

# ***uBuntu* as a constitutional value: A social justice perspective**

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"Our affiliations are becoming more and more narrowly defined, our humanism is becoming a matter of tribal instincts, and our universalism is not very generous. We must learn to say 'we' again. Just as I can say 'I' and still belong to myself, we must be able to say 'we' whilst acknowledging our common sense of belonging." – Tariq Ramadan, *The Quest for Meaning: Developing a Philosophy of Pluralism*

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## **ABSTRACT**

The preamble to the *Constitution of the Republic of South Africa, 1996* (the Constitution) makes a commitment to social justice. This commitment is set against the background of a difficult and tumultuous past characterised by injustices and divisions. The commitment to realising a socially just society rests on all spheres of government, including the judiciary. The judiciary's pursuit of social justice is also expressed as transformative constitutionalism, which requires the judiciary to approach adjudication in such a manner that it brings social change in the South African society.

The notion of social justice has been linked to the concept of *ubuntu* as a constitutional value. The theoretical discussions on the role and functioning of constitutional values in South Africa are insufficient. Literature on *ubuntu* and social justice is more widespread. However, despite the existence of literature on *ubuntu* and social justice, there is none that links these two concepts or explicitly speaks of the constitutional functioning of *ubuntu*.

This study thus sought to determine the ways in which *ubuntu* as a constitutional value can contribute to social justice when used by the judiciary. In establishing these linkages, this thesis unpacks the constitutional values to determine what their role and function should be during adjudication. The study then proceeds to arrive at a suitable legal understanding of *ubuntu* and social justice. This study does not settle on one specific framework of social justice but identifies three frameworks that could be utilised during adjudication. Specific frameworks of social justice that are suitable and aligned with transformative constitutionalism are identified. The ways in which elements from these frameworks are represented in the value of *ubuntu* are analysed.

The study finds that courts contribute to the realisation of social justice by using the value of *ubuntu* as this value demands certain considerations to be brought forward in judicial matters. This includes different types of marginalisations and oppressions individuals and groups may face. This study makes an original contribution by being the first to determine

the manner in which *ubuntu* as a constitutional value aids the judiciary in contributing to the realisation of social justice in South Africa.

**Key words:**

*uBuntu*; constitutional values; social justice; judiciary; South Africa; statutory interpretation; constitutional interpretation.

## OPSOMMING

*Die Grondwet van die Republiek van Suid-Afrika, 1996* (die Grondwet) is verbind tot 'n strewe na sosiale geregtigheid. Hierdie verbintenis lê teen die agtergrond van 'n moeilike en onstuimige verlede gekenmerk deur onreg en verdeeldheid. Die verantwoordelikheid om 'n sosiaal regverdige samelewing te bevorder berus by alle regeringsfere, ook die regbank. Die regbank se strewe na sosiale geregtigheid word tot uitdrukking gebring in die idee van transformerende konstitusionalisme, wat vereis dat die regbank beregting moet benader op so 'n wyse dat dit sosiale verandering in die Suid-Afrikaanse samelewing bewerkstellig.

Die idee van sosiale geregtigheid is gekoppel aan die begrip *ubuntu* as grondwetlike waarde. Daar is onvoldoende teoretiese bespreking van die rol en werking van grondwetlike waardes in Suid-Afrika. Daar is meer literatuur oor *ubuntu* en sosiale geregtigheid beskikbaar. Ondanks die bestaan van literatuur oor *ubuntu* en sosiale geregtigheid, is daar egter geen literatuur wat hierdie twee konsepte verbind of wat die grondwetlike werking van *ubuntu* duidelik aanspreek nie.

Hierdie studie het dus probeer vasstel op watter wyse *ubuntu* as grondwetlike waarde kan bydra tot sosiale geregtigheid wanneer dit deur die regbank gebruik word. Ten einde die verbande tussen hierdie twee konsepte vas te stel, gee hierdie tesis 'n uiteensetting van die grondwetlike waardes die rol en funksie daarvan tydens beregting te ondersoek. Die studie stel uiteindelik 'n toepaslike verstaan van *ubuntu* en sosiale geregtigheid voor. Die studie berus nie op een spesifieke raamwerk van sosiale geregtigheid nie, maar identifiseer drie raamwerke wat tydens die beoordeling gebruik kan word. Geskikte raamwerke vir sosiale geregtigheid wat met transformerende konstitusionalisme belyn is, word geïdentifiseer. Daarbenewens word die wyses waarop elemente uit hierdie raamwerke die waarde van *ubuntu* bevorder, ontleed.

Die studie bevind dat die gebruik van die waarde van *ubuntu* deur howe kan bydra tot die verwesenliking van sosiale geregtigheid, aangesien die waarde vereis dat sekere oorwegings vooropgestel word tydens regspleging. Sodanige oorwegings sluit byvoorbeeld verskillende soorte marginaliserings en onderdrukking wat individue en

groepe in die gesig staar in. Hierdie studie lewer 'n oorspronklike bydrae deur die eerste te wees om te bepaal hoe *ubuntu* as grondwetlike waarde die regbank kan help om sosiale geregtigheid in Suid-Afrika te help verwesenlik.

**Sleutelwoorde:**

*uBuntu*; grondwetlike waardes; sosiale geregtigheid; regbank; Suid-Afrika; wetsuitleg, grondwetlike uitleg.

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## **LIST OF ABBREVIATIONS**

ACDP	African Christian Democratic Party
ANC	African National Congress
AHRLJ	African Human Rights Law Journal
Constitution	Constitution of the Republic of South Africa, 1996
Interim Constitution	Constitution of the Republic of South Africa, 200 of 1993
PELJ	Potchefstroom Electronic Law Journal
PISA	Prevention of Illegal Evictions from and Unlawful Occupation of Land Act
PIE	Prevention of Illegal Squatting Act
SCA	Supreme Court of Appeal
SAJHR	South African Journal of Human Rights
SAPL	South African Public Law
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review

# Chapter 1

## Introduction

### **1.1 Background**

In 1996, South Africa adopted the final Constitution.<sup>1</sup> This Constitution is the supreme law of the country.<sup>2</sup> It entrenches various fundamental rights and freedoms in the Bill of Rights, which forms the cornerstone of South Africa and affirms, among other, the values of human dignity, equality and freedom.<sup>3</sup> There is a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>4</sup> This duty rests on all three spheres of government (national, provincial and local) and all three branches of the state authority (executive, legislative and judicial).<sup>5</sup>

The preamble to the Constitution states, *inter alia*, that it has been adopted to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental rights. Despite the constitutional mandate for the realisation of fundamental rights and the promotion of social justice, South Africa still lags behind in the achievement of the aforementioned social justice goals.<sup>6</sup> For example, according to the 2018 general household survey, the percentage of the South African population

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<sup>1</sup> *Constitution of the Republic of South Africa, 1996* (the Constitution).

<sup>2</sup> Section 2 of the Constitution provides that "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

<sup>3</sup> Section 7(1) of the Constitution provides that "this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".

<sup>4</sup> Section 7(2) of the Constitution provides that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights".

<sup>5</sup> Section 40 (1) of the Constitution provides that "in the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated".

<sup>6</sup> Kehler 2001 *Journal of International Woman's Studies* 41.

that has access to certain basic services has increased, generally.<sup>7</sup> However, despite an increase in access to basic services, nearly half of the South African population are considered chronically poor.<sup>8</sup> South Africa also faces increasing levels of unemployment.<sup>9</sup> In addition to challenges such as poverty and unemployment, South Africa faces other social issues, including xenophobia,<sup>10</sup> gender-based violence and extreme levels of poverty.<sup>11</sup> These examples serve to illustrate that South Africa is still facing many challenges in the pursuit of a socially just and equal society as proclaimed in the Constitution.

The judiciary has been instrumental in promoting social justice by mapping out notions such as rights and values.<sup>12</sup> Prior to the adoption of the Interim and eventually final Constitutions in South Africa, the powers and functions of the judiciary were limited due to parliamentary sovereignty.<sup>13</sup> As part of the Westminster system, parliamentary sovereignty meant that the legislature was the strongest arm of government. Courts could not declare legislation invalid and thus had limited powers of judicial review.<sup>14</sup> After the adoption of the Interim<sup>15</sup> and final Constitutions, the nature of adjudication and the powers of the judiciary changed considerably.<sup>16</sup> Among these

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<sup>7</sup> Statistics South Africa 2019 <http://www.statssa.gov.za/?p=12211>. According to the survey, from 2002 – 2018, access to improved sanitation had improved by 21.3 percent, access to electricity had improved by 8 percent, household drinking water had improved by 4.6 percent.

<sup>8</sup> The World Bank 2018 [http://www.statssa.gov.za/wp-content/themes/umkhanyakude/documents/South\\_Africa\\_Poverty\\_and\\_Inequality\\_Assessment\\_Report\\_2018.pdf](http://www.statssa.gov.za/wp-content/themes/umkhanyakude/documents/South_Africa_Poverty_and_Inequality_Assessment_Report_2018.pdf).

<sup>9</sup> In the fourth quarter of 2019 unemployment stood at 29,1 percent. See Statistics South Africa 2019 <http://www.statssa.gov.za/?p=12689>.

<sup>10</sup> South Africa faced serious xenophobia attacks in 2008, 2015 and more recently in 2019. See Okem and Asuelime 2015 *Journal of African Union Studies* 36.

<sup>11</sup> Gevers, Jama-Shai and Sikweyiya 2013 *African Safety Promotion Journal* 15; Statistics South Africa *Poverty Trends in South Africa* 13.

<sup>12</sup> The term social justice is discussed in Chapter 4.

<sup>13</sup> Wesson and Du Plessis 2008 *SAJHR* 190.

<sup>14</sup> Wesson and Du Plessis 2008 *SAJHR* 190.

<sup>15</sup> *Constitution of the Republic of South Africa* 200 of 1993 (the Interim Constitution).

<sup>16</sup> Du Plessis 2015 *PELJ* 1332.

changes are their entrenched independence and the power to review and invalidate legislation.<sup>17</sup>

In addition to the fundamental changes to the functions and powers of courts, the courts' approach to constitutional and statutory interpretation changed too. Traditionally, only common law theories were used for statutory interpretation. These theories would include literalism,<sup>18</sup> intentionalism,<sup>19</sup> literalism-cum-intentionalism,<sup>20</sup> contextualism,<sup>21</sup> purposivism<sup>22</sup> and objectivism.<sup>23</sup> However, with the arrival of the Constitution, the situation changed. The Constitution itself mandates rules of interpretation. For example, section 39 of the Constitution mandates the courts to promote the values that underlie an open and democratic society when interpreting the Bill of Rights.<sup>24</sup> Courts are also mandated to develop the common and customary law in line with the spirit and purpose of the Bill of Rights while taking into account constitutional values. The

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<sup>17</sup> Section 165 (2) of the Constitution provides that "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".

<sup>18</sup> Literalism means that the meaning of a provision can be deduced from the plain language of the text. See Du Plessis 2015 *PELJ* 1335.

<sup>19</sup> Intentionalism refers to the tradition that ascertaining the intention of the legislature is important for purposes of interpretation. See Du Plessis 2015 *PELJ* 1335.

<sup>20</sup> A combination of the literalist and intentionalist approach. See Du Plessis 2015 *PELJ* 1335.

<sup>21</sup> The approach that context is important in determining the meaning of a provision. Also see Du Plessis 2015 *PELJ* 1335.

<sup>22</sup> The approach that the purpose of the legislation is important in determining the meaning of a provision. See Du Plessis 2015 *PELJ* 1335; Botha *Wetsuitleg* 51.

<sup>23</sup> In accordance with objectivism once law has been enacted it must only be concretised by the courts. Du Plessis 2015 *PELJ* 1335.

<sup>24</sup> Section 39 of the Constitution provides that "when interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

Constitution thus introduced a unique interpretation method to be used in addition to traditional common law theories of interpretation.

Du Plessis<sup>25</sup> points out that there cannot be one single theory of statutory interpretation and that "a new national sense of justice" has to guide statutory interpretation in South Africa. He further maintains that interpretive *leitmotivs*<sup>26</sup> guide statutory and constitutional interpretation in South Africa. These *leitmotivs* include memorial, monumental, transitional and transformative constitutionalism.<sup>27</sup> Memorial constitutionalism sees the Constitution as coming to terms with the past while dealing with matters of the future.<sup>28</sup> Monumental constitutionalism sees the Constitution as a document "triumphantly shedding the shackles of what went before".<sup>29</sup> Transitional constitutionalism envisions the Constitution as a bridge from a culture of authority to a culture of justification.<sup>30</sup> In the final instance, transformative constitutionalism indicates a change in society that is grounded in law.<sup>31</sup>

The term "transformative constitutionalism" was first coined by Klare.<sup>32</sup> In his seminal article, he acknowledges the transformative nature of the Constitution. According to him, transformative constitutionalism implies a large scale social change grounded in law.<sup>33</sup> He reiterates that judges make value-laden decisions when interpreting legislation and the Constitution.<sup>34</sup>

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<sup>25</sup> Du Plessis 2015 *PELJ* 1340. Michelman 1995 *SAJHR* 485.

<sup>26</sup> A leitmotiv can be described as a "recurring keynote or defining idea, *motifs* or *topoi* guiding instances of constitutional interpretation" Du Plessis 2015 *PELJ* 1340-1341.

<sup>27</sup> Du Plessis 2015 *PELJ* 1342.

<sup>28</sup> Du Plessis 2015 *PELJ* 1342.

<sup>29</sup> Du Plessis 2015 *PELJ* 1342.

<sup>30</sup> Du Plessis 2015 *PELJ* 1345.

<sup>31</sup> Du Plessis 2015 *PELJ* 1350. Also see Klare 1998 *SAJHR* 150.

<sup>32</sup> Klare 1998 *SAJHR*.

<sup>33</sup> Klare 1998 *SAJHR* 157-158.

<sup>34</sup> Klare 1998 *SAJHR* 157-158.

These values can be found inside or outside the text.<sup>35</sup> Klare<sup>36</sup> is in favour of a post-liberal interpretation of the Constitution according to which it is acceptable for courts to pursue political goals such as social justice, for example.

Since Klare's article, the concept of transformative adjudication has been heralded by many legal practitioners and academics as the correct approach to constitutional interpretation.<sup>37</sup> In line with this approach it can be argued that transformative constitutionalism requires the judiciary to contribute to the pursuit of a socially just society as envisioned by the Constitution. Furthermore, it seems that constitutional values play an important role in the process of transformation from an unjust to a just society. However, at this point in time, I must concede that concepts such as "socially just society" and "unjust society", even "society" in a broad sense, have contested meanings to which I return in paragraph 1.3 and Chapter 4.

It should be obvious that the judiciary has a pivotal role to play in the interpretation and application of constitutional values in the social justice pursuit.<sup>38</sup> There is no doubt that the Constitution is transformative and that its purpose is not only to restrain state power, but also to achieve societal change such as a more socially just society.<sup>39</sup> The judiciary have dealt with various cases relating to fundamental rights, and their decisions have already made noteworthy changes to the South African society. The principles gleaned from these decisions are invaluable.

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<sup>35</sup> Klare 1998 *SAJHR* 158.

<sup>36</sup> Klare 1998 *SAJHR* 151.

<sup>37</sup> Liebenberg 2008 *Acta Juridica* 150. Hoexter 2008 *SAJHR* 281-299. Langa 2006 *Stell LR* 351-360. For court cases dealing with the concept of transformative constitutionalism see *S v Makwanyane* 1995 6 BCLR 665 (CC) para 142; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 142; *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 157.

<sup>38</sup> Section 39 of the Constitution. Christiansen 2010 *The Journal of Gender, Race and Justice* 581.

<sup>39</sup> Liebenberg 2006 *Stell LR* 6. Klare 1998 *SAJHR* 146.

In *Government of the Republic of South v Grootboom*,<sup>40</sup> for example, the court considered the state's obligation in relation to housing. The court found that the eviction of one of the respondents was not in line with the values of the Constitution, with the court stressing the importance of human dignity, equality and freedom.<sup>41</sup> In *Carmichele v Minister of Safety and Security*<sup>42</sup> the court had to reconsider the duty of the state to protect women against violent crimes and sexual abuse.<sup>43</sup> The court reiterated that the development of the common law must be in line with the values of the Constitution.<sup>44</sup> While the two above-mentioned cases focused on the constitutional values of human dignity, equality and freedom, the courts noted that other values not explicitly mentioned in the Constitution also exist, opening the door for *ubuntu* to be regarded as a value too.<sup>45</sup>

Not everyone is convinced of the positive qualities of *ubuntu* as a constitutional value.<sup>46</sup> Kroeze<sup>47</sup> for example, notes that *ubuntu* as a constitutional value is a useful concept, but that it has not been unpacked properly. She argues that the formalistic legal interpretation of the Constitutional Court has hindered the development of *ubuntu*.<sup>48</sup> At this

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<sup>40</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

<sup>41</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 88; 83; 23; 44. Despite the fact that Mrs Grootboom died without receiving a house the *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) made it possible for declaratory orders to be issued in for example *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC). The case is also often quoted as the court set out the reasonableness test in this case. See Du Plessis 2015 *PELJ* 1353 for a similar opinion.

<sup>42</sup> 2001 4 SA 938 (CC).

<sup>43</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 29.

<sup>44</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 54.

<sup>45</sup> These cases include, inter alia, *S v Makwanyane* 1995 6 BCLR 665 (CC); *S v Mandela* 2001 1 SACR 156 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Dikoko v Mokhatla* 2006 6 SA 235 (CC); *Joseph v City of Johannesburg* 2010 4 SA 327 (CC).

<sup>46</sup> See for example Keevy 2009 *Journal for Juridical Sciences* 19-58. Keevy's viewpoints are further discussed at 3.2.4.

<sup>47</sup> Kroeze "Ubuntu and the Law" 340. Kroeze's viewpoints are further discussed at 2.2.1.

