Article

Ubuntu and South African Law: Its Juridical Transformative Impact

Sipho Nkosi
Lecturer, University of Johannesburg
Advocate of the High Court of South Africa
Email: snkosi@uj.ac.za

Abstract

The paper examines the concept of ubuntu. It begins with a brief examination of the etymological origin, ontology and meaning of the concept. The writer then illustrates these by considering some South African maxims, cultural practices and traditions through which ubuntu finds expression and is concretised. He also examines how the South African courts, particularly the Constitutional Court, have begun to move away from the purely philosophical or theoretical exposition of the concept towards its juridical and transformative value—and implications—for the country's constitutional jurisprudence. To demonstrate this shift, the writer reviews several ground-breaking instances in which the courts found occasion to infuse the country's legal remedies with not only the relational ethos of ubuntu but also with its innate qualities of fairness, sympathy, justice, equity and empathy. The writer expresses the hope that the courts will, in the future, rely on ubuntu to resuscitate old remedies whose essence was in many ways consonant with ubuntu but were rendered obsolete for policy or ideological reasons under colonialism and apartheid. He is also optimistic that the courts will create a new set of remedies that will serve South Africa's noble constitutional project well.

Keywords: Ubuntu; constitution; courts; justice; equity and fairness

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL
Volume 33 | Number 1 | 2018 | #2954 | 20 pages

https://doi.org/10.25159/2522-6800/2954
ISSN 2522-6800 (Online)

Introduction

Any discussion of ubuntu is bound to be multidisciplinary and multifaceted. This is because, as a concept, ubuntu encapsulates cultural, linguistic, etymological, philosophical and juridical facets.[1] The development of its juridical facet is still in its nascent stage in South Africa, and it is hoped that academics, lawyers and judges will help to give it content and meaning in the course of time. There is still a great deal of misunderstanding of and misconception about ubuntu. This is due to a combination of factors, such as cultural chauvinism,[2] ignorance, the difficulties associated with translation and a belief that 'it is impossible to trace the exact denotation of the word in its vernacular origins'.[3] It is hoped that this article will serve as a reminder that one cannot simply dismiss the existence of a concept or practice merely because one's sources do not point to it—one has to make a genuine effort to understand the etymology or ontology of that concept. For instance, ubuntu belongs to the seventh declension of isiZulu nouns.[4] It shares the same root as '*umuntu*',[5] and it means a 'human being', 'person', an 'individual' or a 'being'.[6] As a gerund (verbal noun) the word also connotes a person's state of being (humaneness). In this context, as will be indicated below, it also means a person's readiness and willingness to do something in order to advance goodness wherever they may be.[7] It is a concept which denotes humanity in its totality, with all its vices and virtues.[8] It points to human beings who, though flawed in many respects, are endowed with compassion, concern, consideration, empathy, fairness, justice, mercy and social solidarity.[9] It is for this reason that many South African legal practitioners are beginning to rely on ubuntu.[10] It is the aim of this article, therefore, to

---

1 As Devenish puts it: 'The moral basis of constitutionalism and human rights has its genesis in the ethical content of the teachings of the great religious traditions and philosophies of civilizations, both occidental and oriental, as well as indigenous values like *ubuntu*'—George Devenish, *A Commentary on the South African Bill of Rights* (LexisNexis 1999) 623.

2 See Thomas W Bennett, 'Ubuntu: African Equity' (2011) PER 30/351 and the authorities cited therein.

3 See Bennett (n 2) 31/351. However, see Devenish (n 1) 621, where the author says that values such as ubuntu 'should find appropriate expression in constitutional-law judgments so that our jurisprudence can have an autochthonous [not foreign] character'.

4 GR Dent and CLS Nyembezi, *Scholar's Zulu Dictionary* (Shooter & Shooter 1969) iii.

5 This word, in turn, falls under the first declension of isiZulu nouns.

6 The root is 'ntu' and the plural 'abantu'.

7 See Bennett (n 2) 31/351.

8 Hence the scourges of slavery, xenophobia, tribalism and ethnocentrism.

9 John Mbiti, *African Religions and Philosophy* (Heinemann 1990) 208–209; see also Jeffrie Murphy, 'Mercy and Legal Justice' in Jules Coleman and Ellen Paul (eds), *Philosophy and Law* (Blackwell 1987) 2.

10 For instance, on 8 August 2014, Advocate Barry Roux SC invoked ubuntu in defence of his client, Oscar Pistorius, the South African Paralympic athletics champion who was facing a charge of murder. He argued, persuasively, that the courts should reconsider the way in which they view the concept of a 'reasonable man'; and that it should no longer be denotive only of 'a white man of the 1960s, in the grey suit (and) wearing grey shoes.'

indicate that there is a tangible shift in the discourse on ubuntu: it is gradually moving away from the theoretical and philosophical niceties of the concept to the practical, transformative potency that it possesses.

A Historical and Philosophical Perspective of Ubuntu

Before discussing the transformative impact and practical value of ubuntu for South Africa's constitutional jurisprudence, it is important to examine the linguistic substratum and cultural values on which it is founded. Its ontology is traceable to the adage: 'I am because we are, and since we are, therefore I am.'[11] It emphasises the interconnectedness of humanity irrespective of race, colour or creed.[12] As Mbiti puts it: 'The essence of African (positive) morality is that it is more "societary" than "spiritual"; it is a morality of conduct rather than a morality of being.'[13] It is about 'dynamic ethics', not 'static ethics'.[14] It enjoins members of the community to venture into the world and engage in activities that enhance the condition and dignity of other human beings; and to ensure that justice is served.[15] It is important to note that there are many South African maxims that, if properly translated and understood, could help to give valuable content to ubuntu. This is because these maxims were, for the precolonial black communities, the unwritten Bill of Rights that served as a bulwark against the abuse, cruelty and barbarity of their despotic rulers.[16] The maxims were (and still continue to be) a part of the living law and legal traditions[17] of the different communities, and were (and still are) firmly anchored in their daily experiences.

