

O se re ho morwa 'morwa towe!'^{*}

African jurisprudence exhumed

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Introduction

Abstract

The article is an intervention in the discourse around African jurisprudence and its relevance to contemporary post-colonial African society. It repudiates suggestions that African jurisprudence (*botho/ubuntu*) is unenlightened and inconsistent with the progressive values undergirding the South African Constitution. Drawing lessons largely from the pre-colonial 18th century history of the Basotho kingdom, the article explores how popular participation in that system was a leitmotif of democratic accountability. It lays bare a number of doctrines that abetted the efficacy, effectiveness and accountability of the political system. African jurisprudence also practised human dignity in a way that pulled into harmony formal and substantive justice. It contends that in African jurisprudence human dignity was indivisible. Political and civil freedoms were not separable from socio-economic rights. Finally, the article reviews how the doctrine '*O se re ho Morwa: 'morwa towe!*' not only ensured respect and dignity of every citizen, but was also the anchor of social cohesion and harmony in a multi-cultural society.

In 2009 Justice Bernard Ngoepe, Judge President of the South and North Gauteng High Courts, unleashed a political storm from an unusual platform for a judge – an article in the popular press.¹ The judge highlighted the jurisprudential importance of the then pending change of guard in the South African Constitutional Court. He suggested that changes in the composition of the court should provide an opportunity for new judges to re-examine the values invoked by their predecessors in their interpretation of the South African Constitution.

* Literal meaning: 'Never ever say to a Bushman: "you are just a Bushman"'.

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¹ B Ngoepe 'Choosing new custodians of our constitution' *Sunday Times* 30 August, 2009 11.

According to Judge Ngoepe, there were perceptions among sections of the South African population that the court may have ‘gone overboard’ in applying values derived from Western sources. This trend, he suggested, may well alienate the Constitution from the people whose interests it (is) supposed to serve. He asked, rhetorically:

Should we go to Washington, Canada or London, and ignore as points of reference, the values as perceived by, say, tribesmen and women in rural areas?²

These remarks provoked a response from Eusebius McKaiser, a prominent South African commentator.³ McKaiser defined the discourse as highlighting a conflict between conservatism and liberalism in South African jurisprudence. In his view, Judge Ngoepe had come out of the ‘conservative closet’. In his article, McKaiser suggested that the conservative backlash specifically targeted same-sex marriage, the abolition of the death penalty, and corporal punishment.⁴

Judge Ngoepe may well have regarded these issues as those affronting the social ethos of certain sections of South African society. But, I should like to think that the point of Ngoepe J’s article was to initiate a public discourse about the relationship between the Constitution or perhaps, more accurately constitutional jurisprudence and the citizenry. Therefore, even though McKaiser may have had a point in his assessment of the conflict between conservatism and liberalism in South African constitutional jurisprudence, he appears to have missed this salient point. It is crucial to note, however, that McKaiser is not alone in implying that ‘enlightened’ values are alien to African society – that they are solely a Western import.⁵

In this article the perception that African jurisprudence, otherwise known in South Africa as *botho/ubuntu*⁶, is conservative and inconsistent with the South African Constitution, will be examined and challenged. It will be

² *Ibid.*

³ E McKaiser ‘The darker side of conservatism’ *Mail & Guardian* 4 September 2009 25.

⁴ *Ibid.*

⁵ For a good example in this vein see I Keevy ‘Ubuntu versus the core values of the South African Constitution’ in (2009) 43/2 *Journal for Juridical Science* 52–53, which makes the somewhat startling and categorical conclusion that ‘ubuntu is not in consonance with the values of the (SA) Constitution in general and the Bill of Rights in particular’.

⁶ The terms ‘*botho*’ and ‘*ubuntu*’ mean the same thing respectively in the Sotho grouping and the Nguni grouping of languages. In his book, *Moshoeshoe I profile* (1976), at 31, N Mokhehle also uses the term ‘*setho*’ to denote values consistent with the tenets of *botho*.

contended that *botho/ubuntu*'s⁷ rich, but suppressed human-centredness could, to borrow Matthews's phrase, 'be a truly valuable source of insights for those committed to considering alternatives to the (failed) ... development project'.⁸ In my view this consideration of an alternative route is imperative, especially now when social cohesion is crumbling all over the world under the impact of a cynical democracy, human rights and neo-liberal globalisation.

Jurisprudence speaks to the value-content of a normative system enforced by society's institutions. It therefore makes sense to revisit the jurisprudence of *botho* in the context of an authentic African system of government.

This article provides an overview of normative values during the reign of King Moshoeshoe I of the Basotho. These values are used as an example because African pre-colonial governance was underpinned by broadly similar values. In addition, while the *difaqane*⁹ turbulences systematically undermined African humanitarian values, Moshoeshoe was one of the leaders who tenaciously upheld those values. He reasserted and accentuated these values to regenerate hope and provided a solid spiritual and social platform for the people harshly brutalised by the traumas of *difaqane*.¹⁰ To my mind, this period typifies the golden age of African jurisprudence. Not only does it capture humanity at its truly humanitarian best, but above all it was home-grown. African systems had not yet been touched by colonialism, which corrupted, alienated and re-crafted the indigenous institutions to suit its own interests.¹¹ In certain respects, a comparable phase in Western jurisprudence would be that of the Keynesian political economy which flourished between WWII and the 1970s. The conception of the Western rule

⁷ In a case comment titled 'Ubuntu: the quest for an indigenous jurisprudence' *South African Journal on Human Rights* (1996) 12, at 641, R English correctly says the concept of *ubuntu* is untranslatable. Some authors define it to mean humanness or humanism. In *State v T Makwanyane and M Mccunu* CCT/N3/94 Justice I Mokgoro correctly says that the term envelopes 'key values of group solidarity, compassion, respect, humanity and conformity to basic (humanitarian) norms'.