<sup>48</sup> Kroeze "Ubuntu and the Law" 340.

junction, it is fitting to briefly consider the meaning of *ubuntu* within the South African legal system and for the purpose of this study.<sup>49</sup>

## **1.2 *uBuntu as a constitutional value***

*uBuntu* is a word that is rooted in African philosophy and religion that originates from the Nguni language.<sup>50</sup> There is no uniform definition of *ubuntu*, but it is commonly expressed in the Nguni phrase *nmuntu ngumuntu ngabantu*, which means "a human being is a human being because of other human beings".<sup>51</sup> *Ubuntu* can also be expressed in the words of Joseph Mbiti "I am because we are; and since we are, therefore I am."<sup>52</sup> These phrases indicate that *ubuntu* deals with our interconnectedness as human beings. According to Gade,<sup>53</sup> *ubuntu* can be understood in two senses, firstly, as a moral quality of a person, and secondly, as an ethic in terms of which people are interconnected.

*uBuntu* was introduced into South African jurisprudence by the epilogue of the 1993 Constitution of South Africa, which states that -

there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization.

In *S v Makwanyane*,<sup>54</sup> the Constitutional Court elaborated on the concept of *ubuntu* for the first time, although the judges touched on different aspects. In attempting to define *ubuntu*, Justice Mokgoro's explanation of *ubuntu* firstly as personhood or morality is often quoted.<sup>55</sup> She explains that *ubuntu*

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<sup>49</sup> *Ubuntu* as a term is discussed in more detail in Chapter 3.

<sup>50</sup> Metz 2014 *AHRLJ* 307.

<sup>51</sup> Letseka 2012 *Studies in Philosophy and Education* 48; Gade 2012 *South African Journal of Philosophy* 487; Mokgoro 1998 *PELJ* 2-3.

<sup>52</sup> Ogunbanjo and Knapp van Bogaert 2005 *South African Family Practice* 52.

<sup>53</sup> Gade 2012 *South African Journal of Philosophy* 488.

<sup>54</sup> 1995 6 BCLR 665 (CC). This case dealt with the abolishment of the death penalty and is discussed in more depth at 3.4.1.

<sup>55</sup> Para 307. See for example Malan 2014 *De Jure* 235; Bennett 2011 *PELJ* 34; Kroeze 2002 *Stell LR* 255.

encapsulates respect for human dignity and that it manifests in the concept of humanity.<sup>56</sup> She also emphasises that the spirit of *ubuntu* indicates a shift from confrontation to conciliation.<sup>57</sup> Justice Langa refers to the duty that *ubuntu* places on people to respect each other's dignity.<sup>58</sup> Justice Madala states that *ubuntu* entails humaneness, social justice and fairness, although not delving further into the meaning of these terms or the link between them.<sup>59</sup>

Since the *S v Makwanyane*<sup>60</sup> judgment, the judiciary and scholars embraced *ubuntu* as an important value in the interpretation of other rights and legislation. In *PE Municipality v Various Occupiers*<sup>61</sup>, Sachs J states the following regarding *ubuntu*—

The Constitution and PIE [Prevention of Illegal Eviction from and Unlawful Occupation of Land Act] confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

Sachs J makes it clear that the Constitution does not function within a liberal vacuum where the focus is only on the individual, but that the constitutional order combines individual rights with communitarianism. Despite the importance attached to *ubuntu*, it is not clearly discernible from the above-mentioned case law what *ubuntu* requires as a constitutional value.

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<sup>56</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 307.

<sup>57</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 307.

<sup>58</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 224.

<sup>59</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 237.

<sup>60</sup> 1995 6 BCLR 665 (CC).

<sup>61</sup> *PE Municipality v Various Occupiers* 2005 1 SA 517 (CC) para 37. This case dealt with the eviction of unlawful occupiers from land and is discussed in more depth at 3.4.8.

*Dikoko v Mokhatla*<sup>62</sup> centred on the immunity given to municipal councillors when an action for defamation has been brought against them.<sup>63</sup> In deciding the matter the court borrowed from "traditional law and culture", which is based on the restoration of harmonious human and social relationships to solve a dispute where these relationships have been ruptured by an infraction of community norms.<sup>64</sup> The court criticised the western notion of compensation which entails impoverishing the defendant and held that:<sup>65</sup>

A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process.

In *Dikoko v Mokhatla*,<sup>66</sup> *ubuntu* was clearly related to the concept of restorative justice.<sup>67</sup> The court stated that the law should try as far as possible to restore good relationships rather than making an order that would separate people even further. In the more recent case of *Joseph v City of Johannesburg*,<sup>68</sup> the court had to decide on people's right to electricity.<sup>69</sup> The court held that the *Batho Pele*<sup>70</sup> principles give expression to the constitutional value of *ubuntu*.<sup>71</sup> The court noted further that courts must move beyond the idea of rights as strictly individual entitlements.<sup>72</sup>

It seems as if the courts have given some meaning to the term *ubuntu*, albeit in very vague terms. Against this background, one could argue that

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<sup>62</sup> 2006 6 SA 235 (CC).

<sup>63</sup> This case is discussed in more depth at 3.4.9.

<sup>64</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 68.

<sup>65</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 68.

<sup>66</sup> 2006 6 SA 235 (CC).

<sup>67</sup> Malan 2014 *De Jure* 238.

<sup>68</sup> 2010 4 SA 55 (CC).

<sup>69</sup> This case is discussed in more depth at 3.4.4.

<sup>70</sup> These principles include: consultation, service standards, access; courtesy; information; openness and transparency; redress; value for money; encouraging innovation and rewarding excellence; customer impact; leadership and strategic direction. For a list of the *Batho Pele* principles see <http://www.kzncomsafety.gov.za/Default.aspx?tabid=232>.

<sup>71</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46 footnote 39.

<sup>72</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46 footnote 39.

the judiciary's pursuit of social justice should be understood against the background of *ubuntu* as a constitutional value. It is therefore necessary to find a proper understanding of the concept social justice.

### **1.3 The pursuit of social justice**

As alluded to above, one of the aims of the Constitution is social justice. There is no uniform definition of social justice, although several scholars have theorised on the concept. John Rawls,<sup>73</sup> Nancy Fraser,<sup>74</sup> Martha Nussbaum<sup>75</sup> and Amartya Sen<sup>76</sup> are some of the main theorists on social justice.

John Rawls is one of the most influential writers on this topic. He framed a particular theory on social justice called "Justice as Fairness".<sup>77</sup> To illustrate the idea, he uses fictitious people behind a veil of ignorance who have no idea who they are or what their position in society is.<sup>78</sup> These people then have to decide on rules for the society they live in. All people compete for primary social goods such as basic rights and freedoms, including wealth and power.<sup>79</sup> A key principle in Rawls' theory is that the society should be organised in such a way that the worst off person in society should be in the best possible position.<sup>80</sup>

Despite the popularity of Rawls' theory, various authors have criticised it. Sen and Nussbaum theorise the capabilities approach, for example.<sup>81</sup> Sen argues that even though two people have the same means or "primary

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<sup>73</sup> Rawls *A Theory of Justice*.

<sup>74</sup> Fraser "Social Justice in the Age of Identity Politics" 72-91.

<sup>75</sup> Nussbaum 2003 *Feminist Economics* 33-59.

<sup>76</sup> Sen 2005 *Journal of Human Development* 151-166.

<sup>77</sup> Johnson *et al* 2001 *Jurisprudence* 180.

<sup>78</sup> Rawls *A Theory of Justice* 136-137.

<sup>79</sup> Rawls *A Theory of Justice* 144.

<sup>80</sup> Rawls *A Theory of Justice* 152-153.

<sup>81</sup> Nussbaum 2003 *Feminist Economics* 50 – 51.

goods", they can still have substantially different opportunities.<sup>82</sup> For example, a disabled person can do less with the income (primary goods) that an able-bodied person receives.<sup>83</sup> Nussbaum too criticises the Rawlsian theory of social justice from a gender perspective.<sup>84</sup> She argues that any theory of social justice should take women's capabilities into account, since they are more vulnerable to violence and abuse and generally less healthy than men.<sup>85</sup> Sen and Nussbaum argue that the best way to understand rights is to understand it in terms of capabilities. In other words, people cannot exercise their rights if they do not have sufficient capabilities to do so.<sup>86</sup>

Nancy Fraser has a multi-dimensional theory of social justice that does not only focus on the distributive aspect of justice, but on recognition as well.<sup>87</sup> Distribution focuses on the economic structure of society and the economic exploitation of people.<sup>88</sup> Distributive aspects would typically include access to services and to the labour market.<sup>89</sup> Recognition on the other hand is rooted in social representation, interpretation and communication.<sup>90</sup> Issues that would relate to recognition would be marginalisation of minority groups or misrecognition of certain cultures.<sup>91</sup>

Although scholarly ideas on the standard of social justice differ, scholars on social justice have one thing in common, namely that it deals with the distribution of benefits and burdens in society.<sup>92</sup> Social justice is also

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<sup>82</sup> Sen 2005 *Journal of Human Development* 154.

<sup>83</sup> Sen 2005 *Journal of Human Development* 154.

<sup>84</sup> Nussbaum 2003 *Feminist Economics*.

<sup>85</sup> Nussbaum 2000 *Journal of Human Development* 219.

<sup>86</sup> Nussbaum 2003 *Feminist Economics* 37.

<sup>87</sup> Fraser "Social Justice in the Age of Identity Politics" 6.

<sup>88</sup> Fraser "Social Justice in the Age of Identity Politics" 6.

<sup>89</sup> Fraser "Social Justice in the Age of Identity Politics" 7.

<sup>90</sup> Fraser "Social Justice in the Age of Identity Politics" 7.

<sup>91</sup> Fraser "Social Justice in the Age of Identity Politics" 7.

<sup>92</sup> See 4.2. Social justice as a concept is discussed in depth in Chapter 4 as well as its relation to *ubuntu* in Chapter 5.

particularly concerned with the vulnerable people in society, such as women, children, disabled people and the elderly. It has been mentioned that *ubuntu* relates to the treatment of people as human beings. The goal of social justice is also the inclusion of all members of society, particularly those who are vulnerable.

Keeping in mind that the judiciary is a key agent in transformative constitutionalism and that social justice is an important goal in South Africa, this study asks to what extent the judiciary can and should use *ubuntu* as a justiciable constitutional value to contribute towards the pursuit of social justice in South Africa.

#### **1.4 Objectives**

In light of the above-mentioned outline, the objectives of the study are to:

- distil the meaning and purpose of constitutional values;<sup>93</sup>
- arrive at a legal understanding of *ubuntu*;<sup>94</sup>
- determine if *ubuntu* is a justiciable constitutional value;<sup>95</sup>
- arrive at an understanding of social justice;<sup>96</sup>
- indicate that *ubuntu* as a justiciable constitutional value can contribute to the interpretation of issues of social justice;<sup>97</sup> and
- make recommendations for the use of *ubuntu* as a justiciable constitutional value in the judiciary's pursuit of social justice.<sup>98</sup>

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<sup>93</sup> See Chapter 2.

<sup>94</sup> See Chapter 3.

<sup>95</sup> See Chapter 2 and 3.

<sup>96</sup> See Chapter 4.

<sup>97</sup> See Chapter 5.

<sup>98</sup> See Chapter 6.

### **1.5 Assumptions**

This study relies on a few assumptions. The first of these assumptions is that social justice is one of the objectives of the South African constitutional dispensation. This is evident from the preamble of the Constitution and various court judgments. The second assumption is that social justice is a key part of transformative constitutionalism and that the judiciary is one of the key role players in achieving it.

### **1.6 Hypothesis**

The hypothesis of this study is that *ubuntu* is a justiciable constitutional value that can contribute towards the realisation of social justice in South Africa.

### **1.7 Research methodology**

This study consists of an in-depth literature review, consulting sources such as books, academic journals, case law, reports and internet sources. Chapter 1 introduces the research question by providing an overview of the problem. Chapter 2 consists of a review of literature to establish the meaning of constitutional values. Firstly, different authors' opinions on the nature of constitutional values are discussed and analysed. Thereafter, Chapter 2 proceeds with a discussion on the manner in which courts have dealt with other constitutional values. Chapter 3 consists of a critical discussion of various scholars' opinions on the meaning and value of *ubuntu*. Chapter 3 continues with an analysis of all the case law on *ubuntu* in South Africa. In order to establish an understanding of social justice, Chapter 4 consists of a literature review and analysis of the major theories on social justice, which include that of Rawls, Young, Fraser, Sen and Nussbaum. Chapter 5 is a discussion of the various links that can be made between

*ubuntu* and social justice before a conclusion and recommendations are presented in the final chapter.

## Chapter 2

### Perspectives on constitutional values

#### 2.1 Introduction

As mentioned in Chapter 1, constitutional values have been one of the trademarks of the South African Constitution.<sup>99</sup> Since its adoption the South African courts have followed a value-orientated approach to the interpretation of fundamental rights.<sup>100</sup> The importance of values is evident from the constitutional text itself. Section 1 of the Constitution proclaims that the Republic of South Africa is founded on certain values.<sup>101</sup> These values include human dignity; the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; the supremacy of the Constitution; the rule of law; universal adult suffrage; a national common voters roll; regular elections and a multi-party system of democratic government. Section 39 of the Constitution further mandate courts to promote the values that underlie an open and democratic society when interpreting the Bill of Rights. Despite the apparent importance ascribed to values, the precise role that they play during adjudication is not always entirely clear. The question thus arises what constitutional values are and how they should be used.

In addition, a question that is contingent on the meaning and function of constitutional values is whether there is a difference between rights and values. Given that there is a long list of values in the Constitution, it is not clear whether there is a hierarchy of constitutional values. The purpose of this chapter is to determine the role and meaning of constitutional values and to determine whether one could argue that a hierarchy of values exists.

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<sup>99</sup> See 1.1.

<sup>100</sup> Venter *Constitutional Comparison* 140-141.

<sup>101</sup> Section 1 of the Constitution.

A discussion about the role and function of constitutional values is necessary in order to arrive at a conclusion on the role and function of *ubuntu* as a value, which follows later.<sup>102</sup> The goal is to ultimately investigate the possible uses of *ubuntu* as a constitutional value in the pursuit of social justice. However, for this chapter, the focus is only on constitutional values.

In the body of literature on *ubuntu* as a judicial concept, there is only one contribution that prods at the nature of constitutional values in relation to *ubuntu*.<sup>103</sup> This seems to be a gap in this regard, and further contributions could shed more light on the use of *ubuntu* by the courts. In order to reach this objective, scholarly opinions and court judgments dealing with constitutional values in general are discussed and analysed.

## **2.2 Scholarly viewpoints on constitutional values**

Scholarly work on the nature of constitutional values are sparse, specifically within the South African context. A few South African authors have voiced varied opinions on the concept. What follows is an overview of some of the most prominent viewpoints in this regard.

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<sup>102</sup> See chapter 3.

<sup>103</sup> For example see Kroeze 2002 *Stell LR* 252-264. Other contributions dealing with *ubuntu* as a judicial concept include: Bohler-Muller 2005 *SAPL* 266-280; Mokgoro and Woolman 2010 *SAPL* 400-407; Van Niekerk 2013 *Fundamina* 397-412; Mnyongani 2010 *Obiter* 134-145; Motha 2009 *SAPL* 297-327; Cornell 2004 *SAPL* 666-675; Ndimma 2015 *Comparative and International Law Journal of South Africa* 359-380; Mnyandu 2018 *Obiter* 384 – 398; Metz 2011 *African Human Rights Law Journal* 532-559; Cornell 2010 *SAPL* 382-399; Keevy 2009 *Journal for Juridical Science* 61-88; Church 2012 *De Jure* 511-531; Oyowe 2013 *African Human Rights Law Journal* 103-124; Keevy 2009 *Journal for Juridical Science* 19-58; Bekker 2006 *SAPL* 333-344; Himonga *et al* 2013 *PELJ* 369-427; Cornell and Van Marle 2005 *African Human Rights Law Journal* 195-220; Bennett 2011 *PELJ* 30-61; Mukheibir 2007 *Obiter* 583-589; Kamga 2018 *African Human Rights Law Journal* 625-649; Malan 2014 *De Jure* 231-257; Nkosi 2018 *SAPL* 1-20; Van Niekerk 2005 *Obiter* 474-487.

### 2.2.1 Kroeze – constitutional values and rehearsed rhetorical routines

Kroeze has made two important contributions in the field of constitutional values and constitutional adjudication. The first of these deals with values in general and the second deals specifically with *ubuntu* as a constitutional value.<sup>104</sup> In the first contribution she is not forthcoming with a solution to the question as to what constitutional values are and what courts should do with them. Rather, her contribution lies in the fact that she problematises the use of constitutional values by the Constitutional Court.

Kroeze<sup>105</sup> notes that courts often refer to constitutional values without explaining the exact meaning of the concept. She starts off by explaining that academics often make the argument that a literalist/positivistic approach separates law from morality and that a purposive and teleological approach is needed as it makes use of a value-laden approach to interpretation.<sup>106</sup> With the adoption of the new and Interim Constitution, most people agreed that values play an important part during adjudication. It was assumed that the use of values, she adds, would be a move away from a literalist positivistic tradition.<sup>107</sup> In her opinion one of the main challenges is that the Constitutional Court has "hidden and unexamined rhetorical routines".<sup>108</sup> She adds that these routines are contained in "the discursive practices of normative legal thought".<sup>109</sup> She argues that constitutional values have replaced the so-called "intention of the legislature" in the sense that the judiciary believes that there is an objective set of criteria to be found that restrains the judiciary's discretion.<sup>110</sup> She

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<sup>104</sup> See Kroeze 2001 *Stell LR* 265-276 and Kroeze 2002 *Stell LR* 252-264.

<sup>105</sup> Kroeze 2001 *Stell LR* 273. Kroeze notes the exception of the explanation of *ubuntu* and *regstaat* in *S v Makwanyane* 1995 6 BCLR 665 (CC).

<sup>106</sup> Kroeze 2001 *Stell LR* 265.

<sup>107</sup> Kroeze 2001 *Stell LR* 266.

<sup>108</sup> Kroeze 2001 *Stell LR* 267.

<sup>109</sup> Kroeze 2001 *Stell LR* 267.

