

UBUNTU: FUNDAMENTAL CONSTITUTIONAL VALUE AND INTERPRETIVE AID

by

SIVHAGA NETSHITOMBONI

submitted in part fulfilment of the requirements for
the degree of

MASTER OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF C J BOTHA

JUNE 1998

PREFACE

I am extremely indebted to Professor C J Botha, my supervisor, for the invaluable guidance throughout preparation of this dissertation. I also wish to acknowledge the assistance given to me by retired Professor of Anthropology and Ethnomusicology at the University of Venda Professor N V Ralushai.

This work could not have been completed in time without the excellent typing and proof-reading by my brother Nnzeni to whom I am forever grateful.

Finally, I wish to record a great and continuing debt to my wife Tshilindedzi and our daughters Murangi and Olugaho without whose support this dissertation would have only been a dream.

342.2068 NETS

UNISA	
BIBLIOTEK / LIBRARY	
Class	1996-03-11
Klas
Access
Aanwin



0001708250

TABLE OF CONTENTS

Preface	i
Bibliography	iii
Summary	vi
Abbreviations	vii
CHAPTER 1	
<i>Ubuntu</i> : fundamental constitutional value and interpretive aid	1
Introduction	1
CHAPTER 2	
<i>Ubuntu</i> as extra-textual aid	4
2.1 Definition of <i>ubuntu</i>	4
2.2 Sources of <i>ubuntu</i>	5
2.3 <i>Ubuntu</i> and human dignity	7
2.4 Core values of <i>ubuntu</i> and justice system	8
2.5 <i>Ubuntu</i> in <i>Makwanyane</i>	10
2.6 Advancement and empowerment	12
2.7 Transparency and reconciliation	13
2.8 Freedom of speech	14
CHAPTER 3	
<i>Ubuntu</i> and African Jurisprudence	16
3.1 Individual rights and community	16
3.2 Reconciliation in African jurisprudence	18
3.3 Communitarianism	18
3.4 The question of indigenous values	19
3.5 Constitutional link	21
3.6 Conciliation and rehabilitation	22
CHAPTER 4	
Conclusion	24

BIBLIOGRAPHY

Journals

- H Botha 'The values and principles underlying the 1993 Constitution' (1994) *SAPR/PL* 233.
- G Carpenter 'Constitutional Court sounds death knell for capital punishment' (1996) *THRHR* 145.
- M Corbett 'Aspects of the role of policy in the evolution of our common law' (1987) *SALJ* 52.
- D Davis 'The underlying theory that informs the wording of our bill of rights' (1996) *SALJ* 385.
- E De Wet 'Can the social state principle in Germany guide state action in South Africa in the field of social and economic rights?' (1995) *SAJHR* 30.
- L M du Plessis 'Evaluative reflections on the final text of South Africa's bill of rights' (1996) *Stell LR* 283.
- C R M Dlamini 'Towards a regional protection of human rights in Africa: The African Charter on human and people's rights' (1991) *CILSA* 198.
- R English '*Ubuntu*: The quest for an indigenous jurisprudence' (1996) *SAJHR* 641.
- S B O Gutto 'Group v Individual identity in the African Debate on Human Rights' (1995) *ALR* 42.
- C Heyns 'African human rights law and The European Convention' (1995) *SAJHR* 252.
- C Heyns 'Reasonableness in an divided society' (1990) *SALJ* 279.
- D P Kommers 'German constitutionalism: a prolegomenon' (1991) *Emory Law Journal* 837.
- J D Krige 'Some Aspects of the *Lovhedu* judicial arrangement' (1939) *Journal of Bantu Studies* 133.
- J Kruger 'Is interpretation a question of common sense? Some reflections on value judgements and section 35 (1995) *CILSA* 1.
- M L M Mbaob 'The province of the South African Bill of Rights determined and redetermined - A comment on the case of *Baloro & others v University*

of Bophuthatswana & others' (1996) *SALJ* 33.

- L Mbigi 'African Democracy' *Enterprise* (1996) 70.
- B M Mchunu 'The need for a traditional African jurisprudence in South African legal system' (1996) *Die Landros / The Magistrate* 55.
- M S Motshekga 'The ideology behind witchcraft and the principle of fault in the criminal law' (1984) *Codicillus* 4.
- E Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) *SAJHR* 31.
- P K Rakate 'The status of traditional courts under the final Constitution' (1997) *CILSA* 175.
- A Sachs 'Towards a Bill of Rights for a democratic South Africa' (1991) *JAL* 21.
- A G J M Sanders 'The Bill of Rights issue: Look at the rest of Africa' (1990) *SAPR / PL* 185.
- A G J M Sanders 'The characteristic features of Southern African Law' (1981) *CILSA* 328.
- W L Seriti 'The African Charter on human rights' (1995) *ALR* 12.
- K Stern 'A society based on the rule of law and social justice: Constitutional model of the Federal Republic of Germany' (1981) *TSAR* 241.
- C Villa - Vicencio 'Whither South Africa? Constitutionalism and Law - Making' (1991) *Emory Law Journal* 141.

Occasional papers

- O Dlomo 'Strategic advantages that can be derived from *ubuntu*' Paper delivered at a seminar on incorporation of *ubuntu* into a uniquely South African approach to management held in Midrand on 30 October 1991.
- C Heyns 'Where is the voice of Africa in our Constitution?' Centre for Human Rights (1996) *Occasional Paper* 8.