⁸ S Matthews 'Post-development theory and the question of alternatives: a view from Africa' *year? 25/2 Third World Quarterly* 382.

⁹ Social upheavals caused by wars among the African communities of Southern Africa by the end of the second decade of the nineteenth century. These led to the emergence and consolidation of new nations in the region.

¹⁰ See Mokhehle n 6 above at 12–38; Also EM Leoatle '*Morena Moshoeshoe mor'a Mokhachane* (1944) 5; Also L Thompson *Survival in two worlds: Moshoeshoe of Lesotho 1786–1870* (1975) 24–27.

¹¹ See NL Mahao 'Colonial rule and the transformation of chieftaincy in Southern Africa: a case study of Lesotho' (2007) 21/2 *Speculum Juris* 206–220.

of law at the time came closest to bridging the chasm between formal and substantive justice.¹² This article examines three key elements of African jurisprudence: the democratic accountability doctrine; the indivisible human dignity doctrine; and social cohesion.

THE DEMOCRATIC ACCOUNTABILITY DOCTRINE

An observer of British and Western democracy in general, comments that '(t)he weakness of representative parliamentary democracy lies in the fact that it is nothing like representative or democratic enough.'¹³ He quotes a disillusioned British politician with more than thirty years' experience in parliament and several stints in cabinet, who wrote:

The lessons led me to the conclusion that Britain is only superficially governed by the MPs and the voters who elect them. Parliamentary democracy is, in truth, little more than a means for securing a periodical change in the management team, which is then allowed to preside over a system that remains in essence intact. If the British people were ever to ask themselves what power they truly enjoyed under our present political system they would be amazed to discover how little it is ...¹⁴

In the light of the above, it is remarkable how it is often taken for granted that, where formal democratic processes are in place, citizens wield the power to hold national institutions accountable, beyond the mere periodic changing of politicians, while the entire system remains by-and-large 'on autopilot' so to speak. And yet a growing body of critical political and constitutional scholars casts doubt on the democratic accountability of political systems in both the so-called 'developed' and the 'developing' worlds.¹⁵ Perhaps the historian Hobsbawm addresses this phenomenon best, by contending that '(t)he case for free voting is not that it guarantees rights but that it enables the people (in theory) to get rid of unpopular governments.'¹⁶

¹² H Richards 'Human rights and the end of the age of Keynes' available at: http://howardrichards.org/pacem/index.php?option=com_content&task=view&id=87&Itemid=120 at 3 underscores the significance of this period as the agreement on the part of governments that full employment was their responsibility. In line with that social contract, he indicates, many Western countries, including the USA, did achieve full employment.

¹³ P Foot *The vote: how it was won and how it was undermined* (2005) 437.

¹⁴ T Benn, quoted in *Id* at 443.

¹⁵ See for example, S Marks *The riddle of all constitutions: International law, democracy and the critique of ideology* (2000); Also a chapter titled 'The disconnect in American democracy' in N Chomsky *Interventions* (2007) 97–100.

¹⁶ E Hobsbawm *Globalisation, democracy and terrorism* (2007) 97.

Ironically, assumptions that democracy itself has no roots in African soil and is solely a creation of Western culture, are legion. C Ake counters these suppositions by arguing that those who make them, confuse the principles of democracy with how they are applied in practice. Central to his contention is that democracy reigns where governance is underwritten by widespread participation, the consent of the governed, and public accountability of those in power.¹⁷ If we accept this view, then African jurisprudence does indeed seriously address these principles.

Democratic accountability in African jurisprudence was embedded in the constitutional principle '*morena ke morena ka batho*'. Translated to mean that the chief is the chief by the grace of the people,¹⁸ the principle in fact means far more. It speaks to the participatory nature of governance which renders it inherently democratic and accountable to the governed.

Popular participation in the choice of leaders

This sub-heading may appear misplaced in that it is common knowledge that accession to traditional leadership was, by-and-large, interwoven with the rule of primogeniture. This rule is both prescriptive and male-based. But a more discerning analysis would reveal that the rule of primogeniture was merely one of the rules – a point of departure – but most certainly not final. The correct interpretation of the rule is that it serves the limited function of providing the order of nomination for high office and nothing more. Accession was always subject to a second rule – the rule of ratification. This rule provided for participative processes through the family council, or the *kgotla*, and finally through a public assembly.¹⁹ For his part, Moshoeshoe, who became king not by right of birth, but by strength of character, always emphasised that '*kobo ena ha kea ikapesa, ke e apesitsoe. Ke e apesitsoe ke banna khotla, ka boomo!*' (I did not bestow the crown upon myself. It was bestowed on me by the free will of men at the *kgotla*.)

¹⁷ C Ake 'Rethinking African democracy' (1991) 2/1 *Journal of Democracy* 34.

¹⁸ See EW Smith *The Mabilles in Basutoland* (1939) 39.