In public law, such as it was, the social contract between the monarch and his subjects was founded on *inkosi yinkosi ngabantu bayo*.[18] At a practical level, the maxim meant that the monarch—including the great King Shaka Zulu himself—could rule only with

---

11 Mbiti (n 9) 209.

12 Mbiti (n 9), where he uses the term 'naked'. This is exactly what happened under colonialism and apartheid: the legal system was used to protect one section of the population, a minority, to the exclusion of another, the majority.

13 Mbiti (n 9) 209.

14 Mbiti (n 9) 209.

15 Mbiti (n 9) 208–209.

16 For some of the criticism of ubuntu, see Narnia Bohler-Müller, 'Some Thoughts on the *uBuntu* Jurisprudence of the Constitutional Court' in Drucilla Cornell and Nyoko Muvangua (eds), *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press 2012) 367–368; see Thino Bekker, 'The Re-emergence of uBuntu Court' in Cornell and Muvangua (n 16) 378; see also Irma Kroeze, 'Doing Things with Value: The Case of uBuntu Court' in Cornell and Muvangua (n 16) 334–338.

17 Chuma Himonga, 'The Future of Living Customary Law in African Legal Systems and Beyond, with Special Reference to South Africa' in Jeanmarie Fenrich, Paolo Galizzi and Tracy Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011) 44–46.

18 Its literal meaning is that 'a king is a king through his people'.

the consent, express or implied, of his people.[19] And, at a social and personal level, the relationships were governed by the maxim *umuntu ngumuntu ngabantu*, which means that 'I cannot be what I ought to be until you are what you ought to be'.[20] It emphasised, and it still continues to emphasise, the interconnectedness of humanity.[21] There are other maxims that encourage giving and sharing. For instance, the BaPedi say that '*gofa ke go fega, ware go fa wafegolla*'.[22] The Batswana also have an equivalent, which teaches that '*molomo otlhafunang oroga omongwe*'.[23] And there were several customs and practices which served to concretise and give meaning to these maxims. Some examples of these practices are: (*a*) the *mafisa* (*sisa*)-contract;[24] (*b*) *letsema*;[25] and (*c*) *stokvel*.[26] Moreover, in many black communities, whenever a neighbour borrowed a hoe, a pot or a similar implement, it was incumbent on him or her to return it with some

---

19 However, see Digby Koyana, 'The Interaction between the Indigenous Constitutional System and Received Western Constitutional Law Principles' in PD de Kock and JMT Labuschagne (eds), *Festschrift: JC Bekker* (Southern Book Publishers 1995) 74, where the author expresses the view that the ruler's subordination to law 'did not apply during periods of dictatorship such as that of Shaka and Sekhukhune.'

20 This is almost identical to the words of Martin Luther King Jr in a letter he wrote while he was incarcerated at Birmingham Prison: 'Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects us all indirectly. I can never be what I ought to be until you are what you are ought to be, and you can never be what you ought to be until I am what I ought to be …' Martin Luther King Jr, 'Letter from a Birmingham jail' in James Washington (ed), *Martin Luther King Jr I have a Dream: Writings and Speeches that changed the World* (Harper One 1992) 85.

21 Washington (n 20) 85.

22 It means that 'by giving, and being charitable, one qualifies to receive from practically anyone in the world'. This is the kernel of *ubuntu*: giving generously and sharing selflessly, and there are many variations of it in other African languages.

23 Literally, it means that a mouth that is chewing insults the one that is not chewing. But, at a formal level, the elders used it as a verbal sword to eradicate selfishness among their communities and progeny.

24 This is a contract founded on good neighbourliness, social solidarity and communalism, in terms of which a well-off person lends his or her livestock or poultry to a less fortunate neighbour for use during hard times. These could be milk, wool and eggs—CJ Bekker, *Seymour's Customary Law in Southern Africa* (Juta 1989) 338–341.

25 This is a Sesotho custom that was intended to encourage a spirit of volunteerism: helping other people without expecting any remuneration. Thabo Mbeki, the former president of South Africa, gave it the official seal during his tenure. It is now part of the government's Batho-Pele ('people first') public service policy. It is intended to inspire government employees to become a people-spirited corps of civil servants, thereby 'ensuring a better life for all South Africans' <www.http:/www.dpsa.gov.za/documents>.

26 Even though this practice is not completely 'indigenous' to pre-colonial South Africa, it has been infused with the spirit of ubuntu. It provides a strong and dependable financial and social support structure to its members. It also serves as a networking forum where resources and skills are shared and exchanged—WG Schulze, 'Sources of South African Banking Law: A Twenty-First Century Perspective Part II' (2003) SA Mercantile Law 605–606.

food, seedlings or grain.[27] The maxims, and practices, engendered and fostered a nurturing, caring and humane society. Despite the destruction of the original, pre-colonial socio-political structure, these practices still continue to serve this noble purpose. There is also an idiomatic expression which resonates with black South Africans: '*O entse botho*';[28] or '*Wenze ubuntu*'.[29] At a superficial level, it means that 'You have shown ubuntu'. But its deeper meaning is that 'you have displayed concern, compassion, balance, objectivity, fairness or justice in the circumstances of a particular case.'[30] These are the values that, it is hoped, South Africa's constitutional jurisprudence will be imbued with. However, it is also important to bear in mind that the drafters of the Constitution, like their forebears, were alive to the fact that human beings have a propensity for selfishness, cruelty and barbarity. They were also aware that ubuntu, like the document it undergirds, is aspirational, and will not transform South Africans into a caring, generous, considerate and selfless society overnight.[31] They were conscious of the fact that it would take a long time to retrieve the protective and salutary aspects of the original version of the South African common law[32]—which coincided with ubuntu on many counts—and preserve them. This is because the common law was distorted beyond recognition, in order to extend privilege and wealth to one section of the population, and subject the other to deprivation, poverty, disease and illiteracy.[33] Something very drastic, fundamental and transformative had to be done to ensure redress. A Constitution, with a Bill of Rights deeply anchored in ubuntu, had to be crafted for this purpose. As Quartaert puts it:

> Human rights express the nobler parts of human endeavor – efforts to safeguard liberties, to promote social well-being, and ensure mutual tolerance and respect as necessary ingredients for human dignity … Rights neither exhaust nor supplant moral systems that are rooted in religion or charitable imperative, or popular ideas about the common good. Indeed, they coexist and at times even compete with other moral systems. Human rights

---

27 Obviously, these maxims (and their import) have waned in the glare of poverty and other socio-economic problems, which have precipitated greed and selfishness.