SUMMARY

South African courts face a challenge in the application of intra and extra-textual aids in constitutional interpretation. Given that the 1993 and 1996 Constitutions have brought about a new era in the exercise of human rights, the challenge that the courts face is to strike a balance between individual and communitarian values. I have argued that the African concept of *ubuntu* which was included in the 1993 Constitution and impliedly included in the 1996 Constitution should be applied as a constitutional value and interpretive aid. This argument is fortified by the 1996 Constitution's frequent reference to human dignity, which is accorded full meaning by *ubuntu*. This concept is further examined with a view to linking it with African jurisprudence which is characterised by the exercise of individual human rights within the context of a group. In conclusion proposals on the way forward in the application of *ubuntu* are made.

UBUNTU: FUNDAMENTAL CONSTITUTIONAL VALUE AND INTERPRETIVE AID

Key terms:

Ubuntu; human dignity; extra-textual aid; constitutional interpretation; social justice; human rights; Constitution; indigenous values; courts; African jurisprudence.

of Bophuthatswana & others' (1996) *SALJ* 33.

- L Mbigi 'African Democracy' *Enterprise* (1996) 70.
- B M Mchunu 'The need for a traditional African jurisprudence in South African legal system' (1996) *Die Landros / The Magistrate* 55.
- M S Motshekga 'The ideology behind witchcraft and the principle of fault in the criminal law' (1984) *Codicillus* 4.
- E Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) *SAJHR* 31.
- P K Rakate 'The status of traditional courts under the final Constitution' (1997) *CILSA* 175.
- A Sachs 'Towards a Bill of Rights for a democratic South Africa' (1991) *JAL* 21.
- A G J M Sanders 'The Bill of Rights issue: Look at the rest of Africa' (1990) *SAPR / PL* 185.
- A G J M Sanders 'The characteristic features of Southern African Law' (1981) *CILSA* 328.
- W L Seriti 'The African Charter on human rights' (1995) *ALR* 12.
- K Stern 'A society based on the rule of law and social justice: Constitutional model of the Federal Republic of Germany' (1981) *TSAR* 241.
- C Villa - Vicencio 'Whither South Africa? Constitutionalism and Law - Making' (1991) *Emory Law Journal* 141.

Occasional papers

- O Dlomo 'Strategic advantages that can be derived from *ubuntu*' Paper delivered at a seminar on incorporation of *ubuntu* into a uniquely South African approach to management held in Midrand on 30 October 1991.
- C Heyns 'Where is the voice of Africa in our Constitution?' Centre for Human Rights (1996) *Occasional Paper* 8.

BOOKS

- M C Bassiouni & Z Motala *The Protection of Human Rights in African Criminal Proceedings* Martinus Nijhoff 1995
- J C Bekker *Seymour's Customary Law in Southern Africa* Juta 1989.
- T W Bennet *A Sourcebook of African Customary Law for Southern Africa* Juta 1991.
- A Cachalia
H Cheadle
N Haysom
P Maduna and
G Marcus *Fundamental Rights in the new South Africa* Juta 1994.
- C R M Dlamini *Human Rights in South Africa which way South Africa?* Butterworths 1995.
- M Gelfand *The Genuine Shona: Survival values of an African culture* Mambo Press 1973.
- I Schapera *The Bantu-speaking tribes of South Africa* Maskew Miller 1956.

ABBREVIATIONS

<i>ALR</i>	African Law Review
<i>CILSA</i>	The Comparative and International Law Journal of Southern Africa
<i>JAL</i>	Journal of African Law
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>SAPR/PL</i>	SA Publiek reg / Public Law
<i>Stell LR</i>	Stellenbosch Law Review
<i>THRHR</i>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
<i>TSAR</i>	Tydskrif vir die Suid Afrikaanse- Reg

342.2068 NETS

CHAPTER 1

UBUNTU: FUNDAMENTAL CONSTITUTIONAL VALUE AND INTERPRETIVE AID

INTRODUCTION

In this piece the challenge and role of courts in applying extra-textual aids in constitutional interpretation with specific reference to *ubuntu* is analysed and discussed. It is trite that South African courts adopt a value-orientated approach in constitutional interpretation.¹ The 1993 Constitution specifically enjoined courts to promote values which underlie a democratic society based on freedom and equality.² Furthermore, it referred to South Africa as a constitutional state (*rechtsstaat*).³ The concept of *rechtsstaat* embodies western liberal values which embody a balance between individual and communitarian values.⁴ Equality on the other hand is particularly a communitarian concept.

The 1996 Constitution on the other hand enjoins courts to promote values that underlie an

¹See *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 (B) at 566-567, *Qozeleni v Minister of Law and Order and Another* 1994 (3) SA ECD 625 at 634A-H; *S v Zuma* 1995 (4) BCLR 401 at para 15; *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 9-25.

² See section 35 of the Constitution of the Republic of South Africa, 1993.

³ See Preamble of the 1993 Constitution.