¹⁹ The power of popular decision-making at the *pitso* (public asseembly) is illustrated by the example when Moshoeshoe himself attempted to vary the primogeniture rule in regard to the succession to the throne after his heir presumptive Letsie I. Moshoeshoe was overruled by the *pitso* and it is commonly believed that the reason was that Lerotholi, whom he wanted by-passed, had already endeared himself to the nation as a brilliant leader and warrior of note. In a review of a book by P Sanders, Moshoeshoe, chief of the Sotho, 'LBBJ Machobane in Mohlomi' (1976) 1 *Journal of Southern African Historical Studies* at 110, opines that this act of trying to vary the primogeniture rule was itself unconstitutional. This interpretation is not sustainable. It seems that if the nation had, at the *pitso*, approved the intervention against the rule, the act would have been consistent with custom and therefore perfectly constitutional.

For example, once the nomination as leader had been approved by a public *pitso*, a standard commendation during the leader's investiture would follow. This states advisedly: '*Di bo fule di bo tshoha, e sere ba di tshoarisa serotswana.*' (Freely translated, this means that a leader should exercise authority with extreme circumspection, because failure to do so could lead to dire consequences.) This metaphor served as a warning, with recourse to the principle of recall, should the leader abuse his authority. Needless to say, leaders were always at pains to stress the popular pedigree of their appointment as they understood this was the deciding and legitimating factor of their appointments. Casalis points out that it was customary for leaders to declare publicly that they (the leaders) were the most humble servants of those whose place they occupied.²⁰ An understanding of the relationship between the leader and the people influenced the way in which leaders behaved. Humility, fairness and empathy had to be the stock-in-trade qualities of leadership.

Shared authority as *leitmotif* of popular governance

But '*morena ke morena ka batho*' meant something more. It implied a different philosophy of leadership, constitutionally formulated by cooperative and shared authority – a leader governed through clusters of institutions tasked with participatory management of public affairs. Westerners, schooled in the Austinian philosophy of indivisible sovereignty, struggled to understand this model. This explains why Ellenberger could comment that 'all authority was vested in the chief alone'²¹ and in the same breath remark that the 'chief ... did not rule alone'²² – which was a contradiction in terms' On the other hand, discerning observers grasped the complexity of the system. Thus, writing of Moshoeshe, Smith acknowledged that

(i)n all affairs, legislative, judicial or executive, he acted by [sic] the advice and with the consent of his Council. On occasions of great import, a Pitso, "folk-moot", or national assembly, was called, at which the poorest and the meanest tribesmen had equal right with the proudest to say his say.²³

It is true that each of the powers at face value, vested in the king was exercised in council more or less in the same sense as the powers exercised

²⁰ E Casalis *The Basutos* (1861) 215–216.

²¹ DF Ellenberger *History of the Basuto: ancient and modern* (facsimile reprint) (1992) 265.

²² *Ibid.*

²³ Smith n 18 above.

by the King-in-Council in the Westminster model.²⁴ Smith says that because Europeans failed to understand the workings of the system, they tended to accuse Moshoeshe of being a despot, wielding sole and untrammelled power. He explains that when Europeans demanded instant decisions of Moshoeshe, and he told them that he did not have constitutional powers in those matters and needed more time to consult his people, 'they thought it a mere subterfuge to gain time'.²⁵

Freedom of speech as the lodestar of participation

The participative model was underpinned by citizens' unlimited freedom of expression. Two constitutional doctrines guaranteed the inviolability of the right to free speech in all spheres involving public affairs, be they the *lekgotla* (council or court) or the *pitso*. The first doctrine says '*mooa-kgotla ha a tsekisoe*',²⁶ which means that erring while on a public platform cannot be a punishable offence. This doctrine protects the right of the citizen to express his thoughts openly at a public forum, even if those thoughts may not be 'correct'. It is a doctrine of immunity from criminal prosecution for freedom of expression that ranks with the Westminster principle of parliamentary privilege. Its sister doctrine says *moro-kgotla ha o okoloe mafura* (metaphorically it means that at a *lekgotla* a spade is called a spade). The doctrine empowers participants to dispense with self-censorship. *Moro-kgotla ha o okoloe mafura* protected the right to say that which, under normal circumstances may offend certain sensibilities and expose the speaker to legal liabilities. In particular, it protected the speaker against possible civil liability, including defamation. Together, these two complementary doctrines ensured that freedom of speech was entrenched. Citizens, strangers and passers-by alike had the right to participate in public fora such as the *kgotla* or the *pitso*. The doctrines of *mooa-kgotla ha a tsekisoe* and *moro-kgotla ha o okoloe mafura* were equally available even to such strangers and passers-by.

Procedural protocol required the king not to meddle in the proceedings once he had formally presented the subject for deliberation to the *pitso/kgotla*.

²⁴ See for example, C Doudu 'Lessons from "the modern of all parliaments"' (2010) 496 *New African* at 34 where it is suggested that this model, where a headman ruled with a council whose decisions were subject to review by all village elders who could either endorse or reject them was almost a pattern of most ancient systems before being destroyed by colonisation.

²⁵ See Smith n 18 above at 38.

²⁶ Smith n 18 above at 39, takes the literalist meaning of the doctrine which is 'he who trips in an assembly is not to be blamed'.

