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Ubuntu and the Law in South Africa

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UBUNTU AND THE LAW IN SOUTH AFRICA

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I. INTRODUCTION

The concept *ubuntu*, like many concepts, is not easily defined. Defining an African notion in a foreign language and from an abstract, as opposed to a concrete approach, defies the very essence of the African world-view and may also be particularly elusive. Therefore, I will not attempt to define the concept with precision. In any case, that task is unattainable. In one's own experience, it is one of those things that you know when you see it. Therefore, like many who have written on the subject, I will put forward some views which relate to the concept itself. However, I can never claim the last word. I intend to put forward some thought-provoking ideas on *ubuntu* and its relation to South African law in general, the South African Constitution, and customary law in particular, as a way to initiate debate for *ubuntu*/ism in a new jurisprudence for South Africa.

II. THE CONCEPT *UBUNTU*

Ubuntu, a Zulu word with *botho* as its *sesotho* equivalent, has generally been described as a world-view of African societies and a determining factor in the formation of perceptions which influence social conduct.[1] It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, and the fundamental belief is that "*[u]buntu ngumuntu ngabantu, motho ke motho ba batho ba bangwe,*" which, literally translated, means "a human being is a human being because of other

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[*] Justice of the Constitutional Court of the Republic of South Africa. A revised version of a paper presented at a Colloquium, "Constitution and Law," organized by the Law Faculty, Potchefsroom University for Higher Christian Education (PU for CHE), South Africa, Oct. 31, 1997.

[1] *See generally* Johann Broodryk, Ubuntu in South Africa Ch. I (1997) (unpublished Lit D. thesis, University of South Africa (Pretoria)) (on file with author).

human beings."[2] In other words, the individual's existence and well-being are relative to that of the group. This is manifested in anti-individualistic conduct that threatens the survival of the group. If the individual is to survive within the group, there must be collective effort for group survival. Basically, it is a humanistic orientation towards fellow beings.

Professor Kunene, however, warns against a superficial perception of *ubuntu*:

> For indeed, it is not enough to refer to the meaning and profound concept of ubuntuism merely as a social ideology. Ubuntu is the very quality that guarantees not only a separation between men, women and the beast, but the very fluctuating gradations that determine the relative quality of that essence. It is for that reason that we prefer to call it the potential of being human.[3]

The potential, he states, can fluctuate from the lowest to the highest level during one's lifetime. At the highest level, there is constant harmony between the physicality and spirituality of life. The harmony is achieved through close and sympathetic social relations within the group. Thus, the notion, "a human being is a human being because of other human beings," implies that during one's lifetime, one is constantly challenged by others, practically, to achieve self-fulfilment through a set of collective social ideals. Because the African world-view is not easily and neatly categorized and defined, any attempt to define *ubuntu* is merely a simplification of a more expansive, flexible and philosophically accommodative idea.

The meaning of *ubuntu,* however, becomes much clearer when we examine its practical effect on everyday life. For example, a society based on *ubuntu* places strong emphasis on family obligations. Family members are obliged to help one another. The concept of family is a broad "nuclear" family, which includes the extended family. People are willing to pool community resources to help an individual in need. This is captured in some of the African aphorisms such as, "*[m]otho ke motho ka batho ba bangwe,*" which literally

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[2] *See* LOVEMORE MBIGI & JENNY MAREE, UBUNTU: THE SPIRIT OF AFRICAN TRANSFORMATION MANAGEMENT 1-7 (1995).

[3] Professor Kunene, The Essence of Being Human - An African Perspective, Inaugural Lecture, University of Natal, Durban 10 (Aug. 16, 1996)

translated means, "people live through the help of others," and, "*a botho ba gago e nne botho seshabeng,*" which literally translated means, "let your welfare be the welfare of the nation."

Group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity have, among others, been defined as key social values of *ubuntu.* Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose upon which it is relied. Thus, its value has also been viewed as its basis for a morality of cooperation, compassion, communalism, concern for the interests of the collective respect, and respect for the dignity of personhood, with emphasis on the virtues of that dignity in social relationships and practices. For purposes of an ordered society, *ubuntu* is a prized value, an ideal to which age-old traditional African societies could achieve. The age-old traditional societies had their own customary institutions that functioned on well-adjusted principles and practices. Despite the effect some of the various social forces have had on African societies, the suitability of those original principles and practices is often questioned, and in my view correctly so. Through modernity, the traditional cohesion of African societies has been largely eroded. It can be argued that the social field for an *ubuntu*/ist legal system is not particularly fertile. It can also be argued that the values of *ubuntu,* if consciously harnessed, can enhance the creation of the envisaged value system of the new and contemporary South African jurisprudence. Indeed, as Ali Mazrui observes, ". . . Africa can never go back completely to its pre-colonial starting point but there may be a case for re-establishing contacts with familiar landmarks of modernization under indigenous impetus."[4]

