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# The historical development of the concept “reasonableness” in the law of delict\*

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## OPSOMMING

### Die geskiedkundige ontwikkeling van die begrip “redelikheid” in die deliktereg

Die invloed van redelikheid op die Suid-Afrikaanse deliktereg blyk uit die bewys van al die individuele delikselemente, hetsy by implikasie of uitdruklik. Daar is ’n mate van verwarring en onsekerheid oor die rol van redelikheid, in die besonder by die bepaling van onregmatigheid, nalatigheid en juridiese kousaliteit. Die rede hiervoor vloei voort uit die feit dat redelikheid ’n normatiewe begrip, wat waarde-oordele behels, is. Voordat ’n analise en opheldering van die rol van redelikheid in die bepaling van deliktuele aanspreeklikheid onderneem kan word, lyk dit wenslik om ’n begrip te verkry van die geskiedkundige ontwikkeling van die begrip redelikheid in die materiële reg as ’n geheel en vanuit ’n breër internasionale, regsfilosofiese perspektief. Die begrip redelikheid het met verloop van tyd ontwikkel terwyl teorieë oor geregtigheid ontwikkel is. Hierdie bydrae gee ’n bondige oorsig oor die geskiedkundige ontwikkeling van redelikheid in hierdie sin.

## 1 INTRODUCTION<sup>1</sup>

Generally, in South African law, it is reasonable to hold a person liable in delict for damage sustained only if all the elements of a delict have been established. The elements of a delict include: conduct, in the form of an omission or commission; wrongfulness; fault, in the form of negligence or intention;<sup>2</sup> causation; and harm, also referred to as “loss” or “damage”.<sup>3</sup> Furthermore, cognisance must be taken of the values enshrined in our Constitution,<sup>4</sup> which is the supreme law in South Africa and pertinent to the law of delict. Particular attention must be given to the Bill of Rights contained in Chapter 2.<sup>5</sup>

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<sup>1</sup> This is the first contribution in a series of contributions based on the influence of reasonableness on the elements of delictual liability.

<sup>2</sup> There are exceptions, eg, in cases of strict liability, where fault is not a requirement. This includes damage caused by animals, vicarious liability and strict liability imposed by legislation. See, in general, Neethling and Potgieter *Law of delict* (2015) 379–402.

<sup>3</sup> *Idem* 4 79.

<sup>4</sup> The Constitution of the Republic of South Africa, 1996.

<sup>5</sup> *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 444. In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA

*continued on next page*

The influence of reasonableness on the South African law of delict is evident in establishing all the individual elements of a delict.<sup>6</sup> To some extent, there is confusion and uncertainty in general on the role of reasonableness in determining: delictual liability, the elements of delictual liability, and the tests for determining these elements. Confusion and uncertainty have occurred, in particular, where the influence of reasonableness is explicit, in respect of wrongfulness, negligence, and legal causation.<sup>7</sup> The main reason for this stems from the fact that these elements involve value judgements and policy considerations, which in turn play a role in determining delictual liability. To a certain degree, the tests for determining these elements, as well as the elements themselves, have been conflated.<sup>8</sup> The courts have used the concept of reasonableness as a safety net and as a tool to bring about fair and just outcomes.<sup>9</sup>

Before an analysis of the influence of reasonableness on the elements of liability in the current South African law of delict can be undertaken,<sup>10</sup> it would appear desirable to gain an understanding of the historical development of the concept of reasonableness in the substantive law as a whole and from a broader international, philosophical perspective. The purpose of this contribution is to provide a very brief overview of the historical development of the concept of reasonableness in this sense.