⁴ E De Wet 'Can the social state principle in Germany guide state action in South Africa in the field of social and economic rights?' (1995) *SAJHR* 30 at 39-41; K Stern 'A society based on the rule of law and social justice: Constitutional model of the Federal Republic of Germany' (1981) *TSAR* 241 at 247; DP Kommers 'German constitutionalism : a prolegomenon' (1991) *Emory Law Journal* 837.

open and democratic society based on human dignity, equality and freedom.⁵ In its preamble it provides as one of its objectives the establishment of a society based on democratic values, social justice and fundamental human rights. Democratic values underpin individual freedom as understood in western democracies whereas social justice implies the community's sense of justice which is characterised by the exercise of rights in the context of a group.⁶

The emphasis in the preamble to the establishment of a society based on democratic values, social justice and fundamental rights on the one hand and promotion of values that underlie an open and democratic society based on human dignity, equality and freedom on the other bring about tension between these values that need to be reconciled by the courts. It will be argued with reference to this tension that although the 1996 Constitution, unlike the 1993 Constitution which refers to *ubuntu* in its postamble, does not make any reference to *ubuntu* which transcends a distinction between intra and extra-textual interpretation, its frequent reference to human dignity is impliedly a reference to *ubuntu*. Furthermore, an argument will be forwarded that as the fundamental underpinnings of the Constitution is the harmonisation of liberty and equality, courts should harmonise these two concepts within the particular African context of *ubuntu*.⁷

⁵See section 39 of the Constitution of the Republic of South Africa, 1996.

⁶ See CRM Dlamini 'Human Rights in South Africa Which Way South Africa?' Butterworths (1995) 89-90, D Davis 'The underlying theory that informs the wording of our bill of rights' (1996) *SALJ* 385 at 393; see also De Wet note 4.

⁷ Davis note 6; J Kruger 'Is interpretation a question of common sense? Some reflections on value judgement and section 35' (1995) *CILSA* 1 at 9-11. see also M L M Mbaio 'The province of the South African Bill of Rights determined and redetermined - A comment on the case of *Baloro & others v University of Bophuthatswana & others*' (1996) *SALJ* 33 at 36-41.

Firstly *ubuntu* will be discussed in detail and the manner in which it fits into the wider constitutional picture. It will be examined with a view to link it with other constitutional values and how it can be used as an extra-textual aid to interpretation. Secondly *ubuntu* will be linked to African jurisprudence in general and other constitutional values which are unique to Africa and may be used during constitutional interpretation. In conclusion, an argument will be advanced that the African value system should be applied as an extra-textual aid in constitutional interpretation. These values and proposals on the way forward will be discussed in the following chapters.

CHAPTER 2

UBUNTU AS EXTRA-TEXTUAL AID

In this chapter *ubuntu* is examined and proposals on how it fits into the wider constitutional picture as well as how it can be used as an extra- textual aid to interpretation is discussed.

Since the advent of the 1993 Constitution, *ubuntu* has become a focus of attention and ongoing discussions on the subject continue unabated.⁸ These discussions have been given impetus by its inclusion in the postamble of the 1993 Constitution and its detailed discussion in the landmark case of *S v Makwanyane*⁹ in which the death penalty was declared unconstitutional. The postamble of the 1993 Constitution provides as follows:

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross human rights, the transgression of humanitarian principles in the violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for revenge, a need for *ubuntu* but not for victimisation.

In order to put *ubuntu* in its proper perspective, I will briefly discuss its sources, what it is and link it to some of the constitutional values which underlie our constitution.

2.1 Definition of *ubuntu*

Ubuntu refers to an African way of life that accords respect to human dignity and equality to any person irrespective of status in a communitarian sense. Thus an individual has an inborn

⁸ R English 'Ubuntu: The quest for and indigenous jurisprudence' (1996) *SAJHR* 641; BM Mchunu 'The need for traditional African Jurisprudence in South African legal system' *Die Landdros/ The Magistrate* (1996) 55; G Carpenter 'Constitutional Court sounds death knell for capital punishment' (1996) *THRHR* 144; L Mbigi 'African Democracy' *Enterprise* (1996) 70.

⁹ 1995 (6) BCLR 665 (CC).

corresponding duty to accord respect to other members of the community. Its literal translation is *humaneness*. Its roots can be traced back to rural communities. It is derived from community practices and inheritance from the past.¹⁰ It is like an inborn concept where every member of a community does not have to be reminded that the most outstanding feature in life in interaction with other members of the community, is respect for human dignity.

Children at an early age are taught to respect one another and share any delicacies that they may receive. They are furthermore taught to respect any person who is their parents' peer in the manner that they would respect their own parents. The importance of one's worth as a human being is always regarded as important as another person's worth. In this way human beings treat each other in a spirit of brotherhood and sisterhood. The culture of non-revenge when hurt is always deeply ingrained in the minds of children.

2.2 Sources of *ubuntu*

The main source of *ubuntu* are idioms which set down norms which every member of the community is expected to conform to. Well known amongst them is *Umuntu ngumuntu nga bantu*. Literally translated it means a person is a person because of what other members of the community have done for him. In short, *ubuntu* signifies the centrality and the importance of an individual's interdependence with other members of the community¹¹.

¹⁰M Gelfand *The Genuine Shona: Survival Values of an African Culture* Mambo (1973) at 57-69.

¹¹Mbigi note 8 at 70.

Another idiom which is a cornerstone of respect for human dignity is *Umntu akalahlwa* which means that a person cannot be thrown away.¹² This idiom underscores the need for respect for human life and dignity whatever the circumstances. No matter what wrong an individual has done to the community, that individual remains a human being worthy of humane and equal treatment. A person's right to human dignity is not in any way lessened by that person's transgressions. One glaring example is the punishment which was usually meted out to a person accused of practising witchcraft which results in death, *ubuntu* required that such a person be ordered to leave the boundaries of the community concerned. To show that members of community still regarded that person as a human being worthy of dignity, they would even assist that person's carry belongings away.

