THE SYNERGY OF *uBUNTU*: A LEGAL NICHE IN OUR LAW

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BY

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DECLARATION

I, the undersigned, **Yvette Caroline Hüsselmann**, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of Bachelor of Laws (Honours) is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references.

Signature: ----------

Date: ----------

SUPERVISOR'S CERTIFICATE

I, **Professor Nico Horn**, hereby certify that the research and the writing of this dissertation were carried out under my supervision.

Supervisor's Signature: ----------

Date: ----------

ACKNOWLEDGEMENTS

I can do all things through Christ who strengthens me.

Philippians 4 verse 13.

ALL THE GLORY

My heart is full of admiration

For You, my Lord, my God and King

Your excellence my inspiration

Your words of grace have made my spirit sing

All the glory, honour and power

Belong to You, belong to You

Jesus, Saviour, Anointed One

I worship You, I worship You

You love what's right and hate what's evil

Therefore your God sets you on high

And on your head pours oil of gladness

While fragrance fills your royal palaces

Your throne, O God, will last forever

Justice will be your royal decree

In majesty, ride out victorious

For righteousness, truth and humility

Graham Kendrick

Professor Nico Horn, thank you, for being His instrument of guidance and direction; throughout my journey of becoming *uBuntu {a person through another person; i am because you are}*.

ABSTRACT

In this paper the uses of *uBuntu* in constitutional law, criminal law, and administrative law, the law of property, family law, delict and contract are investigated. Furthermore the theoretical objections to the use of *uBuntu* are stated and responded to. It is found that *uBuntu* provides the South African courts with a metanorm similar to the English notion of equity and that it is being deployed to give voice to something distinctively African. It promises to lay the foundations for a cohesive, plural, South African legal culture, characterised by notions such as reconciliation, sharing, compassion, civility, responsibility, trust and harmony.

KEYWORDS: *uBuntu*, equity, reconciliation, human dignity, humanity, social harmony, restorative justice, cultural heritage.

LIST OF ABBREVIATIONS

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

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CHAPTER ONE:

1.1 INTRODUCTION:

The author was propelled to embark on the study of *uBuntu*, since Customary Law IV, when she became interested in the subject matter as well as being intrigued by it. In the good old days the saying went along these lines: "its love that makes the world go round." Of late, and unfortunately so, the tune has changed to: "its money that makes the world go round." What the author is driving at is that from readings on the philosophies of Laws and the Jurisprudence, thereof, it would appear that the rich and powerful make the Laws. The marginalized, poor, illiterate majority have their rights fall through the cracks. Hence, it is on this premise that the author wishes to highlight the importance of the element of humaneness, as it complements the Constitution of any a proud nation. The reason for the choice of topic is tightly interwoven with the author's postmodernist worldview as a legal eagle, always keeping a bird's eye view on the window of opportunity to enhance another human beings life. Volumes of texts by African philosophers and academics concur that Africans are oppressed by the African continent's oppressive, collective intolerable worldview. There evidence stand in stark contrast to the highest Court's judgments that *uBuntu* subscribes to South Africa's Constitution and Bill of Rights. This inconsistency compels the author to investigate the truth about *uBuntu*, which appears not to be keenly deliberated in Court.

1.2 STATEMENT OF LEGAL OBSERVATION:

Since *S v Makwanyane*, the Constitutional Court and ordinary courts have produced a "seamless text" of rainbow jurisprudence. The concept of *uBuntu* was upheld as "humanness"; the "moral philosophy" of traditional African societies which was, according to Mokgoro, Tutu and Bhengu, difficult to explain in a European language. Apart from the fact that the Court represented *uBuntu* as a communitarian worldview which favours group rights and duties above individual rights and liberties, the Court also conceded that *"uBuntu* is in consonance with the values of the Constitution generally those of the Bill of Rights in particular". Hence, the question that begs to be answered is: Why is then that authors, researchers, academics are *ad idem* that *uBuntu* is part of an African's DNA, that *uBuntu* does not have its rightful place under our Law and we have to content with the misgivings dished out to us by our Courts of Law and the like? *uBuntu* continue to experience opposition from Western philosophers, as well as their African counterparts.

1.3 LITERATURE REVIEW:

The following subject matter came under the spotlight during the conduct of this study:

- the Constitutional Courts miraculous fusion of Western and African philosophies and jurisprudence. Beneath the Court's "rainbow jurisprudence" lies a volatile philosophical relationship which has resulted in the erosion of African values, African jurisprudence and innumerable injustices against the African Other;
- the volatile oppositions within African philosophy where professional African philosophers and African academics oppose the traditional reality or unique philosophy of *uBuntu*;
- the fact that uBuntu, a truly unique collective African philosophy, exists in the face of adversity.

1.4 SIGNIFICANCE OF STUDY:

As very little research has been done on *uBuntu*, the main goals and significance of conducting this study of: **The Synergy of *uBuntu*: A Legal Niche in our Law** are to ascertain the following: Does the philosophy of *uBuntu* exist?; Does *uBuntu* promote values which underlie an open and democratic society based on human dignity, equality and freedom?; Does *uBuntu* comply with the Constitution in general and the Bill of Rights in particular? Also whether Western philosophy has eroded traditional African values? The study continues to illustrate that *uBuntu* is an ancient traditional African philosophy, deeply rooted in the blood of African human beings. *uBuntu* extends beyond good morals, principles and values; rather it transcends into an unshakeable belief system.

1.5 METHODOLOGY:

A qualitative approach is followed with the research methodology being that of a literature study. Sources comprise of books, journals, case law, statutes, international and legal mechanisms, as well as the internet. The author focuses on primary sources throughout the study. As *uBuntu* reflects the collective worldview of traditional African societies in sub-Sahara Africa, authoritative African primary sources from this region are sought to present the bigger picture in *uBuntu* reality. The study reflects a holistic view of *uBuntu* reality and includes views across the African philosophical spectrum. *uBuntu* is a philosophical concept. This study, therefore, takes a philosophical approach to *uBuntu* and embraces otherness from a postmodern perspective. This study makes use of the Namibian Law Journal referencing technique, as accepted by the University of Namibia. In essence, the study conducted was profoundly done by way of desktop research, in addition to an in depth analysis of the Books, Journals and Articles at hand.

1.6 STRUCTURE OF PAPER:

This study consists of five chapters. Chapter One dealing with Introduction, Statement of Legal Observation, Literature Review, Significance of Study, Methodology, Structure of Paper. Chapter Two dealing with the Introduction of *uBuntu*, the Definition(s) of *uBuntu*, the Constitutional value of *uBuntu*, as well as the Philosophy of *uBuntu*. Chapter Three takes an in depth role *uBuntu* plays in our Courts under Public and Private Law. Chapter Four goes on to examine the criticisms and challenges which *uBuntu* has to conquer, in order to be granted its rightful place under the Law. Chapter Five eludes the fact that in its conclusion(s), which is drawn from the reviewed texts, that there may be some hope left for *uBuntu* and its possible co-existence together with the Laws of the Land, as it now stands.

CHAPTER TWO:

2.1 INTRODUCTION:

uBuntu, the Nguni word portrays notions of universal human interdependence, solidarity and communalism which may be traced to small-scale communities in pre-colonial Africa,[1] and which underlie virtually every indigenous African culture.[2] The values the word encapsulates are not themselves unique to African thought,[3] their significance for society and law is arguably much more pronounced in African communities.[4] *uBuntu*, undeniably, represents the core of African philosophy and as such beckons an in-depth look in its quest for extracting true African jurisprudential values. The legal academic pre-occupation with *uBuntu* as 'the key term in indigenous jurisprudence'[5] dates back to its inclusion in the epilogue to the interim Constitution,[6] which ultimately determined that South Africa's legacy of 'gross violations of human rights, the transgression of humanitarian principles in violent conflicts and …hatred, fear, guilt and revenge' could now be addressed 'on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *uBuntu* but not for victimisation'.