III. *UBUNTU* AND SOUTH AFRICAN LAW

Although South Africa is a multicultural society, indigenous law has not been featured in the mainstream of South African jurisprudence. Although an opportunity existed under the reforms of the Special Courts for Blacks Abolition Act 34 of 1986 and the Law of Evidence Amendment Act 4 of 1988, which among other things, empowered mainstream courts to take judicial cognizance of indigenous law, not much has become of that either. Without a doubt, some aspects or values of *ubuntu* are universally inherent to South Africa's cultures. It

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[4] MBIGI & MAREE, *supra* note 2, at 5.

would be anomalous if dignity, humaneness, conformity, and respect were foreign to any of South Africa's cultural systems. On the other hand, the various methods, approaches, emphasis, and attitude are concepts unique to African culture.

I believe we should incorporate *ubuntu* into mainstream jurisprudence by harnessing it carefully, consciously, creatively, strategically, and with ingenuity so that age-old African social innovations and historical cultural experiences are aligned with present day legal notions and techniques if the intention is to create a legitimate system of law for all South Africans.

Including *ubuntu* will enhance the legitimacy of a jurisprudence which is required to manage the challenges that constitutionalism with entrenched human rights poses for us. Hence, there is much room for law reform. As part of a new law management strategy, we need to carefully prioritize current problems and develop new research methods to find a pragmatic and integrated solution.

IV. *UBUNTU* AND THE CONSTITUTION

The Interim Constitution[5] sets the tone for socio-political transformation in South Africa. It created "a historic bridge between the past of a deeply divided society, characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of peaceful co-existence . . . for all South Africans."[6]

To realize the peaceful co-existence recognized by the Interim Constitution, despite the injustices of the past, there is a need for understanding, not vengeance, and a need for reparation, not retaliation. Specifically, that constitution recognized the need for *ubuntu* and not victimization.

In its preamble the Interim Constitution declared:

> Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African Citizenship . . . where there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

The Interim Constitution further declared, "it is necessary for such purposes that

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[5] S. AFR. CONST. (1993).

[6] *Id.* ch. 16 (National Unity and Reconciliation is the postscript of the Constitution).

provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa . . . ." Therefore, the Interim Constitution established a new socio-political order with national unity and a common citizenship, and where all and not only a few should enjoy and exercise their fundamental rights and freedoms.

Finally, despite the potential for disorder that the permissive guarantee of rights and freedoms may have after decades of oppression and repression, these guiding values aim to set the tone for peaceful co-existence. The Preamble specifically required the need for *ubuntu,* but not victimization. The values of *ubuntu* are an integral part of the value system established by the Interim Constitution. With respect to individual human rights and freedoms, the Interim Constitution did not establish a system where these rights and freedoms are exercised and claimed arbitrarily, despite the claims and existence of concomitant rights of others.

The limitations clause, a rights-balancing mechanism, provided specific criteria to be considered when conflicting rights and interests are claimed.[7] As such, the limitations clause could also be a mechanism for peaceful co-existence between individual claimants.

The constitutional principles in the Interim Constitution, which resulted from a solemn pact among the negotiators at Kempton Park, insisted that the new Constitution take its cue from the Interim Constitution. Like the latter, the new Constitution is the supreme law of the land and contains a Bill of Rights described in section 7(1) as the "cornerstone of democracy in South Africa."[8] The new Constitution established democratic values, such as human dignity, equality, promotion of human rights and freedoms, multi-party democracy to ensure accountability, and responsiveness and openness of law. The values in the new Constitution arguably coincide with some key values of *ubuntu* (ism), for example, human dignity, respect, inclusivity, compassion, concern for others, honesty, and conformity. The *ubuntu* values of collective unity and group solidarity are translated into the value of national unity demanded by the new South African society.

The collective unity, group solidarity, and conformity tendencies of *ubuntu* can promote a new patriotism and personal stewardship crucial to the development of a democratic society. A number of other similar survival issues in the law, which are brought about by the challenges of constitutionalism, are

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[7] *See id.* § 33.

[8] S. AFR. CONST. ch. 2, § 7, cl. 1.

easily identifiable. It is around these issues that law reform can harness the ideas of *ubuntu*/ism to achieve appropriate responses to the demands of constitutionalism.