Casalis observes that while tabling the issues, the king had to take care ‘to let his own personal opinion appear as little as possible.’²⁷ After the issues had been tabled, it became a ‘free for all’, open, participatory process. Casalis, who attended the public meetings regularly for twenty-three years, marvelled at the freedom of thought and expression. He said: ‘The orators generally express themselves with the greatest freedom and plainness of speech. It is understood that on these occasions the chiefs must hear the most cutting remarks without a frown.’²⁸ Commenting on the openness of deliberations, especially in judicial disputes, Ellenberger is worth quoting *in extenso*:

Nothing was more congenial to these people than a complicated civil action or a well-defended criminal case. It was a tournament of wits, in which everyone took part, the object being the stultification of a witness, or the conviction out of his own mouth of an accused person. All sorts of questions were allowed, and the idea of cautioning the accused against committing himself never occurred to any one, and would have been dismissed as ridiculous if it had ... When the case had been fully heard, the counsellors, or indeed any one present, gave their opinion upon it, the lowest in rank first, and so on up to the chief, who spoke last, and whose decision was final.²⁹

Leadership talent was about the capacity to listen intently to everything said and ability to capture the opinions correctly. The chief’s role was to summarise the issues, put them in context, and highlight strengths and weaknesses in the opinions expressed. In general, he steered the conclusion towards a middle-ground where all participants had a sense that their views had been accommodated. In this way disaffection or a backlash of cynicism would not taint the decision. In judicial matters the decision would be based on a precept of legal custom, but always with an eye towards reconciliation and restitution of the injured party and the social fostering of harmony.³⁰

We can draw lessons from this constitutional dispensation. The first to note is that authority was anchored in a different epistemology. Leadership was not characterised by a disconnect essentialism; an ‘Ivory tower-ness of the ‘I-know-it-all’ or ‘I-hold-all-the-answers’ variety. The legitimacy of all decisions arose from their being firmly based within the community which

²⁷ See Casalis n 20 above at 234.

²⁸ *Ibid*

²⁹ Smith n 18 above at 265–267.

³⁰ S Gill *A short history of Lesotho* (1993) 50 (Lesotho Museum and Archives).

co-owned them through active and direct participation in governance. In this model, sovereignty resided at multiple levels wherever the people were involved. Sovereignty was not an external expression of particular institutions that stood apart from the governed, but was always a popular expression. Ake is therefore correct to argue that African traditional political systems were infused with democratic values; they were invariably patrimonial, and consciousness was communal as everything was everybody's business, engendering a strong emphasis on participation.³¹

Secondly, open popular participation itself was a powerful self-executing accountability and control mechanism. Self-interest had no place in such an open decision-making environment. Misguided decisions or perversions of justice were automatically exposed by the transparency of the system. Ellenberger correctly points out that the public nature of trials made bribery difficult and if 'a case was talked out, everyone present knew all about it, and a miscarriage of justice would at once be noticed and commented on.'³² I therefore hazard to comment that the answer to the pernicious problems of contemporary African society – problems of a self-serving social and political leadership; corruption; the propensity for a choice of wrong priorities entirely at odds with the pressing and self-evident challenges facing ordinary people on a daily basis – may lie in these lessons.

It must, however, be acknowledged that in the dispensation we have just discussed, women would not participate at either the *pitso* or *kgotla*. And so, like Western jurisprudence at that time, African jurisprudence was also compromised by patriarchal domination.³³ And yet the fact that some of Moshoeshe's female contemporaries, such as the warrior queen Mmanthatsi (of Batlokwa), prophetesses Nongcwausa (of the Amakhosa), and Mmantsopa (of the Basotho) were historical figures of note, proves that even then the 'gender glass ceiling' could be penetrated.

Consider the case of Princess Mmamochesane Sebetoane (of the Makololo). A provincial governor in her own right, she became regent when her father died in 1851. Such was the degree of acceptance of her as regent that when she became disillusioned with the position, a three-day national *pitso* was

³¹ See Ake n 17 above at 34.

³² See Ellenberger n 21 above at 267.

³³ Although there seems to be a perception that patriarchy is exclusive to African systems, Western countries also experienced this social construct, for instance, in Britain men without property were only given the vote in 1918 and women in 1928.

convened in an attempt to dissuade her from abdicating.³⁴ These examples indicate that two hundred or so years ago, African jurisprudence had the capacity to relax patriarchy's firm grip on society – they point to a system already open to the potential for full gender equality, were it allowed to develop along its own logical path of inclusiveness.

THE DOCTRINE OF INDIVISIBLE HUMAN DIGNITY

For jurisprudence to take human dignity seriously, it must come to terms with the fact that dignity is indivisible. A human being cannot have dignity anchored in civil rights and simultaneously live in material wretchedness of deprivation and destitution. If dignity draws from inner and external self-worth, the reality of civil and socio-economic rights must, without qualification, be its bedrock. African jurisprudence adopts this integrated approach to human dignity. It is anchored in a philosophy that professes human dignity to encapsulate physical, spiritual, cultural and material wellness. From this perspective, political and civil rights are inseparable from socio-economic and collective rights – together they make up the totality and indivisibility of human dignity. The maxim *motho ke motho ka batho* (freely translated to mean a person owes his/her social being to other social beings) is the epistemological framework within which dignity is conceptualised. This maxim is the bedrock of a homocentric, sustainable, and resilient social and ecological equilibrium. Although Archbishop Tutu attributes the statement 'I am human only because you are human'³⁵ to *botho* in general, the statement appropriately and specifically describes *motho ke motho ka batho*. First, the expression is rooted in the idea that man acquires the attributes of a social being only in the context of a community of social beings. This context confers on man a consciousness germane only to social beings: spirituality, language, technical abilities, a value system, *etcetera*.

Secondly, from this context arise the socially constructed juridical relations of reciprocal rights and obligations. Ellenberger offers an insight into the significance of civic obligations in the following terms: 'Every Mosuto was responsible for his neighbour. He was liable to be punished for any crime of his neighbour, if he neglected to report it to the chief. A father was responsible for all the members of his family until they married. A village was collectively responsible for each one of its inhabitants.'³⁶ While individualist libertarians might remark that one's neighbour's affairs are of

³⁴ See Ellenberger n 21 above at 322.