Traditional communities exist under the leadership of traditional leaders. In other words, political power is wielded by the traditional leader and his councillors. The idiom which underscores political power is *inkosi yi nkosi nga bantu bayo*. This means that a traditional leader is what he or she is because of the people and owes allegiance to them. Thus *ubuntu* would require that decisions of a traditional leader are all transparent and a reflection of the legal convictions of that leader's community. In traditional gatherings, everybody is allowed to speak, which is a reflection of freedom of speech. In traditional courts, the accused has the right to cross examine witnesses. Representation is understood in a different sense. Everybody has the right to address the court in favour of or against the accused. Therefore representation in a communitarian sense means everybody is free to advance arguments in

¹²O Dlomo 'Strategic advantages that can be derived from *ubuntu*' (*Paper* delivered at a Seminar on 'incorporation of *ubuntu* into a uniquely South African approach to management' held in Midrand) on 30 October 1991.

favour of or against the accused.

Where an accused has been found guilty, that accused may be fined a goat which may be slaughtered in the traditional leader's kraal. To show that the accused is not ostracised by the community, that accused person would be invited to share in the meat. This is an indication that such person will always be one of their peers and therefore deserves to be treated equally and with dignity.

2.3 Ubuntu and human dignity

Ubuntu was expressly referred to in the 1993 Constitution, but not the 1996 Constitution. It is submitted that *ubuntu* is impliedly included in the 1996 Constitution by its frequent reference to human dignity and forms part of the emerging South African and African jurisprudence.¹³ Three reasons are advanced for this argument. First, the 1996 Constitution is drafted in a conciliatory manner reminiscent of the postamble of the 1993 Constitution in that it lays strong emphasis on the importance of national reconciliation and is permeated by respect for human dignity.¹⁴ Secondly, strong emphasis on human dignity is an obvious reaction to the pre 27 April 1994 constitutional era which was characterised by human rights violations, and therefore respect for human dignity must form a bridge between the past and

¹³ See sections 1, 7, 10, 39 and item 22 of schedule 6 which partly retains the postamble of the 1993 Constitution for the purpose of the Promotion of Reconciliation and National Unity Act 1995 (Act No. 34 of 1995); see also *S v Makwanyane supra* para 311, Article 27.7 of the African Charter on Human and People's Rights which imposes a duty on an individual to strengthen cultural values in a spirit of tolerance.

¹⁴ L M du Plessis 'Evaluative reflections on the final text of South Africa's final text of South Africa's bill of rights' (1996) *Stell LR* 283 at 285, for healing of divisions of the past, see the Preamble of the 1996 Constitution.

future.¹⁵ Thirdly, respect for human dignity fortifies and underpins certain elements of other rights entrenched in the Bill of Rights.¹⁶

2.4 Core values of *ubuntu* and justice system

Generally speaking the axis around which the 1996 Constitution revolves is respect for human dignity. The concept of *ubuntu* requires the treatment of any person with dignity irrespective of that person's status. Thus a human being deserves dignity from cradle to grave. Even after burial of a person, members of the community of which that person is a member would for some days refrain from engaging in serious work as a sign of respect to that person's dignity. In short what can be learnt from *ubuntu* in this regard is that respect for human dignity is unconditional and everlasting. Even the most social outcasts who behave like animals would always be regarded as members of the community worthy of humane treatment. Criminal conduct does not in any way make a human being sub-human. In this regard it is interesting to note that the Constitution provides in section 37 that the right to human dignity is non-derogable. This right is a core value whose application underlies the spirit of tolerance. Even if a person is an outcast now, that person may at a later stage be depended upon.

Traditional courts (which are communal in character) place more emphasis on reconciliation than punishing the offender. In traditional communities justice is, according to Krige, realised

¹⁵H Botha 'The values and principles underlying the 1993 Constitution' (1994) *SAPR/PL* 233 at 237; E Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) *SAJHR* 31 at 32.

¹⁶ Cachalia *et al Fundamental Rights in the New Constitution* Juta (1994) 34; for a discussion of human dignity as a foundation of other rights see also *S v Makwanyane supra* para 328; De Wet note 4 at 34.

as follows:

[I]f reconciliation ensues, the court not only rejoices but watches from afar, vicariously participating in, the return of the prodigal son, the wrongdoer, with the beer he has brewed and brought to become reconciled with his father, the aggrieved party¹⁷.

Common amongst the crimes in traditional communities was alleged practising of witchcraft which caused lightning, serious illness or death. It is interesting to note that the majority of blacks believe in witchcraft.¹⁸ These people were often 'sniffed' out by witch doctors. Alleged practising of witchcraft has always been regarded as a serious offence by traditional communities. Those who were found guilty of practising so-called witchcraft were not usually put to death. The usual punishment was to expel them from the borders of the community within which they lived. Even under such circumstances those persons would be allowed to go to another traditional leader for permission to settle in that traditional leader's community. Their application must be transparent. When they leave the former community they were treated with dignity. *Ubuntu* would require that a human being despite the allegations of wrongdoing that human being is facing be treated with dignity.

Thus equality and respect for human dignity are unconditional. What can be learnt from *ubuntu* in this regard is that equality with other members of the community and respect for human dignity is not only for the law-abiding citizens but the social outcasts as well. These are constitutional values which must be promoted by the courts. The feeling of

¹⁷ J D Krige 'Some aspects of the *Lovhedu* judicial arrangement' (1939) *Journal of Bantu Studies* 133 at 144.

