

# AN AFRICAN DOCTRINE OF EQUITY IN SOUTH AFRICAN PUBLIC LAW\*

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## I. INTRODUCTION

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

In many ways, this was an exceptional event. Since the colonial conquest of Africa, the indigenous normative orders have been treated as inferior. At best, they were tolerated in terms of such monitoring devices as the so-called "repugnancy clauses";<sup>1</sup> at worst, they were dismissed as mere custom, not law.<sup>2</sup> South Africa's new constitutional dispensation had the effect of formally elevating customary law to the same status as that of the common law,<sup>3</sup> but even so, the traffic of ideas between the two systems continued to favor the common law as the superior

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1. See Law of Evidence Amendment Act 45 of 1988 § 1(1) (S. Afr.) (formerly Black Administration Act 38 of 1927 § 11(1) (S. Afr.) (repealed)).

2. Because of nineteenth-century positivism, customary law has long suffered under the so-called Austinian handicap. THOMAS W. BENNETT, APPLICATION OF CUSTOMARY LAW IN SOUTH AFRICA 18 (Juta & Co. 1985).

3. See § 211(3) of the S. AFR. CONST., 1996, which obliged the courts to apply customary law when it is "applicable" and is not contrary to the Constitution or any legislation specifically aimed at customary law.

system.<sup>4</sup> The reception of *ubuntu* into the common law reversed this process.

This paper examines the function of *ubuntu* in its new environment. Most of the discussion about this topic, in academic circles at least, has concentrated on the meaning of the term, a question that all too often was reduced to finding a suitable English translation. The most obvious were the calques,<sup>5</sup> “humanity,” “personhood,” or “humaneness.”<sup>6</sup> None of these words, however, has been especially helpful, for they cannot hope to convey the full range of *ubuntu*’s connotations.

As so often happens in law, the search for a definition proceeded on an assumption that the word had a clear referent, whether it was an abstract idea or an actual way of behaving.<sup>7</sup> Rather than continue this search, this paper looks at function, i.e., the ways in and purposes for which a word is being used. Such an analysis steers clear of *priori* meanings, and concentrates instead on why and how a word is currently being used. Functionalism assumes that meaning is malleable. In other words, it acknowledges that users are continually exploiting terms to serve their own particular ends.

In this regard, it must be appreciated that, as a loanword, *ubuntu* falls into a category of terms that is especially susceptible to manipulation. As a newcomer to a strange environment, *ubuntu* must fit in with existing terms and concepts.<sup>8</sup> In turn, its appearance affects the meanings of other words, setting up a relationship between words, their users, and meanings that is dynamic and changing.

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4. In South Africa, the term “common law” is generally used in opposition to African customary law. It denotes the systems of Roman–Dutch and English law that were imported during the colonial period and, in this sense, includes judicial precedents and legislative enactments, both colonial and post-colonial.

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

6. See *S. v. Makwanyane* 1995 (3) SA 391 (CC) at ¶ 307 (S. Afr.).

7. Cf. Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 4 BUFF. HUM. RTS. L. REV. 1, 15 (1998) (stating that the Western use of abstractions “defies the very essence of the African world-view,” which describes ideas through real contexts).

8. As a loanword in English, *ubuntu* “is highly susceptible to change, not only because it is novel, but also because it is isolated”; its links with the language from which it was borrowed are broken, and it has no semantic connections with other words in the language into which it has been absorbed. Christopher Ball, *Lexis: The Vocabulary of English*, in THE ENGLISH LANGUAGE 165, 182-83. (W. F. Bolton & David Crystal eds., 1987).

## II. USES OF *UBUNTU*

An obvious place at which to start an inquiry into the use of *ubuntu* is the history of its usage. At the outset, however, we must accept that it is impossible to trace the exact denotation of the term in its vernacular origins. According to a famous metaphor, *ubuntu* is said to be shrouded in a “kaross of mystery.”<sup>9</sup>

Nevertheless, we do know that *ubuntu* is in the everyday parlance of many African languages, especially those of the *Nguni* group.<sup>10</sup> The word seems to have been co-opted to a nationwide public discourse in South Africa during the 1920s, when the Zulu cultural movement, Inkatha, used it as a catch-all slogan for a program to revive respect for traditional Zulu values.<sup>11</sup> From there, the term was introduced to the discourses of theology, management, and commerce, where it is now widely used to name companies, services, and consumer goods. As cynics put it, *ubuntu* has provided a useful means for packaging products in the appearance of traditional African values.<sup>12</sup>

Somewhat later in this process, *ubuntu* entered the law. A small, but telling, clause in the “postamble” to the 1993 Interim Constitution provided that the deeply divided society that was emerging from apartheid bore a “legacy of hatred, fear, guilt and revenge.”<sup>13</sup> These divisions were now to “be addressed on the basis . . . [of] 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>14</sup>

With no solid legal foundation, apart from this aspirational

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9. VUSAMAZULU CREDO MUTWA, *INDABA, MY CHILDREN* 555-56 (Payback Press 1998). *See also* Mokgoro, *supra* note 7, at 15.