## 2 BRIEF HISTORICAL OUTLINE OF THE DEVELOPMENT OF THE CONCEPT “REASONABLENESS” WHICH AROSE FROM THEORIES OF “JUSTICE” IN WESTERN PHILOSOPHY<sup>11</sup>

Historically, as will be shown below, the modern concept of “reasonableness” in the law seems to have developed gradually over time under the theories of

938 (CC) 953–954, the Constitutional Court referred to the judiciary’s duty to develop the common law in line with the spirit, purport and object of the Bill of rights. See also *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA) 396–397; *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 2 SA 54 (C) 65 in respect of the *boni mores* test for wrongfulness; Neethling “Self-defence: The ‘unreasonable’ reasonable man” 2002 *SALJ* 286 who specifically refers to the indirect application of the Bill of Rights in regard to “the *boni mores* test for wrongfulness and the reasonable person test for negligence”; *K v Minister of Safety and Security* 2005 6 SA 419 (CC) 428; Neethling and Potgieter *Delict* 17; Van der Walt and Midgley *Principles of delict* (2016) 18.

6 See, in general, Ahmed “The influence of reasonableness on the elements of delictual liability” in Potgieter, Knobel and Jansen (eds) *Essays in honour of Johann Neethling/Huldigingsbundel vir Johann Neethling* (2015) 49ff.

7 The tests for wrongfulness, negligence and legal causation all explicitly refer to reasonableness — see, in general, Ahmed in Potgieter, Knobel and Jansen (eds) 51–59 for references to authority.

8 See, eg, Neethling and Potgieter *Delict* 81–87; Neethling and Potgieter “Wrongfulness and legal causation as separate elements of a delict: Confusion reigns” 2014 *TSAR* 889ff; Knobel “Thoughts on the functions and application of the elements of a delict” 2008 *THRHR* 650ff; Scott “Railroad operator’s failure to protect passenger against attack on train not negligent: *Shabalala v Metrorail* 2008 3 SA 142 (SCA)” 2009 *THRHR* 156ff; Scott “Delictual liability for adultery: A healthy remedy’s road to perdition” in Potgieter, Knobel and Jansen (eds) 421ff and Knobel 2008 *THRHR* 652–653 who argue that conflation has occurred.

9 Ahmed in Potgieter, Knobel and Jansen (eds) 60–61.

10 The influence of reasonableness on the elements of delictual liability will be discussed further in detail in later contributions still to be published (see fn 1 above).

11 There is much to be said about the historical, philosophical and political development of the concept “reasonableness” which would require a study on its own. For the purposes of this contribution and series of contributions to follow (see fn 1 above), a few of the most prominent Western philosophers’ theories are briefly mentioned in order to trace its development.

"justice". This is evident from as early on in medieval times when the philosopher, Aquinas, referred to the concept reasonableness in judging the conduct of a person (as a rational creature) and explaining the ambit of the virtue "justice".<sup>12</sup> The first recorded use of the term "reasonable", meaning "having sound judgment, sane, rational" seems to have occurred around the 1300s.<sup>13</sup> Initially, the concept "reasonable" was closely linked to the idea of "reason" as a mental faculty.<sup>14</sup> Reason, in turn, during the "Age of Reason" or "Enlightenment",<sup>15</sup> was thought to be related to one's understanding and knowledge.<sup>16</sup> During this period, philosophers such as Hobbes, Hume and Kant discussed below, challenged traditional religious beliefs and focused on the philosophy of rationality and reason. Thereafter, a "probabilistic conception of reasonableness" developed.<sup>17</sup> Schafer<sup>18</sup> explains that the first theories of "probability" developed alongside the concept reasonableness. Thus, a reasonable belief could be based on a probable belief as opposed to a certain provable belief and the best a person could do was to "respond as reasonably as possible" to the circumstances the person found himself in.<sup>19</sup> Reasonableness became a well-known, independent concept<sup>20</sup> when it was propagated by the American philosopher Rawls in the 1990s.<sup>21</sup> Thus, in order to trace its historical development, it is necessary to trace the development of the concept of "justice" and consider theories of justice which emerged in ancient Greece.