¹⁸ See M S Motshekga 'The ideology behind witchcraft and the principle of fault in the criminal law' (1984) *Codicillus* 4, for the view that most blacks believe in witchcraft.

interdependence is always experienced when an offender has sent a socially acceptable person to the victim express regret to the latter. This was done as soon as possible after wrongdoing. The purpose of sending someone to express regret as soon as possible is to avoid the building up of anger on the part of the victim. The end result would be the payment of a small fee or even no compensation at all. This value has direct link with the procedure adopted by the Truth and Reconciliation Commission.¹⁹ One of the requirements of the granting of amnesty in terms of the Act which established the Commission is full disclosure. This also supports the argument that it is not always necessary to resort to ordinary courts to resolve conflicts. With regards the granting of amnesty Mahomed DP had the following to say:

It is available only where there is full disclosure of all facts to the Amnesty Committee²⁰..

In accordance with *ubuntu* full disclosure is one basis for forgiveness and tolerance. Confession is an embedded theological principle among the *Nguni*, *Sotho*, *Venda* and *Tsonga*.²¹ Therefore full disclosure or public confession is used for reconciling people who are in conflict as long as a person socially acceptable to both parties is present to facilitate such reconciliation. At times the offender would send somebody with a form of compensation on the basis that one day the victim may be an offender who may require pardon.

¹⁹ See Preamble of the Truth Promotion of National Unity and Reconciliation Act, 1995 (*Act No.* 34 of 1995); see also section 20(d).

²⁰ *Azanian Peoples Organisation (AZAPO) and Another v President of the Republic of South Africa and others* 1996 BCLR 1015 (CC) at para 32.

²¹ Hammond-Tooke 'The Ancestors' Healing Process', *The Weekly Mail and Guardian* July 1-7, 1994.

2.5 *Ubuntu in Makwanyane*

In her erudite judgement in *Makwanyane* Mokgoro J highlighted the key values of group solidarity, compassion, respect for human dignity, conformity to basic norms and collective unity which are enveloped by the concept of *ubuntu*²². She went on further to emphasise that the right to life and human dignity were supported by the spirit of *ubuntu*. The emphasis on human dignity in this judgement reaffirms that respect for human dignity is always inherent in *ubuntu*. The inviolability of human dignity is the basis for guaranteeing other values in the Constitution.

Chaskalson P after referring to the postamble which called for the need for reparation but not for retaliation, emphasised that our society should not kill criminals simply to get even with them. He acknowledged the need to be consistent with *ubuntu*. *Ubuntu* does not call for 'an eye for an eye.' It acknowledges that as long as society exists criminals who are part of society will also be in existence. Only a humane way of dealing with them will accord with *ubuntu*.²³

In his judgement Langa J also emphasised the value *ubuntu* puts on life and human dignity²⁴. He identified the importance of another person's life as one's own. This reasoning also accords with the idiom *umuntu ngumuntu nga bantu*. It encompasses the importance of a person's life in society. A person is a member of society irrespective of that person's transgressions. Thus the life of a law abiding citizen is as important as the life of one who has taken the life of another.

²² Para 308.

²³ Para 131.

In his judgement, Madala J dealt with the manner in which *ubuntu* corresponds with rehabilitation. His judgement mainly focused on the possibility of reforming the offender²⁵.

The possibility of reformation is always inherent in *ubuntu*, which acknowledges that a human being is despite transgressions capable of reform and at a later stage should be allowed to resume a normal role in society.

To summarise: the judgements in *Makwanyane* stress the need for application of *ubuntu* as an extra-textual aid to constitutional interpretation. The emphasis on unconditional respect for human dignity corresponds with one of the founding values of the 1996 Constitution which is respect for human dignity.

2.6 Advancement and empowerment

Although *ubuntu* requires the equal and dignified treatment of all persons irrespective of circumstances, the poorest of the poor members of the community receive more generously from traditional leaders in the spirit of *ubuntu* than those considered well to do. Members of a community can collectively plough the fields of these unfortunate members of the community. Furthermore, these less fortunate members can be allowed to stay at the kraal of the traditional leader under the latter's care. The understanding is that for the poor of the poorest to be equal with other members of the community, measures must be taken to make them equal with others in the true sense of the word. This is not seen as punishing the well to do

²⁴ Para 225.

²⁵ Paras 242-244.

for the social ills of the poor. For example, a fully grown young man who cannot afford payment of *lobolo*, can have it paid for him by a traditional leader or his relatives. The reason is to make him substantively equal with his peers.

This can be linked to the present affirmative action contemplated in section 9(2) of the 1996 Constitution which allows for the advancement of persons previously disadvantaged by unfair discrimination. The purpose of *ubuntu* in advancing certain members of the community is not because these members were necessarily previously disadvantaged but to make them equal with others not only in a formal sense, but substantially as well. This form of *ubuntu* is done with the spirit of sharing since it is considered inhuman not to share.

2.7 Transparency and reconciliation

Another feature of *ubuntu* which fits into the wider constitutional picture is decisions affecting people. The essence of this concept is that decisions are not taken on the basis of majority vote but consensus²⁶. In this regard the main aim is to accommodate the views of the minority. Furthermore, decisions by governing bodies have to be transparent. This can be linked to the right to access to information held by the state and the right to administrative justice contemplated in sections 32 and 33 of the 1996 Constitution. These two values constitute a foundation of open and transparent governance.