28 In Sesotho.

29 In isiZulu.

30 For instance, the original Sesotho criminal procedure was founded on, among other pillars, '*mooakhotleng ha tsekisoe*'. Literally, this means 'He who stumbles in court should not be prosecuted'. At a practical level, it meant that the courts were enjoined to show mercy to those who, because of intoxication or insanity, had fallen foul of the law—see Patrick Duncan, *Sotho Laws and Customs* (Oxford University Press 1960) viii.

31 It is for this reason that, during his mid-term budget speech in Parliament on the 26 October 2016, Minister of Finance Pravin Gordhan borrowed from the Sepedi proverb: '*Tau tsa hloka seboka, disitwa ke nare e hlotsa'* (Lions that are fighting among themselves cannot catch even a limping buffalo). In sum, he was exhorting South Africans to return to the underlying values of ubuntu—communitarianism, justice, equity and fairness—in order to preserve the substratum of the *humus politicus*.

32 On the effect of apartheid on the common law, see Edwin Cameron, *Justice: A Personal Account* (Tafelberg 2014) 178–179.

33 Cameron (n 32).

> visions, however, help illuminate the murky world of good and evil, justice and injustice.[34]

Quartaert could well have been describing ubuntu in this passage, particularly its moral, ethical and juridical content. However, it is also important to note that ubuntu has been subjected to severe criticism since 1995, after the *S v Makwanyane*[35] judgment.

The Criticism of Ubuntu

The first criticism is that ubuntu is a 'new' and strange concept.[36] Clearly, this assertion cannot be correct. As indicated above, this kind of criticism is founded on ignorance or cultural chauvinism. Westerners, including some South Africans of European extraction, seem to be very quick to brand what they do not know as strange or *contra bonos mores*.[37] Ubuntu has not only been part of African philosophy and jurisprudence, it has also been an integral component of the 'living customary law' of the different indigenous communities of South Africa since time immemorial.[38] It is, therefore, rooted in the native soil of South Africa.[39]

The second criticism is that ubuntu is vague and ambiguous, and that the dicta on it that have found their way into the law reports are just a collection of the judges' own personal, and subjective, views.[40] However, the criticism loses potency when one considers that ubuntu, like many other normative phenomena, 'encompasses different values simultaneously'; and this where its strength lies.[41] It is also important to note that most of the judges are South African men and women who have received the values embedded in the concept of ubuntu from oral history as passed down to them by their parents and other agnates. Some of them were, prior to ascending to the Bench, in the trenches of public interest or human rights litigation, and they know how dehumanising

---

34 Jean Quartaert, *Advocating Dignity: Human Rights Mobilizations in Global Politics* (University of Pennsylvania Press 2009) 4; Irma Kroeze, 'Power Play: A Playful Theory of Interpretation' (2007) Tydskrif vir die Suid-Afrikaanse Reg 33. On many occasions, judges are called upon, by a higher law, to bend but not to break the law of the land; or to 'rewrite (relevant) legislation (and) both play with and within the rules'. This is ubuntu in operation.

35 1995 (3) SA 391 (CC).

36 See Bennett (n 2) 30/351–53/351.

37 For instance, the successive colonial and apartheid governments refused to accord recognition to customary marriages, despite their being valid in terms of the original *lex loci celebrationis*—see CR Dlamini, 'Recognition of a Customary Marriage' (1982) De Rebus 594.

38 Himonga (n 17) 44.

39 Devenish (n 1) 587.

40 Chuma Himonga, Max Taylor and Anne Pope, 'Reflections on the Judicial Views on Ubuntu' (2013) PER 372/614.

41 Himonga and others (n 40) 385/614.

poverty and oppression were to the black majority of South Africans.[42] The fact that the one judge emphasises one basic right in one context and the other another in a different context does not render the rest of the catalogue worthless.[43] The judges are acutely aware that all these rights are part of the same founding document.

The third criticism, which is linked to the second, is that ubuntu could be used to mean virtually anything to anyone, thereby stifling the debate on its nuances.[44] Kroeze, for instance, says that even though there is nothing wrong with ubuntu as a concept, there is definitely something wrong 'with the Constitutional Court's approach to constitutional values.'[45] This is because, she opines, the court just invokes values (such as ubuntu) like 'little divinities' whose validity and authenticity are not to be questioned by anyone.[46] She concludes that these values might end up being 'accepted as immutable, debate-stopping certainties without any apparent awareness of their ontological status as cultural artifacts.'[47] It is readily conceded that the parameters of ubuntu need to be carefully delineated.[48] This is because ubuntu is just like the proverbial unruly horse which 'when you get astride [it], you never know where it will carry you.'[49] However, that should not be done with the result that its juridical potency is diluted or that its practical relevance is compromised. In other words, we should not end up with a contrived version of the concept that serves only extraneous interests.[50] Nor should ubuntu remain a mere loan-word used only to give a florid resonance to a weak contention or dictum; a verbal crutch of sorts.[51] It is gratifying, however, to note that the judges, led by the justices at the Constitutional Court, are beginning to use

---

42 They include the late Chief Justices Arthur Chaskalson, Ishmael Mohammed and Pius Langa, Deputy Chief Justice Dikgang Moseneke and Justices Kate O'Regan, Louis Skweyiya (who has since passed away) and Edwin Cameron.

43 For instance, in *Hugo v President of the Republic of South Africa* 1997 (4) SA 1 (CC) para 74, Kriegler J laid emphasis on the importance of equality, saying that equality 'is our Constitution's focus and organising principle'. And in *S v Makwanyane* (n 35) para 144 and *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 37, O'Regan J stressed the significance of dignity.