In ancient Greece, it was the poet Homer who in a literary context first referred to the idea of a "just person".<sup>22</sup> Thus, the idea of justice referred to initially by the ancient Greek philosophers mentioned below, emerged from Homer's literary reference to the "just person".<sup>23</sup> Plato, the Greek philosopher,<sup>24</sup> believed in four fundamental moral virtues, namely: wisdom or prudence, courage, temperance or self-control, and justice.<sup>25</sup> Aristotle, the Greek philosopher and student of Plato, was of the opinion that justice required proportional equality. According to Aristotle, distributive justice involved dividing both burdens and benefits equally amongst equal members of society. On the other hand, corrective justice was aimed at restoring a fair balance between interpersonal relations of members where such balance was lost.<sup>26</sup>

12 See Hosten *et al Introduction to South African law and legal theory* (1995) 59–60 and the discussion of Aquinas's ideas further below.

13 Schafer "A brief history of rationality: reason, reasonableness, rationality, and reasons" 2018 *Manuscripto* 504 fn 6.

14 *Ibid.*

15 Which spans from the seventeenth century to the eighteenth century.

16 Schafer 2018 *Manuscripto* 505.

17 *Idem* 510.

18 *Idem* 509 and the authority cited therein.

19 *Idem* 509–510.

20 A concept independent from the concepts "reason" and "rationalism" (see, in general, *idem* 501ff).

21 *Idem* 519 fn 32.

22 Pomerleau "Western theories of justice" *Internet Encyclopedia of Philosophy*, available at <https://bit.ly/2Tcrzqq> (accessed on 15 January 2019).

23 *Ibid.*

24 A student of Socrates, another Greek Philosopher.

25 See, in general, Tarnass *The passion of the Western mind: Understanding the ideas that have shaped our world view* (2010) 16–45 with regard to Plato.

26 Pomerleau (fn 22). See also Wells "Tort law as corrective justice: A pragmatic justification for jury adjudication" 1990 *Mich LR* 2350.

Augustine, the medieval Christian philosopher, embraced Plato's view of the four fundamental moral virtues which became known as the "cardinal virtues". Justice was viewed simply as giving a person what was due to him. A just society was one where no person harmed another. Instead, a person must try to help other members of society if possible. Augustine was of the view that if man's law violates the natural law of God, it is not morally binding on a person and may even be disobeyed.<sup>27</sup>

Aquinas, another medieval Christian philosopher, also embraced the cardinal virtues. In respect of justice, he drew from Aristotle's idea of proportional equality. According to Aquinas, the virtue of justice meant that a person must respect the rights of others. He supported Augustine's view that man's law must not contravene the natural law.<sup>28</sup> The golden rule, a principle of natural law, is to not do to others that which you would not want them to do to you.<sup>29</sup> Natural law is given content by conclusions based on practical reasonableness.<sup>30</sup> Looking at the example of self-defence, Aquinas was a proponent of the view that in such instances, the self-defensive action must be *reasonable* and *in proportion* to the actions of the attacker under the circumstances. Reasonable conduct is natural and in accordance with the nature of things.<sup>31</sup> Aquinas's theory of justice is a blend of Aristotle's and Augustine's.<sup>32</sup>

Hobbes, the English philosopher, believed in Socrates' social contract theory, in that a person's moral and/or political obligations are dependent upon a reciprocal agreement which forms the basis of society. He believed that rights were not naturally attained, but were determined and given by a sovereign ruler. He further believed that laws were required to codify rules of justice as people could not be trusted to honour their social agreements unless they were being forced to do so. According to Hobbes, the law of justice forces us to obey positive laws of the state and any deliberate violation of such law is considered a crime, subject to punishment.<sup>33</sup>

Hume, the Scottish philosopher, was of the opinion that the basic requirements of justice lead to the promotion of the welfare of society. He believed that our approval of just conduct is based on reason and reflection.<sup>34</sup> To Hume, rules of justice included protecting one's proprietary rights, which are not absolute and subject to limitations. The individual's sense of justice stems from a combination of self-interest and sympathy towards others. Hume explained that moral sentiment varies from person to person, but there is common ground among humans with regard to moral attitudes.<sup>35</sup>

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27 Pomerleau (fn 22).