10. *Ubuntu* is the term used in Xhosa and Zulu, *botho* in Sotho, *bunhu* in Tsonga and *vhuthu* in Venda. The word is found in many parts of Africa. *See* JOHANN BROODRYK, *UBUNTU: LIFE LESSONS FROM AFRICA* 17 (Ubuntu Sch. of Phil. 2002), and MOGOBE B. RAMOSE, *AFRICAN PHILOSOPHY THROUGH UBUNTU* 49-51 (Mond Books 2002). It appears as *nunhu* in Shona, *utu* in Swahili, and *umundu* in Kikuyu. *See* Nkonko M. Kamwangamalu, *Ubuntu in South Africa: A Sociolinguistic Perspective to a Pan African Concept*, 13 CRITICAL ARTS 24, 25ff (1999).

11. *See* MFUNISELWA J. BHENGU, *UBUNTU: THE ESSENCE OF DEMOCRACY* 10 (Novalis Press 1996).

12. Rosalind English, *Ubuntu: The Quest for an Indigenous Jurisprudence*, 12 SAJHR 641, 645-46 (1996).

13. S. AFR. (INTERIM) CONST., 1993.

14. S. AFR. (INTERIM) CONST., 1993.

clause, a series of judgments in the Constitutional and High Courts then launched *ubuntu* into the mainstream of legal discourse. It enjoyed immediate success as a way of introducing African values to South African law. Indeed, South Africa's Bill of Rights, the cynosure of the new Constitution, contains little or nothing that is distinctly "African." It could no doubt be argued that we have "no need to look for such characteristics, for the Bill of Rights reflects universal values and ideals, of which African values form an integral part."<sup>15</sup> Nevertheless, *ubuntu* has been used to give voice to something clearly African and to incorporate the values of the majority of the population "into the legal system so as to form a cohesive, plural, South African legal culture."<sup>16</sup>

### A. PUBLIC LAW

*Ubuntu* has played its most prominent role in public law. Not only did the Interim Constitution provide the foundation for a new South African society, but it was also the first official document to use the term. This single word then provided the courts with a point of entry for introducing principles of reconciliation, sharing, compassion, civility, and harmony.

Indeed, the success of the country's constitutional revolution rested on reconciliation, and the Truth and Reconciliation Commission (TRC) played a critical role in facilitating this process.<sup>17</sup> *Ubuntu* was expressly mentioned in the preamble to the Act constituting the TRC,<sup>18</sup> the chair of the Commission, Archbishop Desmond Tutu, deliberately invoked it so as to suggest an African idea of justice.<sup>19</sup> Thus,

[b]y providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but

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15. Helen Keep & Rob Midgley, *The Emerging Role of Ubuntu-Botho in Developing a Consensual South African Legal Culture*, in *RECHT DER WERKELIJKEID* 29, 30 (Fred Bruinsma & David Nelken eds., Reed Business BV 2007).

16. *Id.* at 30.

17. 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." 1 *TRUTH & RECONCILIATION COMM'N OF S. AFR. REPORT* chap. 4, 48 (Gov't Printer 1998) (hereinafter TRC).

18. Promotion of National Unity and Reconciliation 34 of 1995 (S. Afr.).

19. JOHN R. SAUL, *ON EQUILIBRIUM* 94 (Penguin 2001). One of the primary means for securing a political settlement was the amnesty offered to perpetrators of apartheid offenses, provided that they confessed the truth of their deeds. *See AZAPO v. TRC* 1996 (4) SA 562 (C) at 570 (S. Afr.).

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also assisted in the creation of a narrative truth. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless.<sup>20</sup>

Forgiveness—or rather amnesty for apartheid offenses—lay at the heart of the truth and reconciliation process.<sup>21</sup> In *AZAPO v. TRC*, however, it was argued that the removal of civil and criminal liability was unconstitutional because it infringed the right of access to the courts.<sup>22</sup> The Constitutional Court, nonetheless, held that amnesty was essential because without it there would have been no incentive for offenders to disclose the truth, and as the truth unfolded, so would the healing process of reconciliation.<sup>23</sup>

While *ubuntu* was key to achieving the immediate goal of political settlement, it continued to play an important, long-term role in the criminal justice system. Here, it provides a rubric for infusing African ideas of dispute resolution into sentencing policy. Even before the new Constitution, the courts were experimenting with the idea of restorative justice (which, of course, was central to the work of the TRC).<sup>24</sup>

In this sense, *ubuntu* made its debut in *S v. Makwanyane*,<sup>25</sup> a case in which the Constitutional Court gave the world its first judicial exposition. Justice Mokgoro explained the term as

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20. TRC, *supra* note 17, at 112, cited by *Albutt v. Centre for the Study of Violence & Reconciliation* 2010 (3) SA 293 (CC) at ¶ 58 (S. Afr.) per Ngcobo C.J.

21. See *Du Toit v. Minister of Safety & Security* 2009 (1) SA 176 (SCA) (S. Afr.).

22. 1996 (4) SA 671 (CC) at ¶ 677 (S. Afr.).

23. See also *The Citizen 1978 (Pty) Ltd v. McBride* 2010 (4) SA 148 (SCA) at ¶¶ 31ff. (S. Afr.).

24. Although those who committed crimes of apartheid deserved punishment, peace and national unity dictated reconciliation, which has come to be seen as synonymous with restorative justice. See TRC, *supra* note 17, at 414 (citing Peter Biehl, Cape Town hearing, 9 July 1997, who describes how *ubuntu* substantiates restorative justice); PUMLA GOBODO-MADIKIZELA, A HUMAN BEING DIED THAT NIGHT—A STORY OF FORGIVENESS 127-32 (David Philip 2003).