<sup>110</sup> Kroeze 2001 *Stell LR* 271.

argues further that this shows a formalism in legal thinking as the judiciary assumes that the meaning of values can be defined.<sup>111</sup> Kroeze<sup>112</sup> adds that she is not of the opinion that constitutional values should have a clear and objective meaning, but that the courts should at least explain what a constitutional value means in a specific case. However, the courts routinely simply state that something is not in line with a specific value without giving content to that value.<sup>113</sup>

It seems that Kroeze's dissatisfaction is not with the content that the Constitutional Court has given to constitutional values, but about the fact that the court does not give any content to the values. The fact that the courts often do not give any content leads her to conclude that the courts deal with values as if they have uncontested and certain meanings.<sup>114</sup> For Kroeze<sup>115</sup> this reveals a larger problem that the courts have not taken the so-called "linguistic turn". Stated differently, one could say that the courts do not take into account that values are applied within a certain context and the meaning assigned to them will have a certain ideological basis. Kroeze does not state what the alternative to the legal formalistic approach that the courts are taking to values should be. She notes that despite the South African courts' insistence on an objective value system, it is impossible to objectively determine the content of values.<sup>116</sup>

To Kroeze,<sup>117</sup> the location of constitutional values presents a further challenge. She states that it is not clear if one should find the values outside

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<sup>111</sup> Kroeze 2001 *Stell LR* 271.

<sup>112</sup> Kroeze 2001 *Stell LR* 273.

<sup>113</sup> Kroeze 2001 *Stell LR* 273.

<sup>114</sup> Kroeze 2001 *Stell LR* 275.

<sup>115</sup> Kroeze 2002 *Stell LR* 264. The linguistic turn is the idea that language is not just a tool to describe reality it creates reality as well. Du Plessis 2001 *SALJ* 794 states that "succintly verbalized, the linguistic turn in legal interpretation amounts to this: meaning is not discovered in a text, but is made in dealing with a text". Regarding the linguistic turn, also see Painter and Theron 2001 *Acta Academia* 36-66.

<sup>116</sup> Kroeze 2007 *SAPL* 330.

<sup>117</sup> Kroeze 2001 *Stell LR* 267.

or inside of the constitutional text. The Constitution speaks, for example, of values underlying, underpinning or reflected in the Constitution.<sup>118</sup> The first problem that locating values inside the text presents is textualism.<sup>119</sup> Textualism refers to the approach that the meaning of a provision can be determined from the literal meaning of a text without any consideration of extra-textual factors. Secondly, Kroeze mentions that the courts do not seem to be sure which values do underlie the Constitution.<sup>120</sup> The value of dignity, for example, was not mentioned in the Interim Constitution. It was, however, used as a value in *S v Makwanyane*.<sup>121</sup> Other phrases that the courts have confused with values include respect for life, the *regstaat*, the prohibition of arbitrariness and separation of powers.<sup>122</sup> The counter-argument to Kroeze's argument is that it might very well be within the powers of the court to create values not explicitly mentioned in the constitutional text.<sup>123</sup>

However, Kroeze<sup>124</sup> agrees that the meaning of values can be sought outside the constitutional text, but is of the opinion that this too presents its own challenges. The first problematic issue pertains to the question where the values should be found outside of the text.<sup>125</sup> Section 39 of the Constitution speaks of "values of an open and democratic society". She states that the courts either find these values within the current South African society or an ideal future South African society.<sup>126</sup> In addition, the courts also look to comparable democracies to find values.<sup>127</sup> Kroeze<sup>128</sup> argues that these

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<sup>118</sup> Kroeze 2001 *Stell LR* 267.

<sup>119</sup> Kroeze 2001 *Stell LR* 269.

<sup>120</sup> Kroeze 2001 *Stell LR* 269.

<sup>121</sup> Kroeze 2001 *Stell LR* 269. *S v Makwanyane* 1995 3 SA 391 (CC) para 111.

<sup>122</sup> Kroeze 2001 *Stell LR* 269.

<sup>123</sup> Extra-textual values are further discussed in 2.3.6.

<sup>124</sup> Kroeze 2001 *Stell LR* 267.

<sup>125</sup> Kroeze 2001 *Stell LR* 268.

<sup>126</sup> Kroeze 2001 *Stell LR* 268.

<sup>127</sup> Kroeze 2001 *Stell LR* 268-269.

<sup>128</sup> Kroeze 2001 *Stell LR* 268. This can be debated since there are many cases where the courts have, for example, referred to values in the German legal system. See

jurisdictions are restricted to the United States and Canada. She finds it problematic, for example, that Chaskalson J compared the South African legal value system to that of the American legal value system and that the American legal value system is entirely viewed as consistent with *ubuntu*.<sup>129</sup> Kroeze's<sup>130</sup> grievance is that the court has not indicated what the values of the American system or *ubuntu* entail. Even if one were to find the values inside the text, different normative frameworks can still be assigned to them. She adds that the courts often confuse the meaning of rights and values.<sup>131</sup>

In her second contribution Kroeze comes to the conclusion that the problem is not as such the concept of *ubuntu*, but the manner in which the Constitutional Court goes about with values in general.<sup>132</sup> According to her, the problem lies with what Schlag<sup>133</sup> calls "the politics of form". "The politics of form" provides that traditional legal discourse determines what can be regarded as acceptable legal discourse.<sup>134</sup> It does this by assuming that the *form*, i.e. the manner in which legal discourse takes place, is neutral.<sup>135</sup> The

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<sup>129</sup> Rautenbach and Du Plessis 2013 *German Law Journal* 1559-1571 for a discussion on cases where the Constitutional Court referred to German precedent.  
Kroeze 2001 *Stell LR* 269. In *S v Makwanyane* 1995 6 BCLR 665 (CC) para 58 Chaskalson quotes from the American case of *Gregg v Georgia* 428 US 153, 173 (1976) and states the following "The weight given to human dignity by Justice Brennan is wholly consistent with the values of our Constitution and the new order established by it". At the end of his judgment in *S v Makwanyane* 1995 6 BCLR 665 (CC) para 131 Chaskalson states the following: "To be consistent with the value of *ubuntu* ours need to be a society that 'wishes to prevent crime... [not] to kill criminals simply to get even with them'."

<sup>130</sup> Kroeze 2001 *Stell LR* 269.

<sup>131</sup> Kroeze 2001 *Stell LR* 271.

<sup>132</sup> Kroeze 2001 *Stell LR* 262. This chapter specifically focuses on her viewpoints regarding constitutional values in general.

<sup>133</sup> Schlag 1991 *University of Penn Law Review* 801-932. Kroeze 2002 *Stell LR* 258.

<sup>134</sup> Kroeze 2001 *Stell LR* 259.

<sup>135</sup> Kroeze 2001 *Stell LR* 259. Schlag 1990 *Cardozo Law Review* 1632-1633.

form of legal discourse that pains Kroeze<sup>136</sup> is the traditional formalistic thought that she sees as inherent in the South African legal system.

She specifically states that the formalism of the South African judiciary has hindered a value such as *ubuntu* from developing as a result of three rhetorical moves employed by the Constitutional Court.<sup>137</sup> Firstly, the court has made a great effort to prove that *ubuntu* is a universal value, i.e. no different from many other values, such as dignity or freedom.<sup>138</sup> For Kroeze<sup>139</sup> the problem with this rhetorical move is that once values are seen as universal, they no longer have to be explained. Secondly, as a rhetorical move, Kroeze finds the way in which *ubuntu* is defined problematic. The courts seem to be using numerous terms to define the value of *ubuntu*, including terms such as humanity, human dignity, compassion, solidarity.<sup>140</sup> According to Kroeze,<sup>141</sup> ascribing so many terms to a single concept has caused the concept of *ubuntu* to become empty.<sup>142</sup> The third rhetorical move is a dichotomous form of thinking.<sup>143</sup> In relation to *ubuntu*, it implies that *ubuntu* is seen as communitarian, which is the opposite of liberalism.<sup>144</sup> The formalism in this type of thinking lies therein that liberalism is seen as strictly individualistic and that *ubuntu* is seen as strictly communitarian.<sup>145</sup>

Kroeze<sup>146</sup> discusses these three rhetorical routines not as a problem of *ubuntu* but as "something wrong with the Constitutional Court's approach to constitutional values". Following Schlag, she states that the ontological

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<sup>136</sup> Kroeze 2001 *Stell LR* 259.

<sup>137</sup> Kroeze 2001 *Stell LR* 260.

<sup>138</sup> Kroeze 2001 *Stell LR* 260.

<sup>139</sup> Kroeze 2001 *Stell LR* 260.

<sup>140</sup> Kroeze 2001 *Stell LR* 260.

<sup>141</sup> Kroeze 2001 *Stell LR* 260.

<sup>142</sup> Kroeze 2001 *Stell LR* 260.

<sup>143</sup> Kroeze 2001 *Stell LR* 261.

<sup>144</sup> Kroeze 2001 *Stell LR* 261.

<sup>145</sup> Kroeze 2001 *Stell LR* 261.

<sup>146</sup> Kroeze 2001 *Stell LR* 262.

status of values first has to be determined.<sup>147</sup> The ontological status can either be deep (meaning that they form an important part of the manner in which society is put together) or superficial (meaning that they are simply derived from other values or subordinate).<sup>148</sup> The court assumes the ontological depth of a concept and becomes "complacently pragmatic".<sup>149</sup> In the final instance, she adds that the court fails to see how the choices that are made regarding values reveal the power relations they support.<sup>150</sup>

Kroeze brings to the fore many valid concerns regarding the use of constitutional values by the Constitutional Court. However, she does not give any further guidance on how the court should go about using constitutional values, or perhaps more importantly, how courts have to make difficult ideological choices between values as she points out. Later on, I argue that the phenomenon that Kroeze speaks of is part of the constitutional and statutory interpretation required in the current constitutional dispensation and that there is all the more a responsibility on the judiciary to justify their decisions.<sup>151</sup>

### *2.2.2 Venter – values as standards*

Venter<sup>152</sup> describes section 1 of the Constitution, which sets out the values of the Constitution, as the most important founding provision. He adds that the values in section 1 should be part of the interpretation of the Constitution as well as the interpretation of any legal norm in legislation and common law.<sup>153</sup> In answer to the question whether there is a difference between a principle and a value, he notes that a principle gives expression

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<sup>147</sup> Kroeze 2001 *Stell LR* 262. Schlag *Laying down the law* 42-59.

<sup>148</sup> Kroeze 2001 *Stell LR* 262.

<sup>149</sup> Kroeze 2001 *Stell LR* 263.

<sup>150</sup> Kroeze 2001 *Stell LR* 263.

<sup>151</sup> See 2.7.

<sup>152</sup> Venter *Constitutional Comparison* 140-141.

<sup>153</sup> Venter *Constitutional Comparison* 141.

to a value, but elsewhere he adds that one can assume that they are part of the same phenomena that create standards for judicial interpretation.<sup>154</sup>

He defines a constitutional value as something that:<sup>155</sup>

sets requirements for the appropriate or desired interpretation, application and operationalization of the Constitution and everything dependent thereupon

He continues to state that constitutional values have a particular role to play in filling lacunae in the law.<sup>156</sup> Lacuna in the law are bound to arise as the law does not cater for every possible eventuality or human development.<sup>157</sup> Constitutional values aid the judiciary in the development of the law.<sup>158</sup> Venter is, however, silent on the manner in which the judiciary should go about giving meaning to constitutional values.<sup>159</sup> He is also silent on the role and importance of extra-textual values such as *ubuntu* that are pronounced in case law or the manner in which courts have to arrive at the meaning of a particular constitutional value.<sup>160</sup> It appears that Venter accepts that constitutional values come with ready-made meanings. Such an approach is indicative of the legal formalism that Kroeze speaks of.

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<sup>154</sup> Venter 2014 *Tulane European and Civil Law Forum* 91.

<sup>155</sup> Venter 2001 *PELJ* 6. Venter *Global Features of Constitutional Law* 56. Venter 2014 *Tulane European and Civil Law Forum* 91.

<sup>156</sup> Venter 2014 *Tulane European and Civil Law Forum* 91-92.

<sup>157</sup> Venter 2014 *Tulane European and Civil Law Forum* 99.

<sup>158</sup> Venter 2014 *Tulane European and Civil Law Forum* 99.

<sup>159</sup> In Venter 2001 *PELJ* 37-40 he does however note that when looking to other jurisdictions to give content to constitutional values it is important that it is a comparable jurisdiction. He says the following: "To illustrate it would not be convincing to quote the latest American decisions in South Africa to make a case for a "colour-blind" approach to affirmative action. Nor would one be justified to argue, with reference to one Canadian school of thought, that affirmative action should be dealt with as an exception to the proscription of discrimination while there is also a persuasive argument in Canadian literature that the affirmation action provision gives content to the basic concept of equality."

<sup>160</sup> See 2.4 for a more in-depth discussion on extra-textual values.

### 2.2.3 Other authors

Mureinik<sup>161</sup> mentions that one of the main aims of the Constitution is to create a bridge to move away from a discriminatory past. Bray<sup>162</sup> follows Mureinik's opinion that one of the main aims of constitutional values is to guide South Africa in moving forward towards a democratic future away from our discriminatory past. She admits that the discussion on the origin of constitutional values is complex.<sup>163</sup> She sees the origin and authority of constitutional values emanating from the constitutional negotiating and drafting process.<sup>164</sup> To Bray, the constitutional values (including *ubuntu*) were democratically chosen as the people of South Africa chose the constitutional negotiation process.<sup>165</sup>

Bray<sup>166</sup> states that constitutional values are also based on international norms to ensure a place for South Africa in the international arena as part of the "internationalisation and universalisation of human rights". Importantly, Bray<sup>167</sup> notes that constitutional values create the context within which fundamental rights function and also determine their nature and limitation. This has the implication that constitutional values assist courts in interpreting rights. Bray is of the opinion that legal rules are not value-free, but fails to realise that values are not neutral or value-free

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<sup>161</sup> Mureinik 1994 *SAJHR* 31.

<sup>162</sup> Bray 2004 *Perspectives in Education* 39.

<sup>163</sup> Bray 2004 *Perspectives in Education* 39.

<sup>164</sup> Bray 2004 *Perspectives in Education* 39.

<sup>165</sup> Bray 2004 *Perspectives in Education* 39.

<sup>166</sup> Bray 2004 *Perspectives in Education* 39.

<sup>167</sup> Bray 2004 *Perspectives in Education* 40.

either.<sup>168</sup> In other words, the very values that ideologically inform rights need a particular interpretation itself.

Botha<sup>169</sup> is of the opinion that the Constitution requires a value-orientated approach and that such an approach would not imply the use of "metaphysical speculation" or "transcendental truths" as in the natural law tradition. He is furthermore of the opinion that interpretation is culturally and historically situated, with the effect that historical, social and comparative texts have to be used during interpretation.<sup>170</sup> The values listed in the Constitution are also an indication of the society that South Africa wants to move away from.<sup>171</sup> This viewpoint coincides with the vision of the Constitution as a transformative document. He defines values as "the ideals to which a political community has committed itself".<sup>172</sup> Botha<sup>173</sup> notes that the constitutional negotiations awakened many fears over the type of political and legal system that would be at the order of the day. Western-style liberalism received a few objections in particular. Firstly, too much emphasis on individuality would (particularly property rights) interfere with egalitarian objectives.<sup>174</sup> Secondly, an order that places too much emphasis on individual rights would be foreign to many African people, as they are accustomed to a communitarian approach.<sup>175</sup> In this regard, he states the following:<sup>176</sup>

In a nutshell, the constitutional debate centred around diametrically opposite views: between those seeking to entrench the *status quo*, and those fighting

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<sup>168</sup> Bray 2004 *Perspectives in Education* 39.

<sup>169</sup> Botha 1994 *SAPL* 237. In this regard Botha refers to the US Supreme Court system at the beginning of the twentieth century, as an example of the natural law approach that referred to concepts such as "God-given rights" and "natural rights" to prevent social reform. See Botha 1994 *SAPL* 236.

<sup>170</sup> Botha 1994 *SAPL* 237.

<sup>171</sup> Botha 1994 *SAPL* 237.

<sup>172</sup> Botha 1994 *SAPL* 237.

<sup>173</sup> Botha 1994 *SAPL* 237.

<sup>174</sup> Botha 1994 *SAPL* 238.

<sup>175</sup> Botha 1994 *SAPL* 238-239.

<sup>176</sup> Botha 1994 *SAPL* 239.

for liberation; between those in favour of continued balkanisation, and those in favour of a united South Africa; between Western-style liberalism, with its emphasis on individual entitlement, and the more communal approach of both socialism and traditional African societies; between a human rights order, drawing on internationally approved norms and standards (and therefore appealing to cultural universalism), and the cultural relativism of 'indigenous' solutions.

Botha<sup>177</sup> believes that it is possible to accommodate the liberal, traditional and socialist elements in one Constitution. The political elements do, however, have an effect on how the content of constitutional values can be defined. The debate on which political elements to use in the Constitution does not seem to be as straightforward or easy as Botha implies. He argues that social, historical and comparative texts are needed in the act of interpretation, and that judges undoubtedly need some guidance as to which (political) order the Constitution aspires to. This debate is directly relevant to the value of *ubuntu* as it raises the question whether strict individual entitlements are more important than communitarian ones.

It is also useful to look to authors outside the South African jurisdiction. Discourse on values is after all not unique to South Africa. After World War II, many countries included values into their constitutions.

Galban Rodriguez identifies various functions of constitutional values by looking at Latin American constitutions. Firstly, constitutional values have a legitimising function.<sup>178</sup> They legitimise the political, economic, social, cultural and legal system.<sup>179</sup> Secondly, constitutional values perform a guiding function in the sense that they guide the state and all its actors towards certain goals.<sup>180</sup> Thirdly, constitutional values serve as a standard according to which to measure behaviours, decisions,

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<sup>177</sup> Botha 1994 *SAPL* 238-239.

<sup>178</sup> Galban Rodriguez *Constitutional Values* 54.

<sup>179</sup> Galban Rodriguez *Constitutional Values* 54.

<sup>180</sup> Galban Rodriguez *Constitutional Values* 54.

actions and other legal standards.<sup>181</sup> Fourthly, constitutional values serve as the foundation for the validity of other laws, principles and rights.<sup>182</sup> Constitutional values also serve as a standard for the creation of new rights, standards and principles.<sup>183</sup> In the final instance, constitutional values have an interpretive function.<sup>184</sup>

Many of the functions that Galban Rodriguez mentions coincide with the South African uses of values, including the legitimising function, functioning as a standard for other rights, and an interpretive function.