28 Natural law could be known to man through reason and rationalism, but divine law could not. See *ibid.*

29 Viola "Reasonableness, cooperation, and the Golden Rule" 2002 *Yearbook of Legal Hermeneutics* 105,109.

30 *Idem* 91.

31 *Idem* 96.

32 Pomerleau (fn 22).

33 *Ibid.*

34 Wells 1990 *Mich LR* 2400.

35 Hume *A treatise of human nature* (1896) 575–576 referred to by Wells 1990 *Mich LR* 2399. Cf Sibley "The rational versus the reasonable" 1953 *Philosophical R* 558.



Kant, the German philosopher, "held that justice originates in practical reason or morality".<sup>36</sup> He believed that the reason we should do what is right is because it is the right thing to do,<sup>37</sup> and this has nothing to do with good consequences.<sup>38</sup> Kant introduced the deontological theory, the study of duties, rights and obligations.<sup>39</sup> He propounded the test that a person "ought to do" what is reasonably right and must be able to distinguish between right and wrong (accountability).<sup>40</sup> This is thought to be the essence of reasonableness.<sup>41</sup> Kant submitted that notions of duty and "ought" only apply to man who has free will (autonomy).<sup>42</sup> Kant defined imperatives and introduced the theory of categorical imperatives. A categorical imperative according to Kant was an unconditional obligation which applied to all, it was absolutely necessary. It came down to the idea that where a person has a moral duty to do something it is absolutely necessary to perform such action even if it is not desirable. A person cannot refuse to perform it or submit that it does not apply to him.<sup>43</sup> A person has a duty to respect others, and, as moral rational beings, people should try to act in such a way that it is reasonably possible to lay down the law for a moral state.<sup>44</sup> Kant made reference to the duties of justice and duties of merit. To him justice was entwined with obligations that one was required to comply with, thus there is a duty to punish those who are guilty.<sup>45</sup> Kant referred to three rules: that a person should be just in his dealing with others; a person should avoid being unjust to others, even if it meant that he should avoid associating with a disagreeable person altogether; and if he cannot avoid associating with such person he should, at the very least, try to respect them.<sup>46</sup> Fairness and corrective justice or restorative justice (discussed below) are deontological principles. An actor who commits wrongful conduct violates rights.<sup>47</sup> Rawls and Dworkin (discussed below) drew from Kant's theory of rights.<sup>48</sup>

Mill, an English philosopher, emphasised five aspects of justice.<sup>49</sup> They were: that respect for others' legal rights is just, while violating them is unjust; respect for the moral right someone has to something is just, while disrespecting that right is unjust; it is just to give a person what he deserves, while it is unjust not to do so; it is just to keep faith with others, while it is unjust to break faith with

36 See Hosten *et al* *Legal theory* (1995) 71 fn 73.

37 Fletcher "The right and the reasonable" 1985 *Harv LR* 961.

38 Pomerleau (fn 22).

39 *Ibid.*

40 *Ibid.* The concept of "accountability" has been adopted in South African law (see *Weber v Santam Versekeringsmaatskappy Bpk* 1983 1 SA 381 (A) 389; Neethling and Potgieter *Delict* 131; Loubser and Midgley (eds) *The law of delict in South Africa* (2018) 139; Burchell *Principles of delict* (1993) 83; Van der Walt and Midgley *Delict* 226).

41 Sibley 1953 *Philosophical R* 558.

42 Hosten *et al* *Legal theory* 71.

43 *Idem* 71–72.

44 Pomerleau (fn 22). See Viola 2002 *Yearbook of Legal Hermeneutics* 104 who disagrees with Kant's ideas of cognitive demands.

45 Kant *Metaphysical elements of justice: The complete text of the metaphysics of morals, Part I* (1999) 102. See Fletcher 1985 *Harv LR* 963.