25. 1995 (3) SA 391 (CC) (S. Afr.). See also *Bhe v. Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC) at ¶ 45 (S. Afr.) (describing, in an obiter dictum, the valuable features of customary law: an inherent flexibility, consensus-seeking in family meetings for the prevention and resolution of disputes, the unity of the family structures, the “fostering of co-operation, a sense of responsibility in and of belonging to its members,” and “the nurturing of healthy communitarian traditions such as *ubuntu*”).

follows:

Metaphorically, [*ubuntu*] expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.<sup>26</sup>

Justice Langa continued:

It is a culture, which places some emphasis on communalism and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>27</sup>

Social harmony lies at the heart of *ubuntu*. When applied to criminal justice, this value upends the traditional common-law goal of sentencing, which, generally speaking, aims at retribution. Restorative justice seeks instead to promote social cohesion.<sup>28</sup> It does so by keeping offenders out of prison<sup>29</sup> and by seeking reconciliation with both victims and the community at large.

Restoring social harmony is now one of the central aims of sentencing policy in South Africa, and it was encoded as such in the Child Justice Act.<sup>30</sup> This enactment seeks to "expand and entrench the principles of restorative justice in the criminal

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26. 1995 (3) SA 391 (CC) at ¶ 308 (S. Afr.).

27. *S v. Makwanyane* 1995 (3) SA 391 (CC) at ¶ 224 (S. Afr.).

28. On the aim of reconciliation in traditional courts, see Charles R.M. Dlamini, *Whither Lay Justice in South Africa?*, 12 SPECULUM JURIS 1, 6 (1985), and Max Gluckman, THE IDEAS IN BAROTSE JURISPRUDENCE 94-97 (Reprint, Manchester UP 1972).

29. *S v. Sibiya* 2010 (1) SACR 284 (GNP) at ¶ 13 (S. Afr.).

30. Child Justice Act 75 of 2008 (S. Afr.).

justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed.”<sup>31</sup> Hence, courts are required, as far as possible, to divert juvenile offenders from the penal system.<sup>32</sup> For example, in *M v. S*, which dealt with correctional supervision, the court called for crime control to be returned to the community rather than criminal justice agencies.<sup>33</sup> It commented that the offender would have a better chance of social rehabilitation without suffering the negative effects of a prison sentence, loss of a job, and possible destruction of family networks.<sup>34</sup>

Although an important factor in sentencing, *ubuntu* has made only a brief appearance in substantive criminal law. The only case in which it was mentioned is *S v. Mandela*.<sup>35</sup> Here the accused pleaded compulsion, but could not prove that the compulsion was immediate or life-threatening. In holding that lower standards could not be accepted for this defense, the court remarked that we now live in a society based on freedom, dignity, *ubuntu*, and respect for life. Implicit in the idea of *ubuntu* was the principle that every person should be treated with equal concern and respect.

Reconciliation and restorative justice naturally require the participation of all interested parties,<sup>36</sup> and the use of *ubuntu* has given support to another hallmark of South Africa’s new Constitution: participatory democracy. The case of *Albutt v. Centre for the Study of Violence & Reconciliation*<sup>37</sup> was concerned

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31. Child Justice Act 75 of 2008 § 2(b)(iii) (S. Afr.).

32. Thereafter, the terms reconciliation and restorative justice appear frequently. For instance, in § 51(g) and § 2, which specify the “Objects of the Act,” the terms are used. *See also Le Roux v. Dey* 2011 (3) SA 274 (CC) at ¶ 50 (S. Afr.).

33. 2007 (12) BCLR 1312 (CC) at ¶ 63 (S. Afr.).

34. *Id.* (citing Don Pinnock, *What Kind of Justice?*, 111 INST. OF CRIMINOLOGY OCCASIONAL PAPER SERIES 4–95 (1995) and *Beyond Retribution: Prospects for Restorative Justice*, in 111 SOUTH AFRICA MONOGRAPH (Traggy Maepa ed., Inst. for Sec. Stud. 2005)), available at

<http://dspace.cigilibrary.org/jspui/bitstream/123456789/31448/1/Mono111.pdf?1>). *See also S v. Sibiya* 2010 (1) SACR 284 (GNP) at ¶ 13 (S. Afr.) (holding that a suspended prison sentence under the Domestic Violence Act 116 of 1998 (S. Afr.), based upon *ubuntu*, would seek reconciliation between the parties and would keep the offender as an active member of society).

35. 2001 (1) SACR 156 (C) (S. Afr.).

36. *See Albutt v. Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at ¶ 61 (S. Afr.).