2.2 *uBUNTU* DEFINED:

There are many definitions of *uBuntu*, as in the case of African philosophy. *uBuntu* is generally defined as *umuntu ngumuntu ngabantu; motho ke motho ka batho*[7] or humanness. The concept

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[1] Van Niekerk, G.J. 1998. Common Law of South Africa? Roman Law or Indigenous African Law? *CILSA* 31 pp 159, 168-69 and the authorities cited there.

[2] Schutte, A. 1993. Philosophy for Africa. p 46; Van Niekerk, *ibid*, p 167. The concept is common to all indigenous cultures in South Africa, and (apart from the word *uBuntu* itself) is expressed for instance in the Xhosa proverb *Umuntu ngumuntu ngabantu* and the Sotho saying *Motho ke motho ba batho ba bangwe*. Y. Mokgoro, *uBuntu and the Law in South Africa*. Paper delivered at the first colloquium Constitution and Law held at Potchefstroom on 31 October 1997.

[3] Van Niekerk, *supra* p 5, p 167 links *uBuntu* to English (Western) concepts of humaneness and person-hood, and engages also with similar concepts in Eastern thought at pp 170-171.

[4] While acknowledging that the communal notions underlying *uBuntu* are not confined to Africa, Shutte, *supra* p 5, p 47 states that *…the African emphasis is unique, if only by virtue of its greater intensity*.

[5] So called by Johnson, D., Pete, S. & Du Plessis, M. 2001. *Jurisprudence: A South African Perspective.* p 206.

[6] *Constitution of the Republic of South Africa Act 200 of 1993.*

[7] The Zulu proverb ***Umuntu ngumuntu ngabantu*** expresses a profound truth embedded deep within the core of traditional African values. It translates into English as a person is a person because of people. Other translations state a person is a person through other persons. In either case, this compelling truth about what it means to be a

of *uBuntu* encompasses brotherhood, culture, African Religion, traditional African values, justice and law. Bhengu[8] defines *uBuntu* as a "humanistic experience of treating all people with respect, granting them their human dignity". According to Bhengu, the non-racial philosophy of *uBuntu* encompasses values like universal brotherhood, sharing and respect for other people as human beings. Bhengu[9] also defines *uBuntu* as a "moral philosophy" and "humanness".[10] *uBuntu* defined is a notorious difficult task and a plethora of definitions, of which emphasis is laid on different elements of the concept, exist.[11] In *S v Makwanyane*,[12] in which the meaning of *uBuntu* was explicitly contemplated, the following definitions were offered:

Langa contended that:

> "[*uBuntu*] is a culture which places some emphasis on communality and on the inter-dependence of the members of a community. It recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such a 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. …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 integral to this concept."[13]

Mahomed stated the following:

> "The need for *uBuntu* expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and fulfillment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective

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human in the African context reveals the wisdom of our ancestors and the tremendous beauty of our way. According to African ancestral teachings, personhood is understood as a process and the product of interconnectedness experienced and or achieved in the context of the community. This Zulu proverb, with its numerous variants in other branches of the Nguni language family, is a pan-African truth known and lived wherever our cultural reality, though challenged, remains intact or in the process of being resurrected. Be it in the diaspora or on the continent the corollary examples of ***Umuntu ngumuntu ngabantu*** richly abound. In a word it is the spirit of *uBuntu*. *uBuntu*: the spirit of reciprocal living that luminously envelops a community in healing energy radiating from the hearts of interdependent human spirits sharing, loving and observing *Maat* {truth, justice, order, balance and righteousness} in the presence of ancestral spirits until they themselves join their ranks. It is this beautiful continuum of relationships, an unbroken circle of ancestral connections, a cultural ideal imbued with divine purpose and sacred meaning to which this proverb speaks. This is our truth. And while it is there for some to study, it is here for us to live, experience and pass on to the beautiful ones yet unborn! – Kwadwo Gyasi Nkita-Mayala.

[8] Bhengu, M.J. 1996. *uBuntu: the Essence of Democracy.* Cape Town: Novalis Press, p 5.

[9] Bhengu, M.J. 2006. *uBuntu: The Global Philosophy for Humankind*. Cape Town: Lotsha Publications, p 42.

[10] Bhengu, M.J. 1996. *uBuntu: The Essence of Democracy.* Cape Town: Novalis Press, p 5.

[11] For an overview of some of these, see Johnson, Pete & Du Plessis *supra*, p 5, pp 207-209.

[12] 1995 (3) SA 391 (CC).

[13] *Ibid*, paras. 224-25.

> community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by."[14]

Mokgoro states:

> "Generally, *uBuntu* translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it 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 emphasis respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *uBuntu* has become a notion with particular resonance in the building of a democracy. It is part of our 'rainbow' heritage, though it might have operated and still operates differently in diverse community settings."[15]

Van Niekerk puts it as follows:

> "People on earth should live in harmony with each other, with nature, and with the gods and the ancestors. To maintain this harmonious state of affairs, the interests of the individual, as a component of the collectivity, should be looked after. The individual's dignity, health and social welfare should be protected. But her welfare is only one side of the coin, the other side being the welfare of the community. And in that lies the essence of *uBuntu*: the welfare of the individual is inextricably linked to a harmonious relationship with the ancestors and with nature. Although man is at the centre of things, man can be defined only in relation to other men. And the community can likewise be defined only with reference to its individual members."[16]

Given the above definitions, *uBuntu* thus bears reference simultaneously to both individuals and is also a universal concept. Hence, it thus requires tolerance, understanding and respect towards all individuals in interpersonal relationships, in relations between the individual and the group of which she forms part, between different groups, between such groups and larger communities of which they in turn are the component forces, between different communities, and so forth, to eventually encompass all tiers of humanity. *uBuntuism* may thus be observed on its most basic level in individual interactions and in the operation of small groups (such as families), but such interactions reflect a view of humanity generally.[17]

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[14] *Ibid,* para. 263.
[15] *Ibid,* para. 308. It pains to show the universality of *uBuntu*, Mokgoro J went on to liken the values underlying *uBuntu* to those of humanity and menswaardigheid underlying South Africa's Western cultural heritage.
[16] Van Niekerk, *supra,* Fn 3, p 168. See also Shutte, *supra,* Fn 4, p 48.