One of the features of *ubuntu* is the avoidance of confrontation or revenge. It focuses more on tolerance. As stated earlier on, children at an early age are taught not to seek revenge

²⁶ Mbigi note 8 at 70.

when hurt. This value of non-revenge has found its way into the 1993 Constitution and item 22 of schedule 6 of the 1996 Constitution, and has further been enhanced by the amnesty process of the Truth and Reconciliation Commission. The value of non-revenge is further complemented by the spirit of *ubuntu*, which puts more emphasis on rehabilitation and tolerance of criminals.

2.8 Freedom of speech

Freedom of speech is another feature of *ubuntu* which fits into the wider constitutional picture. Freedom of speech in the spirit of *ubuntu* is recognised in various forms including artistic creativity and imparting information or ideas. In traditional communities this value featured prominently in songs criticising governing institutions. It was common to find villagers ploughing a field of a traditional leader singing about their complaints regarding certain aspects of governance.

Criticism of governing institutions was more acceptable than criticising an individual.²⁷ In this regard Schapera observes:

The Chief himself is not above the law. Should his action run counter to accepted standards of what is right and proper, he is severely criticised by his councillors and the people at large.

This form of freedom of expression helps to strengthen good governance.

It is clear that the application of extra-textual aids has far-reaching implications. The concept of *ubuntu* which has succeeded in sustaining generations of the past is not foreign to the values the Constitution seeks to promote, because those values contain elements of respect for

²⁷I Schapera *The Bantu-speaking tribes of South Africa* Maskew Miller (1966) 184.

human dignity. The picture that I envisage for *ubuntu* in constitutional interpretation is that courts should apply it where the question of human dignity has to be considered. This view finds support in the fact that *ubuntu* gives respect for human dignity its fullest meaning.

CHAPTER 3

UBUNTU AND AFRICAN JURISPRUDENCE

In what follows, the link between *ubuntu* and African jurisprudence (as well as other constitutional values that may be used during constitutional interpretation) are discussed. Like the uniqueness of values which any other Constitution may seek to promote, *ubuntu* as a constitutional value has its own unique characteristics.

If one were to greet a Sotho-speaking person and say *O Kae* or in Zulu *Ku njani?* (How are you?) the answers would respectively be *Re teng* and *Si khona* (We are fine). An African always describes himself not as an individual but as a member of a clan or group. This signifies that that person owes existence to a larger group. The feeling of belonging to a group is part of Africans' languages, ritual ceremonies and culture which forms part of *ubuntu*.

3.1 Individual rights and the group

The African Charter on Human and People's Rights which is also a source of African jurisprudence has its own features. It draws heavily on the OAU Charter which provides that freedom, equality, justice and dignity are essential objectives of the achievement of the legitimate expectations of the African peoples²⁸. It provides for the protection of people's rights which allows for an individual to exercise rights within the context of a group²⁹. It also

²⁸ Preamble to the African Charter on Human and People's Rights.

²⁹ Dlamini note 6 at 89; I A Badawi El Sheik 'The African Regional System' in M C Bassiouni and Z Motala *The Protection of Human Rights in African Criminal Proceedings*

imposes duties on an individual towards family, society and the state, as well as the strengthening of cultural values in the spirit of tolerance. This is in no doubt a reflection of the African culture of human rights where an individual cannot exercise rights in isolation, but with due regard to the collective rights of the community³⁰.

It is part of *ubuntu* that individual rights are exercised within the context of the group. This is an interesting link with the German *sozial rechtsstaat* which balances communitarian socio-economic rights and liberal political and civil rights.³¹ Obligations imposed by the Charter on an individual towards family, society and the state and those imposed by *ubuntu*, both acknowledge individual rights within the context of a group.

Amongst the *Venda* payment of *lumalo* or *lobolo* is never made in full. The reason for this is that the relationship between two family groups never comes to an end.³² Since marriage is regarded as a matter between family groups, and not individuals, there will always be an obligation between the two families to mutually support each other in case of need. Furthermore, the African Charter emphasises that an individual has an inborn duty to serve the community without reward, because the essence of African governance is characterised by

Martinus Nijhoff (1991) 25; A G J M Sanders 'The characteristic features of Southern African Law' (1981) *CILSA* 329 at 333.

³⁰ Article 27.

³¹ De Wet note 4 at 31.

³² J C Bekker *Seymour's Customary Law in Southern African Jura* (1989) 96; C R M Dlamini 'A judicial analysis and critical evaluation of *ilobolo* in a changing Zulu society' in T W Bennet *Sourcebook of African Customary Law of African Customary Law for Southern Africa Jura* (1991) 200.

enhancement of collective solidarity, trust and compassion³³.

3.2 Reconciliation in African jurisprudence

One of the distinct features of the African Charter is that unlike the American Convention on Human Rights and Fundamental Freedoms which provides for the establishment of a human rights court to review cases brought before it, it does not make provision for such a court³⁴.

This is attributed to the fact that African jurisprudence prefers the settlement of disputes through conciliation rather than courts of law. This is a feature of *ubuntu*. More emphasis is on reconciliation of members who belong to the same group. Taking a matter to court that can be settled through conciliation without first attempting conciliation is foreign to African jurisprudence.