### ***2.3 Views on specific constitutional values***

The discussion above centred on the general nature and function of constitutional values. The authors seem to agree that values assist courts in the interpretation and limitation of rights as they provide a certain standard. The authors are also in agreement that constitutional values reflect the ideal society. Some authors, however, take for granted that giving meaning and content to constitutional values is itself part of the constitutional process. The discussion that follows looks at specific constitutional values, how the South African courts and scholars have interpreted them, and how they see the role of values in the constitutional order. I focus only on specific values to elucidate relevant points for the discussion.

#### *2.3.1 The value of human dignity*

Human dignity is recognised both as a value and as a right in the Constitution. As a value, it is found in the founding provision,<sup>185</sup> the limitation

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<sup>181</sup> Galban Rodriguez *Constitutional Values* 57.

<sup>182</sup> Galban Rodriguez *Constitutional Values* 57.

<sup>183</sup> Galban Rodriguez *Constitutional Values* 58.

<sup>184</sup> Galban Rodriguez *Constitutional Values* 58.

<sup>185</sup> Section 1 of the Constitution.

clause,<sup>186</sup> as well as the interpretation provision.<sup>187</sup> The dignity jurisprudence of the Constitutional Court is particularly strong as this value has often been invoked in the interpretation of rights as per section 39 of the Constitution and in the limitation of rights as per section 36.<sup>188</sup> However, as becomes apparent in the discussion below, the meaning of dignity is not fixed and the courts have interpreted the right and value of dignity in a variety of ways.

According to Ackermann,<sup>189</sup> the Constitutional Court's jurisprudence of dignity is rooted in Kantian philosophy. Kantian philosophy provides that people should be seen as ends in themselves rather than a means to an end.<sup>190</sup> It also provides that people should be seen as rational self-determining individuals who can make choices about their own lives.<sup>191</sup>

Therefore, people should not be seen as objects. Other authors move away from this viewpoint and see the content of human dignity in a pluralistic manner.

Steinmann,<sup>192</sup> for example, relying on Neuman,<sup>193</sup> notes that the right to human dignity is suprapositive as it receives legitimacy from extra-legal

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<sup>186</sup> Section 36 of the Constitution.

<sup>187</sup> Section 39 of the Constitution.

<sup>188</sup> Woolman *The Architecture of Dignity* 73; Liebenberg 2005 *SAJHR* 3; Botha 2009 *Stell LR* 172; Goolam 2001 *PELJ* 10; Du Plessis 2010 *SAPL* 688. Section 36 of the Constitution provides that "the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose."

<sup>189</sup> Ackermann *Human Dignity* 100.

<sup>190</sup> Law *Philosophy* 297.

<sup>191</sup> This heading does not permit a lengthy discussion on the philosophical viewpoints of Kant but serves to show that the courts have used different conceptions of dignity. For further reading on Kant and dignity see Cornell 2008 *Acta Juridica* 18-46; Botha 2009 *Stell LR* 183-186; Mokgoro and Woolman 2010 *SAPL* 400-407.

<sup>192</sup> Steinmann 2016 *PELJ* 3.

<sup>193</sup> Neuman 2003 *Stanford Law Review* 1868.

sources. There is no reason to think that the value of human dignity would be any different. Steinmann<sup>194</sup> is of the opinion that there are three ways of interpreting human dignity. Firstly, there is ontological , which refers to the Kantian view that every person has inherent worth. Steinmann<sup>195</sup> adds that, in accordance with Ciceronian Stoicism, a person's dignity is "rooted in his ability to reason and his self-actualisation". There are several examples of cases where the courts have employed the value of human dignity to interpret rights in the Kantian sense as mentioned. In *S v Makwanyane*,<sup>196</sup> for example, the Constitutional Court considered whether the death penalty was a justifiable punishment in criminal law. Despite the omission of dignity in the interpretation clause of the Interim Constitution, the court relied on the value of human dignity for the abolishment of the death penalty. The court found the death penalty to be a cruel and inhumane punishment by the fact that it instrumentalises an offender as a deterrent for future crimes while it has not been conclusively proven that the death penalty is an effective deterrent.<sup>197</sup> According to Mokgoro J, the death penalty dehumanises a person.<sup>198</sup> The fact that the court was of the opinion that the death penalty should not be used as a deterrent implies that the court used Kantian understanding of dignity.

Secondly, Steinmann<sup>199</sup> opines that the relational aspect of human dignity requires that others respect a person's human dignity. The fact that others must respect a person's dignity implies that there is a certain expectation that the individual has from the community, but at the same time broader society has expectations from individuals.<sup>200</sup> The case *MEC for Education:*

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<sup>194</sup> Steinmann 2016 *PELJ* 10.

<sup>195</sup> Steinmann 2016 *PELJ* 10.

<sup>196</sup> 1995 6 BCLR 665 (CC).

<sup>197</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 313.

<sup>198</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 316.

<sup>199</sup> Steinmann 2016 *PELJ* 17-18.

<sup>200</sup> Steinmann 2016 *PELJ* 18; Botha 2009 *Stanford Law Review* 219.

*Kwazulu-Natal v Pillay*<sup>201</sup> centred on the right of a school girl to wear a nose stud to school as part of her religion. The school used a school code that prohibited the wearing of jewellery to refuse her permission to wear the nose stud. In finding that she had been unfairly discriminated against, the court referred to the importance cultural identity for the concept of dignity. Langa holds that:<sup>202</sup>

Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.

In the above quotation the court expresses a relational view of dignity by explaining that the acceptance of a person's cultural identity is an important part of dignity. O'Regan refers to the importance of people making decisions that will give meaning to their lives. She also reiterates the importance of associative bonds of others in a community.<sup>203</sup>

In the third sense, the state should create conditions for people to live a dignified life.<sup>204</sup> The state could create these conditions through the realisation of socio-economic rights.<sup>205</sup> Liebenberg<sup>206</sup> is of the opinion that there are three major points of criticism against the use of human dignity as a value. The first is that it is difficult to determine the meaning of the value of human dignity.<sup>207</sup> Secondly, human dignity places great emphasis on individual liberty and freedom.<sup>208</sup> Thirdly, as a result of the emphasis on individual and personal aspects, it is not a useful value to use when dealing

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<sup>201</sup> 2008 2 BCLR 99 (CC).

<sup>202</sup> *MEC for Education: Kwazulu Natal v Pillay* 2008 2 BCLR 99 (CC) para 53.

<sup>203</sup> *MEC for Education: Kwazulu Natal v Pillay* 2008 2 BCLR 99 (CC) para 150-153.

<sup>204</sup> Steinmann 2016 *PELJ* 22.

<sup>205</sup> Steinmann 2016 *PELJ* 22.

<sup>206</sup> Liebenberg 2005 *SAJHR* 6.

<sup>207</sup> Liebenberg 2005 *SAJHR* 6.

<sup>208</sup> Liebenberg 2005 *SAJHR* 6.

with socio-economic redress or group-based discrimination.<sup>209</sup> Liebenberg<sup>210</sup> concedes, however, that the value of human dignity has positive contributions to make towards determining the obligations of the state in terms of realising socio-economic rights. In a similar vein to Steinmann, she agrees that relying on the Kantian view of dignity is too narrow. She argues that the value of human dignity requires that the state should not interfere with people's autonomy and liberties. On the other hand it requires the creation of social conditions that will enable people to practice their personal autonomy and liberties.<sup>211</sup> She relies on Nussbaum's list of capabilities to indicate that positive obligations rest on the state to give people a dignified life.<sup>212</sup> Liebenberg<sup>213</sup> is furthermore of the view that human dignity is a relational value and adds that it is part of our constitutional democracy to see it as such. A relational concept of dignity requires that social and economic conditions are redressed.<sup>214</sup>

A relational sense of dignity that refers to the importance of difference is present in *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs*.<sup>215</sup> The case dealt with the question of whether or not the term "spouse" could be extended to same-sex partnerships under the *Aliens Controls Act*.<sup>216</sup> The court held that gay and lesbian people are worthy of equal respect despite their different sexual orientations. The *Aliens Controls Act* thus infringed on gay and lesbian people's dignity as they were treated differently for no legitimate reason.<sup>217</sup> The court remedied the situation by

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<sup>209</sup> Liebenberg 2005 *SAJHR* 6. Also see Albertyn and Goldblatt 1998 *SAJHR* 257-258.

<sup>210</sup> Liebenberg 2005 *SAJHR* 31.

<sup>211</sup> Liebenberg 2005 *SAJHR* 9.

<sup>212</sup> See 3.3.1.5 for a list of the capabilities and a general discussion on Nussbaum's viewpoints.

<sup>213</sup> Liebenberg 2005 *SAJHR* 11.

<sup>214</sup> Liebenberg 2005 *SAJHR* 12.

<sup>215</sup> 2002 2 SA 1 (CC).

<sup>216</sup> 96 of 1991.

<sup>217</sup> *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2002 2 SA 1 (CC) para 54.

adding the term "or partner in a permanent same-sex life partnership" after the word "spouse".

The view that identity is central to dignity was also espoused in *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs*.<sup>218</sup> It is submitted that our relationships influence our identity. When there is discrimination in terms of the people you can form relationships with, such as one's partner, it infringes a part of one's identity and thus one's dignity.

Courts often make a link between dignity and *ubuntu*. In *S v Makwanyane*, various justices alluded to this link. *uBuntu* and dignity are similar in the sense that both concepts prescribe that people should be treated in a certain way as a result of the innate characteristic of being a human being. Authors also often refer to the relational component of dignity.<sup>219</sup> The relational component of dignity and the fact that we are interconnected as human beings, create a strong link between dignity and *ubuntu*.

In *Dawood v Minister of Home Affairs*<sup>220</sup> O'Regan made a distinction between the right and value of human dignity. She held that even though dignity is a value of the Constitution, it is the right to dignity that must be protected and respected, but she does not expand on this particular point.<sup>221</sup> One can deduce that she is implying that the value is not justiciable but only informs the interpretation of the Constitution and other legal provisions.

At this point it seems the courts have viewed the value of dignity in a manifold of ways. Some have laid a strong emphasis on the views of Kant, others prefer a communal sense of dignity, and some regard personal and

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<sup>218</sup> *National Coalition of Gay and Lesbian Equality v Minister of Home Affairs* 2002 2 SA 1 (CC) para 42. Also see Ackermann *Human Dignity* 106.

<sup>219</sup> Botha 2009 *Stanford Law Review* 189; Steinmann 2016 *PELJ* 6; Liebenberg 2005 *SAJHR* 11.

<sup>220</sup> 2000 3 SA 936 (CC).

<sup>221</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

cultural identity as part of a person's sense of dignity. Besides the different understandings of dignity, Woolman identifies three uses of the value of dignity. In the first instance, the value of dignity is an aid to interpret other rights.<sup>222</sup> In the second instance, dignity is used to limit other rights, usually where another right infringes a person's dignity.<sup>223</sup> In the last instance, the value of dignity is used to develop the common law in terms of section 39 of the Constitution.

### 2.3.2 *The value of equality*

Equality is also both a value and a right in the Constitution. The Constitution envisages an approach of substantive equality as opposed to formal equality.<sup>224</sup> Formal equality refers to the instance where people are treated equally despite any difference.<sup>225</sup> Substantive equality takes cognisance of social and political differences, for example race and gender, that contribute to inequality.<sup>226</sup>

Similar to the value of dignity, equality as a value has also been used by courts for the interpretation of other rights. In *Khosa v Minister of Social Development*<sup>227</sup> the question before the court was whether Mozambican nationals who had obtained permanent residency in South Africa could apply for social assistance for their children in terms of *the Social Assistance Act*.<sup>228</sup> The Act was interpreted to allow South African citizens to obtain social grants.<sup>229</sup> The court found that the word "permanent resident" should be

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<sup>222</sup> Woolman *The Architecture of Dignity* 87.

<sup>223</sup> Woolman *The Architecture of Dignity* 87.

<sup>224</sup> Alibertyn 2007 *SAJHR* 254.

<sup>225</sup> Smith 2014 *AHRLJ* 611.

<sup>226</sup> Smith 2014 *AHRLJ* 611. Alibertyn 2007 *SAJHR* 254.

<sup>227</sup> 2004 6 SA 505 (CC).

<sup>228</sup> 59 of 1992.

<sup>229</sup> Section 3(c) of the Act provides that "subject to the provisions of this Act, any person shall be entitled to the appropriate social grant if he satisfies the Director-General that he —(a) is an aged or disabled person or a war veteran; (b) is resident

read into the part of the relevant legislation that read "South African citizen" to include permanent residents within the scope of the Act.<sup>230</sup> In its reasoning the court held that the value of equality informs constitutional adjudication.<sup>231</sup> The court further mentioned that the wording of socio-economic rights in the Constitution implies equality as the word everyone is using.<sup>232</sup>

The value of equality has also been used to interpret other rights in *Government of the Republic of South Africa v Grootboom*.<sup>233</sup> The court pointed out that it is important to understand rights within their historical context. The history of social inequality in South Africa has influenced the manner in which the value of equality is seen.<sup>234</sup> The lack of access to services and disparities in wealth influences the manner in which equality is seen. The understanding of substantive equality then in turn influences the manner in which the right to adequate housing, in this case, is interpreted. This view of equality corresponds with Botha and Bray's statements above that constitutional values indicate a break from the discriminatory past of South Africa.<sup>235</sup>

In *S v Baloyi*<sup>236</sup> the court used the principles of substantive equality to interpret the right to be presumed innocent.<sup>237</sup> The facts of the case involved domestic violence. The appellant averred that section 3(5) of the *Prevention of Family Violence Act*<sup>238</sup> operates similarly to section 170 of the *Criminal*

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in the Republic at the time of the application in question; (c) is a South African citizen; and(d) complies with the prescribed conditions."

<sup>230</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 42.

<sup>231</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 42.

<sup>232</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 42.

<sup>233</sup> 2001 1 SA 46 (CC).

<sup>234</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 25.

<sup>235</sup> See 2.2.3.

<sup>236</sup> 2001 1 BCLR 86 (CC).

<sup>237</sup> Jagwanth 2005 *Acta Juridica* 138.

<sup>238</sup> 133 of 1993.

*Procedure Act*,<sup>239</sup> which reversed the onus of proof in criminal matters. The court had to decide between the constitutional duty to provide effective remedies against domestic violence and the right to a fair trial.<sup>240</sup> In its judgment the court emphasised that domestic violence is gender specific and places an unequal burden on women. In doing so the court used the principles of substantive equality to interpret the right to a fair trial.<sup>241</sup> The court held that section 3(5) of the *Prevention of Family Violence Act* does not place a reverse onus on the accused to prove innocence.<sup>242</sup>

The value of equality is also used to interpret legislation. For example, the *Intestate Succession Act*<sup>243</sup> and the *Maintenance of Surviving Spouses Act*<sup>244</sup> failed to recognise monogamous Muslim marriages for the purposes of the word "spouse" in the two Acts. In *Daniels v Campbell*<sup>245</sup> the applicants contended that the two Acts were unconstitutional as they discriminated on the basis of gender. While there was no express exclusion of Muslim marriages in the Act, the court had to interpret the meaning of the word "spouse" in the Acts. The court held that the values of equality, tolerance and respect favoured an interpretation of "spouse" that includes monogamous Muslim marriages.<sup>246</sup> The court highlighted the persistent inequality between men and women by stating that it is important to keep in mind that the patriarchal nature of a society where women are financially dependent on men and property is often not registered in women's names.<sup>247</sup> The fact that the court took into account the patriarchal nature of society and the vulnerable position of many women is indicative of a

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<sup>239</sup> 51 of 1977.

<sup>240</sup> *Sv Baloyi* 2001 1 BCLR 86 (CC) para 1.

<sup>241</sup> Jagwanth 2005 *Acta Juridica* 138.

<sup>242</sup> *S v Baloyi* 2001 1 BCLR 86 (CC) para 33.

<sup>243</sup> 81 of 1987.

<sup>244</sup> 27 of 1990.

<sup>245</sup> 2004 7 BCLR 735 (CC).

<sup>246</sup> *Daniels v Campbell* 2004 7 BCLR 735 (CC) para 21.

<sup>247</sup> *Daniels v Campbell* 2004 7 BCLR 735 (CC) para 22.

substantive approach to equality, which influenced the interpretation of Acts in favour of Muslim women.

Similar to the value of dignity, courts use the value of equality to develop the common law in terms of section 39(2) of the Constitution. In *Fourie v Minister of Home Affairs*<sup>248</sup> the applicants contested the common law position that marriage is exclusively between a man and a woman. The common law position thus seemed to discriminate against homosexual people. In its judgment the court referred to "a democratic, universalistic, caring and aspirationally egalitarian" society.<sup>249</sup> The court emphasised that people should be accepted for who they are despite differences based on sexual orientation, and that equality is significant in the society that South Africa wants to be.<sup>250</sup> The court found that the common law view of a marriage was inconsistent with the Constitution and that this view unfairly discriminates against homosexual people.<sup>251</sup> The state was ordered to correct the defect within twelve months.<sup>252</sup> The effect of the judgment was that the *Civil Union Act*<sup>253</sup> was promulgated.

Despite the use of a substantive approach to equality, some authors contest its content. Albertyn,<sup>254</sup> for example, has been critical of the courts' reliance on dignity to give content to equality. She avers that the problem with using dignity (exclusively) as a measure of inequality is that dignity often only focuses on the individual.<sup>255</sup> Only using dignity as a measure of inequality poses the risk of not taking into account systems and structures of

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<sup>248</sup> 2006 3 BCLR 355 (CC).

<sup>249</sup> *Fourie v Minister of Home Affairs* 2006 3 BCLR 355 (CC) para 60.

<sup>250</sup> *Fourie v Minister of Home Affairs* 2006 3 BCLR 355 (CC) para 60.

<sup>251</sup> *Fourie v Minister of Home Affairs* 2006 3 BCLR 355 (CC) para 155.

<sup>252</sup> *Fourie v Minister of Home Affairs* 2006 3 BCLR 355 (CC) para 163.

<sup>253</sup> 17 of 2006.

<sup>254</sup> Albertyn 2015 *Acta Juridica* 435.