44 See Bohler-Müller (n 16) 367; see Bekker (n 16) 378; Kroeze (n 16) 333.

45 Kroeze (n 16) 341.

46 Id 341.

47 Id 343.

48 The greater challenge lies not in whether 'we can understand or determine the exact contours of uBuntu, but in defending a certain conception of uBuntu'—see Yvonne Mokgoro and Stu Woolman, 'Where Dignity ends and uBuntu begins: An Amplification of, as well as an Identification in Drucilla Cornell's Thoughts' (2010) SAPL 406.

49 To borrow from Burrough J in *Richardson v Mellish* (1924) 2 Bing 252.

50 See Devenish (n 1) 587.

51 Kroeze (n 16) 340; see also *Dikoko v Mokhatla* 2006 (6) 235 (CC) para 113.

ubuntu to expand or circumscribe old legal remedies and processes in order to improve their efficacy.[52]

The fourth criticism is that the communal ethic of ubuntu stifles individual autonomy.[53] This is one of the many myths about African concepts that need debunking. As has been the case with lobolo and the customary marriage, ubuntu is being viewed from a Western perspective, through a European or an American lens, with disastrous results.[54] This approach creates the impression that communality and individual autonomy are mutually exclusive in African law and jurisprudence. Even during the not-so-idyllic pre-colonial times,[55] the individual, male or female, had clearly distinct and separate rights which did not require the co-operation of the community for their assertion, realisation and protection.[56] And, despite it being a relational ethic, ubuntu allows for the individual person to 'transcend (his or her) biological distinctiveness'.[57] And, therefore, it would be wrong to confuse it with 'simple-minded commutarianism'.[58] The relationship between the individual and his or her property and marriage under customary law will be used to illustrate this point below.

There is family property, house property and personal property.[59] Family property—which is sometimes referred to as 'the general family estate'[60]—comprises property that the family head has not allotted to any particular house.[61] It has to be used for the benefit of all the members of the family.[62] House property consists of the property that has

---

52 To illustrate this point, some of the post-Makwanyane judgments such as *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty)* Ltd 2012 (1) SA 256 (CC), *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) and *Molusi & Others v Voges NO & Others* 2016 (3) SA 370 (CC) are discussed below.

53 See Drucilla Cornell, 'Is there a Difference that Makes a Difference between Ubuntu and Dignity?' (2010) SAPL 396.

54 See *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) paras 16–18; see also *Amodu Tijani v The Secretary, Southern Nigeria* 1912 (2) AC 399 (PC) 404 and CR Dlamini, 'Recognition of a Customary Marriage' (1982) De Rebus 594.

55 A phrase used by Moseneke DCJ in *Gumede* (n 54) para 19.

56 Thomas W Bennett, *Customary Law in South Africa* (Juta 2004) 256–257.

57 Cornell (n 53) 392, where she also says that in ubuntu 'individuals are intertwined in a world of ethical relations and obligations from the time they are born.' However, this part of her argument seems to characterise ubuntu as a purely relational ethic that does not allow for individuality or autonomy.

58 Cornell (n 53) 392.

59 Bennett (n 56) 254–260.

60 Id 258.

61 Id 256–257. It is important to note that in allotting the property, the family head has to consider the rights and interests of all the individual members of the family, including the women and children.

62 It is submitted that, under original customary law, this was the only category of property that the family head could dispose of by means of a will—Bekker (n 24) 72. However, on how the law on this point has been changed to rid it of (unfair) discrimination on the basis of race, sex and gender, see *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC); see also section 6 of the Recognition of Customary Marriages Act 120 of 1998 and the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

already been allotted to a particular house.[63] In many instances, this category includes the lobolo paid in respect of a maiden of a particular house in the homestead (family home) or fines and damages paid for the wrongs committed against the women or children of that house.[64] Both family property and house property fall under the control of the family head[65] and must be used for the benefit of all the members of the family.[66] However, different rules apply in respect of personal property. It accrues and inheres in the individual owner, male or female, to the exclusion of everybody else.[67] The examples of this kind of category of property are the person's own clothes, pets, weapons or artefacts; and they can be used only with the consent and permission of that owner.[68]

A customary marriage is viewed as the coming together of two family groups to which the bridal couple belong.[69] However, the individuality of the two persons making up the bridal couple cannot be discounted.[70] This is because, among other requirements, the consent of the woman, for instance, is an essential part of the resultant matrimonial pact; and the enjoyment of conjugal rights is strictly conditional on her consent.[71]

Ubuntu and Constitutional Democracy in South Africa

It is important to note that ubuntu is mentioned only once in the interim Constitution.[72] There is even no specific reference to it at all in the final Constitution.[73] The question that arises therefore is: Why are the law reports and the legal literature so replete with references to ubuntu? The answer seems to lie in the Constitution itself. The Preamble

63 A 'house' is a unit into which a family home is divided; and it has its own property and status—see Bekker (n 24) 126.

64 See Bennett (n 56) 256–257.

65 It is important to note that South Africa's constitutional compact, of which ubuntu is an integral part, now prohibits unfair discrimination on the basis of sex or gender—see section 9 of the Constitution of the Republic of South Africa Act 108 of 1996.

66 Bennett (n 56) 255.

67 See Bennett (n 56) 256–257.

68 ibid.

69 Bekker (n 24) 96.

70 Id 106–107, 110–111.

71 With regard to the approach of the South African courts where forced marriages and the custom of *ukuthwala* are concerned, see *S v Jezile* 2015 (2) SACR 452 (WCC).

72 See the postamble of the South Africa Constitution Act 200 of 1993 (often referred to as 'the interim Constitution'), which introduced ubuntu into the South African constitutional framework and legal lexicon for the first time. The interim Constitution also included Constitutional Principles on which the crafting of the (final) Constitution was to be based. These principles were a concrete demonstration that ubuntu was to be the *Grundnorm* of South Africa's constitutional system—see the *Certification of the Constitution of South Africa Act 108 of 1996* 1996 (4) SA 744 (CC) para 32 et seq.