37. *Albutt* 2010 (3) SA 293 (CC) (S. Afr.).

with business left unfinished by the TRC, namely, a form of amnesty for individuals who had not taken part in the TRC process. To solve this problem, the President announced a special pardon for those who had committed politically motivated offenses. As to whether victims were to be given a voice in this special dispensation, the Constitutional Court held that their participation was essential, partly to establish the truth and partly to achieve national reconciliation.<sup>38</sup> It observed that, in Africa, “[v]ictim participation was the norm in deciding the proper ‘punishment’ for offenders in traditional African society” and “this remarkable tradition of participation and capacity for forgiveness in African society also underlay, at a deeper level, the amnesty process.”<sup>39</sup>

It is in administrative justice, however, that the courts have found the widest scope for deploying *ubuntu*. By means of this concept, they have sought to break down the typical Western conception of society as a collection of atomistic individuals.<sup>40</sup> In *Port Elizabeth Municipality v. Various Occupiers*,<sup>41</sup> for instance, Justice Sachs held that

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

Similarly, in *Union of Refugee Women v. Director: Private*

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38. *Albutt v. Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at ¶ 56 & 59 (S. Afr.) (per Ngcobo, C.J.) Justice Froneman noted in ¶ 90 that our constitutional democracy was not merely representative, but also participatory, a principle that determined even the executive function. *Id.* at ¶ 90 (citing *Doctors for Life Int'l v. Speaker of the Nat'l Assembly* 2006 (6) SA 416 (CC) at ¶ 121 (S. Afr.), and *Matatiele Municipality v. President of the RSA (No 2)* 2007 (6) SA 477 (CC) at ¶ 40 (S. Afr.)).

39. *Albutt* 2010 (3) SA 293 (CC) at ¶ 91 (S. Afr.).

40. *Union of Refugee Women & Others v. Director: Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC) at ¶ 147 (S. Afr.) (“Today the concept of human interdependence and burden-sharing in relation to catastrophe is associated with the spirit of *ubuntu-boho*.”).

41. 2005 (1) SA 217 (CC) at ¶ 37 (S. Afr.).

*Security Industry Regulatory Authority*,<sup>42</sup> where Sachs J. had to consider the constitutionality of a blanket refusal to allow refugees from African countries to take up employment in the South African security industry,<sup>43</sup> he spoke of *ubuntu* as “[t]he culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves.”<sup>44</sup>

By implication, the Constitutional Court called upon courts to “move beyond the common law conception of rights as strict boundaries of individual entitlement.”<sup>45</sup> *Ubuntu* was thus developed by the courts to inject respect, civility, fairness, and trust into the state’s relationships with the people of South Africa. These relationships have been extraordinarily diverse. They include everything, from the dealings of the lower with the higher courts,<sup>46</sup> to the police with offenders,<sup>47</sup> the President with a state employee,<sup>48</sup> the Department of Home Affairs with foreigners,<sup>49</sup> and of course, local authorities with their constituencies.<sup>50</sup>

## B. PRIVATE LAW

*Ubuntu* has received a markedly cooler welcome in private law.<sup>51</sup> Although invoked on several occasions, nearly all have

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42. *Union of Refugee Women & Others v. Director: Private Security Industry Regulatory Authority & Others* 2007 (4) SA 395 (CC) at ¶ 145 (S. Afr.).

43. *Id.* at ¶ 147 (S. Afr.).

44. *Id.* (citing W. DAVID HAMMOND-TOOKE, THE ROOTS OF BLACK SOUTH AFRICA 99 (Jonathan Ball 1993), who said that, in traditional society, “the hospitality universally enjoined towards strangers, [is] captured in the Xhosa proverb: *Unyawo alunompumlo* (the foot has no nose). Strangers, being isolated from their kin, and thus defenceless, were particularly under the protection of the chief and were accorded special privileges.”).

45. *Joseph v. City of Johannesburg* 2010 (4) SA 55 (CC) at ¶ 46 (S. Afr.). Justice Skweyiya remarked that *Batho Pele* indicated an equivalence of “citizen” and “customer” for purposes of the public service (especially because the customers have no choice in service provider). *Id.* at ¶ 46 n.39.

46. *Pharmaceutical Society of South Africa v. Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v. Minister of Health* 2005 (3) SA 238 (SCA) at ¶ 38 (S. Afr.).

47. *Bertie Van Zyl (Pty) Ltd v. Minister for Safety & Security* 2010 (2) SA 181 (CC) at ¶¶ 77-78 (S. Afr.).

48. *Masetsha v. President of the RSA* 2008 (1) SA 566 (CC) at ¶ 238 (S. Afr.) concerned the President’s act terminating the applicant’s position as head of the National Intelligence Agency.

49. *Koyabe v. Minister for Home Affairs* 2010 (4) SA 327 (CC) at ¶ 62 (S. Afr.).

50. In *Joseph* 2010 (4) SA 55 (CC) at ¶¶ 46-47 n.39 (S. Afr.), the Constitutional Court linked fair and respectful administrative action to *Batho Pele*.

51. Dennis Davis, *Private Law After 1994: Progressive Development or Schizoid*

been concerned with the state's treatment of its citizens. For example, *Ryland v. Edros*<sup>52</sup> involved recognition of a Muslim marriage. Previously, such unions had been considered contrary to South African public policy and *boni mores*, but on the basis of the postamble to the Interim Constitution and Justice Langa's judgment in *Makwanyane*,<sup>53</sup> the court held that values of equality and tolerance demanded a new approach by the courts.

Similarly, *ubuntu* has been frequently invoked in relation to the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act (PIE).<sup>54</sup> This legislation aims to alleviate the plight of the homeless and those forced to seek shelter on property owned by another. To achieve a just and equitable settlement, it requires the courts to consider the lawfulness of the squatters' occupation and their interests and circumstances, together with broader constitutional values. Hence, although the claims of property owners may be based on sound legal grounds, they may be refused to realize higher values. These have been variously described as justice, equity, fairness, grace, and compassion.<sup>55</sup>

The leading case, and the prime example of the application of *ubuntu* with regard to PIE, is *Port Elizabeth Municipality v. Various Occupiers*.<sup>56</sup> In response to a petition signed by 1600 people in the neighborhood, the Municipality sought an eviction order against sixty-eight people who, for a number of years, had been occupying shacks on privately owned land within the municipal area.<sup>57</sup> Justice Sachs appealed to *ubuntu* in the terms quoted above, namely, that we are not islands unto ourselves, but

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*Confusion?*, 24 SAJHR 318, 329 (2008).