<sup>255</sup> Albertyn 2015 *Acta Juridica* 435. Also see Liebenberg and Goldblatt 2007 *SAJHR* 343 on the use of dignity in relation to equality rights.

disadvantage. Albertyn and Fredman<sup>256</sup> argue that equality cannot be restricted to the value of dignity. They argue that the idea of substantive equality is not reducible to dignity.<sup>257</sup> They are in favour of an understanding of substantive equality that takes into account the different aspects of disadvantage. They argue further that the sole reliance on dignity to understand equality is too individualistic.<sup>258</sup> There are various other dimensions that can be added to the understanding of equality that have been supported by the courts. For example, difference and diversity are also features of substantive equality.<sup>259</sup>

The court supported the view that difference and diversity should form part of equality in *MEC for Education: Kwazulu-Natal v Pillay*.<sup>260</sup> The court focused on cultural difference as part of one's identity. This cultural identity is important as it emanates from a sense of community.<sup>261</sup> The case takes into account group difference as the court acknowledged that the school's code encourages "mainstream and historically privileged forms of adornment" while excluding other minority groups.<sup>262</sup>

Albertyn and Fredman<sup>263</sup> are furthermore of the opinion that substantive equality should also include social and economic inclusion. People are often excluded from social and economic opportunities as a result of belonging to a particular group.<sup>264</sup> This aspect of substantive equality can be illustrated with reference to *Bhe v Khayelitsha Magistrate*.<sup>265</sup> This case concerned the constitutionality of the rule of male primogeniture. The court held that

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<sup>256</sup> Albertyn and Fredman 2015 *Acta Juridica* 431.

<sup>257</sup> Albertyn and Fredman 2015 *Acta Juridica* 431.

<sup>258</sup> Albertyn and Fredman 2015 *Acta Juridica* 434.

<sup>259</sup> Albertyn and Fredman 2015 *Acta Juridica* 448.

<sup>260</sup> Albertyn and Fredman 2015 *Acta Juridica* 448.

<sup>261</sup> Albertyn and Fredman 2015 *Acta Juridica* 449.

<sup>262</sup> *MEC for Education: Kwazulu Natal v Pillay* 2008 2 BCLR 99 (CC) para 44. Albertyn and Fredman 2015 *Acta Juridica* 449.

<sup>263</sup> Albertyn and Fredman 2015 *Acta Juridica* 438.

<sup>264</sup> Albertyn and Fredman 2015 *Acta Juridica* 439.

<sup>265</sup> 2005 1 SA 580 (CC).

women are a particularly vulnerable group that are excluded from economic activity as a result of customary rules of inheritance.<sup>266</sup> The court came to the conclusion that the rule of male primogeniture as used in customary law is unconstitutional as it unfairly discriminates on the basis of gender.<sup>267</sup>

Ackermann<sup>268</sup> contends that if one claims that all people are equal, it necessitates the question "in what sense are people equal?" He argues that the answer should be equal in human worth, or simply put, dignity.<sup>269</sup>

Ackermann describes human worth or dignity as follows:<sup>270</sup>

the capacity for and the right to respect as a human being. This arises from all those aspects of the human personality that flow from human intellectual and moral capacity; which in turn separate humans from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfillment in their lives. It also arises from the capacity of human beings to enter into meaningful relationships with others and thereby achieve self-fulfilment at least in part.

Ackermann<sup>271</sup> thus disagrees with Albery and Fredman and believes that dignity is an essential characteristic of equality. As alluded to above, Liebenberg shares the sentiment that dignity can be used when dealing with issues of equality.<sup>272</sup> Liebenberg and Ackermann are correct in stating that dignity can give content to equality. This approach is also evident from how the courts have utilised the value of dignity. Essentially, the "dignity question" is whether a person's self-worth, or dignity, has been recognised and the "equality question" is whether there was a justifiable reason for not recognising a person's self-worth.

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<sup>266</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 91.

<sup>267</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 136.

<sup>268</sup> Ackermann *Dignity* 23.

<sup>269</sup> Ackermann *Dignity* 23. Ackermann 2006 *SAJHR* 609.

<sup>270</sup> Ackermann *Dignity* 23-24.

<sup>271</sup> Ackermann *Dignity* 23.

<sup>272</sup> Liebenberg 2005 *SAJHR* 12.

There are different opinions on what the content of equality should be, as is the case with dignity. It does appear that dignity is an important criterion of equality. Since dignity forms an essential part of equality, the links between equality and *ubuntu* should be obvious. Furthermore, equality is also essential in the interpretation and limitation of rights.

From the above discussion on equality it becomes apparent that the manner in which values are interpreted and applied depends on context. It also seems that the history of a country determines the importance of a value and how it is defined. The history of comparative jurisdictions are therefore important when looking to those jurisdictions to give content to constitutional values.<sup>273</sup> The history of segregation in South Africa has certainly placed equality, and particularly substantive equality, on a better footing.

### 2.3.3 *The value of freedom*

The foundational value of freedom is one of the few constitutional values that the Constitutional Court has given content to. It can generally be understood as the state of not being restrained by something or someone to do or say something.<sup>274</sup> In *Ferreira v Levin*,<sup>275</sup> Ackermann discussed the meaning of the right and value of freedom at length. The case dealt with the question whether section 417 of the *Companies Act*,<sup>276</sup> which required the applicants to be summoned to proceedings where they could incriminate themselves, was constitutional. In considering whether the relevant provisions of the *Companies Act* were inconsistent with the right to freedom and security of the person, Ackermann indicated the interlinkage between

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<sup>273</sup> See 2.2.2. This point relates to Venter's caveat that courts should carefully consider which jurisdictions they choose to utilise comparatively.

<sup>274</sup> Cambridge Dictionary 2018  
<https://dictionary.cambridge.org/dictionary/english/freedom>.

<sup>275</sup> 1996 1 SA 984 (CC).

<sup>276</sup> 61 of 1973.

freedom and human dignity by pointing out that one cannot live a dignified life without being free to develop one's own talents.<sup>277</sup> Freedom was thus seen as a precondition for the enjoyment of human dignity. Ackermann<sup>278</sup> was furthermore in favour of a teleological approach in terms of which freedom is broadly interpreted.

In the *Ferreira v Levin*, Ackermann referenced Isaiah Berlin, a political philosopher, who distinguishes between positive and negative freedom.<sup>279</sup> According to Berlin, negative freedom entails asking the question which areas a person be left to what he/she wants to do.<sup>280</sup> In a positive sense it entails asking the question who/what determines who a person can be.<sup>281</sup> Ultimately, Ackermann opted for the negative sense of freedom in terms of which freedom requires that no obstacles be placed in a person's way for him/her to be the person he/she wants to be.<sup>282</sup> Ackermann also argues that the Constitution protected a residual right to freedom.<sup>283</sup> The rest of the bench did not agree with him on the matter of residual rights, but Ackermann is often heralded for his theoretical engagement with constitutional values.<sup>284</sup> *Ferreira v Levin* also points to the conclusion that the content of constitutional values are suprapositive, meaning that their content is found outside of the confines of law.

Various authors have criticised Ackermann's viewpoint on the legal meaning of freedom. Liebenberg,<sup>285</sup> writing on the application of the value of freedom

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<sup>277</sup> *Ferreira v Levin* 1996 1 SA 984 (CC) para 49.

<sup>278</sup> See 2.5.1.3 for a discussion on the teleological approach.

<sup>279</sup> *Ferreira v Levin* 1996 1 SA 984 (CC) para 52. Also see Klare 1998 *SAJHR* 176.

<sup>280</sup> *Ferreira v Levin* 1996 1 SA 984 (CC) para 52.

<sup>281</sup> *Ferreira v Levin* 1996 1 SA 984 (CC) para 52.

<sup>282</sup> *Ferreira v Levin* 1996 1 SA 984 (CC) para 54. See Liebenberg 2008 *Acta Juridica* for an approach the negative and positive elements of the value of freedom when interpreting socio-economic rights.

<sup>283</sup> *Ferreira v Levin* 1996 1 SA 984 (CC) para 69.

<sup>284</sup> For articles that support this stance see Liebenberg 2008 *Acta Juridica*; Du Bois 2008 *Acta Juridica* 112-148.

<sup>285</sup> Liebenberg 2008 *Acta Juridica* 150.

to the adjudication of socio-economic rights, applauds Ackermann's attempt to give legal meaning to the value of freedom. However, she does not agree that freedom should be confined to only a "negative sense" as such a viewpoint fails to take into account that "freedom is a capacity of human beings that must be developed in a social context".<sup>286</sup> According to Liebenberg,<sup>287</sup> freedom requires a measure of self-determination which is fostered by our personal and social relationships. The society that we live in influences our sense of autonomy. It is therefore important that society is structured in such a way that people have a broad range of options to choose from when determining how they want to live their lives.<sup>288</sup> She adds that it is important that people feel that they have a sense of participation in the decisions that are being made about their lives.<sup>289</sup> The aforementioned actions require going beyond the "negative sense" of freedom and creating certain conditions that enable people to make choices. Liebenberg<sup>290</sup> adds that she suspects that Ackermann embraces a negative conception of freedom as he fears that actions that embrace a positive sense of freedom may lead to paternalistic regulation and counter real autonomy. She states that this type of regulation is a real concern, but that it should not blind us to the fact that there is an unending tension and interaction between the individual and collective.<sup>291</sup> In this sense she reiterates the sentiments of Nedelsky,<sup>292</sup> who states that the collective is both a danger and the source of a person's autonomy.

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<sup>286</sup> Liebenberg 2008 *Acta Juridica* 159.

<sup>287</sup> Liebenberg 2008 *Acta Juridica* 150.

<sup>288</sup> Liebenberg 2008 *Acta Juridica* 160.

<sup>289</sup> Liebenberg 2008 *Acta Juridica* 160.

<sup>290</sup> Liebenberg 2008 *Acta Juridica* 160-161.

<sup>291</sup> Liebenberg 2008 *Acta Juridica* 161.

<sup>292</sup> Liebenberg 2008 *Acta Juridica* 161; Nedelsky 1989 *Yale Journal of Law and Feminism* 21.

Fagan<sup>293</sup> has criticised the fact that Ackermann is of the opinion that dignity is the basis of freedom. He argues, like Liebenberg, that the basis of freedom is not dignity, but autonomy.<sup>294</sup> He subscribes to the viewpoint of Raz, who states that people are autonomous when they can make choices regarding their own lives.<sup>295</sup> Seeing autonomy and not dignity at the centre of freedom also makes it difficult to apply dignity in a "negative sense".<sup>296</sup>

Freedom forms part of the triad of constitutional values, namely human dignity, equality and freedom. All three these values are used in the application, interpretation and development of fundamental rights.

#### *2.3.4 The value of democracy, universal adult suffrage and a national common voters roll*

The values of democracy, universal adult suffrage and a national common voters roll are all related in the sense that they are all linked to the election process. The terms universal adult suffrage and a common voters roll are relatively straightforward as they simply state that every person has a right to vote and that potential voters should be registered on a common voters roll. The question as to what democracy means is riddled with complexities. Malan states the following:<sup>297</sup>

The concept of democracy (interests and values of a democratic society etc) has nevertheless not received much attention in the courts. This is quite understandable, however, since courts, whose task it is to adjudicate concrete disputes, assisted by legal practitioners and presided over by judges who are also primarily legal practitioners and not legal (or political) philosophers, are not best qualified to articulate views on this rather theoretical question.

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<sup>293</sup> Fagan 2008 *Acta Juridica* 177-184.

<sup>294</sup> Fagan 2008 *Acta Juridica* 182.

<sup>295</sup> Fagan 2008 *Acta Juridica* 182. Fagan quotes Raz who states the following: "The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."

<sup>296</sup> Fagan 2008 *Acta Juridica* 184.

<sup>297</sup> Malan 2006 *SAPL* 143.

Despite the complexity of the question, I cannot agree with Malan that democracy is too a theoretical question for courts to pursue views on what it means. The courts have constructed meanings for values as alluded to above, although not always explicitly.<sup>298</sup> There is no reason to assume that the value of democracy would be any more theoretically complex than any of the other constitutional values. More importantly, the value of democracy is prominent in the constitutional text. It is a founding value in terms of section 1 of the Constitution. Any limitation in terms of section 36 of the Constitution must be justifiable in an open and democratic society based on human dignity, equality and freedom. Furthermore, in terms of section 39 of the Constitution, the values of an open and democratic society must be promoted when interpreting the Bill of Rights. It would make sense that courts have to have an understanding of democracy before they would be able to apply any of these provisions.

There have indeed been a number of cases where the courts have explored the meaning of democracy and related terms. In *August v Electoral Commission*<sup>299</sup> the voting rights of prisoners were at issue. The *Electoral Act*<sup>300</sup> listed exceptions of people who cannot vote, but made no mention of prisoners.<sup>301</sup> The applicants applied for a certificate that the Electoral Commission would make all the necessary arrangements for people to vote. In deciding the matter, the courts referred to the values of universal adult suffrage and a common voters roll. The court had to interpret the silence of the *Electoral Act* on prisoners in light of the value of democracy. Sachs reiterated the importance of the values of democracy and a common voters roll.<sup>302</sup> He related these values to the fact that the right to vote forms part

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<sup>298</sup> See 2.3.1-2.3.3.

<sup>299</sup> 1999 3 SA 1 (CC).

<sup>300</sup> 73 of 1998.

<sup>301</sup> Section 8(2) of the *Electoral Act*.

<sup>302</sup> *August v Electoral Commission* 1999 3 SA 1 (CC) para 17.

of our dignity and worth as human beings.<sup>303</sup> It was against the background of these values that the court found that the Electoral Commission had the responsibility to make appropriate arrangements for prisoners to vote.

In *Democratic Alliance v Masondo*<sup>304</sup> the court had to decide whether or not minority parties should be represented on the mayoral committee of a municipality. The majority found that the mayoral committee does not constitute a council committee and that it is therefore not subject to the provisions that say it must be representative. Sachs in a minority judgment states that fair representation does not constitute a process of winner takes all, but that all voices should be heard.<sup>305</sup> He further emphasises the importance of critical debate in a democracy.<sup>306</sup>

In *Doctors for Life International v Speaker of the National Assembly*<sup>307</sup> the constitutionality of the procedure for public participation during the passing of bills came before the court. Ngcobo dealt extensively with the meaning of democracy.

In the first instance he mentions that democracy includes representative and participatory elements.<sup>308</sup> Representative democracy refers to the fact that citizens can vote for a party to represent them in government.<sup>309</sup> Participatory democracy refers to the fact that citizens can participate in the decision-making processes of government.<sup>310</sup> Ngcobo goes further by stating that the notion of democracy should be seen against the history of South Africa where many citizens were previously denied the right to

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303 *August v Electoral Commission* 1999 3 SA 1 (CC) para 17.

304 2003 2 SA 413 (CC).

305 *Democratic Alliance v Masondo* 2003 2 SA 413 (CC) para 42.

306 *Democratic Alliance v Masondo* 2003 2 SA 413 (CC) para 43.

307 2006 6 SA 416 (CC).

308 *Doctors for life v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 111.

309 *Doctors for life v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 111.

310 *Doctors for life v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 111. See Phooko 2017 *Obiter* 518-520 on the difference between participatory and representative democracy.

partake in decision-making processes.<sup>311</sup> The importance of democracy should also be seen against the reality that there is a great disparity between people who are wealthy and have influence and those who do not.<sup>312</sup>

### 2.3.5 *The value of non-racialism and non-sexism*

The values of non-racialism and non-sexism can be seen as sub-parts of equality as they deal with equal treatment irrespective of sex and race. The value of non-racialism has appeared largely in cases concerning affirmative action. In *Minister of Finances v Van Heerden*, Sachs made the following remark about non-racialism:<sup>313</sup>

In this context, redress is not simply an option, it is an imperative. Without major transformation we cannot heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. At the same time it is important to ensure that the process of achieving equity is conducted in such a way that the baby of non-racialism is not thrown out with the bath-water of remedial action.

While non-racialism remains an important value, raced-based measures have to be taken to achieve the ideal of non-racialism, which includes affirmative action and broad black based economic empowerment.<sup>314</sup>

### 2.3.6 *Observations on specific values*

A few observations can be made based on the discussion above. In the first instance, courts and academics engage more with specific values than constitutional values in general.

Secondly, courts engage with values to varying degrees. Few engage with the content,<sup>315</sup> some refer to previous cases where the values were dealt

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<sup>311</sup> *Doctors for life v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 112.

<sup>312</sup> *Doctors for life v Speaker of the National Assembly* 2006 6 SA 416 (CC) para 115.

<sup>313</sup> *Minister of Finances v Van Heerden* 2004 6 SA 121 (CC) para 137.

<sup>314</sup> Dupper 2008 *SAJHR* 431.

<sup>315</sup> For example Ackermann J in *Ferreira v Levin*. See 2.3.3.

with in more detail,<sup>316</sup> and lastly some only refer to the values without any reference to the possible meaning. Courts fall short in terms of their consistency when using values. I argue later that values play a key role in the interpretive process.<sup>317</sup> I am thus of the opinion that courts have to be clear and direct as to how they understand a particular value and how it affects their decision.

Thirdly, it appears that values are indeed used in the limitation and interpretation of rights as set out section 39 of the Constitution. It seems from the case law above that values aid interpretation in that they provide an objective or aim for the South African legal system. In other words, law should be interpreted in such a way that it is congruent with the South African constitutional value system. However, it is not just the legislation or applicable provisions that are being interpreted and limited in light of values, but the actual outcome of the case.

As an illustration, *Department of Home Affairs v Fourie*<sup>318</sup> is useful. In this matter the court utilised the value of dignity and equality to interpret the law of marriage in South Africa, which did not provide for same-sex marriages. The effect prior to the *Civil Unions Act*<sup>319</sup> and the judgment was that people in same-sex marriages could not enter into a legally recognised union and could not fully enjoy a part of their identity. The effect of the law prior to the judgment was that a vulnerable part of society suffered unfair discrimination. The fact that a vulnerable part of society is discriminated against plays a role as equality in the Constitution is meant to mean substantive equality. Substantive equality provides that the position of people in society have to be taken into account. I do not think the courts

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<sup>316</sup> For example *PE Municipality v Various Occupiers* 2005 1 SA 517 (CC).

<sup>317</sup> See 2.6.1.

<sup>318</sup> 2006 3 BCLR 355 (CC).

<sup>319</sup> 17 of 2006.

are wrong in going about things in this manner, as it is impossible to know whether a legal provision is congruent with a constitutional value until the outcome is known.