73 The Constitution of South Africa Act 108 of 1996.

makes social justice (ie ubuntu) the matrix, or *Grundnorm*,[74] of the Constitution. Moreover, section 39(2) enjoins the courts 'to promote the spirit, purport and objects of the Bill of Rights' whenever they interpret legislation that affects the rights enshrined in it. There was, therefore, no need to inscribe ubuntu, *eo nomine*, into the final Constitution. The Constitution itself—particularly the provisions of sections 7–39—is denotative of ubuntu. In *S v Makwanyane*,[75] where similar provisions of the interim Constitution[76] were considered, Mokgoro J described the concept in the following terms:

> While it envelopes 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.[77]

This dictum demonstrates the desire on the part of the drafters of this epoch-making document, and the judges, to fashion an equitable society where democracy, justice, equity and the rule of law are not just hollow concepts, but foundational, transformative values. Most of the laws that emanate from the various legislative spheres of the country are emblematic of this conscientiousness. Some of the most important examples this kind of law-making are: the Employment Equity Act,[78] the Extension of Security of Tenure Act,[79] the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,[80] the South African Social Security Agency Act,[81] the Consumer Protection Act[82] and the National Credit Act.[83] And, in order to provide every person with the best legal protection possible, these Acts must 'be understood purposively'.[84] This is because these Acts constitute 'remedial legislation (that) is umbilically linked to the Constitution'.[85] Despite the judges' not using the word 'ubuntu' in some of their judgments, the conclusion that their thinking was shaped by the values embodied in

---

74 This is the principle or idea that undergirds the moral as well as the legal order of a particular society—see Cornell (n 53) 385.

75 1995 (3) SA 391 (CC).

76 Chapter 3 (sections 7–33) of the interim Constitution.

77 Paragraph 308. At para 224 Langa J had this to say: 'The concept (of ubuntu) is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises the status of a person as a human being, entitled to unconditional respect, human dignity, value and acceptance from other members of the community.'

78 Act 45 of 1998.

79 Act 62 of 1997.

80 Act 19 of 1998.

81 Act 9 of 2004.

82 Act 68 of 2008.

83 Act 34 of 2005.

84 A phrase used by Moseneke DCJ in *Department of Land Affairs v Goedgelegen Tropical Fruits* 2007 (6) SA 199 (CC) para 53.

85 See (n 84) above.

ubuntu is inescapable. The minority judgment in *Bato Star v Minister of Tourism and Environmental Affairs*[86] is an example of this phenomenon. The case was about the interpretation of section 2 of the Marine Living Resources Act.[87] This is a piece of legislation whose objective it is 'to redress historical imbalances and to ensure equity within all the branches of the fishing industry' by ensuring a fair allocation of fishing rights to black people who were excluded under the old order. In the course of his judgment, Ngcobo J (as he then was) held:

> The Constitution is now the supreme law of our country. It is therefore the starting point. Indeed, every court must promote the spirit, purport and objects of the Bill of Rights in interpreting any legislation. That is the command of section 39(2). Implicit in this command are two provisions: first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least one identifiable value enshrined in the Bill of Rights [such as social justice or ubuntu], and second, the statute must be reasonably capable of such interpretation.[88]

Therefore, an invocation of the provisions of section 39(2), by counsel, is actually an exhortation to the court to follow the command, as set out in Ngcobo J's dictum, and to infuse into whatever piece of legislation that is being construed as the foundational values of the Constitution. It is important to note, however, that the application of section 39(2) is not necessarily dependent on the wishes of the litigants.[89] In other words, the Bill of Rights itself encapsulates the values ubuntu (the 'spirit, purport and objects'), and they are particularly embodied in the following provisions:

- section 9 (the right to equality and the correlative right not to be unfairly discriminated against on the basis of race, sex, gender or social background));
- section 10 (respect for human dignity);
- section 11 (the right to life);
- section 12 (the right to the freedom and security of the person);
- section 21(3) (the right to enter, remain in, and reside anywhere in South Africa),
- section 23 (fair labour practices),
- section 26(3) (the right to decent accommodation), and
- section 35 (the right to a fair trial).

---

86 2004 (4) SA 490 (CC).

87 Act 18 of 1998.

88 Paragraph 72.

89 See *Makate* (n 52) paras 88–90.

A number of court decisions will be discussed to illustrate this point.

In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[90] the question that arose for consideration was whether the common law of contract needed to be developed in accordance with the spirit, purport and objects of the Bill of Rights. The case involved the termination, by Shoprite, of a lease agreement that it had with Everfresh and the subsequent ejectment proceedings. In the High Court, KwaZulu-Natal, Pietermaritzburg, Everfresh argued that Shoprite had no right to terminate the lease agreement, contending that it had exercised the option under that lease to renew it. In the alternative, Everfresh argued that Shoprite was obliged to make a bona fide attempt to negotiate the rental for the renewal period. The High Court rejected this contention and granted an ejectment order, stating that, according to South African law, an option to enter into an agreement on terms still to be agreed upon by the parties is not binding, and the application was dismissed. Everfresh approached the Supreme Court of Appeal, which dismissed the appeal. In the Constitutional Court, Everfresh introduced a constitutional dimension to its case for the first time. It argued that the common law ought to be developed in accordance with the provisions of section 39(2) of the Constitution. This, it contended, would help to determine the validity of a lease concluded subject to 'reasonable rental'. Yacoob J, in his minority judgment, accepted that Everfresh was raising a genuine constitutional matter that required consideration by the Constitutional Court. He said that the issue of good faith in contracts 'touches the lives of many ordinary people in our country',[91] and that the values embodied in ubuntu were crucial 'in determining the sprit, purport and objects of the Constitution'.[92] He also said that these values applied to juristic persons too.[93]