Ubuntu/ism can be employed to create responsive legal institutions for the advancement of constitutionalism and a culture of human rights in South Africa in several ways: (i) by promoting the values of the new Constitution by translating them into more familiar *ubuntu* values and tendencies; (ii) by harnessing some unique *ubuntu* value, tendency, approach and/or strategy; (iii) by promoting and/or aligning these aspects of *ubuntu* with core constitutional demands,

V. *UBUNTU* AND AFRICAN CUSTOMARY LAW/ INDIGENOUS LAW

For the first time in South Africa's history, indigenous law and its application has acquired constitutional status. Section 211, which takes its cue from the Interim Constitution, recognizes the institution of traditional leaders and the systems of indigenous law that they observed. It specifically enjoined courts to apply this law, where it is applicable, but subject to the Constitution and applicable legislation.[9]

The Constitution brings to an end the marginal development of customary law or indigenous principles. It addresses the need to bring outdated and distorted customary law institutions in line with the values of the Constitution. Indigenous law is replete with such institutions which deserve to be discarded or re-aligned and developed. *Ubuntu*/ism, which is central to age-old African custom and tradition, abounds with values and ideas that have the potential for shaping not only current indigenous law institutions, but South African jurisprudence as a whole. Examples that come to mind are:

> the original conception of law was perceived not as a tool for personal defense against an adversary, but as an opportunity given to all to survive under the protection of the order of the communal entity;
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> communalism which emphasizes group solidarity and interest groups generally, with all the rules that sustain it, as opposed

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[9] *See id.* ch. 12, § 211, cl. 3.

> to individual interests, with its individualistic tendencies, with its likely utility in building a sense of national unity among South Africans;
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> the conciliatory character of the adjudication process which aims to restore peace and harmony between members rather than the adversarial approach to litigation which emphasises retribution and seems repressive. The importance of group solidarity requires restoration of peace between litigants, rather than an all-out victor and an all-out loser;
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> the idea that law, experienced by an individual within the group, is bound to individual duty as opposed to individual rights demands or entitlement. Closely related is the notion of individual sacrifice for group interests and group solidarity so central to *ubuntu*/sm and possibly useful for the development of a jurisprudence of socio-economic rights.

The shared values of *ubuntu*/sm and the Constitution, and the significant and effective approaches, methods, techniques and strategies of the former can play a crucial role in shaping and formulating a new indigenous law and jurisprudence to meet the demands and challenges of constitutionalism for indigenous law. How exactly these values can be utilized to form jurisprudential responses to the current challenges brought by competing demands in a complex and rapidly changing South Africa requires close examination of current shortcomings of existing institutions, their mechanisms and their strategies.

Section 39(2) of the new Constitution provides that in the interpretation of the Bill of Rights or any legislation, courts have a specific injunction to develop indigenous law, taking into account the spirit, purpose and object of the Bill of Rights. Since the values of the Constitution, and at least the key values of *ubuntu*/sm seem to converge, indigenous law may need to be aligned with these converging values. It is, however, not only the system of indigenous law which need this re-alignment. South African law as a whole is constantly placed under the scrutiny of the Constitution. Therefore, the values of *ubuntu* can provide the necessary "indigenous impetus."

VI. CONCLUSION

When Chief Justice Mahomed addressed the World Jurist Association Seminar in Cape Town in February of this year, he summed up the significance of African values:

> the ageless emotional and cultural maturity of Africa is less dramatic but not less significant or potentially powerful in influencing, in shaping and in formulating the constitutional ethos which must inform and define judicial responses to jurisprudential challenges arising from competing demands in a complex and rapidly changing society. That maturity expresses itself through a collectivist [emotion] of communal caring and humanism, and of reciprocity and caring.[10]

These African values which manifest themselves in *ubuntu* are in consonance with the values of the Constitution generally and those of the Bill of Rights in particular. The human rights violations and indignities of the past have not well served the legitimacy and respect for South African law.

The advent of constitutionalism has seen unconstitutional laws and actions invalidated and set aside. Institutions of democracy, which had been created by the Interim Constitution to advance a culture of democracy and human rights, have also swung into much action. However, less than four years of constitutionalism has not and cannot have achieved the necessary popular understanding and appreciation for the varied implications of constitutionalism for South Africa; nor did it and could it have restored fully the dignity of our legal system. In the true spirit of *ubuntu*, no one, especially not lawyers, can afford to sit back and watch our new-found constitutionalism slide into disrepute. Quite obviously, the complete restoration of the reputation of South African law and jurisprudence requires considerable modification of existing rules. We will thus have to be ingenious in finding and/or creating law reform programs, methods, approaches and strategies that will enhance adaptation to such unprecedented change.

The values of *ubuntu*, I would like to believe, if consciously harnessed, can be central to a process of harmonizing indigenous law with the Constitution

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[10] *Chief Justice Hails New Constitution and African Values*, DE REBUS: THE SOUTH AFRICAN ATTORNEYS' JOURNAL, Feb. 1997, at 78.

and can be integral to a new South African jurisprudence.