³⁵ See a quotation attributed to Archbishop D Tutu in English n 7 above.

³⁶ Ellenberger n 21 above at 268.

no concern to oneself, I cannot but wonder whether it is not precisely this abrogation of civic responsibility that has contributed to the high levels of crime experienced in South Africa today.

Be that as it may, *motho ke motho ka batho* further imposed obligations on the individual and the community to restore positive rights where they had been breached, or create them where none existed. Positive rights for everyone affirmed what Jessup refers to as 'a universal respect of the worth of each individual'³⁷ and they maintained the social equilibrium. The community understood that it was duty-bound to respond positively to a citizen's call for help with his or her private chores. Members did these chores for each other, according to Ellenberger, with no expectation of payment.³⁸ Chores could include helping in emergency situations or in bigger projects such as building a house, or ploughing or harvesting the fields. *Letsema* (communal labour support) was an institution for mobilising the energies and resources of the collective to meet the welfare needs of each member. This drew from the philosophical creed *letshoele le beta poho* (no problems are too big for collective efforts). Society further developed the *mafisa* system (a loan system which functioned along the lines of a revolving fund) where livestock, usually cattle, was provided to needy citizens in order to support the indigent within their ranks.

Government also had a direct constitutional duty to provide positive rights. The term *morena/borena* is a proxy for government in the African constitutional system. Casalis writes that: '... it is formed of the verb *rena*: to be prosperous, to be tranquil. *Morena*, therefore, signifies, 'He who watches over the public safety and welfare.'³⁹ He further elaborates thus:

The chiefs are the great providers for the community. They must, with produce of their flocks, feed the poor, furnish the warriors with arms, supply the troops in the field, and promote and strengthen the alliances which are contracted with neighbouring nations.⁴⁰

Because citizens' welfare and security was the *raison d'être* for the institution, the chief's ambit of accountability was indeed broad. Ake notes that chiefs were answerable not only for their own actions, but also for

³⁷ G Jessup 'Development law: squaring the circle, advancing human rights in Africa' 2006 *Human Rights Review* 98.

³⁸ Ellenberger n 21 above at 268.

³⁹ Casalis n 20 above at 214.

⁴⁰ *Id* at 216.

natural catastrophes such as famine, epidemics, floods and drought.⁴¹ This is why Schapera says the chief was ‘at once ruler, judge, maker and guardian of the law, repository of wealth, dispenser of gifts, leader in war, priest and magician of the people’.⁴²

As head of government, Moshoeshe is known to have used and developed the distributive *mafisa* institution⁴³ on an entirely new and unprecedented scale. Through *mafisa* and other measures, he inspired moral and material regeneration among people whom *difaqane* had disrupted, scattered and reduced to destitution.⁴⁴ Thompson observes that Moshoeshe and the chiefs even provided *mafisa* for settlement of *bohadi* (dowry) for indigent warriors which in those days amounted to no less than ten herds of cattle.⁴⁵ The author, Antjie Krog refers to *mafisa* as ‘a kind of Marshall plan to improve the lives of the poor and destitute’. In her view the system saved many people from starvation and created a strong, reliable and loyal gratitude which led people to return the cattle once they were on their feet, so that the king could help others.⁴⁶ According to Krog, Moshoeshe’s was a caring government because it was convinced that safety, care and trust engendered positive forces which benefited the community as a whole.⁴⁷

This social organisation drew its inspiration from a metaphysics that envisions that there is always enough to go around – to provide for the spiritual and socio-economic needs of all of humanity. It is a belief system from which springs a jurisprudence of substantive social justice; of indivisible human dignity based on fellowship, sharing and solidarity. It is critical to highlight that the values underlying African jurisprudence stand in sharp contrast to those once eloquently described by former British Prime Minister, Margaret Thatcher when she declared that in the United Kingdom there was no such thing as society, but only an aggregation of individuals.⁴⁸ In this metaphysics, each individual is on his/her own, with his/her social existence directly linked to his/her capacity to bargain in a ‘free’ marketplace.

⁴¹ Ake n 17 above at 55.

⁴² I Schapera *Handbook on Tswana law and custom* (1934) 62.

⁴³ Note 27 above at 85.

⁴⁴ See a relatively detailed discussion of Moshoeshe’s use of *mafisa* in Thompson n 10 above at 53–61.

⁴⁵ *Id* at 61.

⁴⁶ A Krog *Begging to be black* (2009) 29.

⁴⁷ *Id* at 26.

⁴⁸ This statement is attributed to Mrs Thatcher in J Rapley *Globalization and inequality: neoliberalism’s downward spiral* (2004) 77.

Richards proffers a useful insight into the fundamentals of this type of society. He contends that the dominant world system, so-called 'modernity', expresses a culture deeply embedded in the constitutive rules of the bargaining society. A fundamental characteristic of these constitutive rules is that they are socially exclusionary.⁴⁹ Jurisdictions based on Richards's notion of 'a bargaining society' pay lip service to the rule of law. And yet at the same time they institutionalise what Mieville refers to as a conception of the rule of law that is 'an abstract construction that is not only incapable of reflecting the complexities of reality, but actually serves to obscure them'.⁵⁰ 'The formal conception of the rule of law', Mieville further suggests, 'was always a mask for substantive inequalities in power'.⁵¹ In this type of culture unemployment, social marginalisation and attendant social vices of crime are rationalised as collateral damage resulting from a weak bargaining position in the marketplace. Logically true human dignity can never be fully realised in this social order.