However, Moseneke DCJ, in the main judgment, bemoaned the fact that Everfresh's case had changed and mutated with every forum it went to; and that in certain instances it had changed even in the same forum. He pointed out that Everfresh had not raised any constitutional matter in the High Court or the Supreme Court of Appeal, and that it raised such a matter for the first time only in the Constitutional Court. He stated that the Court could not simply develop the common law on this point without prejudicing Shoprite.[94] He then proceeded to set out the factors that weighed with him in coming to his conclusion. He pointed out that this 'was a commercial dispute of considerable monetary value';[95] that Everfresh itself had not 'pleaded any dire consequences, commercial or otherwise, that would ensue if the lease were not renewed';[96] or that it

90 2012 (1) SA 256 (CC).
91 Paragraph 22.
92 Paragraph 23.
93 Paragraph 24. This is because these entities are themselves managed and controlled by human beings.
94 Paragraph 50. His view was that 'it would not be in the interests of justice for a litigant to adjust its case as it goes along to the prejudice of an opposing litigant.'
95 Paragraph 66.
96 ibid.

had no alternative premises on which to continue its business operations.[97] Nor did Everfresh demonstrate any vulnerability which might have been engendered by any unequal bargaining power between the parties.[98] He also said that there was nothing to suggest that Everfresh lacked proper legal representation, or that it was given wrong advice.[99] However, the Deputy Chief Justice introduced a rider and said that, if the case had been properly pleaded, the Constitutional Court would definitely have infused the applicable common law with the values of ubuntu, which are an 'integral part of our constitutional compact'.[100] He then stated that where there is a contractual obligation on the parties to negotiate in good faith, 'it would be hardly imaginable that our constitutional values would not require that the negotiations be done reasonably with the view to reaching an agreement in good faith.'[101]

There has been some criticism of the majority judgment in *Everfresh*.[102] Mpungavanhu, for instance, is of the view that the Constitutional Court missed an opportunity to develop the common law of contract, particularly the concept of good faith,[103] which has been in dire need of development since the demise of the *exceptio doli generalis* in *Bank of Lisbon and South Africa Ltd v Ornelas*.[104] This, he says, would have helped to fill in the gaps and ensure contractual justice in this area of the law.[105] He also says that failure on the part of the courts to recognise the existence of a duty to negotiate, in cases where there is no deadlock-breaking mechanism, seems to work in favour of recalcitrant parties who can easily argue that 'a promise to negotiate in good faith is too illusory or too vague to enforce.'[106] The present writer agrees with Mpungavanhu about the need to develop the common law of contract on this point. This is because the *exceptio doli generalis*, which provided a remedy against the enforcement of unfair contracts, or the enforcement of contracts in unfair circumstances, is no longer available to protect vulnerable contractants.[107] As Yacoob J put it, the issue of good faith in contract

---

97 ibid.

98 ibid.

99 ibid.

100 Paragraph 72.

101 ibid.

102 See Brighton Mupangavanhu, 'Yet Another Missed Opportunity to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd* [2011]' (2013) Speculum Juris 164. He seems to be in agreement with Yacoob J's minority judgment.

103 At 149.

104 1988 (3) SA 580 (A) 607, where Joubert JA said: 'All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as superfluous, defunct anachronism. *Requiescat in pace*.'

105 At 149. He laments the court's 'fixation on avoiding prejudice to Shoprite without balancing this with an adequate assessment of potential contractual injustice to Everfresh.'

106 At 158.

107 RH Christie, *Law of Contract* (Butterworths 2001) 14–15. It is also important to note that not every consumer enjoys the kind of protection envisaged in the National Credit Act 34 of 2005 and the

'touches the lives of many ordinary people in our country'.[108] It is also true that the transformation of the common law of contract is 'a matter of considerable public and constitutional importance'[109] and that it would need to be infused with 'the values embraced by an appropriate appreciation of ubuntu'.[110] However, Mupangavanhu—like Yacoob J—seems to ignore the procedural aspects and factors already mentioned above which militated against Moseneke DCJ's 'tackling the wide-ranging intricacies related to renewal clauses in leases.'[111] Another factor that the Deputy Chief Justice considered is that Everfresh had, ironically, benefited from prolonged litigation, which ensured its continued occupation and use of the leased premises.[112]

Like *Everfresh*, *Makate v Vodacom (Pty) Ltd*[113] involved a *pactum de contrahendo*—an agreement to enter into a contract at a future date. Makate, the applicant, was an employee of the respondent, Vodacom. He averred that, while in the employ of Vodacom, he developed an idea which was used to create a product now known as 'Please call me'. The product enables a subscriber who has no money to make a call to send a message to another subscriber, asking him or her to call. In its practical, implemented form, the idea generated a great deal of revenue for Vodacom. Makate averred that he had discussed the idea with his mentor, Lazarus Muchenje, who, in turn, referred him to one Grissler, the Director of Product Development and Management. In the course of the discussions with Grissler, Makate indicated that he wanted to get 15 per cent of the revenue. However, the parties agreed that the negotiations on the exact amount be deferred to a later date; and that in the event of a dispute, the matter be referred to the Chief Executive Officer, Allan Knott-Craig. Makate never received his share of the revenue. Unbeknown to Makate, Grissler and Knott-Craig suddenly changed the narrative, and took all the credit for the development of the product.

Makate then approached the Southern Gauteng High Court, Johannesburg, for an order directing Vodacom to honour its obligation under the parties' oral agreement. In the alternative, he asked that the court develop 'the common law of contract and infuse it with constitutional values such as ubuntu and good faith.' Vodacom responded by contending that Grissler had no authority, actual or ostensible, to bind it in this regard. It also argued that because Makate was an employee of Vodacom at the time when the product was conceived, the product belonged to Vodacom and he was not entitled to

---

Consumer Protection Act 68 of 2008. This, therefore, calls for an ubuntu-inspired development of the concept of good faith to the point of resuscitating the *exceptio doli generalis* in some form or other.

108 Yacoob J's minority judgment at para 22.

109 Yacoob (n 108).

110 Paragraph 23.

111 Paragraph 64.

112 ibid.

113 2016 (4) SA 121 (CC).

any compensation at all. Vodacom also raised a special plea contending that Makate's claim had prescribed.