2.3 *uBUNTU'S* CONSTITUTIONALITY:

The philosophy of *uBuntu* and the intricate and expansive nature, thereof, comes as no surprise that attempts to officially incorporate it into the formal jurisprudence have been only partly successful. Other than recognizing *uBuntu* as a philosophy, for which it stands, the courts and commentators have attempted to treat it as a uni-dimensional value. Thus leading to such emphasis being placed only on those aspects of *uBuntu* that fit with the purpose for which it is invoked,[18] and as a result thereof, is often applied in an inconsistent fashion, piecemeal. Thus, in the classic case of *S v Makwanyane*, which declared the death penalty unconstitutional, much emphasis was placed on the 'centrality' of the values of human life and dignity. This was done to demonstrate its relation to the concept of *uBuntu*, with the intended consequence that, since the death penalty was found to violate the rights to life and dignity in the interim Constitution, its imposition was also considered to be contrary to the spirit of *uBuntu*.[19]

2.4 *uBUNTU*: THE AFRICAN PHILOSOPHY:

South Africa's new constitutional dispensation had the effect of elevating customary law to the same status as that of the common law,[20] the flow of terms and concepts remained unidirectional. The significant reception of *uBuntu* into the common law reversed this process. The most obvious translations of this *uBuntu* were the calques[21] "humanity", "personhood" or "humaneness";[22] however, none has been especially helpful. These calques cannot fully convey the many facets and connotations in *uBuntu* nor, of course, the cultural implications, thereof. *uBuntu*, it is said, in a well-known metaphor, to be shrouded in a "kaross of mystery"[23]. From the history of it; it would appear that the concept thereof was co-opted into a nation-wide public discourse in South Africa during the 1970s, when the Zulu cultural movement, Inkatha, used it as

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[17] For an overview of several theoretical explanations of these complex interactions between the individual and the collective by African theorists, see Shutte, *supra*, Fn 4, pp 48-51.

[18] Mokgoro, *supra* p 7, p 2 agrees that [b]ecause of the expansive nature of the concept, its social value will always depend on the approach for which it is intended on.

[19] See *S v Makwanyane, supra* p 6, paras. 225 (per Langa J); 241-43 (per Madala J); 311 (per Mokgoro J).

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

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

[22] *S v Makwanyane, supra* Fn 19, para. 308.

[23] Mutwa, V.C. 1998. *Indaba, My Children.* Edinburgh: Payback Press, pp 555-556. See also Mokgoro, Y. 1998. *uBuntu* and the Law in South Africa. *Buffalo Human Rights Law Review* 4 p 15.

a slogan in its programme to revive respect for traditional Zulu values.[24] From there on, *uBuntu* migrated into the discourses of theology and business management, where it was used – as cynics put it – to package decision-making in the appearance of traditional African values.[25]

uBuntu then entered the legal arena (the law) in a small but telling "postamble" to the 1993 Interim *Constitution*. Emerging from apartheid, this deeply divided society bore a "legacy of hatred, fear, guilt and revenge". Such divisions were now to "be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *uBuntu* but not for victimization".[26] Apart from this aspirational clause and with no solid legal foundation, *uBuntu* was then absorbed into the mainstream of legal discourse by a series of judgments in the Constitutional and High Courts.

Every facet of African communal existence is shaped to embrace Africa's philosophy of life. *uBuntu* philosophy is reflected throughout the African heritage: traditions, culture, customs, beliefs, values and the extended family.[27] Ngubane,[28] cited in Bhengu[29] describes the meaning of ubuntu principles in traditional Africa as follows:

- my neighbour and I have the same origins; same life-experience and a common destiny;
- we are the obverse and reverse sides of one entity;
- we are unchanging equals;
- we are mutually fulfilling compliments;
- we have simultaneously legitimate values;
- my neighbour's sorrow is my sorrow; his joy is my joy;
- he and I are mutually fulfilled when we stand by each other in moments of need; his survival is a precondition for my survival;
- no community has any right to prescribe destiny for other communities;

[24] Bhengu, M.J. 1996. *uBuntu: The Essence of Democracy.* Cape Town: Novalis Press, p 10.
[25] English, R. 1996. *uBuntu: The Quest for Indigenous Jurisprudence*. 12 *SAJHR* pp 645-646.
[26] *Constitution of the Republic of South Africa Act* 200 of 1993.
[27] Broodryk, J. 2002. *uBuntu: Life Lessons from Africa*. Pretoria: *uBuntu* Philosophy School.
[28] Ngubane, J.K. 1979. *Conflict of Minds*. New York: Book in Focus Inc.
[29] Bhengu, M.J. *supra* Fn 24, 8-9.

- never prescribe destiny for another person;
- my neighbour is myself in a different disguise;
- equals do not prescribe destiny for each other;
- to be inhumane is to be an animal [*isilwane*];
- all that one lives for is to be the best one can be;
- every moment in one's life one evolves, for perpetual evolution is one's destiny;
- every person extends himself/herself into humanity;
- humanity is the blanket that cover's one's body, it is one's flesh, it is the matrix in which one grows; it is the face of the infinity which sees itself;
- wealth must be shared;
- your neighbour's poverty is your poverty;
- allow no racism in our mind;
- no race is great or small;
- one's mother is his/her Law;
- one's father is his/her Law;
- one's relatives and neighbours are the Law;
- my society's Law is my Law;
- law is my sceptre;
- knowledge is the challenge of being human so as to discover the promise of being human; and
- to know the Law is the glory of being human.

uBuntu philosophy and its communitarian ideals oppose every facet of Western atomistic liberalism. Western liberalism juxtaposes the African communitarian view on community, law, spirituality, being a person, and equality.

CHAPTER THREE:

3.1 *uBUNTU* UNDER PUBLIC LAW:

3.1.1 CONSTITUTIONAL LAW:

Evidently, *uBuntu* has played its most prominent role in public law. The Interim Constitution provided not only for the foundation for a new South African society, but it was also the first official document to use an African term. The usage of the single word *uBuntu* thus provided a gateway for African ideas and values to infuse South African law. In *Albutt v Centre for the Study of Violence and Reconciliation, and Others*,[30] for example Froneman J commented that South Africa's participatory democracy, although apparently something quite novel was in fact an ancient principle of traditional African methods of government.[31] Reasons for the success of South Africa's constitutional revolution were notions of participation and reconciliation, and a critical institution facilitating this process was the Truth and Reconciliation Commission [TRC].[32] *uBuntu* was expressly referred to in the preamble to the Commission's constitutive instrument, the Promotion of National Unity and Reconciliation Act.[33] When discussing the TRC's extraordinary achievements, the Canadian philosopher John Ralston Saul concluded that a strong contributory factor was the outlook of the chair, Archbishop Desmond Tutu, who has "very consciously evoked pre-European African concepts such as *uBuntu*" to establish a personal and national sense of justice".[34] South Africa's TRC is the only truth commission to have been given powers of amnesty. The 1993 Interim Constitution made specific provision for an amnesty process, but did not prescribe what this would entail. Indeed, the wording of the Constitution's preamble was deliberately vague, in effect, leaving it up to a subsequent political process to work out the detail. Although the undertaking to indemnify perpetrators was a bitter pill to swallow, especially for those within the anti-apartheid movement, most commentators agree that momentum towards transition would have been fundamentally undermined without it.

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

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

[32] The TRC was conceived as part of the bridge-building process designed to help lead the nation away from a deeply divided past to a future founded on the recognition of human rights and democracy. (Truth and Reconciliation Committee *Report*. 1998. Vols 1-5, chap 4, 48).

[33] *Promotion of National Unity and Reconciliation Act* 34 of 1995.

[34] Saul, J.R. 2001. *On Equilibrium*. Toronto: Penquin p. 94.