Fourthly, the history of South Africa does seem to play a role in how values are conceptualised and in turn how those values are applied during legal interpretation. For example, in *Doctors for Life v Speaker of the National Assembly*,<sup>320</sup> Ncgobo J holds that the fact that many South Africans had no participation in political decision making and could not vote influenced the importance of the value of democracy, in particular participatory democracy.<sup>321</sup>

## **2.4 Extra-textual values**

The question arises whether the values named in section 1 of the Constitution forms a restrictive list. Various references have been made to values that do not appear in the constitutional text by the Constitutional Court.<sup>322</sup> These values include separation of powers,<sup>323</sup> cooperative government, transformation<sup>324</sup> and *ubuntu*.<sup>325</sup> Botha<sup>326</sup> is also of the opinion that despite *ubuntu* not appearing in the 1996 Constitution, it should still be considered a constitutional value because of the prominence the judiciary gives it.

Kroeze<sup>327</sup> refers to the fact that the Constitutional Court has located values inside and outside of the constitutional text, as alluded to above. On

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<sup>320</sup> 2006 6 SA 416 (CC) para 112.

<sup>321</sup> See 4.4 for a discussion on the historical context of South Africa.

<sup>322</sup> Freedman "Constitutional Law: Structures of Government" 20.

<sup>323</sup> *Glenister v President of RSA* 2009 1 SA 287 (CC) 29-35.

<sup>324</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) para 73.

<sup>325</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 224. Also see the cases dealing with *ubuntu* mentioned at 3.4.

<sup>326</sup> Botha *Interpretation of Statutes* 148.

<sup>327</sup> Kroeze 2001 *Stell LR* 267.

different occasions, the court has sought constitutional values in the present democratic society, in the ideals of the future and in foreign jurisdictions.<sup>328</sup> This leads to the conclusion that constitutional values are not restricted to the constitutional text. The above-mentioned case law also shows that the content given to constitutional values are also often found beyond the constitutional text. The exercise of employing constitutional values thus leaves judges with a certain extent of discretion regarding the source of the values. It is clear that the values contained in the constitutional text are not restrictive. Moreover, section 1 of the Constitution refers to "founding values," which simply means that these are the values that the country is founded upon. Section 39 continues to refer to values based "on an open and democratic society." These phrases seem to indicate that there is space for the development of values that are not explicitly mentioned in the Constitution.

The obvious question is whether guidelines exist to determine when and how courts should go about when finding or establishing a value not listed in the constitutional text. The rule of law necessitates that courts not just make arbitrary decisions but that they justify their decisions judicially.<sup>329</sup> The court should therefore state why the specific idea is important enough to be a value in the South African legal system.

The above-mentioned debate obliges a discussion on the judiciary and its relation to values. However, the question of a hierarchy of values should be addressed first.

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<sup>328</sup> Kroeze 2001 *Stell LR* 267.

<sup>329</sup> Venter 2018 *SAJHR* 166. Also see *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) para 25.

## **2.5 A hierarchy of values**

Another issue that comes to the fore is whether the values discussed in this chapter function as a hierarchy. In other words, the question is whether some values are more important than others. This question is relevant as it could give an indication of the extent to which *ubuntu* should be taken into account by courts as a constitutional value, or differently put, what the prominence of *ubuntu* should be as a constitutional value. It is important to know whether values are always mutually supportive or whether one should have preference, as it has already been established that constitutional values play an important role during adjudication.<sup>330</sup> Furthermore, quoting Woolman and Davis, Banda and Pieterse<sup>331</sup> reiterate that since the meaning of values are open-ended, it will lead to arguments about the political philosophies underlying these values. Certain values might have different political aims, Banda and Pieterse mention. For example, freedom and equality aspire to libertarianism and egalitarianism respectively.<sup>332</sup> It seems therefore that a hierarchy of values does exist in the minds of some, if not all, jurists.

Venter,<sup>333</sup> for example, answers the question of hierarchy in the affirmative by creating a categorisation of constitutional values. He categorises constitutional values into primary nuclear values, supporting nuclear values, structural and procedural values and derived values.<sup>334</sup> He regards human dignity as the primary nuclear value as it is an unqualified value in the Constitution.<sup>335</sup> Equality and freedom are seen as supporting nuclear values as they are mentioned in section 7 of the Constitution and contained in the

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<sup>330</sup> See 1.1.

<sup>331</sup> Banda and Pieterse 2005 *SALJ* 876. Woolman and Davis 1996 *SAJHR* 361.

<sup>332</sup> Banda and Pieterse 2005 *SALJ* 876.

<sup>333</sup> Venter *Constitutional Comparison* 143.

<sup>334</sup> Venter *Constitutional Comparison* 143.

<sup>335</sup> Venter *Constitutional Comparison* 142.

phrase "open and democratic society based on human dignity, equality" which appears in section 36 (the limitation clause) and section 39 (the interpretation clause).<sup>336</sup> The values democracy, supremacy of the Constitution and the rule of law are all seen as structural and procedural values. In the last instance, non-racialism and non-sexism are seen as derived values as they are subcategories of equality.<sup>337</sup> Although Venter offers this categorisation, he does not expressly state that some values are more important than others. However, the use of the word "primary" leads to the inference that he at least regards human dignity, equality and freedom as more important values than the others.<sup>338</sup>

The view that human dignity is the core value of the Constitution has received support from many scholars.<sup>339</sup> The centrality of human dignity also seems to be apparent from the courts. In *S v Makwanyane*<sup>340</sup> the court emphasised the importance and centrality of human dignity. Human dignity, equality and freedom are referred to as the triumvirate values.<sup>341</sup> Some authors also mention human dignity, equality and freedom as part of the core values of the Constitution.<sup>342</sup>

Another legal scholar, Botha,<sup>343</sup> is of the opinion that dignity is not only at the centre of the constitutional order, he concedes in the incidence of a conflict between values, recourse is made to human dignity as a value. In

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<sup>336</sup> Venter *Constitutional Comparison* 142.

<sup>337</sup> Venter *Constitutional Comparison* 143.

<sup>338</sup> In Venter 2014 *Tulane European and Civil Law Forum* 91 he is of the opinion that some values are more important than others. Furthermore, he states that human dignity can be seen as a "primary kernel value of the Constitution" and that equality, liberty, supremacy of the Constitution and the rule of law are supporting values.

<sup>339</sup> Liebenberg 2005 *SAJHR* 3; Botha 2009 *Stell LR* 172; Goolam 2001 *PELJ* 10; Du Plessis 2010 *SAPL* 688.

<sup>340</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 313.

<sup>341</sup> Du Plessis 2010 *SAPL* 687.

<sup>342</sup> Keevy 2009 *Journal of Juridical Science* 19.

<sup>343</sup> Botha 2009 *Stell LR* 177.

a similar vein, Du Plessis<sup>344</sup> notes that human dignity is often the wedge between equality and freedom. Yet some authors are of the opinion that dignity as a value is overused and that not enough attention is given to other constitutional values.<sup>345</sup>

The value of dignity is not only referred to as the centre of the new constitutional order, but as the *grundnorm* of the new South African constitutional order.<sup>346</sup> According to Kelsen,<sup>347</sup> a *grundnorm* is the central norm of a legal order from which all other norms and laws receive its validity. Interestingly, the only other value that has been described as the *grundnorm* of the new constitutional order is *ubuntu*.<sup>348</sup> In this sense one could say that *ubuntu* and dignity occupy an even higher status than other constitutional values since they are said to infuse the entire legal order.

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<sup>344</sup> Du Plessis 2005 *PELJ* 17. Du Plessis 2010 *SAPL* 687-688. Also see Steinmann *The Legal Significance of Human Dignity* 140.

<sup>345</sup> Albertyn and Fredman 2015 *Acta Juridica* 438. However, Albertyn and Fredman confine their criticism of human dignity to the extent to which it influences the content of the right to equality.

<sup>346</sup> Cornell 2008 *Acta Juridica* 21. Steinmann *The Legal Significance of Human Dignity* 3.

<sup>347</sup> Johnson *et al* *Jurisprudence* 137.

<sup>348</sup> Cornell 2010 *SAPL* 399. While the judiciary has not specifically used the term "*Grundnorm*" they have indicated that *ubuntu* is a value that is central to the South African legal order. In *PE Municipality v Various Occupiers* 2005 1 SA 517 (CC) para 37 Sachs J held that "the spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order." In *S v Makwanyane* 1995 6 BCLR 665 (CC) para 308 Mokgoro J held that "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." More recently in *Afriforum v Tshwane Municipality* 2016 6 SA 279 (CC) para 11 Moegeng CJ held that "All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of "*ubuntu*". "*Motho ke motho ka batho ba bangwe*" or "*umuntu ngumuntu ngabantu*" (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing."

Academic opinions on the status of *ubuntu* in the hierarchy of values are divergent. Bennett<sup>349</sup> argues that *ubuntu* should occupy a higher status as a metanorm. He likens *ubuntu* to the use of equity in the English legal system.<sup>350</sup> Equity is a principle used by English judges to mitigate the effects of the strict or abstract application of the law.<sup>351</sup>

Du Plessis is of the opinion that *ubuntu* should only be an underlying value of the South African legal system as opposed to a foundational value. Under the heading of foundational values, Du Plessis<sup>352</sup> includes human dignity, equality, freedom and interestingly, the rule of law. In support of her argument that *ubuntu* should only be seen as an underlying value, Du Plessis refers to various cases. These cases indicate that *ubuntu* does occupy a higher status than other values, or rather as Bennett states that it acts on a meta level. Phrases such as "*ubuntu* permeates the constitutional order",<sup>353</sup> "*ubuntu* suffuses the whole constitutional order"<sup>354</sup> and "it is constitutive of our constitutional culture"<sup>355</sup> are used. Du Plessis' argument is thus not convincing.

I am of the opinion that authors and courts alike provide a strong basis for the argument that the foundational values of human dignity, equality and freedom occupy a higher status in the South African legal order. As Venter mentions above, these values are consistently mentioned in constitutional

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<sup>349</sup> Bennett *Ubuntu: An African Jurisprudence* 61. Bennett 2015 *PELJ* 48-51. See 3.2.2 for a more in-depth discussion of Bennett's viewpoints on *ubuntu*.

<sup>350</sup> Bennett *Ubuntu: An African Jurisprudence* 61. Bennett 2015 *PELJ* 48-51.

<sup>351</sup> Bennett 2015 *PELJ* 48.

<sup>352</sup> Du Plessis *The Harmonisation of Good Faith and uBuntu in the South African Common Law of Contract* 206 footnote 1109.

<sup>353</sup> *S v Makwanyane* 1995 3 SA 391(CC) para 237. Du Plessis *The Harmonisation of Good Faith and uBuntu in the South African Common Law of Contract* 97.

<sup>354</sup> *PE Municipality v Various Occupiers* 2005 1 SA 517 (CC) para 37. Du Plessis *The Harmonisation of Good Faith and uBuntu in the South African Common Law of Contract* 101.

<sup>355</sup> *Dikoko v Mothatla* 2006 6 SA 235 (CC) para 113. Du Plessis *The Harmonisation of Good Faith and uBuntu in the South African Common Law of Contract* 106.

provisions as well as case law. This leads to the logical conclusion that the courts cannot derogate from the values of human dignity, equality and freedom. Furthermore, of these three values human dignity is regarded as the most important.

The more complex and pertinent question is whether the value of *ubuntu* should also be seen as an additional foundational value. Here too the courts have provided various judgments that answer this question in the affirmative.<sup>356</sup> It is thus my opinion that *ubuntu* does occupy a higher status based on the jurisprudence of the courts and the writings of various authors.

## **2.6 Values, principles, rules and rights**

The term *values* can potentially be conflated with other terms. In the pursuit of an understanding of constitutional values, which is the main objective of this chapter, these terms have to be distinguished from each other.

In the first instance values should be distinguished from rights. As mentioned above in *Dawood v Minister of Home Affairs*<sup>357</sup> O'Regan mentions that values have to be distinguished from rights. She confirms that values, and in particular the value of human dignity, should be employed in the interpretation and limitation of rights.<sup>358</sup> She mentions further that even though "the value of dignity might be offended", it is the right that must be enforced.<sup>359</sup> Values are thus distinguishable from rights in that they are not

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<sup>356</sup> See the discussion above under 2.5 where reference was made to *S v Makwanyane* 1995 3 SA 391 (CC) para 308, *PE Municipality v Various Occupiers* 2005 1 SA 517 (CC) para 37 and *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 11 where the importance of *ubuntu* as a value was stated.

<sup>357</sup> See 2.3.1. *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

<sup>358</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

<sup>359</sup> *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 35.

entitlements to be enforced but aid judicial interpretation. In certain instances, the courts have confused values and rights.<sup>360</sup>

Values also have to be distinguished from principles. Venter<sup>361</sup> maintains that principles are distinguishable from values as principles give expression to values, but that the two concepts stem from the same phenomenon that sets standards for judicial interpretation.

From the perspective of American jurisprudence, Dworkin<sup>362</sup> is of the viewpoint that principles are the standards judges use in hard cases. Dworkin's theory of principles should be explained against the background of traditional positivistic rules, in general, and Hart's conception of law in particular.

Hart set out his well-known theory of the law in the seminal work: *The Concept of Law*. According to Hart, the law consists of a system of rules. Firstly, he identifies primary rules that set out certain obligations. These obligations would include, for example, rules that murder and theft is outlawed or that people should pay taxes. However, Hart<sup>363</sup> states that what distinguishes a legal society from a pre-legal one is the establishment of secondary rules. These secondary rules include rules regarding the legal status of rules, how these rules might be changed and the rules to be used

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<sup>360</sup> For example, in *S v Makwanyane* 1995 3 SA 391 (CC) para 111 where the court stated "Respect for life and dignity, which are at the heart of s 11(2), are values of the highest order under our Constitution. The carrying out of the death penalty would destroy these and all other rights". Also see Kroeze 2001 *Stell LR* 269-271 regarding the courts confusion between values and rights. In *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 11 the court also seemed to have interpreted *ubuntu* as a right creating an enforceable obligation by stating that all South Africans should adhere to *ubuntu*. For a more in-depth discussion on this case see para 3.4.12.

<sup>361</sup> Venter 2014 *Tulane European and Civil Law Forum* 91. See para 2.2.2.

<sup>362</sup> Dworkin *Taking Rights Seriously* 71. Hard cases refer to instances where the law does not provide a clear answer, see Dworkin *Taking Rights Seriously* 81.

<sup>363</sup> Hart *A New Conception of Law* 55.

during adjudication.<sup>364</sup> Hart is of the opinion that the judiciary does not have a wide discretion when interpreting legislation. He is furthermore of the view that there should be a separation of law and morality, thus he has a positivist viewpoint. According to Hart,<sup>365</sup> judges have to restrict their discretion to so-called penumbral cases. These are cases where the ordinary language of provisions have no clear answer.<sup>366</sup> In these instances the judiciary is allowed to use their discretion and have recourse to social policies, aims and purposes to properly interpret the law.<sup>367</sup> Hart<sup>368</sup> does not see this exercise, i.e. the recourse to social policies, as judges using extra-legal standards, but as that "the judges are only drawing out of the rule what, if it is properly understood, is 'latent' within it".

Dworkin's theory is essentially a criticism of positivism.<sup>369</sup> He<sup>370</sup> criticises positivism and Hart's conception of the law in particular on the basis that rules do not cover the entirety of law. He proposes that extra-legal principles used in hard cases (penumbral cases) should be seen as law. Dworkin<sup>371</sup> argues that Hart did not sufficiently take account of principles in his theory on rules. By principle Dworkin understands a standard that fairness or justice requires that also has a moral element.<sup>372</sup>

Dworkin starts off with the distinction between rules and principles. He uses the example of *Riggs v Palmer*<sup>373</sup> to illustrate his point. In this case a man

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<sup>364</sup> Hart *A New Conception of Law* 55 -57.

<sup>365</sup> Hart "Positivism and the Separation of Law and Morals" 69.

<sup>366</sup> In Hart "Positivism and the Separation of Law and Morals" 69 he states "We may call the problems which arise outside the hard core of standard instances or settled meaning 'problems of the penumbra'; they are always with us whether in relation to such trivial things as the regulation of the use of the public park or in relation to the multidimensional generalities of the constitution."

<sup>367</sup> Hart "Positivism and the Separation of Law and Morals" 71.

<sup>368</sup> Hart "Positivism and the Separation of Law and Morals" 71.

<sup>369</sup> Lyons 1977 *The Yale Law Journal* 416.

<sup>370</sup> Dworkin *Taking Rights Seriously* 22.

<sup>371</sup> Dworkin *Taking Rights Seriously* 22.

<sup>372</sup> Dworkin *Taking Rights Seriously* 22.

<sup>373</sup> 115 NY 506 (1889).

murdered his grandfather.<sup>374</sup> The court had to determine whether the grandson could inherit from the grandfather.<sup>375</sup> There was no rule in this instance and so the court had to take the guidance of the common law principle that no person should receive a benefit from their own wrongdoing.<sup>376</sup> Within the South African context the example of *Riggs v Palmer* might be a bad example as there is a specific legal rule in the South African common law which provides that a person who kills another may not inherit from that person. It is therefore important to remember that the court in *Riggs v Palmer* did not rely on a specific legal rule, but on the general principle that no person may benefit from their own wrongdoing.

Dworkin<sup>377</sup> refers to a second example to illustrate the working of principles in *Henningsen v Bloomfield Motors, Inc.* Henningsen had signed a contract with a company from which he had bought a car.<sup>378</sup> One of the provisions of the contract had been that the manufacturer's liability was limited to the "making good" of defective parts.<sup>379</sup> Henningsen's argument was that automobile manufactures had a broader liability that obligated them to cover the medical and other related costs of a person involved in a car accident.<sup>380</sup> Despite not being able to refer to any rule or provision in a statute, the court had concurred with Henningsen.<sup>381</sup> The court had stated that freedom of contract was important, but that "in a society such as ours, where the automobile is a common and necessary adjunct of daily life, and where its use is so fraught with danger to the driver, passengers and the public, the manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars. Consequently, the courts must

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374 Dworkin *Taking Rights Seriously* 23.

375 Dworkin *Taking Rights Seriously* 23.

376 Dworkin *Taking Rights Seriously* 23.

377 32 NJ 358 161 A2d 69 (1960).