Justice Pius Langa, former South African Chief Justice, writes of what he refers to as a 'transformative constitutionalism' in which he views the new society envisaged by the South African Constitution as one based on substantive equality. In his view, transformation is a social and economic revolution.⁵² To my mind, this revolution is not at all feasible unless South African society re-defines itself fundamentally by dispensing with the constitutive rules of exclusion along with their values that have seduced the African elite to connive in maintaining and entrenching those rules. This is a huge task dictating a decisive paradigm shift in episteme inspired by a morality-based reconceptualisation of human beings and the human species' collective self-preservation. Anything less will render Justice Langa's clarion call for transformative constitutionalism, a mere echo in history akin to the biblical lamentations of Jeremiah.

THE MEANING OF SOCIAL JUSTICE

In a critique, Rosenbaum identifies the Achilles heel of the Western justice system as its disconnection with the public's sense of justice. The legal system's notion of justice, he contends, is served merely by finding legal facts that do not incorporate the moral dimensions of emotional and literal truth. This weakness in the law engenders a moral revulsion and cynicism in

⁴⁹ H Richards 'Humanizing methodologies in transformation' (an unpublished paper delivered at the University of South Africa, July 20, 2010).

⁵⁰ C Mieville *Between equal rights* year? 314.

⁵¹ *Id* at 316.

⁵² P Langa 'Transformative constitutionalism' 2006 *Stellenbosch Law Review* 2006 352.

the public mind.⁵³ Rosenbaum acknowledges that some harms are occasioned at the intangible sphere of the spirit – in the form of humiliation, indignity, or basic neglect, which the legal system does not recognise as deserving of relief. The consequence ‘is a justice system that rejects the full dimensions of the human experience.’⁵⁴ This is what can be called ‘ostrich jurisprudence’, typified by the technical reductionism inherent in positivism, which allows the legal system to steer clear of real and meaningful justice.⁵⁵ Rosenbaum advocates an alternative in the form of ‘a new paradigm of moral justice.’ Under moral justice, remedies must also offer moral and spiritual relief and be directed at both the body and the soul.⁵⁶ The poignancy in Rosenbaum’s theory of moral justice lies in its close affinity to precepts of African jurisprudence. I will draw on two historical examples to illustrate this.

Restorative justice

African jurisprudence has always had restorative justice as its focal point.⁵⁷ The background to my first illustration is thus: The *difaqane* turmoil of the first quarter of the eighteenth century was a most debilitating period for Southern Africa. With the entire region having been plunged into devastating wars, turmoil and famine, cannibalism for survival occurred. Interviewed by the French missionary, Arbousset, Rakotsoane, a former leader of a group of cannibals, explained that in the absence of grain, livestock and game, people found themselves first eating their dogs, then their sandals, karosses and leather shields. In time some secretly started eating their children and the weak, and soon, the hunting of humans for survival became a common practice.⁵⁸

⁵³ T Rosenbaum *The myth of moral justice: why our legal system fails to do what’s right* (2004) 17.

⁵⁴ *Id* at 34.

⁵⁵ This is the dominant trend in South African jurisprudence, albeit one that the Constitutional Court has cautiously attempted to lay to rest in some of its groundbreaking judgements such as *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC). Needless to say that a conservative backlash against the emerging progressive jurisprudence, led by the Constitutional Court has not held back. In an unprecedented attack by a judge of a lower court on a higher court, Justice Wills of the South Gauteng High Court in *Emfuleni Local Municipality v Builders Advancement Services CC and Others* 2009/51258 (unreported case) remarked: ‘Quite how the Constitutional Court could have come to (this) conclusion is one of the great unfathomable mysteries of my life.’

⁵⁶ Mieville, note 50 above.

⁵⁷ Tutu n 35 above.

⁵⁸ Arbousset’s encounter with former cannibals in 1840 appears in T Couzens *Murder at Morija* (2003) 54.

Rakotsoane and his people had, years before, intercepted Moshoeshoe's grandfather, killed him, and eaten his flesh. Later arrested and charged before the king's *lekgotla*, they confessed to the crime. It seemed a straightforward matter of imposing the harshest punishment matching the crime. While the *lekgotla* was inclined to impose capital punishment, Moshoeshoe disagreed. His opinion was that meting out capital punishment to people dehumanised by circumstances beyond their control, would not be just. More significantly, he understood that the punishment would not prevent the crime of cannibalism as it would not induce those still roaming in the wild to rejoin society. He contended that as the accused had eaten the flesh of his grandfather, they had symbolically become the graves of his grandfather. Moshoeshoe argued that imposing the death penalty on them would amount to the desecration of the tombs of one's ancestors.⁵⁹

This argument held sway as it was in line with the moral dimensions of punishment. To preserve these 'symbols of interment', the king performed rituals on the cannibals to rehabilitate them spiritually and socially. An ox was slaughtered and purification medicines were prepared and applied to the cannibals' bellies to cleanse them of the social perversion of eating human flesh.⁶⁰ In African culture a cleansing ceremony is a necessary passage of rite to facilitate a person's difficult journey from an unedifying experience to a positive one.⁶¹ For the rehabilitation to be put to practice, the king also presented the cannibals with *mafisa* cattle and land, decreeing that they should plough crops for their livelihood and forsake cannibalism.⁶²

This episode highlights the essence of restorative justice. It proceeded from a realisation that a formalistic approach does not always solve societal problems. Formalism fails to address all the complex dimensions of human existence. Gill observes that the act of giving the cannibals fields, animals and security, served to persuade many to relinquish their habits and rejoin the community.⁶³ From a bigger perspective, this episode is considered an example of the magnanimity, reconciliation and restorative qualities of African jurisprudence at work.

