the Constitutional Court in the case of *Barkhuizen v Napier*<sup>131</sup> in which the Court had to pronounce whether the time-limitation clause in a short-term insurance contract should comply with the reasonableness and fairness standards or be found to violate public policy. The Court responded positively by highlighting the need to advance reasonableness and fairness, standards which echo ubuntu. The Court held:<sup>132</sup>

Broadly speaking the test announced in *Mohlomi*<sup>133</sup> is whether a provision affords a claimant an adequate and fair opportunity to seek judicial redress. Notions of fairness, justice and equity, and reasonableness cannot be separated from public policy. Public policy takes into account the necessity to do simple justice between individuals. Public policy is informed by the concept of ubuntu. It would be contrary to public policy to enforce a time-limitation clause that does not afford the person bound by it an adequate and fair opportunity to seek judicial redress.

The other case in which the relevance of ubuntu to the law of contract is evident is *Everfresh Market Virginia*.<sup>134</sup> The Constitutional Court was approached to decide whether values, such as ubuntu, that inform the Bill of Rights should apply in the law of contract or whether the latter should rely on law from the colonial period embedded in the common law. The matter was raised after Everfresh had been evicted from a leased property by Shoprite Checkers. The decision of the High Court, upheld by the Supreme of Court of Appeal, was in favour of Shoprite with a strong reliance on the

129 *Koyabe* (n 103) para 62.

130 Himonga, Wilson & Pope (n 45) 415.

131 *Barkhuizen v Napier* (n 100).

132 *Barkhuizen v Napier* para 51.

133 *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC); 1996 (12) BCLR 1559 (CC).

134 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

common law. While seeking leave to appeal, the applicant advanced new arguments based on the need to consider the values that inform the Bill of Rights, namely, good faith and ubuntu. While expressly recognising the significant place of ubuntu 'as informing public policy in a contractual context',<sup>135</sup> the majority of the Court, however, refused leave to appeal not because of the inconsistency of ubuntu and good faith with contract law, but because the applicant had initially agreed with the decision of the High Court based on the common law,<sup>136</sup> and raised the ubuntu question only in the Constitutional Court. Moseneke J observed:<sup>137</sup>

Had the case been properly pleaded, a number of interlinking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact.

The minority opinion underlined the need effectively to transform contract law by moving from the colonial legal tradition at the centre of common law<sup>138</sup> to adopt an approach which captures ubuntu. Yacoob J explained:<sup>139</sup>

It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is in my view, too narrow an approach ... The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu.

The importance of ubuntu can also be perceived in a case of eviction. In *Port Elizabeth Municipality v Various Occupiers*<sup>140</sup> the case was anchored on the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE).<sup>141</sup> The aim of this legislation is to protect homeless people who occupy private property from illegal eviction. In this case, the Municipality sought an eviction order against 68 persons who had erected shacks on private land within the municipality after having received a petition signed by 1 600 persons who supported the removal of illegal occupiers. Sachs J reminded the applicant that

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.<sup>142</sup>

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135 *Everfresh Market Virginia* (n 134) para 61.

136 *Everfresh Market Virginia* paras 56, 59, 60 & 61.

137 *Everfresh Market Virginia* para 71.

138 *Everfresh Market Virginia* para 23.

139 *Everfresh Market Virginia* para 24.

140 *Port Elizabeth Municipality* (n 96) para 37.

141 Prevention of Illegal Evictions From and Unlawful Occupation of Land Act 19 of 1998.

142 *Port Elizabeth Municipality* (n 96) para 37.

This view was a clear reliance on ubuntu in dealing with issues of private property. Sachs J reminded the defendant:<sup>143</sup>

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 and should be considered when dealing with foreigners.