3.3 Communitarianism

In Africa life centres around the group, not the individual. The exercise of an individual right is understood in the context of a group. Although the term 'Peoples' is not defined in the Charter, it is submitted that this involves peoples linked by shared common values. Individualism in the strict sense of the word is foreign to Africa and as such a communitarian approach to constitutional interpretation would always be appropriate in Africa. In this context the idiom *Umntu ngumuntu nga bantu* (which signifies the centrality of mutual support and sharing of resources) becomes more appropriate. The real and lasting

³³ Mbigi note 8 at 70. SBO Gutto 'Group v individual identity in the African debate on human rights' (1995) *ALR* 42-45; C R M Dlamini 'Towards a regional protection of human rights in Africa: The African Charter on human and people's rights' (1991) *CILSA* 198.

³⁴ W L Seriti 'The African Charter on human rights' (1995) *ALR*; 16; P K Rakate 'The status of traditional courts under the final Constitution' (1997) *CILSA* 175 at 187.

duty imposed on an individual in the exercise of human rights is to balance individual rights against the rights of others. As a result the African approach to human rights favours the common good of society. The overall rights of the community often prevail over individual rights and freedom.

3.4 The question of indigenous values debate

The viewpoint that our legal system should reflect indigenous values rooted in history has been strengthened by a call for the application of value judgements, which also involves the determination of their content.³⁵ In this regard Heyns says:

Our Constitution must be truly legitimate, it must reflect the soul of our nation, it must be an expression of our history and our deepest values because on them will it have the spontaneous support of our people.³⁶

This was a call that our Constitution should be deeply rooted in African soil and thus reflect indigenous values which the people had a part in developing.³⁷ In other words, the values that our Constitution seeks to promote must be part of our history and form part of the nation's pride and culture.

Thus Sachs J had the following to say³⁸:

³⁵ A Sachs 'Towards a Bill of Rights for a democratic South Africa' (1991) *JAL* 21 at 30-31. C Heyns *African human rights law and the European Convention* (1995) *SAJHR* 252 at 260, *S v Acheson* 1991 (2) SA 805 (NMHC) at 813.

³⁶ Heyns 'Where is the Voice of Africa in our Constitution' Centre for Human Rights (1996) *Occasional Paper* 8.

³⁷ AJ G M Sanders 'The Bill of Rights issue: Look at the rest of Africa' (1990) *SAPR/PL* 185 at 192.

³⁸ *S v Mhlungu* 1995 (7) BCLR 793 (CC) at para 127.

We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.

Such an approach clearly goes beyond the text of the Constitution, since it acknowledges the intention of the framers of the Constitution to frame it as they did and give content to the values which the framers had in mind when framing it. Furthermore, it must reflect the core values of society. *Mhlungu* not only paved the way for the application of indigenous values, but also posed a challenge to subsequent decisions to reflect the soul of the nation. In this way we will take pride in what is indigenously ours.

Even before *Mhlungu* a view was held that certain values should prevail in a community. A former Chief Justice had the following to say in this regard:³⁹

A community has certain common values and norms. These are in part a heritage from the past. To some extent too they are the product of the influence of other communities; of the interaction that takes place between peoples in all spheres of human activity; of the sayings and writings of the philosophers, the thinkers, the leaders, which have universal human appeal; the judge must become 'the living voice of the people' he must ... interpret society to itself

Courts should accept overall responsibility for giving content to the values which the Constitution seeks to promote. The emphasis placed on human dignity and social justice in the Constitution presupposes that these values must be given an indigenous perspective. In *Makwanyane*⁴⁰ Mokgoro J placed particular importance on the importance of indigenous

³⁹ M Corbett 'Aspects of the role of policy in the evolution of our common law' (1987) *SALJ* 52 at 67.

⁴⁰ At para 300.

South African values⁴¹. Sachs J agreed that traditional beliefs and values of all sectors of society must be taken into account.⁴² He went on further to say that values peculiar to African society should have been placed before the court during the debate about the death penalty. In my view this is a challenge to the courts to utilise expert evidence of those members of our community who are knowledgeable in African jurisprudence and for legal academics to include it in their curricula as responsibility to promote our values cannot be left to the judiciary alone.

3.5 Constitutional link

The 1996 Constitution recognises the imposition of duties and responsibilities of citizenship in section 3. The imposition of duties and responsibilities presupposes that a person's right is exercised with due regard to the rights of others. In this context it is worth noting that individualism is foreign to African jurisprudence. The real and lasting effect of the duty imposed on an individual is that such individual is expected to perform certain duties: not for reward, but rather to help and support the community of which the individual is a member. At all times there is always a feeling of reciprocity between an individual and the community. Thus Mahomed J in *Makwanyane* emphasised reciprocity in interaction with the collective humanity⁴³ when he said :

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 the fulfilment involved in recognising their innate humanity, the reciprocity this generates and in interaction within the collective community; the richness of the creative emotions which it engenders the moral

⁴¹ At para 361.

⁴² At para 370.

⁴³ At para 263.

energies which it releases both in givers and the society which they serve and are served by.

The African value system which allows for imposition of duties on a citizen to exercise rights with due regard to the rights of the community can be applied as an extra-textual aid to interpretation. This will be in accordance with the spirit of the Constitution which is based on the will of the people. Again this approach reflects the importance of the group. In adjudicating on the exercise of individual rights courts should appreciate the importance of striking a balance between individual and community rights.