52. 1997 (2) SA 690 (C) at 708 (S. Afr.).

53. 1995 (3) SA 391 (CC) at ¶ 224 (S. Afr.).

54. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (S. Afr.).

55. See *Wine v. Zondani* [2009] JOL 24358 (SE) (S. Afr.) (citing *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.)).

56. 2005 (1) SA 217 (CC). The court approved *Port Elizabeth Municipality v. Peoples Dialogue on Land & Shelter & Others* 2000 (2) 1074 (SECD) (S. Afr.), which in turn was quoted with approval by Olivier JA. in *Ndlovu v. Ngcobo; Bekker v. Jikka* 2003 (1) SA 113 (SCA) at ¶ 65 (S. Afr.).

57. Justice Sachs held the following: "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." *Id.* at ¶ 37.

must live in community with others.<sup>58</sup> Hence, while PIE emphasizes justice and equity, these values are to be seen as “interactive, complementary and mutually reinforcing” with equality and the rule of law.<sup>59</sup>

One might have thought that the law of delict would provide fertile ground for *ubuntu* since it is based on such indeterminate concepts as reasonableness and the duty of care. Surprisingly, however, *ubuntu* has had little effect in this branch of the law. *Carmichele v. Minister of Safety & Security*<sup>60</sup> is a good example. In *Carmichele*, the courts had to decide whether the state owed the applicant a duty of care. While the Constitutional Court could well have referred to *ubuntu* jurisprudence to answer this question, it held that adjustments to the common law should be based on an “objective normative value system” reflecting underlying constitutional values,<sup>61</sup> without deciding the actual content of that system.<sup>62</sup>

The only case in delict to have applied *ubuntu* was *Dikoko v. Mokhatla*,<sup>63</sup> but it involved a remedy rather than the substantive law. Justice Mokgoro held that monetary compensation for defamation diverted attention away from two basic considerations: that the reparation represents injury to dignity and reputation, not necessarily to the pocket; and that courts should attempt to reestablish a respectful relationship between the parties.<sup>64</sup> A Roman-Dutch law remedy, the *amende honorable* (apology), was therefore revived to acknowledge a sense of *ubuntu* and to emphasize restorative rather than retributive justice.

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58. *Johannesburg v. Rand Props. (Pty) Ltd* 2007 (6) SA 417 (SCA) at ¶ 62 (S. Afr.) per Jahbay, J. (quoting Sachs, J., at ¶ 37).

59. However, “[t]he necessary reconciliation can only be attempted by a close analysis of the actual specifics of each case.” *Id.* at ¶ 35.

60. 2001 (4) SA 938 (CC) at ¶ 54 (S. Afr.).

61. Davis, *supra* note 51, at 321.

62. The matter was then referred back to the High Court to reconsider in light of the claimant’s constitutional rights. In *Carmichele v. Minister of Safety & Sec.* 2003 (2) SA 656 (C) at ¶ 16 (S. Afr.), Justice Chetty confirmed the “strictly” common-law position on the matter and then considered the effect of the Constitution. He emphasized that the criterion for wrongfulness—the legal convictions of the community—was now “to be found in the Constitution and not in some vague notion of public sentiment or opinion.” See Johan W.G. Van der Walt, *Horizontal Application of Fundamental Rights & the Threshold of the Law in View of the Carmichele Saga*, 19 SAJHR 517, 522-23,525 (2003).

63. 2006 (6) SA 235 (CC) at ¶ 69 (S. Afr.).

64. *Id.* at ¶ 69.

Contract, too, has proved remarkably resistant to *ubuntu*, although its reception in this area is a more complex matter. First, most of the everyday issues associated with unfair or unconscionable contracts have now been resolved by the National Credit Act<sup>65</sup> and the Consumer Protection Act.<sup>66</sup> Second, it can be argued that, to deal with the type of problems for which *ubuntu* has been argued, the common law already has specific mechanisms in place, notably, the principles of good faith, public policy, and, of course, the Bill of Rights.

One such common-law mechanism used to be the *exceptio doli generalis*, a remedy that was formerly invoked as a defense to the enforcement of terms in contracts that were unfair or unconscionable.<sup>67</sup> In *Bank of Lisbon v. De Ornelas*,<sup>68</sup> however, the former Appellate Division decided that the *exceptio* did not form part of our law. According to Joubert JA., it had disappeared in the Middle Ages and, as a “superfluous defunct anachronism,” should be laid to rest. Its place was then taken by public policy, good faith, and the Bill of Rights.

While the courts have occasionally mentioned *ubuntu* in typical private-law relationships,<sup>69</sup> they have been reluctant to elaborate on the concept in this context.<sup>70</sup> In fact, it had a direct bearing on the outcome of only two cases: *Law Society, Northern Provinces v. Mogami*,<sup>71</sup> which involved the attorney-client relationship, and *Badenhorst v. Badenhorst*,<sup>72</sup> which involved a married couple’s claim to the husband’s parents’ farm. The silence in private law seems, therefore, to give credence to Davis’s comment that the courts have allowed principles of legal certainty and private autonomy to prevail over the

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65. National Credit Act 34 of 2005 (S. Afr.).