46 Pomerleau (fn 22). See also Fletcher 1985 *Harv LR* 965–966.

47 Simons "Tort negligence, cost-benefit analysis, and tradeoffs: A closer look at the controversy" 2008 *Loy LA LR* 1183.

48 Zipursky "Rawls in tort theory: Themes and counter-themes" 2004 *Fordham LR* 1926.

49 Pomerleau (fn 22).

another; in certain instances it is just “to be *partial*”.<sup>50</sup> According to Mill, a person could legitimately interfere with another person’s freedom to act in order to protect himself. Furthermore, force could be justifiably used against another in trying to prevent such person from harming others.<sup>51</sup> Mill rejected the idea of equality as being an indispensable component to understanding justice. To Mill, justice embodied moral requirements which were the most important social utility.<sup>52</sup>

Hart,<sup>53</sup> another English philosopher and supporter of the legal positivist theory,<sup>54</sup> submitted that there are primary and secondary rules of law. The primary basic duty imposes rules that demarcate what one is required to do, or refrain from doing.<sup>55</sup> The primary rules interact with the secondary rules, which are dependent on the primary rules, and confer powers whether in a public or private setting – this is, according to Hart, the essence of law.<sup>56</sup> The secondary rules may authorise the introduction of new primary rules, the abolition or modification of existing rules, or regulation of the primary rules.<sup>57</sup> The criteria used to establish the primary rules include reference to legislation, authoritative texts, customary practices or case law.<sup>58</sup> More weight may be attached to, for example, legislation than to customary practices.<sup>59</sup> Starr<sup>60</sup> with reference to Hart’s views explains that the secondary rule which confers power on the adjudicator, allows the adjudicator to sanction the violation of a primary rule. The interaction between the primary rules and secondary rules with the “ultimate rule of recognition” whereby one supreme rule governs validity over all rules is the essence of law. Starr<sup>61</sup> refers to Hart’s “ultimate rule of recognition” within the context of English law where “what the Queen in parliament enacts is law”. The “ultimate rule of recognition” may be equated with a constitution.<sup>62</sup> Starr<sup>63</sup> submits that Hart believes that law and morality are closely linked. Hart<sup>64</sup> refers to the words “should”, “ought”, “must”, “right” and “wrong” when judging conduct. However, Hart is of the view that morality is not a requirement for law to be

50 Pomerleau (fn 22).

51 *Ibid.*

52 *Ibid.*

53 *Concept of law* (1961) 151. See Starr “Law and morality in HLA Hart’s legal philosophy” 1984 *Marq LR* 675.

54 The positive law theory insists on referring to existing law whether in terms of legislation, case law, etc, not natural law or morality. See explanation by Wells 1990 *Mich LR* 2361; Himonga and Nhlapo (eds) *African customary law in South Africa: Post-apartheid and living perspectives* (2014) 41. Mill also supported legal positivism over natural law theories supported by Aquinas, Hume and Kant.

55 Eg, a person may not trespass or exceed the speed limit. See Hart *Concept of law* 91–93; Starr 1984 *Marq LR* 676.

56 Hart *Concept of law* 151. See Starr 1984 *Marq LR* 675.

57 Hart *Concept of law* 78–79. See Starr 1984 *Marq LR* 676.

58 Hart *Concept of law* 97. See Starr 1984 *Marq LR* 677.

59 Hart *Concept of law* 92–93. See Starr 1984 *Marq LR* 677.

60 1984 *Marq LR* 678.

61 *Ibid.*

62 See Himonga and Nhlapo (eds) 42–47 who refer to the Constitution of the Republic of South Africa, 1996 as the rule of recognition, the supreme law of the land to which all law must conform.

63 1984 *Marq LR* 673–686.