The High Court dismissed Makate's claim. He then lodged an appeal with the Supreme Court of Appeals. This Court dismissed his appeal, confirming the judgment of the High Court. Makate then approached the Constitutional Court, where he took the matter a step further. He asked the court to invoke the provisions of section 39(2) of the Constitution when interpreting the Prescription Act,[114] saying that, as it stands, the Act limits his right to access the courts. On the question whether *pacta de contrahendo* were binding on the parties, Jafta J stated that an agreement 'to negotiate in good faith in the future, is enforceable in our law, if the agreement provides for a deadlock-breaking mechanism, in case the parties fail to reach consensus.'[115] However, Jafta was at pains to explain whether there was any obligation to negotiate in good faith even in instances where there was no deadlock-breaking mechanism, saying that this 'remains a grey area of our law'.[116] This, it would seem, is because the courts have not been unanimous on this point. For instance, in *Premier of the Free State Provincial Government v Firechem (Pty) Ltd*,[117] the court said that such an agreement was enforceable because 'the absolute discretion vested with the parties to agree or to disagree.'[118] However, in *Southernport Sawmills v Transnet Ltd*,[119] the court came to a different conclusion.[120] And, as stated above, the Constitutional Court said, in *Everfres*h, that where there is

> a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values (of ubuntu) would not require that negotiation be done with the view to reaching an agreement in good faith.[121]

This approach is preferable. It is not premised on any arbitrary consideration. It is flexible enough to ensure fairness and to prevent 'contractual injustice'[122] between the parties.

Molusi & Others v Voges NO & Others[123] turned on the lawfulness of the termination of several leases that the applicants had entered into with the respondents at different times. The respondents were the trustees of a family trust which owned the premises in question. Some of the leases were in writing and the others were oral. The respondents approached the courts for an order terminating the leases and evicting the applicants on

---

114 Act 68 of 1969.
115 Paragraph 97.
116 Paragraph 100.
117 2000 (4) SA 413 (SCA).
118 Paragraph 35.
119 2005 (2) SA 202 (SCA).
120 Paragraph 8.
121 Paragraph 72.
122 Mupangavanhu (n 102) 171.
123 2016 (3) SA 370 (CC).

the ground that the applicants had failed to pay the stipulated rental. The Land Claims Court and the Supreme Court of Appeal came to the conclusion that the leases had been lawfully terminated. In coming to the conclusion, the two forums relied on the common-law remedies of ownership and reasonable notice. However, the provisions of the Extension of Security of Tenure Act (ESTA)[124]—whose *ratio legis* it is to ensure that evictions are founded on 'lawful grounds' and are carried out in a 'just and equitable' manner—were not taken into account.[125] In the Constitutional Court, Nkabinde J pointed out that the Land Claims Court and the Supreme Court of Appeal had relied on pre-constitutional common-law authority in dealing with the issues under consideration, stressing that ownership and reasonable notice were no longer the only grounds on which to found a claim for eviction.[126] She also emphasised the point that the courts should now pay 'due regard to the constitutional imperatives' as stated in section 26(3) of the Constitution and not ignore the 'special constitutional regard for the occupiers' place of residence.'[127] She then proceeded to explain the *raison d'être* of the Constitution itself in the following terms:

> The purpose of the adoption of the Constitution was to establish a society based not only on democratic values and fundamental human rights but also on social justice.[128]

Nkabinde J also said that non-compliance with the provisions of the ESTA 'will not only render [the applicants] homeless but will also frustrate their security of tenure and the aims of [the Act].'[129]

The influence and impact of the ubuntu-inspired dictum of Sachs J in *Port Elizabeth Municipality v Various Occupiers*[130] is quite palpable in the judgment of Nkabinde J. This is mainly because the two cases are almost on all fours. They both deal with substantively similar pieces of legislation and with the perennial scourge of homelessness in South Africa.[131] In *Port Elizabeth Municipality* Sachs J exhorted the

---

124 Act 62 of 1997.

125 Section 8(1) (*a*)–(*e*) of the Act sets out specific factors that must be considered before an eviction may be considered to have been 'just and equitable'. These factors include considering the fairness of the agreement between the parties; the procedure followed by the owner or person in charge of the property in evicting the occupiers; the existence of a legitimate expectation and the interests of the parties (including the comparative hardship that any one of them is likely to experience).

126 Paragraph 30.

127 ibid.

128 Paragraph 6.

129 Paragraph 47. Section 26(3) provides as follows: 'No one may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

130 2005 (1) SA 217 (CC).

131 In *Port Elizabeth Municipality*, a case that involved the eviction of occupiers (about 68 adults and a number of children) from a privately owned piece of land within the jurisdiction of the Port Elizabeth

courts to 'go beyond their normal function' and engage in 'active judicial management according to equitable principles.'[132] He also emphasised 'good neighbourliness',[133] and the need to 'infuse the values of grace and compassion (ubuntu) into the formal structure of the law.'[134]

Conclusion

From the aforegoing, it is clear that ubuntu places primacy on one's concern for one's fellow men, communitarianism and social solidarity. In addition to being relational in nature as an ethic, ubuntu also encompasses many other values such as fairness, empathy, justice, sympathy, equity and compassion. And, even though South Africans (or sub-Saharan Africans) have no monopoly over the values it espouses, ubuntu is etymologically and linguistically South African. The languages, culture and traditions of South Africa help to give it a rich indigenous, autochthonous resonance. The maxims also help to give it meaning and content. However, there has been seismic shift of late: ubuntu has moved from the realm of philosophical and theoretical niceties into the trenches of practical, legal complexities. Lawyers are now constantly relying on ubuntu when drawing up their pleadings and crafting their arguments. In turn, the judges continue to infuse the core values of ubuntu when interpreting the laws of the country, thereby creating new remedies, procedures and processes, or restricting and circumscribing the old ones, and resuscitating those that were discarded in the past for policy or ideological reasons. This is true of the *exceptio doli generalis*—which served to protect parties from unfair contractual terms or from contracts that were entered into under unfair circumstances. The *exceptio doli generalis* was a really potent and effective remedy and it needs to be revived in some or other guise.