Chapter Four of the TRC's founding legislation outlined the mechanisms and procedures of the amnesty process. These provided for the establishment of an Amnesty Committee (the Committee) and empowered it to consider and decide on applications for amnesty. The Act provided that the Committee could grant amnesty where it was satisfied that the application complied with the formal requirements of the Act; that the incident in question took place within specific time parameters, that it constituted an act associated with a political objective, that the applicant had made full disclosure of all the relevant facts, and that the nature of the violation was proportionate to the objective sought. The Act provided for immunity from criminal and civil prosecution for those granted amnesty. Some within the anti-apartheid movement vehemently opposed any form of amnesty, leading the Azanian People's Organisation and several prominent anti-apartheid families to challenge the constitutionality of the amnesty provisions. In a contentious judgment that skirted around South Africa's adherence to international legal principles and obligations, the Constitutional Court accepted the imperative of an amnesty within South Africa's particular set of circumstances, a necessary gambit that would offer some measure of restorative justice for victims and survivors of gross human rights violations. Indeed, linking amnesty to specific criteria, such as full disclosure, was construed by the Court in its judgment as part of a "a difficult, sensitive, perhaps even agonizing, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement to wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations." The 1996 Constitution subsequently reaffirmed the amnesty provisions contained in the interim constitution, as well as the TRC legislation. This affirmation has underwritten a general understanding that the amnesty process was an unsavory, yet necessary step, posited as 'middle ground' between the advocates of retribution and the champions of impunity. There remains considerable disagreement however, as to whether that was really the case.

Amongst others, one of the primary means for securing a political settlement was the amnesty offered to perpetrators of apartheid offences, provided that they confessed the truth of their deeds.[35]

> By providing the environment in which victims could tell their own stories in their own languages, the Commission not only helped to uncover existing facts about past abuses, but also assisted in the creation of a narrative truth. In so doing, it also sought to contribute to the process of reconciliation by ensuring that the truth about the past included the validation of the individual subjective experiences of people who had previously been silenced or voiceless.[36]

In *AZAPO and Others v TRC and Others*,[37] however, the applicants argued that the removal of civil and criminal liability was unconstitutional and infringed their right of access to the courts. The Constitutional Court held that the amnesty procedure had been specifically chosen, because without it there would have been no incentive for offenders to disclose the truth and, as the truth unfolded, so would the processes of reconciliation and reconstruction. The Court noted, further, that amnesty was a crucial component of the negotiated settlement itself, without which the Constitution could not have been enacted. As Mahomed DP (as he then was) observed, the TRC sought to "promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past".[38]

3.1.2 CRIMINAL LAW:

uBuntu, has played a more important, long-term role in the criminal justice system, erstwhile it was one of the keys to the political settlement. Under the criminal justice system, African ideas of dispute resolution had (even earlier) been introduced as a sentencing policy under the label of "restorative justice". It was a concept central to the TRC process: although those who

[35] In *AZAPO v TRC* 1996 4 SA 562 (C) 570, the Court noted that the new dispensation requires reconciliation between the people of South Africa and the reconstruction of society. In order to achieve this, according to the post-amble, amnesty is required.
[36] Truth and Reconciliation Commission *Report* p 112, cited by *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para. 58 per Ngcobo CJ.
[37] *AZAPO v TRC supra* p 13.
[38] *Ibid*, para 677.

committed crimes of apartheid deserved punishment, peace and national unity dictated reconciliation (which has come to be seen as synonymous with restorative justice).[39]

uBuntu, in this regard, made its debut in the jurisprudence of the Constitutional Court in *S v Makwanyane*.[40] Here the word was given its first full exposition by the courts.

Mokgoro J held that:

> Metaphorically, [*uBuntu*] expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation.[41]

Justice Langa continued:

> It is culture, which places some emphasis on communality 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.[42]

Harmonisation of society lies at the heart of *uBuntu* and, when applied to criminal justice, it completely upends the common-law system which, in general, aims at retribution. Restorative justice seeks to promote cohesion[43] by inducing reconciliation between the offender, the victim and the community at large, thereby requiring the participation of all interested parties in the proceedings.[44]

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[39] *Supra*, Fn 32, p 414 citing Peter Biehl, (Father of the late Amy Biehl and Founder of the Forgiveness Project), who describes how *uBuntu* substantiates restorative justice; Gobodo-Madikizela, 2003. *A Human Being Died-A story of Forgiveness.* Claremont: David Philip, pp 127–132.

[40] *Supra*, Fn. 11.

[41] *Supra* p 14, para. 308.

[42] *Ibid*, para. 224.

[43] On the aim of reconciliation in traditional courts, see Dlamini, CRM. 1985. Whither lay justice in South Africa? *Speculum Juris* 6 and Gluckman, M. 1972. *The Ideas in Barotse Jurisprudence*. Manchester: Manchester University Press, pp 94–97.

[44] As noted in *Albutt v Centre for the Study of Violence and Reconciliation supra* p 14, para. 60.

One of the most central aims of the sentencing policy in South Africa is now that of restoring social harmony. In *M v S (Centre for Child Law Amicus Curiae),*[45] which dealt with correctional supervision, the court commended the fact that restorative justice places crime control in the hands of the community rather than criminal justice agencies. Moreover, as a result of this stance, the offender has a better chance of social rehabilitation without enduring the ill effects of incarceration, loss of employment and the possible destruction of family networks.[46]

In the process of the reconfiguration of traditional courts, key components such as reconciliation and restorative justice are featured, amongst others. The *Traditional Courts Bill*, which was tabled on 9 April 2008, makes much of the need to "affirm the values of the traditional justice system, and to align the goals of restorative justice and reconciliation with the Constitution".[47] The South African Law Commission has also proposed this policy for the community tribunals it recommends be established in the townships.[48]

An even more decisive goal of restorative justice appears in the Child Justice Act.[49] A declaration is made to "expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed", as provided for in the "Aims" part of this enactment. Thereafter reconciliation and restorative justice appear frequently, as, for instance, in the "Objects of the Act"[50] and the policy of diverting juvenile offenders from the penal system.[51]

Under substantive criminal law, *uBuntu* has made but only a brief appearance. *S v Mandela*[52] involved a plea of compulsion. No prove of immediacy of life-threatening compulsion could however be proven by the accused. The court found that, if lower standards were accepted for

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[45] *M v S (Centre for Child Law Amicus Curiae)* 2007 12 BCLR 1312 (CC) para. 63.
[46] The court cited, in this respect, Pinnock, D. 1995. What kind of Justice? web.uct.ac.za.ezproxy.uct.ac.za/depts../sjrp/publicat/whatknd.htm [Accessed on 22 May 2011]; Maepa, E. (ed) 2005. www.iss.co.za/pubs/Monographs/No111/Chap2.htm [Accessed on 24 July 2011].
[47] Clause 2 (a) *Traditional Courts Bill* B15-2008.
[48] South African Law Commission 1997 www.justice.gov.za paras 3.45 – 3.46.
[49] *Child Justice Act* 75 of 2008.
[50] Section 2(b) (iii) *Child Justice Act* 75 of 2008.
[51] Section 51(g) *Child Justice Act* 75 of 2008.
[52] *S v Mandela* 2001 1 SACR 156 (C).

this defence, too little would be required of people who now live in a society based on freedom, dignity, *uBuntu* and respect for life. Within the idea of *uBuntu*, it was implicit that every person deserved equal concern and respect.

3.1.3 ADMINISTRATIVE LAW:

The courts have been granted significant opportunities to invoke *uBuntu* under this branch of the law as a result of the porous concepts of administrative justice. *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others*,[53] for instance, was a case concerning the refusal to allow refugees from African countries to take up employment in the security industry. A blanket refusal was considered by Sachs J, to be unfair discrimination.[54] He spoke of "[t]he culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves",[55] in reference to *uBuntu*. Although these words had been used in relation to homeless South Africans, Sachs held that they should be a reminder that we are not islands unto ourselves[56] and, on the basis of this metaphor, proceeded to apply the principle to the state's relationship with foreigners.[57] The values of civility and trust were also derived by the courts from *uBuntu*. *Masetlha v President of the RSA and Another*,[58] for instance, was a case concerning the President's termination of the applicant's position as head of the National Intelligence Agency. Erstwhile the act of termination was not in itself unfair, the Constitutional Court held that, three ancillary issues were: the manner in which the news was publicly communicated;[59] and the general public interest.[60] Civility and fairness were held inseparable from *uBuntu*, by the Court.