64 *Concept of law* 56–191–194.

valid but it does shape law *inter alia* either through legislation or the judicial process.<sup>65</sup> The law must develop laws prohibiting one person from harming another.<sup>66</sup>

Rawls,<sup>67</sup> the American philosopher, was of the view that two basic principles should be adopted in the hope of a just society, namely: allocating fundamental basic rights and duties equally to all; and social and economic inequalities are acceptable only if they result in benefiting the greater good.<sup>68</sup> He<sup>69</sup> submits that a Kantian view of a society of people that are rational, reasonable, morally autonomous, free and equal, is a preferable alternative to the utilitarian theory.<sup>70</sup> To Rawls, justice is the primary social virtue.<sup>71</sup> Justice requires eliminating any arbitrary distinctions and establishing a practice whereby a balance is struck between competing interests and claims.<sup>72</sup> Rawls<sup>73</sup> submits that discrimination and injustice may occur when an adjudicator or others holding authoritative positions fail to apply a rule or interpret it correctly due to "subtle distortions of prejudice and bias". Where there is different treatment, it must be justified with reference to legal principles and rules. Each person is expected to decide for himself whether an action is reasonable and morally justifiable.<sup>74</sup> Rawls advocates a universal concept of justice and believes in the tolerance and mutual respect for incompatible views and values whether relating to religious, philosophical, or moral values, so long as they are reasonable.<sup>75</sup> According to Keating's<sup>76</sup> account of Rawls's<sup>77</sup> ideas, the terms that reasonable people will suggest and adhere to are terms that all members of society, as free and equal individuals, could reasonably expect. Society's willingness to adhere to such terms is based on reciprocity. To Rawls,<sup>78</sup> being reasonable encompasses the idea that a person accepts that others have equal rights to pursue their goals and it is therefore necessary to find terms acceptable to all members of society. Rawls propelled the concept of reasonableness to a separate and distinct concept distinguishing it from the concept of justice.<sup>79</sup>

65 *Idem* 199–200. See Starr 1984 *Marq LR* 686–687.

66 See Starr 1984 *Marq LR* 677.

67 "Justice as fairness" 1958 *Philosophical R* 165. See Fletcher "Fairness and utility in tort theory" 1972 *Harv LR* 550.

68 Rawls 1958 *Philosophical R* 166.

69 Rawls *Political liberalism* (1993) 302. See Keating "Reasonableness and rationality in negligence theory" 1996 *Stan LR* 318.

70 The "utility" theory was proposed by the philosopher Bentham. This theory was later called the "greatest happiness" principle. According to this principle, a moral act is an act that maximises utility (or happiness) for the greater good. See Pomerleau (fn 22); Rawls *Political liberalism* 164 294–299; Zipursky 2004 *Fordham LR* 1925; Keating 1996 *Stan LR* 322.

71 Pomerleau (fn 22).

72 *Philosophical R* 164.

73 *A theory of justice* (1971) 235. See Moran *Rethinking the reasonable person: an egalitarian reconstruction of the objective standard* (2003) 64–165 with reference to Rawls.

74 Rawls *Philosophical R* 170–171.

75 Rawls *Political liberalism* 36. See Pomerleau (fn 22); Keating 1996 *Stan LR* 318 323–324; 1996 *Stan LR* 318.

77 *Political liberalism* 50.

78 *Idem* 48–54. See Viola 2002 *Yearbook of Legal Hermeneutics* 99 who, like Fletcher, supports Rawls's idea of reasonableness and reciprocity.

79 See in general Mandle "The reasonable justice as fairness" 1999 *CJPH* 75ff who summarises the use of reasonableness by Rawls.

Dworkin,<sup>80</sup> the American philosopher, criticised Hart's<sup>81</sup> views and propounded the theory of law as integrity. According to this theory, law should be interpreted constructively taking into account a community's shared principles. In difficult cases, the adjudicator considers existing rules, principles and precedents that fit best. If, for example, a number of earlier decisions fit, then the adjudicator must choose one, justifying the choice while taking into consideration moral principles such as fairness and justice.<sup>82</sup> Dworkin<sup>83</sup> who is well-known for his idea of trumping right, states that certain interests or rights, including fundamental rights, must be protected against the government. It would be wrong to sacrifice certain important individual interests for the collective benefit.<sup>84</sup>