This reliance on ubuntu has led to the development of what is known as the concept of 'meaningful engagement' in which parties to a dispute are encouraged to talk to each other, to engage, to find suitable solutions to conflicts. 'Meaningful engagement' was first used in the case of *Olivia Road*,<sup>144</sup> where the City of Johannesburg, seeking an eviction order to remove approximately 400 people who illegally occupied unsafe buildings, was requested to meaningfully engage with them to 'resolve the differences and difficulties aired in this application in the light of the *values of the Constitution*, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned'.<sup>145</sup> After engaging with each other the parties agreed to make the building safer and more habitable and provide alternative accommodation for the illegal occupiers in the city. This agreement was endorsed by the Court, which later ruled that allowing a municipality to evict people from their home without meaningfully engaging them would amount to the violation of the spirit and purpose of the Constitution.<sup>146</sup>

The concept of meaningful engagement has now been institutionalised as it was relied on in numerous cases,<sup>147</sup> including matters around education rights,<sup>148</sup> but it is criticised for not engaging the substantive rights at stake, deferring the outcome of the litigation to the engagement between the parties.<sup>149</sup> Liebenberg is concerned that 'meaningful engagement as an adjutory strategy may descend unto an unprincipled, normatively empty process of

143 As above. A similar conclusion decision was reached in *Koyabe* (n 103).

144 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

145 Order 1 (my emphasis).

146 *Olivia Road* (n 144) para16.

147 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC); *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC), *Abahlali base Mjondolo Movement of South Africa & Another v Premier of the Province of KwaZulu-Natal & Others* 2010 (2) BCLR 99 (CC).

148 *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 (8) BCLR 761 (CC) (see paras 74-78); *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) paras 128 & 139; *MEC for Education v Governing Body of the Rivonia Primary School* 2013 (6) SA 582 (CC) paras 69, 72 & 73.

149 S van der Berg 'Conceptualising meaningful engagement in South Africa: Eviction cases' exclusive gem?' 16 November 2012, <http://ohrh.law.ox.ac.uk/conceptualising-meaningful-engagement-in-south-africa-eviction-cases-exclusive-gem/> (accessed 17 June 2017).

local dispute settlement'.<sup>150</sup> Nevertheless, it could be argued that this approach is 'valuable and it advances constitutional justice particularly by ensuring that the parties themselves become part of the solution',<sup>151</sup> on the understanding that they are members of a human family. In addition, it enables the Court to advance humanism and compassion in reading the law, and this approach echoes ubuntu philosophy which cannot be dissociated from the spirit of the Constitution. This link is expressed by Sachs J<sup>152</sup> in his call for the infusion of an 'element of grace and compassion into the formal structure of the law' and always to remember the element of human interdependence.<sup>153</sup>

The significance of ubuntu also has surfaced in the law of delict. In *Dikoko v Mokhatla*<sup>154</sup> the Court was called upon to determine whether municipal councillors are liable for defamation for statements made in executing their official duties and whether a public hearing of the Council is protected by privilege.<sup>155</sup> Upholding the judgment of the High Court, the Constitutional Court found that statements were not afforded privilege by statute of the Constitution. In their judgment, both Mokgoro and Sachs JJ relied on ubuntu to highlight the inadequacy of the damages imposed by the High Court. In Mokgoro's view, the amount imposed was extremely high,<sup>156</sup> and Sachs was of the view that a request for an honest apology would have been enough to repair the prejudice suffered.<sup>157</sup>

Essentially, the two justices called for restorative justice in a case of defamation which involved restoring a person's self-worth or dignity. The latter is not necessarily repaired through monetary compensation, but could be settled by an apology or withdrawal of the defamatory comments as the core objective ultimately is to restore harmony between the parties, as expressed in ubuntu principles.<sup>158</sup> As correctly noted by Himonga, Wilson and Pope, this decision 'reaffirmed the important constitutional status of ubuntu',<sup>159</sup> by explaining that it

has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It

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150 S Liebenberg 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of "meaningful engagement"' (2012) 12 *African Human Rights Law Journal* 19.

151 *Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 97.

152 As above; see also *Port Elizabeth Municipality* (n 96) para 37.

153 *Hoërskool Ermelo* (n 151).

154 *Dikoko v Mokhatla* (n 97).

155 In terms of sec 28 of the North West Municipal Structures Act 3 of 2000.

156 *Dikoko v Mokhatla* (n 97) para 80.

157 *Dikoko v Mokhatla* paras 116-119.

158 *Dikoko v Mokhatla* paras 69 & 112.