378 Dworkin *Taking Rights Seriously* 23.

379 Dworkin *Taking Rights Seriously* 23.

380 Dworkin *Taking Rights Seriously* 23.

381 Dworkin *Taking Rights Seriously* 24.

examine purchase agreements closely to see if consumer and public interests are treated fairly".<sup>382</sup> The court thus relied on the principle that public interest should be considered when concluding purchase agreements.

Dworkin<sup>383</sup> states that rules and principles set standards and give direction in a case. However, rules operate in an all-or-nothing fashion, meaning that rules either apply or they do not.<sup>384</sup> Dworkin<sup>385</sup> refers to the rule that a will is only valid if signed by three witnesses. It cannot then be that the will is valid if only signed by two witnesses.<sup>386</sup> Principles, on the other hand, do not support a particular outcome and they do not provide automatic legal consequences.<sup>387</sup> A principle may give direction, but does not "necessitate a particular decision".<sup>388</sup> A principle also continues to exist after the outcome of a case.<sup>389</sup>

Dworkin has said a great deal about principles but for present purposes it suffices to say that a principle sets a standard. He is also of the opinion that a principle might be extra-legal, meaning that it need not be taken up in a statute or Constitution. He states that we can use a principle by "appealing to an amalgam of practice and other principles in which the implications of legislative and judicial history figure along with appeals to community practices and undertakings".

An important question is whether principles differ from values. Dworkin<sup>390</sup> does not give any opinion on the differences between values and principles.

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382 32 NJ 387, 161 A.2d at 85. Dworkin *Taking Rights Seriously* 24.

383 Dworkin *Taking Rights Seriously* 24.

384 Dworkin *Taking Rights Seriously* 24.

385 Dworkin *Taking Rights Seriously* 25.

386 Dworkin *Taking Rights Seriously* 25.

387 Dworkin *Taking Rights Seriously* 25.

388 Dworkin *Taking Rights Seriously* 25.

389 Dworkin *Taking Rights Seriously* 35.

390 He does however speak of values in themselves and the conflicting nature of them. See Dworkin 2001 *Arizona Law Review* 251-260.

Looking to the South African jurisdiction, Venter<sup>391</sup> seems to be correct that values and principles are utilised to set standards, or direction as Dworkin would put it, during judicial interpretation.

Values and principles differ in that values seem more broadly formulated than principles. South African law is replete with principles, already taken up in statute. For example, section 2 of the *National Environmental Management Act*<sup>392</sup> sets out a number of environmental management principles. One of these principles is environmental justice.<sup>393</sup> Environmental justice must be pursued in particular so that vulnerable and disadvantaged persons are not unfairly discriminated against.<sup>394</sup> This section is clearly a principle as it sets a standard for interpretation and decision making without speaking of a particular outcome or legal consequence. Furthermore, this principle gives expression to a broader value, which is congruent with Venter's view.<sup>395</sup> It is clear that in the Act the principle of environmental justice gives expression to the value of equality, particularly substantive equality as it takes into account vulnerable and marginalised groups.

At this stage it is evident that values, principles, rules and rights cannot be the same. However, these terms all create certain standards within law. Rules and rights create enforceable entitlements while values and principles are seen as standards of interpretation, with principles being more specific than values.

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<sup>391</sup> See 2.2.2.

<sup>392</sup> 107 of 1998.

<sup>393</sup> Section 2(4)(c) of the Act provides that "environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons."

<sup>394</sup> Section 2(4)(c) of the *National Environmental Management Act* 107 of 1998.

<sup>395</sup> See 2.2.2.

## **2.7 The South African judiciary and constitutional values**

### *2.7.1 The transformative duty on the judiciary*

It is impossible to investigate the nature and function of constitutional values without discussing the interpretive role of the judiciary since it has been established that one of the core functions of constitutional values is the limitation and interpretation of rights. It might be that constitutional values place an obligation on other spheres of the state and even on civil society, but this issue does not fall within the scope of this study. This study is limited to the judiciary's use of constitutional values.

As already mentioned in Chapter 1, the nature of adjudication has changed since the new constitutional dispensation in South Africa. As discussed, judges' powers used to be limited by parliamentary sovereignty, but the 1996 Constitution has granted judges extensive powers of interpretation.<sup>396</sup> Constitutional adjudication is further complicated by the fact that the Constitution is value-laden. This complicates adjudication as values do not come with ready-made meanings. As Davis states, the Constitution allows various readings dependent on the ideological viewpoint of the judge.<sup>397</sup> The specific adjudicative and ideological viewpoint also has to be justified by each judge.<sup>398</sup>

The role of values during adjudication has become all the more important as the Constitution is seen as a transformative document.<sup>399</sup> The judiciary is a key role player in the project of transformative constitutionalism and the

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<sup>396</sup> See Chapter 1.

<sup>397</sup> Davis 2004 *Acta Juridica* 104.

<sup>398</sup> Davis 2004 *Acta Juridica* 105.

<sup>399</sup> *Soobramooney v Minister of Health Kwazulu Natal* 1997 12 BCLR 1696 (CC) para 8; Davis and Klare 2010 *SAJHR* 404.

rationale for the utilisation of constitutional values emanates from the transformative nature of the Constitution.

As alluded to in Chapter 1, the term transformative constitutionalism was coined by Klare and has since been adopted by the courts and academics alike. According to Klare,<sup>400</sup> a post-liberal interpretation of the Constitution is favoured. A post-liberal interpretation means, *inter alia*, that the strict divide between law and politics that would be maintained in a classical liberal tradition is no longer maintained. Klare<sup>401</sup> points out that various aspects of the Constitution point to the desirability of a post-liberal interpretation, including socio-economic rights and substantive equality; positive duties on the state; the horizontal application of the Constitution; public participation; multiculturalism and historical self-consciousness. Klare<sup>402</sup> argues that it is unlikely that the drafters of the Constitution would have intended for the old formalistic legal methods to be applied to a Constitution and its transformative goals.

A classical liberal legal tradition would have judges leave their political and personal viewpoints out of the adjudicative process and interpret and apply the law mechanically. As Zitzke<sup>403</sup> puts it, this type of formalism looks like  $F+R=C$ . This type of formula would imply that legal interpretation and adjudication is simple arithmetic. This is problematic as legal texts do not come with ready-made meanings. According to Klare,<sup>404</sup> texts do not have fixed meanings but have to be interpreted. This means that the interpreter often has to rely on values outside the text and law.

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<sup>400</sup> Klare 1998 *SAJHR* 151.

<sup>401</sup> Klare 1998 *SAJHR* 155.

<sup>402</sup> Klare 1998 *SAJHR* 156.

<sup>403</sup> Zitzke *Transformation in the South African Law of Delict* 10. The letters do not symbolise anything in this equation, it simply serves to illustrate the arithmetic nature of legal formalism.

<sup>404</sup> Klare 1998 *SAJHR* 157.

It is firstly important to note that transformative constitutionalism dictates that constitutional values play an integral part in adjudication. Secondly, the content of those values will not necessarily be found in legal texts. This scenario becomes more complicated as values outside legal texts are needed to interpret legal texts, but those very values have to be given content to as well. Judges thus have a certain discretion in deciding which scholars to use. Giving content to values by relying on the writings of political philosophers, for example, would thus be part of a post-liberal tradition.<sup>405</sup> Klare refers to two other judges who point out the importance of values in legal interpretation to support his statement. Justice Mokgoro states the following:<sup>406</sup>

The interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself...To achieve the required balance will of necessity involve value judgments. This is the nature of constitutional interpretation.

The second judge, justice Kriegler, states the following:<sup>407</sup>

The judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large.

The above-mentioned statements support the argument that values play an important role during adjudication and especially constitutional adjudication. However, these values do not come with a pre-determined meaning. Ackermann says the following in this regard:<sup>408</sup>

The judge may not rule *ipse dixit*, she may not simply declare that her word, by utterance alone, constitutes the law. What she says must reflect the law. In reality it is of course impossible to seek constitutional truth in such a disembodied way. It is always a human individual carrying on a dialogue with a text. As Gadamer (1989: 387) puts it 'One partner in the hermeneutical conversation, the text, speaks only through the interpreter. Only through him are the written marks changed back into meaning'. The text always speaks to

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<sup>405</sup> Klare 1998 *SAJHR* 162.

<sup>406</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 302-304. Also see Klare *SAJHR* 158.

<sup>407</sup> *S v Makwanyane* 1995 6 BCLR 665 (CC) para 302-304. Also see Klare *SAJHR* 158.

<sup>408</sup> Ackermann *Dignity* 27.

an individual whose mind is not a clean slate when 'hearing' and responding to the text. The judges' slate contains the history of her own ideas through which the constitutional text filters. The influence of a filter like this cannot be avoided. At best the interpreter can remain aware at all times of her own history of ideas when seeking to apply 'objectively' the conventional interpretive tools. One of the most important of these tools is of course the purpose of the particular constitutional provision, determined in the context of the Constitution as a whole and its overall purpose.

It is therefore not only the work of judges to employ constitutional values in the interpretation and limitation of rights, but also to determine the meaning of those constitutional values, albeit in a controlled manner. To this end Ackermann<sup>409</sup> adds that it might be necessary to look to religious and philosophical writings to give meaning to specific constitutional values.

Transformative adjudication grants judges a large degree of discretion. The question remains within which bounds that discretion should be exercised. Stated differently, the question arises whether judges are granted too much leeway in utilising constitutional values. There seems to be a tension between the freedom of adjudication and constraint.

Klare is aware of this dilemma, or at least perceived dilemma. For example, he has praised Justice Ackermann's willingness to delve into the meaning of constitutional values by referring to authors such as Isaiah Berlin.<sup>410</sup> However, he states that there is still a duty on the judiciary to explain why, for example, the writings of Berlin are to be preferred over that of Biko or Mandela.<sup>411</sup> Klare states that it must not be taken as self-evident why certain theories are used.<sup>412</sup> He argues that we can never really get rid of the fact that judges will bring their own ideological baggage to adjudication.<sup>413</sup> The only cure for an unrestrained discretion is that judges should motivate their

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<sup>409</sup> Ackermann *Dignity* 27-28.

<sup>410</sup> Klare 1998 *SAJHR* 176.

<sup>411</sup> Klare 1998 *SAJHR* 177.

<sup>412</sup> Klare 1998 *SAJHR* 177.

<sup>413</sup> Klare 1998 *SAJHR* 162-163.

outcomes and such motivations should be transparent so that the public is in a position to critique such motivations.<sup>414</sup>

Van Marle<sup>415</sup> has added the same sentiments as Klare in relation to the indeterminacy thesis. She argues that one can identify two streams when dealing with transformative constitutionalism within the South African context, namely the functionalist approach and the critical approach.<sup>416</sup> She describes the functionalist approach as an approach that is still associated with a separation between law and morality, but functionalists as "free-market positivists".<sup>417</sup> The critical approach consists of a radical critiquing of law and politics.<sup>418</sup> She understands the project of transformative constitutionalism in South Africa as a process of questioning the theoretical and ideological underpinnings of concepts within the law.<sup>419</sup> Relating the above-mentioned to the discussion on constitutional values, it would mean that judges are obligated to engage deeply and critically with their choice of the content of constitutional values.

Despite the fact that some judges admit to the fact that content must be given to constitutional values, various authors are still of the opinion that judges deal too superficially with constitutional values. Kroeze<sup>420</sup> opines that even though values can never have one objective clear and abstract meaning, it remains requisite for courts to determine what they understand under a value in a specific case. She adds that the courts fail to give any

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<sup>414</sup> Klare 1998 *SAJHR* 163-164.

<sup>415</sup> Van Marle 2009 *Stell LR* 294.

<sup>416</sup> Van Marle 2009 *Stell LR* 294.

<sup>417</sup> Van Marle 2009 *Stell LR* 295.

<sup>418</sup> Van Marle 2009 *Stell LR* 295.

<sup>419</sup> Van Marle 2009 *Stell LR* 298.

<sup>420</sup> Kroeze 2001 *Stell LR* 273.

substantial content and simply state that something is not in line with a particular value.<sup>421</sup>

There are various approaches to constitutional and statutory interpretation. The approaches that the courts follow will determine to what extent constitutional values should be used during adjudication. At this juncture it is important to reflect on some of the most important academic opinions on constitutional and statutory interpretation.

### *2.7.2 A post-liberal reading*

As mentioned above, transformative constitutionalism is heralded by many.<sup>422</sup> However, some authors have criticised transformative constitutionalism.<sup>423</sup> Roux<sup>424</sup> expresses particular concern that Klare favours a post-liberal reading of the Constitution, but does not pause to explain his understanding of post-liberalism. For purposes of the present argument, it would be prudent to determine what a post-liberal interpretation requires of adjudication and where it positions constitutional values. It is a central part of the argument in favour of transformative constitutionalism. Roux argues that it would be the best interpretation of the Constitution.

A post-liberal perspective on adjudication can be attributed to the school of critical legal studies. One of the critical legal studies movement's central claims is against the liberal legal philosophy.<sup>425</sup> Admittedly, the school of

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<sup>421</sup> Kroeze 2001 *Stell LR* 273. She does however note that the Court's interpretation of *ubuntu* and *regstaat* in *S v Makwanyane* does serve as an exception this regard.

<sup>422</sup> See 1.1.

<sup>423</sup> Brickhill and van Leeve 2015 *Acta Juridica* 141-171. Roux 2009 *Stell LR* 258-285. Sibanda 2011 *Stell LR* 482-500.

<sup>424</sup> Roux 2009 *Stell LR* 263. Roux states at 263 "Klare's assertion that he does not have to defend the post-liberal reading as the best interpretation of the Constitution for purposes of LC&TC, even though he would be prepared to do so for other purposes, is unconvincing."

<sup>425</sup> Altman *Critical Legal Studies and Liberalism* 110-111. Hunt 1986 *Oxford Journal of Legal Studies* 5. The critical legal studies movement was broad and varied but this statement can be generalised as an objection of the school.

liberal legal philosophy is wide and spans many years. Nevertheless, I sketch the central tenets of this school in broad strokes below. Liberalism originated from the Enlightenment in the 18<sup>th</sup> century. Locke, one of the earlier writers in the liberal tradition, states that:<sup>426</sup>

Freedom of men under government is to have a standing rule to live by, common to every one of that society and made by the legislative power erected in it, a liberty to follow my own will in all things where the rule prescribes not, and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man.

A central tenet of liberalism, as evident from Locke's quote, is thus the rule of law and the liberty to do what one wants to where there is no rule prohibiting it. Legal liberals are of the view that the law is neutral and can be applied objectively. They are furthermore of the opinion that law has determinate and predictable results, in other words, they believe that the law can produce legal certainty. Legal liberals generally include Rawls, Hart and Dworkin.<sup>427</sup>

In general, the critical legal studies movement criticises the liberal legal thought on four points. These points include the indeterminacy of law, anti-formalism, contradiction of law and marginality.<sup>428</sup> The law is seen as indeterminate as the law cannot cover all possible situations.<sup>429</sup> In other words one might be able to state what a certain provision states, but one cannot predict the outcome of every case as situations vary.

Secondly, critical legal studies criticise liberal legalism on the basis of formalism.<sup>430</sup> Formalism can be summed up as the idea that legal rules can be applied without recourse to extra-judicial factors such as social goals,

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<sup>426</sup> Locke *Second Treatise of Government* 15.

<sup>427</sup> Hunt 1986 *Oxford Journal of Legal Studies* 8.

<sup>428</sup> Russell 1986 *Ottawa Law Review* 8.

<sup>429</sup> Russell 1986 *Ottawa Law Review* 8.

<sup>430</sup> See 2.7.2 above on Klare's perspective on the South African Constitution and formalism.

values, political or economic factors.<sup>431</sup> Formalism therefore leads to the conclusion that law and adjudication is objective and neutral.

The school of critical legal studies also believe in inherent contradictions that are present in law.<sup>432</sup> The contradictions arise from the fact that legal rules rely on competing types of norms with the implication that parties can argue from different sides.<sup>433</sup> These contradictions also lead to the indeterminacy and unpredictability in law mentioned above.<sup>434</sup> Contradictory norms that are often referred to within the school of critical legal studies include that of individualism vs altruism, or differently stated, the self and the community.<sup>435</sup>

One of the major points of criticism against the school of critical legal studies has been that it lacks a constitutive theory.<sup>436</sup> However, it does expose the fallibility of law. Although there is no constitutive theory, it seeks to go beyond the traditional, liberal and formalistic view of law and adjudication. Hence, the term post-liberal.

Roux states that Klare is not clear on what he means with a post-liberal interpretation. However, to my mind Klare, seems to be clear that there are very distinct features of the South African Constitution that makes it different from a traditional liberal Constitution, which seems to require a post-liberal and transformative approach. At the heart of this post-liberal approach is the narrowing of a divide between law and politics and a value-

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<sup>431</sup> Russell 1986 *Ottawa Law Review* 8. Unger *The Critical Legal Studies Movement* 8.

<sup>432</sup> Russell 1986 *Ottawa Law Review* 8.

<sup>433</sup> Russell 1986 *Ottawa Law Review* 8. Altman *Critical Legal Studies and Liberalism* 113.

<sup>434</sup> Altman *Critical Legal Studies and Liberalism* 113.

<sup>435</sup> Hunt 1986 *Oxford Journal of Legal Studies* 21.

<sup>436</sup> Hunt 1986 *Oxford Journal of Legal Studies* 37.

laden outlook. Roux states the following with regard to the use of the term post-liberal:<sup>437</sup>

I, for my part, would resist putting a label on the political ideology manifest in the Constitution, since I think this would inevitably make it less than the sum of its parts. I would also, as I have said, certainly avoid the label 'post-liberal' because of its implications that liberalism has a conceptual termination point. If pressed, I would say that the Constitution is a liberal Constitution- of a particular type- certainly not a classical liberal Constitution, but one that reflects the more statist and communitarian tradition within liberalism, and connects it with the indigenous African philosophy of *ubuntu*.

Elsewhere Roux gives the following two suggestions on the functioning of the Constitutional Court:<sup>438</sup>

First, the court should redouble its effects to develop a substantive "moral reading" of the Constitution...Secondly, the court should return to the foundational distinction between the elaboration of the content of rights and the permissible grounds for their limitation, and develop a more coherent theorisation of the values underlying an "open and democratic society based on human dignity, equality and freedom. It is that theorization, after all, that stands between South Africans and government by political faction.