Costa Neto,<sup>85</sup> with reference to Dworkin's ideas, explains that according to Dworkin, competing rights are not weighed against each other. Rights of the individual cannot be weighed against society's demands. Certain interests trump any benefit and cannot be weighed. There are however, instances where a right may be limited, which include, where the values embraced by the original right are not at stake, or where the cost to society would be "great enough to justify whatever assault on dignity or equality might be involved".<sup>86</sup> Costa Neto<sup>87</sup> convincingly argues that, in general, competing interests may be weighed against each other. Certain rights (trumps) may be assigned a greater abstract weight (a winning margin) when weighed against other constitutional values.

### 3 BRIEF COMPARATIVE OUTLINE OF THE CONCEPT OF "JUSTICE" IN SOUTH AFRICAN CUSTOMARY LAW

In South African customary law, the emphasis is on solidarity, group interests or rights, duties and obligations.<sup>88</sup> The aim of customary law is to restore justice based on healing between the parties as well as the community<sup>89</sup> rather than penalising the individual.<sup>90</sup> Aristotle's idea of corrective justice (discussed above) is similar to the customary law idea of restorative justice. This is expressed in the concept of *ubuntu* which has been recognised as a constitutional principle in South Africa.<sup>91</sup>

"*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

80 *Taking rights seriously* (1977) 82–130.

81 See, in general, Dworkin *Law's empire* (1986).

82 See *idem* 42 49, 227 231 239.

83 *Taking rights seriously* 191. See Costa Neto "Rights as trumps and balancing: reconciling the preconcilable?" 2015 *Rev Direito GV* 160 with reference to Dworkin.

84 See Dworkin *Taking rights seriously* 31 173; Costa Neto 2015 *Rev Direito GV* 161.

85 2015 *Rev Direito GV* 161 with reference to Dworkin *Taking rights seriously* 197–198.

86 *Taking rights seriously* 200. See Costa Neto 2015 *Rev Direito GV* 162.

87 2015 *Rev Direito GV* 159 ff.

88 Himonga and Nhlapo (eds) 197.

89 *S v Maluleke* 2008 1 SACR 49 (T) paras 26 34. See Himonga and Nhlapo (eds) 213.

90 Mokgoro J in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 69 stated that the aim of traditional customary law is the "restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms". See also Himonga and Nhlapo (eds) 212.

91 In *S v Makwanyane* 1995 6 BCLR 665 (CC) para 307. See also *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 37; Himonga and Nhlapo (eds) 213.

to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. 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. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of 'humanity' and 'menswaardigheid', are also highly prized. It is values like these that Section 35 [of the Constitution of the Republic of South Africa, 1996] requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality."

Historically, *ubuntu* played a part in reconciling and mending society after the apartheid era where people were separated on grounds of race and colour. In modern times, it represents solidarity which is interrelated with equality and liberty. They are regarded as three pivotal constitutional values.<sup>92</sup>

Restorative justice entails: meeting to discuss the harm caused as well as the way forward from that point, concentrating on repairing the harm done instead of punishing the offender, restoring mutual respect between the parties, and participation between the parties, thereby encouraging other people close to the parties to also participate. Restorative justice in modern times is evident in mediation and dispute resolution procedures.<sup>93</sup> It has been used as part of a remedy for defamation where a retraction and apology to the victim for the defamatory statements was ordered.<sup>94</sup>

Traditionally, customary law did not formulate punishment in the form of torture, detention, imprisonment, or hard labour.<sup>95</sup> Punishment was formulated in the form of fines, confiscation of property and loss of social standing within the community.<sup>96</sup> However, for serious offences (such as witchcraft), banishment from the community and execution could be imposed by the chief or king.<sup>97</sup> Banishment, execution and corporal punishment have been abolished in South Africa.<sup>98</sup> Customary law is generally voluntarily observed by the community members out of fear of "supernatural punishment".<sup>99</sup> Customary law does not make a clear distinction between criminal law and the law of delict.<sup>100</sup> There are set prescribed damages for delicts committed.<sup>101</sup> Crimes under the Natal Code of Zulu Law<sup>102</sup> whereby customary law was codified during the colonial, Union and apartheid era include *inter alia*: a failure by individuals who have a natural duty