159 Himonga, Wilson & Pope (n 45) 402-404.

feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.<sup>160</sup>

Emphasising the importance of ubuntu in the law of delict, Bennett describes the *Dikoko* case as instrumental in showing that an African concept at the centre of this article is applicable in matters of defamation.<sup>161</sup>

The other defamatory case in which the Constitutional Court referred to ubuntu was the case of *The Citizen v McBride*.<sup>162</sup> Under the Promotion of National Unity and Reconciliation Act of 1995, Mr McBride was granted amnesty for the murder committed while he was an ANC operative. However, when McBride applied for a senior police post and was appointed, the newspaper *The Citizen* published articles claiming that he was a 'murderer' and had no contrition or remorse for his crime. The Court had to decide whether a newspaper was liable for defamation for publishing articles that called the respondent a 'murderer' and indicating that he lacked contrition for his crime. According to the majority judgment the claim about the lack of contrition of the defendant only was defamatory,<sup>163</sup> hence the Court awarded Mr McBride R50 000 in damages.

Nevertheless, the minority judgment found for the respondent. It highlighted the importance of ubuntu which is 'the embodiment of a set of values and moral principles which informed the peaceful co-existence of the African people in this country who espoused ubuntu based on, among other things, mutual respect'.<sup>164</sup> Mogoeng J explicitly underlined 'our constitutional values and our unique and rich history' based on ubuntu which should be applied,<sup>165</sup> particularly in 'cases of defamation that relate to the amnesty process sensitivity to this national project is called for. The law cannot simply be applied with little regard to the truth and reconciliation process and ubuntu.'<sup>166</sup> In other words, more attention should have been paid to the ubuntu philosophy by the majority opinion in this case.

In the final analysis ubuntu informs the decisions of South African courts and therefore is a valuable source of law as demonstrated through court decisions. From the foregoing, it is imperative to identify the trends of ubuntu jurisprudence.

### 3.2 Trends and distinctiveness of ubuntu jurisprudence

From the above examination of the Constitution and case law informed by ubuntu, it is observed that unlike jurisprudence in the West, which foregrounds the abstract and the individual, ubuntu

160 *Dikoko v Mokhatla* (n 97) para 113.

161 Bennett (n 110) 40.

162 *The Citizen 1978 (Pty) Ltd v McBride* (n 102).

163 *The Citizen* (n 102) para 136.

164 *The Citizen* para 217.

165 *The Citizen* para 244.

166 *The Citizen* para 243.

jurisprudence is characterised by a 'legal subject as a living and lived experience'.<sup>167</sup> Essentially, it seeks equilibrium, fairness, concord and harmonisation of human relations.<sup>168</sup> In its quest for social harmony, it becomes flexible and provides the necessary space needed by judges to reach their objective of ensuring that their judgment is responsive to a specific context at a particular time. According to Ramose, ubuntu jurisprudence puts a 'strong emphasis on the creativity of the judge to advance the compassion and harmony and preserve "the family atmosphere"'.<sup>169</sup>

The other specificity of ubuntu jurisprudence is that it disregards the notion of prescription which is considered an impediment to unveiling the truth which is the core element of justice. In other words, unlike in Western jurisprudence where prescription at all times should be observed, ubuntu law has no such limitation and the matter can reach the court at any time. This practice is informed by the fact that the concrete character of the law originates from people's tangible experiences. Mbaye explains that prescription is alien to Africa in the following terms:<sup>170</sup>

Prescription is unknown in African law. The African believes that time cannot change the truth. Just the truth must be taken into consideration each time it becomes known, so must no obstacle be placed in the way of the search for it and its discovery.

Sharing this view, Ramose argues that 'law as a continuous live experience cannot reach the point of finality' or cannot be obstructed by prescription which in ubuntu philosophy is considered as a 'mechanism to affirm and eternalise an injustice'.<sup>171</sup>

Unlike Western concepts of law, ubuntu jurisprudence is not determined by the typology of laws such as contract law, defamation law, delict, and so forth, but by its appetite to find the truth and its consideration of the humanity of the parties to a case. From this perspective it always seeks to preserve the tree of humanity with the view that the parties to a case are all branches of the same tree. Therefore, in its endeavour to humanise justice, it relies on reconciliatory notions such as 'meaningful engagement', which enables litigants to talk to one another and seek an amicable settlement to the dispute. For Ramose, ubuntu jurisprudence captures three elements simultaneously at play, namely, 'the speech of reason,

167 Ramose (n 1) 72.

168 K Mbaye 'The African conception of law' in R David & International Association of Legal Sciences (eds) 'The legal systems of the world: Their comparison and unification' (1974) 2 *International encyclopaedia of comparative law* 37.