66. Consumer Protection Act 68 of 2008 (S. Afr.).

67. *Weinerlein v. Goch Bldgs. Ltd.* 1925 AD 282 at 292-93 (S. Afr.).

68. 1988 (3) SA 580 (A) at 607 (S. Afr.).

69. See, e.g., *Barkhuizen v. Napier* 2007 (7) BCLR 691 (CC) at ¶ 51 (S. Afr.); *Pharm. Mfrs. Assoc. of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (3) BCLR 241 (CC) (S. Afr.); and *Brisley v. Drotsky* 2002 (4) SA 1 (SCA) at ¶ 95 (S. Afr.); and *Fourie v. Minister of Home Affairs* 2005 (3) SA 429 (SCA) at ¶ 25 (S. Afr.).

70. Cf. *Fourie* 2005 (3) SA 429 (SCA); Davis, *supra* note 51, at 323.

71. 2010 (1) SA 186 (SCA) at ¶ 22 (S. Afr.).

72. [2005] JOL 13583 (C) at ¶ 24 (S. Afr.). This claim was found to be an abuse of the parents’ generosity. The court spoke of the wife’s claim as “an irresistible temptation of greed,” and added, “her attitude undermined *ubuntu*, that godly value with which all human beings are ordained.” *Id.*

transformative, communitarian power of the “constitutional values of freedom, equality and dignity.”<sup>73</sup>

### C. UBUNTU: AN AFRICAN EQUITY

From the cases above, it appears that the courts are using *ubuntu* as a metanorm to solve problems where there is no hard and fast rule to determine the outcome. In such situations—sentencing and administrative decision-making being the most obvious—*ubuntu* functions as a means for reaching an equitable solution.

In fact, *ubuntu* bears a close resemblance to the English-law doctrine of equity. This, too, was a metanorm, albeit one invoked for a somewhat different reason: to correct injustices resulting from strict application of the common law.<sup>74</sup> Hence, by appealing to equity, English judges could contrive fairer results in particular factual scenarios.<sup>75</sup> In this manner, the doctrine of equity was called upon “to regulate the conscience of defendants so that they act[ed] with propriety in situations where, by following the letter of the common law, they could act unconscionably.”<sup>76</sup>

As the latter quote indicates, the history of equity in English law was connected to good conscience and, ultimately, religion. In fact, courts of equity were originally presided over by the Lord Chancellor, the chief Minister of the King’s Court.<sup>77</sup> Early

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73. Davis, *supra* note 51, at 328.

74. In this sense, Justice Sachs, in *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at ¶ 36 (S. Afr.), linked *ubuntu* to PIE and, through that means, to justice and equity. As a result, “[t]he court is called upon to go beyond its normal functions, and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.” *Id.* He went on to say the following:

The inherited injustices at the macro level will inevitably make it difficult for the courts to ensure immediate present-day equity at the micro level. The judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails.

*Id.* at ¶ 38.

75. ALASTAIR HUDSON, *EQUITY & TRUSTS* 5 (3d ed. Cavendish Publ’g 2003).

76. CARLETON K. ALLEN, *LAW IN THE MAKING* 406-07 (7th ed. Clarendon Press 1964). *See also* Westdeutsche Landesbank Girozentrale v. Islington LBC, [1996] A.C. 669 (appeal taken from Eng.).

77. During the fourteenth century, the Chancellor’s powers expanded to hear matters and make decrees on his own authority. PHILIP H. PETIT, *EQUITY & THE*

Chancellors, known as “keepers of the King’s conscience,”<sup>78</sup> were clerics,<sup>79</sup> and, as a result, the development of equity in English law owed much to canon law.<sup>80</sup> This origin in religion has an interesting parallel with *ubuntu*, which also finds its ultimate sanction in the spiritual realm, namely, the departed ancestors who stand as guardians of the African moral order.<sup>81</sup>

The question now arises whether *ubuntu* will continue to play a productive role as a norm of equity. After all, comparative law teaches that legal transplants will not survive if they prove to be superfluous to the needs of their new environment. This argument is confirmed by linguistic theory.

From an English language perspective, *ubuntu* is a so-called “loan” word.<sup>82</sup> This qualifier implies a word taken from another language to denote a phenomenon that has never before been given expression in its new environment (or possibly a phenomenon that already has many terms of expression). As a loan word, *ubuntu* “is a solution to a problem. Often the need is obvious, but sometimes it is unseen or barely felt, and then it is only in finding something to plug the gap that we actually realize the gap was there in the first place.”<sup>83</sup> Even so, *ubuntu* is an intruder, *l'emprunt est un intrus*,<sup>84</sup> and, as such, will have to adapt to its new environment.<sup>85</sup> If it is redundant, the terms of the host language will gradually predominate.

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LAW OF TRUSTS 2 (9th ed., Butterworths 2001). As the number of petitions seeking equitable remedies to the Chancellor increased, a separate system of courts was created, known as the Courts of Chancery. HUDSON, note 75, at 12.