92 As explained by Sachs J in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 113.

93 As explained by Sachs J in *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 114.

94 See *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 6 BCLR 577 (CC) paras 199–203; *The Citizen 1978 (Pty) Ltd v McBride (Johnstone as Amici Curiae)* 2011 8 BCLR 816 (CC) para 132; Van der Walt and Midgley *Delict* 30 fn 22.

95 Himonga and Nhlapo (eds) 213.

96 *Idem* 214.

97 *Ibid.*

98 See authority referred to by *idem* 215 fn 23–25.

99 *Idem* 214.

100 Rautenbach and Bekker *Introduction to legal pluralism in South Africa* (2014) 157–158.

101 Himonga and Nhlapo (eds) 198. However, the amount of damages is not set where delicts such as theft and assault are committed against the leader.

102 Proc R151 of 1987.

to care for and provide necessities for others, and failing to warn neighbours or others of contagious or infectious disease carried by one's livestock.<sup>103</sup> In respect of damage to property, for example, where an animal is killed, the owner of the animal must be notified and the animal must be replaced. The person who killed the animal is entitled to keep the carcass of the dead animal.<sup>104</sup> Compensation is paid for damage to crops and where a person failed to put out a fire.<sup>105</sup> It is clear that customary law focuses on repairing relations between parties in an amicable way keeping respect and dignity. The focus is not on monetary compensation.

#### 4 SYNTHESIS

It seems that in South African customary law, the concept of reasonableness is not explicitly referred to but implicit in the idea of restorative justice. There are also traces of deontological principles similar to those stemming from Kant's views and ideas of justice similar to those propagated by Aristotle, where the concept of reasonableness developed.

As shown from the western philosophers' views and South African customary law principles, the concept of "reasonableness" developed over time when theories of "justice" were being shaped. Justice requires: a balancing of interests, mutual respect of other's interests or rights, and treating individuals equally as advocated by Rawls, Dworkin and the South African customary law principle *ubuntu*. Under certain circumstances it is justified to infringe another's interests, and reasonable, as advocated by Aquinas. Acting reasonably is about doing what is right from a moral perspective which involves duties, rights and obligations as advocated by Kant. Moral principles shape the law as submitted by Hart. Acting reasonably depends on what the law prescribes as reasonable conduct as advocated by Hobbes, Mill and Hart. What is considered as reasonable can be gleaned from society's views. When interests or rights are infringed, there must be redress from the law to restore the balance that was lost as advocated by Aristotle. The South African customary law concept *ubuntu*, propagates restorative justice aimed at repairing the harm done as well as the relations between the parties. *Ubuntu* in modern times represents solidarity which is interrelated with equality and liberty. These three concepts are regarded as pivotal constitutional values and the values enshrined in our Constitution which is the supreme law in South Africa, are pertinent to the law of delict in general. It is evident that the concept of *Ubuntu*, fairness, justice, equity, policy considerations, society's views and reasonableness are all intertwined. Thus acting reasonably requires: taking others' interests into consideration besides one's own interests, consideration of moral principles, and what the law sets as boundaries to reasonable conduct. Redress is called for when a person has acted unreasonably in infringing another's interests or rights unreasonably. When deciding whether it is reasonable to restore the balance under the circumstances and find one responsible or liable, fairness and equality must be applied to all parties as well as their interests and rights – then justice is served. Thus all these concepts and theories used in the pursuit of justice, collectively played a part in shaping the current law of delict in South Africa.

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103 See other offences referred to by Himonga and Nhlapo (eds) 221–222.

104 Rautenbach and Bekker 167.

105 *Ibid.*