⁵⁹ L Thompson n 10 above at 53 and Leoatle n 10 above at 19.

⁶⁰ Ellenberger n 21 above at 227–228. See also Thompson n 10 above.

⁶¹ L Mbigi 'Ubuntu: spirit of African solidarity' 1996 *Enterprise* 63.

⁶² Thompson n 10 above.

⁶³ Gill n 30 above at 70.

The death penalty

The second illustration highlights the place of capital punishment in African jurisprudence. Historical accounts attest to the fact that the death penalty was generally not considered consistent with restorative justice. Where pragmatism dictated its use, it was in isolated cases which could be rationalised away in terms of the moral exigencies of each society. In *State v T Makwanyane and M Mchunu*,⁶⁴ Sachs J concluded that among the Cape Nguni, the death penalty was confined to cases of suspected witchcraft. Apparently not even murder warranted the death penalty unless caused by witchcraft. The position may well have been the same among the Zulu people. Among the Basotho the influence of the seventeenth century sage, Mohlomi Monyane, who had been Moshoeshoe's mentor and tutor in the cannons of *botho*, had a direct bearing on capital punishment. Mohlomi strongly impressed upon Moshoeshoe to be wary of capital punishment in general, and never to impose the death penalty for alleged witchcraft. In one of his lectures to Moshoeshoe, Mohlomi is reported to have said:

One day you will truly be a chief and ruler over men. You should then perform your duties in their affairs "SETHO" ... Learn to understand men and know their ways. Learn to bear with their human weaknesses and shortcomings ... In their disputes, adjudicate with justice, perfect justice and sympathy. You must not allow elements of preferences based on wealth, status or prestige influence and tarnish any of your decisions in your judgements. Always keep in mind that all people are equal before the law. Also, you should never sentence anybody to death who is accused of sorcery. Keep a careful watch on doctors – most of them are false healers and shameless liars who instigate endless quarrels among the people.⁶⁵

Sachs J in the *Makwanyane* case above mentions that along with Moshoeshoe, the Barolong King Montshiwa, would also not invoke the death penalty for witchcraft.⁶⁶

With regard to the Basotho, it appears that for certain serious crimes the death penalty was retained but seldom applied. This is apparent from a statement attributed by Casalis to Moshoeshoe himself, where the king says:

⁶⁴ See again Sachs J judgment in the *Makwanyane* case, n 7 above.

⁶⁵ Mohlomi Monyane as represented in Mokhehle n 6 above at 31–32.

⁶⁶ Mokhehle n 6 above.

I once had two rebels thrown over there (pointing at the cliffs of Thaba Bosiu), and I have often repented of it. More than once, when trouble has come upon me, I have attributed the cause of it to this act of severity.⁶⁷

After that incident, capital punishment was abolished and replaced by heavy fines.⁶⁸ Casalis, who arrived in Lesotho in 1833, writes that during the twenty-three years he lived among the Basotho, there were no death sentences or personal attempts on the life of the king.⁶⁹

It is clear, therefore, that even before the death penalty was formally abolished, in Ellenberger's words, 'the national sense was always keenly averse to it'.⁷⁰ Significantly, this national aversion predates the time when European death penalty abolitionists brought the issue into the public domain, by some two hundred years. Developed democracies such as the USA are still wrestling with accommodating abolitionist values in their jurisprudence.⁷¹

SOCIAL COHESION AMID DIVERSITY

History repudiates perceptions that Africans are intolerant and cannot abide differences.⁷² Incidentally, Moshoeshoe's prototype-state was built around the diversity of cultures. In addition to the Barwa (the San), people of Nguni stock arrived in the kingdom at various times, either as survivors of the *difaqane*, or later as fleeing from European expansion in the region.

Where different peoples with their own political systems, cultures and languages joined an already established polity, the challenge for the constitutional system would always be the terms of their integration within the larger political system. In other words, would the solution lie in cultural, linguistic and political assimilation or another formula?

Moshoeshoe's approach remains a blueprint for unity in diversity. He placed each one of these groups under the jurisdiction of their own political leaders,

⁶⁷ Casalis n 20 above at 220.

⁶⁸ Thompson n 10 above at 81.

⁶⁹ Casalis n 20 above.

⁷⁰ Ellenberger n 21 above at 267.

⁷¹ For an extensive survey of the status of capital punishment in various Western jurisdictions, including the USA, one needs look no further than the exhaustive Constitutional Court discussion in *State v T Makwanyane and M Mchunu*, n 5 above.