78. HUDSON, *supra* note 75, at 11.

79. ALBERT K.R. KIRALFY, POTTER’S HISTORICAL INTRODUCTION TO ENGLISH LAW & ITS INSTITUTIONS 570 (4th ed., Sweet & Maxwell 1958), and KONRAD ZWEIGERT & HIEN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 194 (Tony Weir trans., Clarendon Press 2d ed. 1987).

80. Canon law drew, in turn, from the principles of natural law, as espoused by St. Thomas Aquinas, and even earlier by Greek and Roman philosophy. ALLEN, *supra* note 76, at 388ff.

81. ILZE KEEVY, *Ubuntu Versus the Core Values of the South African Constitution*, 34 J. JURID. SCI. 9, 34-35, 30-32 (2009), and Thomas W. Bennett & James Patrick, *Ubuntu the Ethics of Traditional Religion*, in TRADITIONAL AFRICAN RELIGIONS IN SOUTH AFRICAN LAW § 3 (Thomas W. Bennett ed., UCT Press 2011).

82. Perhaps a better expression is “borrowed,” since these words will not be returned to source.

83. HENRY HITCHINGS, THE SECRET LIFE OF WORDS 5 (John Murray 2008).

84. LOUIS DEROUY, *L'EMPRUNT LINGUISTIQUE* 215 (Société d'ed. 1956).

85. HITCHINGS, *supra* note 83, at 12.

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As it happens, the English doctrine of equity was not received into South African law.<sup>86</sup> Purists engaged in the *bellum juridicum* of the last century argued that an alien concept such as this would pollute Roman-Dutch law. As the unique product of a particular judicial system, equity had no place in our civil-law regime,<sup>87</sup> which was already amply equipped with equitable remedies.<sup>88</sup> These were unjust enrichment, public policy, good faith, formerly the *exceptio doli generalis*, and later, the Bill of Rights.

Nevertheless, the range of these remedies is not as pervasive as equity, and by implication, they do not play the same role as *ubuntu*.<sup>89</sup> The rules of enrichment, for example, could be used to correct situations of injustice caused by strict application of the common law.<sup>90</sup> Unlike equity, however, they applied only in certain limited circumstances. Hence they dealt primarily with problems arising in private-law relationships;<sup>91</sup> they concerned only the specific enrichment of defendants before determining whether it was unjust; and they offered compensation rather than the broader range of remedies available under equity.<sup>92</sup>

Good faith, too, plays a limited role in South African law. It has always been a fundamental principle,<sup>93</sup> but as the court held in *Brisley v. Drotsky*, it could not be used as an independent ground for setting aside or refusing to enforce contractual provisions.<sup>94</sup> While the abstract idea of bona fides is a foundation and justification for legal rules,<sup>95</sup> and can “perform creative,

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86. Van der Walt, *supra* note 62, at 530.

87. See RICHARD H. CHRISTIE, THE LAW OF CONTRACTS IN SOUTH AFRICA (5th ed. LexisNexis Butterworths 2006) 521.

88. Graham Douthwaite, *South Africa & the Law*, ACTA JURIDICA 52 (1960).

89. Although the argument in favor of good faith is favored by REINHARDT ZIMMERMANN, THE LAW OF OBLIGATIONS 667 n.192 (OUP 1996); Jacques D. Du Plessis, *Common Law Influences on the Law of Contract & Unjustified Enrichment in Some Mixed Legal Systems*, 78 TUL. L. REV. 219, 242 (2003-2004).

90. HUDSON, *supra* note 75, at 15. See also Du Plessis, *supra* note 89, at 242.

91. REBECCA WILLIAMS, UNJUST ENRICHMENT & PUBLIC LAW 12-13, 16-18 (Hart 2010).

92. Jan G. Lotz, *Enrichment*, in 9 THE LAW OF SOUTH AFRICA ¶¶ 208, 243 (Willem A. Joubert & John A. Faris eds., LexisNexis Butterworths 2005).

93. Frederik D.J. Brand, *The Role of Good Faith, Equity & Fairness in the South African Law of Contract: The Influence of the Common Law & the Constitution*, 126 SALJ 71, 73 (2009).

94. *Brisley v. Drotsky* 2002 (4) SA 1 (SCA) at ¶ 16 & 22 (S. Afr.).

95. See also *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA) (S. Afr.) and *Tuckers Land & Dev. Corp. v. Hovis* 1980 (1) SA 645 (A) (S. Afr.).

informative and controlling functions through established rules of contract law,” it may not be used directly to intervene in contractual relationships.<sup>96</sup> In such circumstances, the courts must refer, instead, to the established rules in order to preserve legal certainty.<sup>97</sup> In summary, although good faith is an aspect of *ubuntu*, it is not used in situations where the courts readily apply *ubuntu*.<sup>98</sup>

Public policy would, at first sight, seem to embrace equity and fairness, since it stands for “the general sense of justice of the community, the *boni mores*, manifested in public opinion.”<sup>99</sup> Even so, this principle is not the same as *ubuntu*. While policy is mutable, in that it is always changing in response to social demands, *ubuntu* is constant and timeless.