3.6 Conciliation and rehabilitation.

As pointed out earlier, the 1996 Constitution is drafted in a conciliatory manner. This is to be found in the requirement for the establishment of a state based on democratic values, social justice and fundamental human rights. All courts, forums and tribunals, are enjoined by section 39 to promote these values, and it may be argued that the framers also had courts and tribunals known to the African people in mind. Traditional courts, which also apply *ubuntu* in resolving disputes, are also called upon to promote these values.

Another feature of African jurisprudence is that the possibility of rehabilitation is recognised more often than not. In *Makwanyane* Madala J thus emphasised the need to recognise the possibility of rehabilitation⁴⁴. As an individual is part and parcel of the community, it is always felt that at some stage that individual will be reconciled with the community through rehabilitation. Punishment must reflect the community's morals that a human being is capable

⁴⁴Paras 241-244.

of rehabilitation through reconciliation with the community. This underscores the tolerance and forgiveness inherent in *ubuntu*,⁴⁵ and our courts can promote this value through taking into account the possibility of reconciliation of an offender with the community through rehabilitation.

Like any other society no rights are absolute. *Ubuntu* recognises the exercises of rights within limits. Individual rights are exercised within the limits prescribed by society. The *nexus* between limits imposed by *ubuntu* in the exercise of rights and constitutional limits is that both acknowledge that no right is absolute.

One argument that can be advanced from what has been sketched above is that South Africans are united in their diversity, and *ubuntu* as a constitutional value should be applied in constitutional interpretation and thereby form part of the emerging South African jurisprudence. Our legal system should promote this indigenous value which international jurisprudence may well emulate in future.

⁴⁵ Dlomo note 12.

CHAPTER 4

CONCLUSION

I have argued that there is a telling challenge to all courts, tribunals and other forums to promote indigenous values in constitutional interpretation as well. Coupled to the promotion of these values is the legitimacy question. An in-depth reading of the 1996 Constitution reveals that values which the Constitution seeks to promote are both African and Western. As pointed out earlier, the Constitutional Court should accept overall responsibility for addressing the legitimacy question of the judiciary. It is submitted that the promotion of societal values will go a long way in addressing this question of legitimacy.

It needs to be emphasised that there are valuable lessons to be learnt from the African value system. It is characterised by unconditional respect for human dignity. Furthermore, it recognises that a person's worth as a human being can only be expressed fully through interaction with others. An individual is obliged to exercise rights with due regard to community rights which at times may prevail over individual rights.⁴⁶ As South Africa has a wealth of diverse cultures, only values which reflect the will, demands, biases and legal convictions of those who are affected by them should prevail.⁴⁷

⁴⁶Ferni Odenkunle 'Strategy and policies for the advancement of human rights in the administration of criminal justice in Africa - an outline' in Bassiouniu and Motala note 29 at 51; for a discussion of a synthesis of these rights see the definition of *soziale rechstaat* in De Wet note 31.

⁴⁷C Heyns 'Reasonableness in a divided society' (1990) *SALJ* 279 at 280-282.

Most western democratic societies place a high value upon individual freedom as against the collective rights of the community. To suggest that traditional liberal values do not fully reflect the spirit and the soul of the South African nation, does not necessarily reflect an anti-Western bias. Only 'home-brewed' values can stand the test of time⁴⁸. However, the promotion of these values cannot be left to courts alone.

It will be recalled that the historic 1994 elections were preceded by voter education unparalleled in this country since all sectors of the community were involved. At this moment the retentionists are shouting for the return of the death penalty. The majority of South Africans are not aware that *ubuntu* which permeates their daily life, is one of the reasons why the death penalty has been found to be unconstitutional in *Makwanyane*. Perhaps this is an opportune moment for the government to launch a campaign aimed at teaching the 'people' that the Constitution they voted for in 1994 calls for *inter alia* the promotion of African values permeated by respect for human dignity. The promotion of African values calls for a tremendous effort on the part of the courts, government, media and legal academics to promote a new approach to understanding our values. This will undoubtedly enhance our Constitution and the role of the judiciary. As individual rights may conflict with the exercise of rights within the context of a group, the solution lies in reconciling them in such a manner that accords with society's hopes and aspirations.⁴⁹ Arguably the exercise of individual rights (as understood in Western democracies) and the exercise of rights within the context of a

⁴⁸ Heyns note 35 252 at 260.

⁴⁹ see 'Recommendations of the Gaborone Seminar on Human Rights and Development in Africa' in Bassiouni and Motala note 29 at 470-472 see also C Villa-Vicencio Whither South Africa? Constitutionalism and Law-Making (1991) *Emory Law Journal* 141 at 157.

group can be used to complement each other in a conciliatory manner.

Lastly courts have an ever-lasting duty to pursue the accomplishment of the core purpose the Constitution set the nation to achieve: the promotion and enhancement of human rights in the spirit of human dignity.⁵⁰ It is hoped that courts will interpret the Constitution in a manner that will reconcile the exercise of individual rights with the exercise of rights within the context of a group by applying *ubuntu* as an extra-textual aid and thereby create a conciliatory bridge between these two categories of rights.⁵¹

⁵⁰See item 6(1) of Schedule 2 of the 1996 Constitution regarding the oath or solemn affirmation of judicial officers to uphold and protect the Constitution and the human rights in it; section 8(1) of the Constitution binds the judiciary as well, section 7(2) of the Constitution places an obligation on the state to promote and fulfil the rights enshrined in the Bill of Rights.

⁵¹Heyns note 36 at 11; Davis note 6.