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[53] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para. 145.
[54] *Ibid.*
[55] Citing, in this respect, Hammond-Tooke, WD. 1993. *Roots of Black South Africa*. Johannesburg: Jonathan Ball, p 99, who said that, in traditional society, the hospitality universally enjoined towards strangers, [is] captured in the Xhosa proverb: *Unyawo alunompumlo* (the foot has no nose). Strangers, being isolated from their kin, and thus defenceless, were particularly under the protection of the chief and were accorded special privileges.
[56] Today the concept of human interdependence and burden-sharing in relation to catastrophe is associated with the spirit of *uBuntu-botho*. Here Sachs J cited *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) *para* 37: We are not an island 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.
[57] *Supra*, p 16, para. 150.
[58] *Masetlha v President of the RSA* 2008 1 SA 566 (CC).
[59] Thereby affecting the Applicant's reputation as high profile incumbent of a public post. See *ibid*, para. 236.

Civility was described as:

> more than just courtesy or good manners…. It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. In this sense, civility was connected to *uBuntu,* and was said to be "deeply rooted in traditional culture", and "widely supported as a precondition for the good functioning of contemporary democratic societies".[61]

In *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another*,[62] *uBuntu* was described as a relationship of mutual respect. This was a matter involving an urgent application for leave to appeal from a judgment of the Cape High Court. Harms JA held that the delay was so unreasonable as to be tantamount to a refusal. He noted a reference by the Judge President of the court *a quo* to the spirit of *uBuntu* in interpreting statutes, and said that this term [*uBuntu*]:

> ought to apply to the relationship between courts and the respect required of organs of State and courts towards citizens and towards each other… Delays in giving judgment give the impression of an imperious judge, and undermine public confidence in the judiciary, since "justice delayed is justice denied".[63]

Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)[64], in similar vein, again associated *uBuntu* with a general obligation to treat people with respect and dignity, to avoid undue confrontation and, more specifically to give reasons for administrative decisions. The case dealt with the removal of residence permits from non-South Africans, and it raised questions about just administrative action. Mokgoro J held that declaring a person an illegal alien has serious implications, *inter alia*, being compelled to leave the country and thereafter suffering an international stigma that can be used to deny entry into other countries.[65]

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[60] *Ibid*, para. 237: those exercising public power should avoid acting in a way that could disturb public confidence in the integrity of the incumbents of these institutions.
[61] *Ibid*, para. 238.
[62] *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 3 SA 238 (SCA) para 38 per Harms JA.
[63] *Ibid*, para 39.
[64] *Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae)* 2010 4 SA 327 (CC) per Mokgoro J.
[65] Hence, the Court said (para 61) that the person concerned would be naturally anxious to know why the declaration was made, especially if it had been based on a misunderstanding or incorrect information.

In addition, the Judge linked the principles of fairness, accountability and transparency with the policy of *Batho Pele* (meaning "People First" in seSotho), a slogan used in local government to indicate that the best interests of the public must be put first.[66]

In *Joseph and Others v City of Johannesburg and Others*[67] the Constitutional Court also linked respectful and fair administrative action to *Batho Pele*. Skweyiya J said that: "*Batho Pele* gives practical expression to the constitutional value of *uBuntu*, which embraces the relational nature of rights". Calling upon courts to "move beyond the common-law conception of rights as strict boundaries of individual entitlement", he remarked in a footnote that Batho Pele indicated an equivalence of "citizen" and "customer" for the purposes of the public service (especially because the customers have no choice in service provider).[68]

Joseph's case concerned termination of the electricity supply to the applicants' residence, because the landlord had failed to pay the bills. The applicants sought reconnection of the electricity, as well as an order that they were entitled to procedural fairness (in the form of notice and an opportunity to make representations to the service provider, City Power). However, as tenants, the applicants had no contractual nexus with City Power. Nonetheless, the Court held that the company had to comply with the requirement of procedural fairness,[69] since:

> government [must] act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens.[70]

Albutt v Centre for the Study of Violence and Reconciliation, and Others [71] involved unfinished business of the TRC, i.e. a form of amnesty for those who had not participated in the process. A special pardon by the President was announced to that end for those who had committed politically motivated offences.

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[66] *Supra*, Fn 64, para 62. The Court referred to *Van der Merwe v Taylor* 2008 1 SA 1 (CC) para 71.
[67] 2010 4 SA 55 (CC).
[68] *Ibid*, para 46. See the *Batho Pele* Handbook: Department of Public Service and Administration [date unknown] www.dpsa.gov.za. See also Cloete, F. and Mokgoro, YM. 1995. *Policies for Public Service Transformation*. Kenwyn: Juta, pp 7-8.
[69] *Supra*, Fn 67, para 47.
[70] *Ibid*, para 46.
[71] 2010 3 SA 293 (CC).

In this special dispensation, the question was whether victims were to be given a voice 'to be heard' or not. In order to achieve the objectives of nation-building and national reconciliation: [72]

> the notion of participatory democracy is also an African one. Victim participation was the norm in deciding the proper "punishment" for offenders in traditional African society …this remarkable tradition of participation and capacity for forgiveness in African society also underlay, at a deeper level, the amnesty process. [73]

Although s 33 of the 1996 *Constitution* and the *Promotion of Administrative Justice Act* [74] have formalised administrative decision-making, the technicalities of determining administrative action have left significant loopholes. In *Fedsure Life Assurance v Greater Johannesburg Metropolitan Council*, [75] the Court was concerned with budgetary resolutions, which were clearly not "administrative actions", because the Council had acted as a legislative body. Nonetheless, the Constitutional Court held that the exercise of public power was subject to a principle of legality.[76]

Potentially another occasion for asserting *uBuntu* and a new area of discretion has been provided by this principle. Subsequently, legality has been invoked with regard to the President's power to appoint a commission of inquiry, [77] prematurely proclaiming a statute in force, [78] the dismissal of the head of the National Intelligence Agency, [79] and the exercise of the power of pardon. [80]

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[72] *Ibid*, paras 56, 59 per Ngcobo CJ. Froneman J noted (para 90) that our constitutional democracy was not merely representative, but also participatory (citing *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 121 and *Matatiele Municipality v President of the RSA* (No 2) 2007 6 SA 477 (CC) para 40, a principle that determined even the executive function.

[73] *Supra*, Fn 71, para 91.

[74] Act 3 of 2000.

[75] 1999 1 SA 374 (CC).

[76] *Ibid*, para 58: It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law: *Minister for Justice and Constitutional Development v Chonco* 2009 6 SA 1 (SCA) para 27.

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

[78] *Pharmaceutical Manufacturers Association of SA: in Re: President of the RSA* 2000 2 SA 674 (CC) paras 85, 89, 90.

[79] *Masetlha v President of the RSA* 2008 1 SA 566 (CC) paras 78, 81.

[80] *Supra*, Fn 71, paras 68 – 69.