Moreover, public policy does not have an unlimited scope of operation. “[S]imple justice between man and man” in the parties’ individual capacities cannot alone determine the public interest, because the idea is too simplistic and could lead to arbitrary decisions.<sup>100</sup> Indeed, rather than relying only on public policy to deal with unfair situations in contract, the courts seem to prefer linking it to the Bill of Rights.<sup>101</sup> In *Barkhuizen v. Napier*,<sup>102</sup> for instance, the court held that “the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights.”<sup>103</sup> Thus, although we can say that policy is *informed* by *ubuntu*, the converse is not necessarily

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96. Hence, there is the limited role of good faith. *See Eerste Nasionale Bank van Suidelike Afrika Bpk v. Saayman NO* 1997 (4) SA 302 (A) at 312-31 (S. Afr.), especially the minority judgment of Olivier JA. at 323F-326G.

97. *See South African Forestry Co. Ltd. v. York Timbers* 2005 (3) SA 323 (SCA) at ¶ 27 (S. Afr.).

98. Cf. SCHALK W.J. VAN DER MERWE ET AL., CONTRACT GENERAL PRINCIPLES 219 (3d. Juta & Co. 2007).

99. *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at ¶ 73 (S. Afr.). Also, shortly after the *Bank of Lisbon* case, *Sasfin (Pty) Ltd. v. Beukes* 1989 (1) SA 1 (A) (S. Afr.) invoked public policy to have a contract declared unenforceable.

100. VAN DER MERWE ET AL., *supra* note 98, at 219.

101. *See* CHRISTIE, *supra* note 87, at 16-17. *See also* *Brisley v. Drotsky* 2002 (4) SA 1 (SCA) at ¶ 95 (S. Afr.); *Carmichele v. Minister of Safety & Sec.* (2001) (4) SA 938 (CC) (S. Afr.) and *South African Forestry Co. Ltd. v. York Timbers* 2005 (3) SA 323 (SCA) (S. Afr.).

102. 2007 (5) SA 323 (CC) at ¶ 30 (S. Afr.).

103. *Barkhuizen v. Napier* 2007 (7) BCLR 691 (CC) at ¶¶ 73, 85 (S. Afr.).

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true.<sup>104</sup>

*Ubuntu* is often linked with South Africa's new constitutional values, especially by Justice Sachs. He has held, for instance, that "[o]ur Constitution requires a court . . . to weave the elements of humanity and compassion within the fabric of the formal structures of the law . . . and to promote . . . a caring society based on good neighbourliness and shared concern."<sup>105</sup> Following this line of thinking, the Constitutional Court has talked of *ubuntu* and dignity—a core value of the South African Constitution<sup>106</sup>—as analogous concepts.<sup>107</sup>

Notwithstanding its association with the Bill of Rights, *ubuntu* mediates even this, the supreme source of all South Africa law.<sup>108</sup> As Justice Mokgoro said, in *S v. Makwanyane*: "[the values of *ubuntu*] underlie, first and foremost, the whole idea of adopting a Bill of Fundamental Rights and Freedoms in a new legal order. They are central to the coherence of all the rights entrenched in Chapter 3 . . ."<sup>109</sup> Thus, *ubuntu* "regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."<sup>110</sup> In this way, it is available to guide the interpretation of rights and

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104. *Barkhuizen v. Napier* 2007 (7) BCLR 691 (CC) at ¶¶ 51 (S. Afr.).

105. *Johannesburg v. Rand Props. (Pty) Ltd.* 2007 (6) SA 417 (SCA) at ¶ 62 (S. Afr.), and *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) at ¶ 37 (S. Afr.). See also *Cape Town v. Residents at Bluewaters* (5083/09) [2010] ZAWCHC 32 (Feb. 24, 2010) at ¶ 25 (S. Afr.).

106. S. AFR. CONST., 1996 §§ 1(a), 10. "Everyone has inherent dignity and the right to have their dignity respected and protected." *Id.* § 10.

107. See, e.g., *S v. Makwanyane & Another* 1995 (3) SA 391 (CC) at ¶ 225 (S. Afr.) ("An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*.").

108. In *Port Elizabeth Municipality* 2005 (1) SA 217 (CC) at ¶ 37 (S. Afr.), Justice Sachs affirmed that the spirit of *ubuntu*-botho "suffuses the whole constitutional order, combining individual rights with a communitarian philosophy and providing a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern." Previously, with reference to the interim Constitution, Justice Madala expressed similar sentiments. *Makwanyane* at ¶ 237 (S. Afr.).

109. 1995 (3) SA 391 (CC) at ¶ 307 (S. Afr.).

110. *Barkhuizen v. Napier* 2007 (7) BCLR 691 (CC) at ¶¶ 224-25 (S. Afr.).

to reconcile seemingly conflicting rights.<sup>111</sup>

As a metanorm with a particular role to play in public law, *ubuntu* seems to have a positive future in the South African legal system. It cannot be described as a rule, or even a principle.<sup>112</sup> Rather, it has a broader scope suggesting that it is closer to a value, or, better still, a representation of the right way of living, and, even more important, an African way of living.<sup>113</sup>

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111. *Port Elizabeth Municipality* 2005 (1) SA 217 (CC) at ¶ 13 (S. Afr.). As with PIE, the Courts have to find a “balance between illegal eviction and unlawful occupation.” *Id.*

112. See also KEEVY, *supra* note 81 (arguing that *ubuntu* is not a “philosophy” in the Western sense).

113. RAMOSE, *supra* note 10, at 40. In this sense, it is akin to the Hindu notion of *dharma*, which can be variously translated as “righteous duty, law, morality or religion.” WERNER MENSKI, HINDU LAW: BEYOND TRADITION & MODERNITY 98 (O. U. P., 2003).