The same consideration applies to legislation. The earlier cases of the Constitutional Court, such as *Makwanyane*, helped to lay down a sound jurisprudential foundation that, indirectly, continues to influence law-making in a positive way. And, in the recent past, as exemplified by *Everfresh*, *Molusi* and *Makate*, the judges have been building a beautiful constitutional edifice in which all South Africans, and their friends, will find refuge. It is also hoped that South Africa will be a place where fairness, justice, concern and compassion constitute its citizens' mantra.

References

Bekker CJ, Seymour's Customary Law in Southern Africa (Juta 1989).

Municipality, the court was called upon to interpret the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

132 Paragraph 35.

133 Paragraph 37.

134 ibid.

Bekker T, ‘The Re-emergence of uBuntu Court’ in D Cornell and N Muvangua (eds), *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press 2012).

Bennett TW, Customary Law in South Africa (Juta 2004).

Bennett TW, ‘Ubuntu: African Equity’ (2011) 30 PER 351.

Bohler-Müller N, ‘Some Thoughts on the uBuntu Jurisprudence of the Constitutional Court’ in D Cornell and N Muvangua (eds), *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press 2012).

Cameron E, *Justice: A Personal Account* (Tafelberg 2014).

Christie RH, *Law of Contract* (Butterworths 2001).

Cornell D, ‘Is there a Difference that Makes a Difference between Ubuntu and Dignity?’ (2010) SAPL 382 at 396.

Dent GR and Nyembezi CLS, Scholar’s Zulu Dictionary; English–Zulu, Zulu–English (Shooter & Shooter 1969).

Devenish GE, A Commentary on the South African Bill of Rights (LexisNexus 1999).

Dlamini CR, ‘Recognition of a Customary Marriage’ (1982) De Rebus 593.

Duncan P, *Sotho Laws and Customs* (Oxford University Press 1960).

Himonga C, ‘The Future of Living Customary Law in African Legal Systems and Beyond, with Special Reference to South Africa’ in J Fenrich, P Galizzi and TE Higgins (eds), *The Future of African Customary Law* (Cambridge University Press 2011).
https://doi.org/10.1017/CBO9780511844294.003

Himonga C, Taylor M and Pope A, ‘Reflections on the Judicial Views on Ubuntu’ (2013) PER 372/614.

Koyana DS, ‘The Interaction between the Indigenous Constitutional System and Received Western Constitutional Law Principles’ in PD de Kock and JMT Labuschagne (eds), *Festschrift: JC Bekker* (Southern Book Publishers 1995).

Kroeze IJ, ‘Power Play: A Playful Theory of Interpretation’ (2007) Tydskrif vir die Suid-Afrikaanse Reg 19.

Kroeze IJ, ‘Doing Things with Value: The Case of uBuntu Court’ in D Cornell and N Muvangua (eds), *uBuntu and the Law: African Ideals and Postapartheid Jurisprudence* (Fordham University Press 2012).

Luther King Jr M, ‘Letter from a Birmingham Jail’ in JM Washington (ed), *Martin Luther King Jr I have a Dream: Writings and Speeches that Changed the World* (Harper One 1992).

Mbiti JS, African Religions and Philosophy (Heinemann 1990).

Mokgoro Y and Woolman S, ‘Where Dignity Ends and Ubuntu Begins: An Amplification of, as well as an Identification in Drucilla Cornell’s Thoughts’ (2010) SAPL 401.

Mupangavanhu B, ‘Yet Another Missed Opportunity to Develop the Common Law of Contract? An analysis of Everfresh Market Virginia (Pty) Ltd v Shoprite (Pty) Ltd [2011]’ (2013) Speculum Juris 149.

Murphy JG, ‘Mercy and Legal Justice’ in J Coleman and E Paul (eds), *Philosophy and Law* (Blackwell 1987).

Quartaert JH, Advocating Dignity: Human Rights Mobilizations in Global Politics (University of Pennsylvania Press 2009).

Schulze WG, ‘Sources of South African Banking Law: A Twenty-First Century Perspective Part II’ (2003) SA Mercantile Law 601.

Cases

Amodu Tijani v The Secretary, Southern Nigeria 1912 (2) AC 399 (PC).

Bank of Lisbon and South Africa Ltd v Ornelas 1988 (3) SA 580 (A).

Bato Star v Minister of Tourism and Environmental Affairs 2004 (4) SA 490 (CC).

Bhe v Magistrate, Khayelitsha 2005 (1) SA 580 (CC).

Certification of the Constitution of South Africa Act 108 of 1996, 1996 (4) SA 744 (CC).

Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC).

Department of Land Affairs v Goedgelegen Tropical Fruits 2007 (6) SA 199 (CC).

Dikoko v Mokhatla 2006 (6) 235 (CC).

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

Gumede v President of the Republic of South Africa 2009 (3) SA 152 (CC).

Hugo v President of the Republic of South Africa 1997 (4) SA 1 (CC).

Makate v Vodacom (Pty) Ltd 2016 (3) SA 370 (CC), 2016 (4) SA 121 (CC).

Molusi & Others v Voges NO & Others 2016 (3) SA 370 (CC).

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

Premier of the Free State Provincial Government v Firechem (Pty) Ltd 2000 (4) SA 413 (SCA).

Richardson v Mellish (1924) 2 Bing 229.

S v Jezile 2015 (2) SACR 452 (WCC).

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

Southernport Sawmills v Transnet Ltd 2005 (2) SA 202 (SCA).

Legislation

Constitution of the Republic of South Africa Act 108 of 1996 (now Constitution, 1996).

Consumer Protection Act 68 of 2008.

Employment Equity Act 45 of 1998.

Extension of Security of Tenure Act 62 of 1997.

Marine Living Resources Act 18 of 1998.

National Credit Act 34 of 2005.

Prescription Act 68 of 1969.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Recognition of Customary Marriages Act 120 of 1998.

Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

South Africa Constitution Act 200 of 1993 (interim Constitution).

South African Social Security Agency Act 9 of 2004.