169 Ramose (n 1) 72.

170 Mbaye (n 168) 147.

171 Ramose (n 1) 86-87; see also HV Alison 'Redefining "property": The constitutional battle over land redistribution in Zimbabwe' (1994) *Journal of African Law* 146-152.

responsiveness to concrete experience, and the laying down of a rule or rules for responding to a specific experience'.<sup>172</sup>

It could be argued that unlike Western law which finds its source in equity,<sup>173</sup> ubuntu jurisprudence goes beyond equity and is based on local reality for the sake of preserving harmony, social justice and dignity. Even though the latter is often equated to ubuntu, it is important to note, as correctly argued by Bennett, 'while [t]he Western conception of dignity envisages the individual as the right-bearer, ubuntu sees the individual as embedded in a community'.<sup>174</sup> This understanding and implementation of ubuntu is important in fostering human rights in South Africa and Africa in general because, as correctly argued by Merry, 'for human rights to be culturally legitimate, they must fit into existing normative and ways of thinking'.<sup>175</sup>

#### 4 Concluding remarks

The aim of this article was to assess the extent to which the cultural value of ubuntu, which echoes the togetherness, compassion and respect for dignity in communities, is a source of law in South Africa. If so, it aimed to unveil the emerging trends of ubuntu jurisprudence. During this interrogation the article unpacked the concept of ubuntu which includes an exploration of its role in the TRC. It proceeded to examine emerging ubuntu jurisprudence to unveil its trends and distinctiveness.

First, in terms of findings the article found that ubuntu was significant in achieving a peaceful transition from apartheid to a democratic state in South Africa. Even though for many the TRC did not yield positive results as the question of reparation is still pending, in line with the ubuntu requirement this transition was built on forgiveness, tolerance, reconciliation and the need for restorative justice for the sake of the entire country. Although some views hold that ubuntu was used to advance the 'nation-building' agenda that followed the transition to democracy, it is also credited with the peaceful transition to democracy in South Africa, which is considered an achievement.

Second, the article found that in the early days of constitutionalism in South Africa, the interim Constitution expressly referred to ubuntu as a tool to establish an egalitarian nation. Although the concept of ubuntu did not appear in the final Constitution, its transformative attributes based on equality, dignity, respect for human rights and the

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172 Ramose (n 1) 87-88.

173 Bennett (n 110).

174 Bennett (n 110) 48.

175 SE Merry *Human rights and gender violence: Translating international law into local justice* (2006) 179.



prohibition of discrimination echo the ubuntu notion of caring for one another. Furthermore, the Constitution unambiguously recognised customary law as a source of law to be applied subject to it, and this recognition was highlighted by some judges in the cases of *Bhe*,<sup>176</sup> *Mayelane*<sup>177</sup> and *Gumede*.<sup>178</sup>

Third, the concept of ubuntu informed the decisions of the Constitutional Court in many other cases involving criminal law, immigration, social security, eviction, delict and many others. The article found that the cultural value of ubuntu indeed is a source of law in South Africa.

In terms of trends and specificity, unlike Western ideas of law, ubuntu jurisprudence originates from lived experience and a local context with a strong emphasis on the need to preserve social harmony. It does not believe in prescription which is considered an obstruction to justice. In addition, its flexibility enables the judge to create responsive solutions to the problem without focusing on branches of laws. Ubuntu jurisprudence echoes the notion of togetherness of African people by enabling the judge to create and rely on reconciliatory notions such as 'meaningful engagement' to secure social equilibrium. It is hoped that unveiling the trends and specificity of ubuntu jurisprudence or the African approach to law will inspire other African countries to rely on local realities to protect human rights, as this method legitimates the human rights discourse and enhances the enforcement of these rights because of their embodiment in the local community.

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176 *Bhe* (n 77).

177 *Mayelane* (n 81).

178 *Gumede* (n 85).