3.2 *uBUNTU* UNDER PRIVATE LAW:

3.2.1 THE LAW OF PROPERTY:

In the field of private law, *uBuntu* has been far less welcome than public law. [81] As such, the concept has been asserted mostly in relation to the *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act* (hereafter PIE), [82] legislation that aims to address the plight of the homeless and those forced to seek shelter on property owned by another. It is required of the Act that the courts should consider the lawfulness of the squatters' occupation, their interests and their circumstances, together with broader constitutional values, in order for them to achieve a just and equitable settlement. Erstwhile, claims are based on sound legal grounds, they may, however, be refused in order to realise higher norms. Invariably, such higher norms have been described, amongst others, as compassion, grace, fairness, equity and justice.[83]

PIE's leading case in direct relation to it; is that of *Port Elizabeth Municipality v Various Occupiers*.[84] The Municipality sought an eviction order against 68 people who, for a number of years, had been occupying shacks on privately owned land within the Municipality; in response to a petition signed by 1600 people in the neighbourhood. The Constitutional Court's approach was put in the following terms by Sachs J:

> 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 visions of a caring society based on good neighbourliness and shared concern.[85]

The next few sentences are redolent of the language of *uBuntu*:

> The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *uBuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy.

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[81] Davis, D. 2008. Private Law after 1994: Progressive Development or Schizoid confusion? *SAJHR*, p 329.
[82] Act 19 of 1998.
[83] *Wine v Zondani* 2009 JOL 24358 (SE), citing *Port Elizabeth Municipality* below.
[84] 2005 1 SA 217 (CC). The court approved *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter* 2000 2 1074 (SECD), which in turn was quoted with approval by Olivier JA in *Ndlovu v Ngcobo; Bekker v Jikka* 2003 1 SA 113 (SCA) para 65.
[85] *Supra*, Fn 84, para 37.

> 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.[86]

Sachs J then indicated that, 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.[87] Moreover, in another context he said that: "[o]ur Constitution requires a court … to weave the elements of humanity and compassion within the fabric of the formal structures of the law … and to promote … a caring society based on good neighbourliness and shared concern". [88]

In order to achieve justice and equity, the courts have been obliged to adopt a variety of innovative approaches. [89] In *Transnet t/a Spoornet v Informal Settlers of Good Hope and Others*,[90] for example, the court ordered the applicant to conduct a survey so that it could properly assess "the needs and the rights of the persons presently illegally occupying the Rail Reserve and the prospect, if any, of relocating the communities to a safer and healthier site".

3.2.2 FAMILY LAW:

Other than in the *Child Justice Act* mentioned earlier, *uBuntu* has featured in only three cases in this branch of the law. *Ryland v Edros*[91] was the first such case, which concerned recognition of a Muslim marriage. Such marriages were previously considered contrary to South African public policy and *boni mores*. However, based on the post amble to the Interim Constitution and Langa J's exposition of *uBuntu* in *S v Makwanyane and Another*,[92] the court held that a new approach was demanded by the values of equality and tolerance.

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[86] In *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 62 per Jahbay J quoting Judge Sachs at para 37.
[87] However, "[t]he necessary reconciliation can only be attempted by a close analysis of the actual specifics of each case": *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 35.
[88] *Ibid*, para 62; Supra, Fn 84, para 37.
[89] *Supra*, Fn 84, para 36.
[90] 2001 4 All SA 516 (W) 524.
[91] 1997 2 SA 690 (C) 708.
[92] *Supra*, p 6, Fn 12, para 224.

A married couple's claim to the husband's parents' farm was found to be an abuse of the parents' generosity, in the case of *Badenhorst v Badenhorst*.[93] The court spoke of the wife's claim as "an irresistible temptation of greed", and added that "her attitude undermined *uBuntu*, that godly value with which all human beings are ordained".

uBuntu, was considered in an *obiter dictum*, in the case of *Bhe and Others v Magistrate, Khayelitsha and Others*,[94] dealing with the constitutionality of the customary law of succession. The Constitutional Court described the valuable features of customary law, its inherent flexibility, consensus-seeking in family meetings for the prevention and resolution of disputes, the unity of the family structures, the "fostering of co-operation, a sense of responsibility in and of belonging to its members", and "the nurturing of healthy communitarian traditions such as *uBuntu*.[95]

3.2.3 DELICT:

Although the law of delict leaves itself open to *uBuntu* via such open-ended concepts as reasonableness, the duty of care, and the largely discretionary process of assessing damages, the concept has had little effect. An opportune moment to assert *uBuntu* arose in the case of *Carmichele v Minister of Safety and Security*, [96] when the court was called upon to determine if the state owed the applicant a duty of care. However, the Constitutional Court did not determine this question. Instead, it held that adjustments to the common law should be based on an "objective normative value system" reflecting underlying constitutional values, [97] without deciding the content of that value system.[98]

[93] 2005 JOL 13583 (C) para 24.
[94] 2005 BCLR 1 (CC) para 45.
[95] Citing Mokgoro J in *S v Makwanyane supra*, p 6, paras 307-8.
[96] 2001 4 SA 938 (CC) para 54.
[97] *Supra*, p 21, Fn 81, p 321.
[98] The matter was then referred back to the High Court to reconsider in light of the claimant's constitutional rights. In *Carmichele v Minister of Safety and Security supra*, Fn 96, para. 16, Chetty J confirmed the strictly common-law position on the matter, and then considered the effect of the Constitution. He emphasised that the criterion for wrongfulness – the legal convictions of the community – was now to be found in the Constitution and not in some vague notion of public sentiment or opinion. See Van der Walt, JWG. 2003. Horizontal Application of Fundamental Rights and the Threshold of the Law in view of the *Carmichele* Saga. *SAJHR* pp 522-523, 525.

Dikoko v Mokhatla [99] is the only case in which *uBuntu* played a significant role. Here Mokgoro J held that monetary compensation for defamation diverted attention away from two basic considerations in this aspect of the law: that the reparation represents injury to dignity and reputation, not necessarily to the pocket, and that courts should attempt to re-establish a respectful relationship between the parties. An old remedy of *amende honorable* (apology) was therefore revived to acknowledge a sense of *uBuntu* and to emphasize restorative rather than retributive justice.

3.2.4 THE LAW OF CONTRACT:

The law of contract has to a certain extent; proven to be resistant to *uBuntu*, although a possible reception of the concept in this area is a more complex matter. Moreover, it is argued that contract law already has specific mechanisms to deal with the type of problems which *uBuntu* addresses.

One such mechanism, formerly, was the *exeptio doli generalis*. As a remedy, this mechanism could be invoked as a defence to the enforcement of unfair or unconscionable terms in contracts.[100] In *Bank of Lisbon v De Omelas*, [101] 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.

Notwithstanding, the elimination of the *exceptio doli*, the courts still had available principles of good faith and public policy, together of course with the Bill of Rights, to correct unfair contracts. Good faith has always been a fundamental principle of our law, [102] but its role is limited.[103] In *Brisley v Drotsky*[104] the Supreme Court of Appeal held that good faith could not be used as an independent ground for setting aside or refusing to enforce contractual provisions.

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[99] 2006 6 SA 235 (CC) para 69 per Mokgoro J.
[100] *Weinerlein v Goch Buildings Ltd* 1925 AD 282 292-3.
[101] 1988 3 SA 580 (A) 607.
[102] Brand, FDJ. 2009. The Role of Good Faith, Equity and Fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution. *SALJ* p 73.
[103] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman* 1997 4 SA 302 (A) 312-31, especially the minority judgment of Olivier JA at 323F-326G.
[104] 2002 4 SA 1 (SCA) paras 16, 22.