⁷² This is one of many untruthful imports of modernity which unfortunately Keevy (n 3 above at 22) attributes to *ubuntu*. He set out to deconstruct *ubuntu*'s stereotyping of 'women, children, homosexuals, lesbians, witches, strangers and outsiders'.

where they governed themselves according to their own laws and customs, while remaining part of the polity as a whole. Casalis observes that

there were villages and clusters of villages whose inhabitants remain Nguni in language, dress and culture, with chiefs and headmen of Nguni lineages, but subject to the political authority of Moshoeshoe and his territorial chiefs and allies.⁷³

Thus, guaranteed self-determination and space to practise their own culture, they became a proud part and parcel of the nation and its political system.⁷⁴

At the fundamental level this milieu was held together by the doctrine '*O se re ho Morwa: 'Morwa towe!*',⁷⁵ which affirms the equality of humans regardless of race, ethnicity or social standing, and unreservedly condemns discrimination based on such criteria. The doctrine also carries a powerful moral force by banishing discrimination by stereotyping. In its broader context, it conveys that no person should be belittled, despised, or denied equal treatment. In conversational discourse, when a Mosotho says '*Ha o nyatse Morwa, o nyatse moqheme*', he means that it is not the ideas you despise, but the person uttering them. That kind of attitude demeans the other person and is entirely unacceptable. Between them, these doctrines upheld respect and the dignity of everyone and levelled the playing field for a harmonious society of equal citizens.

Laws protecting the vulnerable

Further, Moshoeshoe laid down a set of rules concerned with the safety, security and welfare of travellers, foreigners and other categories of vulnerable people. Among these, the following are especially relevant and instructive:

- Women, children, travellers, and the aged are inviolable and must be treated well during war.
- Those who surrender in war must be spared. While the offensive weapons of a captive should be taken from him, he must generally be allowed to keep his shield.
- The person of an ambassador/messenger or delegate is inviolable.
- The protection of a stranger is the responsibility of his host and a traveller's goods should not be seized from him.

⁷³ Ellenberger n 21 above at 174

⁷⁴ Until today large swathes of present day Lesotho have been occupied by Zulu-speaking Ngunis in the North of the country, while the Xhosa-speaking Ngunis inhabit large parts of the Quthing district in the south and parts of central Maloti.

⁷⁵ See n * above.

- Upon an alarm being sounded, a foreign visitor should join citizens in the defence of the realm, even if the attackers were his own countrymen.⁷⁶

These principles were not new; they constituted part and parcel of the corpus of customary law. In formally proclaiming and adapting them to the emergent harsh environment of *difaqane*, Moshoeshoe not only reclaimed them, but proved the vitality, adaptability and resilience of *botho*, adversities notwithstanding. Thus, he reaffirmed *botho* and restored it to the core of society at a time when it was most needed. For Moshoeshoe these values were a platform on which he built national cohesion and solidarity with group and personal dignity, and tolerance of diversity as core values.

Ellenberger relates the experience of Makara, one of the earliest leaders to voluntarily join Moshoeshoe, after the latter intervened to have Makara's stock restored to him. Makara allegedly said to Moshoeshoe: 'My child, since thou knowest to restore to travellers that which has been taken from them on the road, thy power will grow, and thou wilt become a great chief.'⁷⁷

Reflecting on this early episode in his career, Moshoeshoe was later to remark:

... from the time Makara joined us, and throughout my life my power has never ceased to grow And it is on account of this that when I became a chief I made a law – to which I have ever adhered – that no one should molest a traveller on the way⁷⁸

What clearly arises from these rules is an humanitarian jurisprudence offering protection to the innocent, the weak and the vulnerable. It is a jurisprudence that ensured that xenophobia had no place in the psyche of the people and, as Thompson observes, '(f)oreigners (were) everywhere respected and well received'.⁷⁹

CONCLUSION

As indicated at the beginning of this article, jurisprudence is the study of the ethic and values that underpin institutional behaviour. The historical documents consulted portray that African jurisprudence is neither backward nor inconsistent with the South African Constitution. If anything, attempts to portray it in that light stem from either genuine ignorance, or deliberate misrepresentation. The latter cannot be dismissed lightly in cases when

⁷⁶ Mokhehle n 6 above at 48–49.

⁷⁷ Ellenberger n 21 above at 108.

⁷⁸ *Id* at 108–109.

⁷⁹ Note 7 above at 81.

interpretations of the Constitution are major factors in ideological, philosophical and epistemological disputes. Misrepresentation of African jurisprudence may well be a shrewd attempt to keep its values suppressed, as Justice Sachs noted in the *Makwanyane* case. Naturally, its delegitimisation effectively emasculates its claim to be one of the cardinal sources of the Constitution.

With that, post-colonial African society remains imprisoned by the values of an exclusionary society. These values are disguised as god-ordained; a law of nature; or as the Romans would have it, the *jus gentium* for all of humanity. Hence the term ‘global village’ – but it is in a global village where, in the marketplace of values, having nothing of his to offer, the African will always be a spectator at best.

It is problematic that while African countries were liberated from the yoke of colonialism, and many have adopted formal democracies, the majority of their people remain socially disenfranchised and are effectively barred from participation in governance, the economy, and even the conception of what justice is. Colonialism without the colonists remains on autopilot disguised as progress. This has all the hallmarks of a society in crisis, if only because it is not in touch with the soul of its people. Witness here in South Africa how every five years people queue up to cast their vote, but no sooner than they have done so, are they back on the streets rioting because they realise that voting *per se* neither ends disenfranchisement nor restores their sense of belonging!

I conclude with Jean-Marc Ela’s poetic summation of the challenge of Africa:

Africa is not against development. It dreams of other things than the expansion of a culture of death or an alienating modernity that destroys the fundamental values so dear to Africans ... Africa sees further than an all-embracing world of material things and the dictatorship of the here and now, that insists on trying to persuade us that the only valid motto is ‘I sell, therefore I am’. In a world often devoid of meaning, Africa is a reminder that there are other ways of being.⁸⁰

I have no doubt that African jurisprudence offers this alternative way.

⁸⁰ Matthews n 8 above at 381–382.