While the abstract idea of *bona fides* was a foundation and justification for legal rules[105] and could "perform creative, informative and controlling functions through established rules of contract law", it could not be used directly to intervene in contractual relationships. The courts should refer instead to rules of hard law. In this way, legal certainty could be preserved.[106]

Public policy would seem to embrace the ideas of *uBuntu* and justice, for it stands for "the general sense of justice of the community, the *boni mores*, manifested in public opinion".[107] Shortly after the *Bank of Lisbon* case, *Sasfin (Pty) Ltd v Beukes*[108] invoked public policy to have a contract declared unenforceable. This principle, nevertheless, does not have an unlimited scope of operation. Van der Merwe *et al* contend that "simple justice between man and man" in the parties' individual capacities cannot alone determine the public interest, because the idea is too simplistic and could lead to arbitrary decisions.[109]

Rather than relying on public policy alone to deal with contractual unfairness, the courts seem to prefer linking it to the Bill of Rights.[110]

Thus, in *Barkhuizen v Napier*,[111] the court said that:

> "the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them."[112]

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[105] See also *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA); *Tuckers Land and Development Corp v Hovis* 1980 1 SA 645 (A).
[106] *South African Forestry Co Ltd v York Timbers* 2005 3 SA 323 (SCA) para 27.
[107] *Napier v Barkhuizen* 2006 4 SA 1 (SCA) para 73.
[108] 1989 1 SA 1 (A).
[109] Van der Merwe, SWJ *et al*. 2007. *Contract: General Principles.* Lansdowne: Juta, Third Edition, p 219.
[110] Christie, R.H. 2006. *The Law of Contract in South Africa*. Durban: LexisNexis, Butterworths, Fifth Edition, pp 16-17. See also *Brisley v Drotsky supra*, p 24, para 95; *Carmichele v Minister of Safety and Security supra*, p 23; *South African Forestry Co Ltd v York Timbers supra*, Fn 106.
[111] 2007 7 BCLR 691 (CC) para. 30.
[112] *Ibid*, paras 73, 85.

In general, the court's approach to *uBuntu* in the private law sphere has been conservative. Except for PIE related matters, they seem unwilling to incorporate new ideas. While mention has been made of *uBuntu* and/or equity in contract,[113] the courts have been reluctant to develop these norms any further.[114] Davis has therefore remarked that principles of legal certainty and private autonomy seem to have prevailed over the transformative, communitarian power of the "constitutional values of freedom, equality and dignity"[115] – a sad reflection on the law that provides ground rules for the economic structure of South Africa's fragmented and unequal society.[116]

[113] *Ibid*, para 30; *Supra*, p 20, Fn 78, para 44, *Supra* p 24, Fn 104, para 95; *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) para 25.
[114] *Ibid*, *Fourie v Minister of Home Affairs.* See *supra*, p 21, Fn 81, p 323.
[115] *Supra*, p 21, Fn 81, p 539.
[116] *Supra*, p 23, Fn 98, Van der Walt, p 539.

CHAPTER FOUR:

4.1 OBJECTIONS RAISED AGAINST *uBUNTU*:

The concept of *uBuntu* is criticised on many grounds by the skeptics. They say, at the outset, that it is too vague to be of any use.[117] However, this objection, almost immediately can be refuted. *uBuntu*, as a metanorm, is necessarily generalized. The concept cannot be described as a rule or even as a principle.[118] It has a much broader scope suggesting that it is closer to a value or, better still, a representation of the right way of living.[119] In this sense, it is akin to the Hindu notion of *dharma*.[120]

It is senseless to object to the ambiguity of such terms, for precision cannot be expected of concepts that must play such multifarious roles in society. This point is especially true for a legal system such as South Africa's, when the country is in the process of forging new values. To demand an exact definition of *uBuntu* would be to impose a premature restriction on its function.[121]

Another objection claims that the communal ethic of *uBuntu* denies individual autonomy, and that the "appeal to cohesion privileges dangerous hierarchies [and] corrupt tribal authorities". Based on its association with African tradition, *uBuntu*, is perceived to be backward-looking and can have little to offer to the modern world. Drucilla Cornell, however, one of the foremost scholars working on dignity jurisprudence, would contest these objections on the ground that both *uBuntu* and the related concept of dignity are banners of a high ethical endeavour.[122]

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[117] Klug, H. 2000. *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction.* Cambridge: Cambridge University Press, p 164.

[118] See also Keevy, I. 2009. *uBuntu* versus the core values of the South African Constitution. *Journal of Juridical Science*, 34(2), pp 34-35, who argues that *uBuntu* is not a philosophy in the Western sense.

[119] Ramose, MB. 2002. *African Philosophy through uBuntu.* Harare: Mondi Books, p 40.

[120] Which can be variously translated as righteous duty, law, morality or religion: Menski, W. 2003. *Hindu Law: Beyond Tradition and Modernity*. Dehli: Oxford University Press, p 98.

[121] Hence, Cornell, D. and Van Marle, D. 2005. Exploring *uBuntu*: Tentative Reflections. *Afr Hum Rts LJ* p 205, argue that the generality of *uBuntu* is its strength.

[122] Cornell, D. 2009. *Is there a Difference that makes a Difference Between uBuntu and Dignity?* www.isthisseattaken.co.za/pdf/Papers_Cornell.pdf [accessed on 16 April 2011].

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

Redundancy, is yet another objection to *uBuntu*. The question that begs answering is whether *uBuntu* is necessary when we have a right to dignity enshrined in the Constitution?[123] Indeed, the Constitutional Court has often talked of dignity and *uBuntu* as analogous concepts.[124] Any exact correlation, however, must be countered. The Western conception of dignity envisages the individual as the right-bearer, whereas *uBuntu* sees the individual as embedded in a community.[125]

Those exploring dignity jurisprudence in South Africa, would concede that:

> dignity in *uBuntu* thinking is not rooted in reason because of an ethical concern shared with many feminists that this would deny dignity to too many human beings. Thus, such a ground for dignity runs foul of the virtues of inclusiveness and acceptance. Instead dignity is rooted first and foremost in our singularity and uniqueness and at the same time in our embeddedness as part of a human community.[126]

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

[124] See for example, *Supra*, p 6, Fn 12, para 225: 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*.

[125] Keep, H. and Midgley, R. 2007. The Emerging Role of Ubuntu-botho in Developing a Consensual South African Legal Culture". In Bruinsma, F. and Nelken, D. (eds), *Recht der Werkliijkheid*. Gravenhage: Reed Business BV, p 34, who reply that dignity can be interpreted as beyond respect in an individualistic sense by incorporating an attitude of communality and inclusiveness: in other words, respect for dignity requires one not only to respect each member of society, but also to behave with dignity in ensuring that every member is given an opportunity to exercise his or her right to dignity to the full. Nevertheless, the authors say (at 33) that, although communalism is not unique to *uBuntu*, a feature of Western legal thought is its use of concepts like rationality, reasonableness and equity and a strong emphasis on individualism and on freedom.

[126] *Supra*, p 27, Fn 122.

4.2 *uBUNTU* AND ITS HURDLES:

The ideal of a new constitutional community can be glimpsed already in *Makwanyane (supra, p 6),* where the Justices of the Constitutional Court utilised the African principles of *uBuntu*, community, and unity to argue that the death penalty should be abolished. In a thorough critique of this judgment and its "frightening" lack of jurisprudence rigour, Van Der Walt[127] argues that:

> "a rigorous jurisprudence must remain dissatisfied with the feel-good flavour of a jurisprudence that has done little more than add a local indigenous and communitarian touch to the Christian, Kantian or Millsian respect for the individual that informs Western jurisprudence. A rigorous jurisprudence would ask more probing questions regarding *uBuntu*"[128].

Van der Walt thus rejects Justice Sachs' somewhat "rosy portrayal" of African jurisprudence[129] and conducts his own research into aspects of African culture that endorse the *lex talionis* and executions, and hereby refutes to a certain extent Sachs' own more romantic version of African culture and practice. He concludes that utilizing *uBuntu* without question as a constitutional value in Makwanyane may have served the immediate purpose of abolishing the death penalty, but it can be argued in future that this decision was based on a spurious interpretation of *uBuntu*.[130]

Lenta[131] also cautions that the Constitutional Court's resort to *uBuntu* (in Makwanyane) can be seen as providing cover for the operations of power in the case:[132]

> "although the Court's resort of *uBuntu* seems to contain ethically laudable sentiments – the valorisation of excluded identity, tradition and forms of community – on a Foucauldian reading, its political effect is to substitute long prison sentences in the place of execution, which Foucault perceives as a new form of domination."[133]

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[127] Van der Walt, J. 2005. Law and Sacrifice: Towards a Post-apartheid Theory of Law, p 109; and see also Van der Walt. 2005. Vertical Sovereignty and Horizontal Plurality: Normative and Existential Reflections on the Capital Punishment Jurisprudence Articulated in *S v Makwanyane*, 20:2, *SAPL*, p 253.
[128] *Ibid*, 111.
[129] *Ibid*, 113.
[130] *Ibid*, 114.
[131] Lenta, P. 2001. Just Gaming: The Case of Postmodernism in South African Legal Theory. *SAJHR* (17) p 173.
[132] *Ibid*, 190.

Lenta's concerns here resonate somewhat with those expressed by Van der Walt. The truth of the matter is that if *uBuntu* remains a "bloated" concept [134] that can mean "all things to all men",[135] it can also be (mis)used in the exercise of power. In essence, "*uBuntu*-speak" can be easily manipulated, used to enforce social and legal conformity and to silence dissenting voices and, it can, Lenta suggests, become a new form of domination. As Van der Walt correctly points out, ubuntu in a certain sense does not sound any different from the centuries-old tight hierarchical order endorsed by the order of the Corpus Christi in medieval Europe.[136] What then sets ubuntu apart from other Western values? What separates ubuntu from authoritarian discourses that demand respect and obedience from the "collective"? These are the pertinent questions which beckon our attention and further investigation.

4.3 *uBUNTU*: REFLECTING LIGHT:

Echoing Mokgoro's concerns with the development of a just and caring community, Justice Albie Sachs makes explicit reference to *uBuntu* in *PE Municipality* in justifying his refusal to uphold an eviction order which would result in the homelessness of a large number of squatters. He highlights in his judgment the (constitutional) requirement that everyone must be treated with "care and concern" within a society based on the values of human dignity, equality and freedom. He also reminds that the Constitution places a demand upon the judiciary to decide cases, not on generalities, but in the light of their own particular circumstances:

> "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".[137]

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[133] *Ibid*, 191.
[134] Kroeze, IJ. 2002. Doing Things with Values II: The Case of *uBuntu*. *Stellenbosch Law Review* (13) p 260.
[135] English, R. 1996. *uBuntu*: The Quest for an Indigenous Jurisprudence. *SAJHR* (12) pp 641, 646.
[136] Van der Walt, J. *supra*, p 29.
[137] *PE Municipality*, *supra*, p 21, par. 37.

Sachs thus places the question of eviction within its historical context by referring to "pre-democratic" laws that enabled drastic responses to illegal squatting, assaulting the dignity of black people and allowed the creation of affluent white areas.[138] Sachs then contrasts this position to the "new era" where homeless people must be treated with dignity and respect, as it is not only the poor whose dignity is affected when evicted and forcibly removed, but also the whole of society is demeaned by such actions.

[138] *Ibid*, paras 8-10.

CHAPTER FIVE:

5.1 CONCLUSION:

Therefore, it seems as if the South African courts have a metanorm, similar to equity. Therefore, in such instance, we need to take care that we are not too quick to develop *uBuntu* in the same manner as equity. In 1529 the post of the Chancellor was secularised, after which lawyers began to develop equity jurisdiction in the same casuistic manner as the common law.[139] When these decisions came to be regarded as binding precedents – a process assisted by publication of the Chancellor's decisions – equity was treated in much the same way as the common law.[140] It became a self-standing system, with its own rules and technicalities.[141]

As a result, the doctrine of equity is no longer accepted as a wholly beneficial adjunct to the common law.[142] Although its strength lies in its flexibility and the possibility of achieving justice on a case-by-case basis,[143] equity jurisprudence has hardened into an institution sharing the same inflexibility as its common-law partner.[144] Ironically, it can even result in inequitable outcomes.[145]

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

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[139] Zwiegert, K. and Kötz, H. 1987. *Introduction to Comparative Law*. Oxford: Claredon Press, Second Edition, p 195.
[140] Petit, PH. 2001. *Equity and the Law of Trusts*. London: Butterworths, Nineth Edition, p 2.
[141] Petit, *ibid*. Mason, A. 1994. The Place of Equity and Equitable Remedies in the Contemporary Common Law World. *LQR*, pp 238-239. See also Zwiegert and Kötz, *supra*, p 197.
[142] Allen, CK. 1964. *Law in the Making*. Oxford: Claredon Press, Seventh Edition, p 425, for one, doubts whether the doctrine was of benefit to English Law in general.
[143] Zwiegert and Kötz, *supra*, p 196.
[144] Kiralfy, AKR. 1958. *Potter's Historical Introduction to English Law and its Institutions*. London: Sweet and Maxwell, Fourth Edition, p. 569.
[145] Allen, *supra*, p 425.

However, these values and principles, however, are distinctively African. It must be remembered that *uBuntu* is a "loan word" in English, which suggests that it was adopted to signify a phenomenon that was never before expressed in its new environment. A new word is a solution to a problem. Often the need is obvious, but sometimes it is unseen or barely felt, and then it is only in finding something to plug the gap that we actually realise the gap was there in the first place.[146]

uBuntu involves more than entitlements to equal treatment or fair play. It obliges the individual, also, "to give the same respect, dignity, value and acceptance to each member of [the] community. Moreover, 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".[147]

Keep and Midgley observe that there is "very little in the Bill of Rights that is ostensibly "African" or a reflection of African values". The response could be that we have "no need to look for such characteristics, for the Bill of Rights reflects universal values and ideals, of which African values form an integral part". All values are "essentially the same, even though they might be expressed in different idiom".

Simply expressing universal values differently or whether embracing a different set of values or simply expressing universal values differently, ubuntu is being deployed to give voice to something distinctively African, and we may concur with the attempt to incorporate that quality "into the legal system so as to form a cohesive, plural, South African legal culture".[148] This culture will be one characterised by such ideas as reconciliation, sharing, compassion, civility, responsibility, trust and harmony.

[146] Hitchings, H. 2008. *The Secret Life of Words.* London: John Murray, p 5.
[147] *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 224-225.
[148] Keep and Midgley, *supra* p 28, p 30.

When we "defend ideals" such as *uBuntu*, a lot can go wrong. The traps are numerous and it is rather a risky business, but if we dare to risk failure, if we dare to ask what good we are without others, if we dare to imagine a revitalised philosophy *uBuntu*, if we dare to do it differently, we may have stories worth telling future generations. Stories of Hope.

"WHAT GOOD AM I?"

"What good am I then to others and me
If I've had every chance and yet still fail to see
If my hands are tied must I not wonder within
Who tied them and why and where must I have been?
What good am I if I say foolish things
And I laugh in the face of what sorrow brings
And I just turn my back while you silently die
What good am I?"

{Bob Dylan}[149]

[149] Dylan, Bob. 1989. *Oh Mercy*. What Good am I? Special Rider Music.

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