It seems that Roux's trouble with the term "post-liberal" is semantic. Roux is opposed to the term post-liberal as it implies that there is an end to liberalism. This is not the only possible view. Du Plessis,<sup>439</sup> for example, states that Klare uses the term post-liberal as it refers to a Constitution that contains "conventional liberal democracy" as well as "the basic tenets of an all-out transformation of the South African society". At the end of the day, he is still in favour of a reading of the Constitution that follows a certain normative political account. Secondly, he is in favour of the development of a theorisation of the (constitutional) values that are used.

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<sup>437</sup> Roux 2009 *Stell LR* 280.

<sup>438</sup> Roux 2009 *Stell LR* 284.

<sup>439</sup> Du Plessis 2015 *PELJ* 1352.

The South African authors mentioned below establish the view that a post-liberal approach to adjudication and interpretation is preferred, not only constitutionally, but when interpreting statutes as well.

#### 2.7.2.1 Lourens Du Plessis

Du Plessis<sup>440</sup> has always maintained that he is not in favour of a theory of interpretation that suggests rigid rules or a formula that one could apply in any situation. He is in favour of broadly defined interpretive tools. He suggests a multiple strategy that includes reliance on five techniques of statutory interpretation.<sup>441</sup> These include grammatical interpretation, systematic interpretation, teleological interpretation, historic interpretation and comparative interpretation.<sup>442</sup> Each of these methods are subsequently discussed.

The first technique that Du Plessis<sup>443</sup> refers to is called grammatical interpretation. During grammatical interpretation the adjudicator has recourse to the "natural language" or everyday language use of the text.<sup>444</sup> Natural language can be juxtaposed with "formal language", which refers to specialist or subject-specific terms.<sup>445</sup> He states furthermore that language, even natural language, cannot be clear and unambiguous.<sup>446</sup> The grammatical interpretation will thus always be the starting point, but many authors regard it as trite that it cannot be the sole basis of any adjudicator since the meaning of values are never entirely straightforward or devoid of context.

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<sup>440</sup> Du Plessis 2005 *SALJ*611. Du Plessis 2015 *PELJ*1340. Du Plessis 1998 *Acta Juridica* 18.

<sup>441</sup> Du Plessis 1998 *Acta Juridica* 18.

<sup>442</sup> Du Plessis2005 *SALJ* 600-601.

<sup>443</sup> Du Plessis 1998 *Acta Juridica* 14. Du Plessis 1999 *Saskatchewan Law Review* 310.

<sup>444</sup> Du Plessis2005 *SALJ* 601.

<sup>445</sup> Du Plessis 2005 *SALJ* 602.

<sup>446</sup> Du Plessis 2005 *SALJ* 602.

The second technique is systematic interpretation.<sup>447</sup> Du Plessis<sup>448</sup> notes that systematic interpretation can be summed up as contextualisation. He adds that contextualisation refers to the text within the context of the rest of the text.<sup>449</sup> Systematic interpretation is the reason adjudicators look to the preamble, schedule and long titles of Acts for meaning.<sup>450</sup> There is an overlap between systematic and purposive interpretation as "a purposeful reading needs to be a holistic reading".<sup>451</sup> Furthermore, the preamble and long title describe the purpose of an Act, and in that the linkages between systematic and purposive interpretation are apparent.<sup>452</sup>

One can also distinguish between intra and extra-textual interpretation. Intra-textual systematic interpretation refers to the scheme of the specific text to be interpreted.<sup>453</sup> Intra-textual systematic interpretation overlaps with grammatical interpretation since a systematic interpretation requires reference to definition clauses in the text, for example, and since the preamble, long title and schedule assists in giving meaning to a specific text.<sup>454</sup> Extra-textual systematic interpretation refers to what Du Plessis<sup>455</sup> terms "meaning generative signifiers" in the textual environment. These meaning generative signifiers include, *inter alia*, the Constitution, the *Interpretation Act*,<sup>456</sup> the political and constitutional order, the legally recognised interests of society and international law.<sup>457</sup> Extra-textual systematic interpretation also supports the thinking that constitutional values play a role during statutory interpretation and not just constitutional

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447 Du Plessis 1998 *Acta Juridica* 14. Du Plessis 1999 *Saskatchewan Law Review* 310.

448 Du Plessis 2005 *SALJ* 603

449 Du Plessis 2005 *SALJ* 603.

450 Du Plessis 2005 *SALJ* 604.

451 Du Plessis 2005 *SALJ* 604

452 Du Plessis 2005 *SALJ* 605.

453 Du Plessis 2005 *SALJ* 604.

454 Du Plessis 2005 *SALJ* 606.

455 Du Plessis 2005 *SALJ* 606.

456 33 of 1957.

457 Du Plessis 2005 *SALJ* 606.

adjudication, as a "meaning generative term", to use Du Plessis' term. This is so as adjudicators would rely on constitutional values as something outside the text to aid with interpretation.

The next technique most relevant to this study is the teleological technique.<sup>458</sup> Du Plessis<sup>459</sup> describes teleological interpretation as purposive interpretation that takes cognisance of the objects and values of the legal system. He cautions against the use of a strictly teleological approach.<sup>460</sup> The first reason that he offers is that one cannot know the purpose of a provision since it is impossible to know what the purpose is before interpretation.<sup>461</sup> Du Plessis adds that purposive interpretation was used in the pre-democratic era too. It is perhaps because of this fact that the South African courts are not using a purposive approach to statutory interpretation devoid of values.

Du Plessis<sup>462</sup> refers to Botha, who states that the teleological approach is "a value-activating interpretation". Du Plessis<sup>463</sup> mentions that if this is indeed what constitutional interpretation is, then such terminology (i.e. value-activating interpretation) is preferred rather than simply speaking of a "purposive interpretation". He is of the opinion that the most authoritative source of values is set out in the Constitution in sections 1, 7, 41, 195, and 39.<sup>464</sup> He adds, however, that "other" values could also be inferred from the rest of the constitutional text.<sup>465</sup> As alluded to above, Du Plessis<sup>466</sup> mentions that purposive and teleological interpretation should be used in

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<sup>458</sup> Du Plessis 1998 *Acta Juridica* 15. Du Plessis 1999 *Saskatchewan Law Review* 310.

<sup>459</sup> Du Plessis 2005 *SALJ* 607.

<sup>460</sup> Du Plessis 2005 *SALJ* 607.

<sup>461</sup> Du Plessis 2005 *SALJ* 607.

<sup>462</sup> Du Plessis 2005 *SALJ* 607.

<sup>463</sup> Du Plessis 2005 *SALJ* 607-608.

<sup>464</sup> Du Plessis 2005 *SALJ* 608.

<sup>465</sup> Du Plessis 2005 *SALJ* 608.

<sup>466</sup> Du Plessis 2005 *SALJ* 608.

collaboration with systematic interpretation as subjective prejudices can never be left out of adjudication and it should be held in check.

Du Plessis<sup>467</sup> continues to refer to historical interpretation. This method of interpretation allows the adjudicator to look at the genesis of the text.<sup>468</sup> Du Plessis<sup>469</sup> maintains that it is not so much about historical facts, but about the spirit of the history. He adds that any teleological interpretation without recourse to the history is empty.<sup>470</sup> References to the predecessors and successors of provisions are all modes of historical interpretation that can add to the meaning of a provision.<sup>471</sup>

The last technique that Du Plessis identifies is comparative interpretation. Du Plessis identifies two types of comparative interpretation. Firstly, there is comparative interpretation in terms of international law.<sup>472</sup> The second type is comparative interpretation in terms of foreign law.<sup>473</sup> He is of the opinion that this method of interpretation will be used less as our constitutional dispensation becomes more established.<sup>474</sup>

Despite the general canons of construction that Du Plessis described, he has also written about four *leitmotivs* that are useful to constitutional interpretation. A *leitmotiv* can be described as "a recurring keynote or defining ideas, motifs or topoi guiding instances of constitutional interpretation".<sup>475</sup> These *leitmotivs* include memorial, monumental, transitional and transformative constitutionalism.

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<sup>467</sup> Du Plessis 1998 *Acta Juridica* 15. Du Plessis 1999 *Saskatchewan Law Review* 311.

<sup>468</sup> Du Plessis 2005 *SALJ* 609.

<sup>469</sup> Du Plessis 2005 *SALJ* 609.

<sup>470</sup> Du Plessis 2005 *SALJ* 609.

<sup>471</sup> Du Plessis 2005 *SALJ* 610.

<sup>472</sup> Du Plessis 2005 *SALJ* 610.

<sup>473</sup> Du Plessis 2005 *SALJ* 611.

<sup>474</sup> Du Plessis 2005 *SALJ* 611.

<sup>475</sup> Du Plessis 2015 *PELJ* 1341.

Memorial constitutionalism affirms the importance of the Constitution for the new constitutional dispensation.<sup>476</sup> Du Plessis distinguishes between monumental and memorial constitutionalism. According to him, monumental constitutionalism celebrates and memorial constitutionalism commemorates.<sup>477</sup> *MEC for Education: Kwazulu-Natal v Pillay*<sup>478</sup> is a good example of the use of memorial constitutionalism. The Constitutional Court found that the school had unfairly discriminated against Sunali Pillay. The school's code of conduct did not allow for any exemption and favoured one religion above others, placing an undue burden on people from minority groups.<sup>479</sup> There was a strong focus in the judgment on not repeating the past and highlighting the atrocities of the past in South Africa so as not to repeat it.

Various other court cases have echoed memorial constitutionalism. In *Minister of Home Affairs v Fourie*,<sup>480</sup> for example, the constitutionality of the omission of same-sex marriages from the common law definition of marriage was questioned. In the judgment the following quotation by Satchwell reverberates memorial constitutionalism:<sup>481</sup>

The acknowledgement and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation.

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<sup>476</sup> Du Plessis 2015 *PELJ* 1342. Also see Du Plessis 2000 *Stell LR* for a discussion of memorial constitutionalism.

<sup>477</sup> Du Plessis 2015 *PELJ* 1343.

<sup>478</sup> 2008 2 BCLR 99 (CC).

<sup>479</sup> Du Plessis 2008 *AHRLJ* 398.

<sup>480</sup> 2006 3 BCLR 355.

<sup>481</sup> *Minister of Home Affairs v Fourie* (CC) 2006 3 BCLR 355 para 60.

Du Plessis has also identified transitional constitutionalism as a *leitmotiv*. The metaphor of Etienne Mureinik of a bridge from an old to a new South Africa is useful to describe transitional constitutionalism.<sup>482</sup> The postamble to South Africa's interim constitution states that the Constitution is:

a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future found on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class or sex.

This postamble reflects the need at that time to secure peaceful negotiations.<sup>483</sup> This postamble is reflected in the preamble of the final Constitution. Du Plessis refers to Mureinik, who states that the point of a new constitutional dispensation is to make a bridge from a culture of authority to a culture of justification. It has been particularly important in cases concerning just administrative action.

The fourth *leitmotiv* to which Du Plessis refers is the well-known concept of transformative constitutionalism. As alluded to in Chapter 1, transformative constitutionalism refers to a large scale social change that is grounded in law. Du Plessis is of the opinion that transformative constitutionalism could influence constitutional and statutory interpretation in that interpretation requires a non-formalist, non-legalist and non-literalist approach to interpretation.<sup>484</sup> He also states that transformative constitutionalism has an impact on interpretation in that it challenges the view that legal interpretation is non-political.<sup>485</sup> Du Plessis<sup>486</sup> adds that he takes it for granted that the "pre-understanding" of the adjudicator influences the outcome of statutory and constitutional interpretation. By pre-

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<sup>482</sup> Mureinik 1994 *SAJHR* 31-32. Du Plessis 2015 *PELJ* 1345.

<sup>483</sup> Du Plessis 2015 *PELJ* 1346.

<sup>484</sup> Du Plessis 2015 *PELJ* 1351; 1353.

<sup>485</sup> Du Plessis 2015 *PELJ* 1353.

<sup>486</sup> Du Plessis 1998 *Acta Juridica* 17.

understanding, Du Plessis<sup>487</sup> means the adjudicator's "preconceptions, prejudices, beliefs and ideologies".

From Du Plessis' viewpoints on interpretation one can gather that the use of values during interpretation is important. He stresses the importance of traditional theories of interpretation, while simultaneously being influenced by constitutional *leitmotifs* and values. Furthermore, constitutional values play a role in statutory and constitutional interpretation alike. However, the caveat that it is not the only form of interpretation is clear. The second caveat, namely that interpretation is a process and that it is impossible to know the meaning of values before the interpretative process, can also be gleaned from his theory. Du Plessis also emphasises that the purposive interpretation is not the same as the teleological approach.

In general, Du Plessis' perspective on constitutional and statutory interpretation does have a post-liberal flare. Although he does not use the word post-liberal, he does distinguish the South African Constitution from a classical liberal one. There are many correlations between Du Plessis' perspective and that of Klare in relation to constitutional and statutory interpretation.

#### 2.7.2.2 George Devenish

Prior to the constitutional dispensation, Devenish already expressed that a teleological interpretation is the best method of interpretation.<sup>488</sup> He

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<sup>487</sup> Du Plessis 1998 *Acta Juridica* 17.

<sup>488</sup> Devenish *Interpretation of Statutes* 52.

provides several reasons why other methods, for example those mentioned by Du Plessis, would not work.

For example, he is opposed to the literal theory, which suggests that the meaning of a text is solely determined by the words of the legislative text.<sup>489</sup> He is of the opinion that giving words meaning is the first step of many steps in the interpretive process.<sup>490</sup> He furthermore describes this theory as a-contextual and primitive.<sup>491</sup> Regarding the literal theory, Devenish adds that:<sup>492</sup>

... it's premised on a superficial and fallacious perception of language, since words do not have fixed and precise meanings and judges do not have some sort of authentic dictionary to ascertain meaning.

According to the literal theory of interpretation, one may only depart from the normal language of a text if the literal reading would have an absurd effect. Devenish is of the opinion that such an approach would have a static effect on the development of the law.<sup>493</sup> Although Devenish already refuted the literal approach before the constitutional dispensation, it has now been confirmed that the sole reliance on the literal meaning of a text can never be valid in the South African legal system as such a reading would be grossly inconsistent with section 39 of the Constitution, which obliges courts to interpret customary law, common law and legislation in line with the spirit, purport and object of the Bill of Rights.<sup>494</sup>

Devenish continues to discuss the subjective theory of interpretation. This approach looks to the intention of the legislature to determine the meaning of a provision. He points out that this theory is not flawless, the most

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<sup>489</sup> Devenish *Interpretation of Statutes* 26. Devenish 2016 *Obiter* 643-644.

<sup>490</sup> Devenish *Interpretation of Statutes* 26.

<sup>491</sup> Devenish *Interpretation of Statutes* 26.

<sup>492</sup> Devenish *Interpretation of Statutes* 27.

<sup>493</sup> Devenish *Interpretation of Statutes* 32.

<sup>494</sup> In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2005 4 SA 490 (CC) the Court criticised the use of the "literal meaning" approach.

obvious flaw being that a strict adherence renders the law rigid and static.<sup>495</sup> This theory would also not be entirely fitting in the constitutional dispensation as the intention of the legislature and parliamentary sovereignty is a thing of the past.

Devenish distinguishes between the purposive and teleological approaches, while some authors seem to conflate the two approaches. The purposive interpretation looks to the purpose of the legislation. Even though Devenish looks favourably upon the purposive approach, he is of the opinion that even the purposive approach neglects certain values.<sup>496</sup> A purposive approach was particularly problematic in a country such as South Africa where unjust laws were applied.<sup>497</sup> Judges would still be able to apply a purposive approach and maintain the *status quo* of an unjust system.

The approach that Devenish favours is the teleological approach.<sup>498</sup> This approach looks at the purpose of the text, but it is also a value-orientated approach. It is wider than the purposive approach.<sup>499</sup> The teleological approach takes justice and security into account and definitely has an ethical dimension to it. Despite Devenish having written about this approach before the constitutional era, he still maintains his viewpoint post-1994 and argues that the teleological approach is the approach of the Constitutional Court as well.<sup>500</sup> The teleological approach is also in line with an interpretative approach that regards constitutional values as important.

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<sup>495</sup> Devenish *Interpretation of Statutes* 35.

<sup>496</sup> Devenish *Interpretation of Statutes* 38.

<sup>497</sup> Devenish *Interpretation of Statutes* 38.

<sup>498</sup> Devenish *The South African Constitution* 213.

<sup>499</sup> Devenish *Interpretation of Statutes* 46.

<sup>500</sup> Devenish 2008 *SALJ*. Devenish 2006 *SALJ*.

### 2.7.2.3 Wessel Le Roux

Le Roux contributes to the discussion on constitutional and statutory interpretation by specifically looking at the Constitutional Court's use of section 39 of the Constitution. In general, Le Roux supports a teleological interpretation, but is cautious of the manner in which courts apply this approach. He is concerned that courts too often venture outside of the permitted meaning of the text. He specifically raises this view in relation to *African Christian Democratic Party v Electoral Commission*.<sup>501</sup> According to him the court sacrificed the integrity of the text in favour of pursuing the purpose of the text and the Constitution.<sup>502</sup> Le Roux's discussion of this specific case is particularly telling regarding the court's use of constitutional values and his criticism of it.

The case dealt with the registration of political parties. Section 14 of the *Local Government: Municipal Electoral Act*<sup>503</sup> provides that a party may only contest an election in the municipal area if it has submitted the following in the relevant municipal area before a prescribed deadline:

- (a) notice of intention to participate in the specific election
- (b) a party list,
- and (c) a prescribed deposit in the form of a bank guaranteed cheque.

The African Christian Democratic Party (ACDP) did not submit the bank guaranteed cheque to the local office but to the central office in Pretoria.<sup>504</sup> When the party realised their mistake the deadline had passed.<sup>505</sup> The Electoral Commission refused to add the ACDP to the list and they could not take part in the elections.<sup>506</sup> The Electoral Court was also of the opinion that

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<sup>501</sup> 2006 3 SA 305 (CC).  
<sup>502</sup> Le Roux 2006 *SAPL* 384  
<sup>503</sup> 27 of 2000.  
<sup>504</sup> Le Roux 2006 *SAPL* 385.  
<sup>505</sup> Le Roux 2006 *SAPL* 385.  
<sup>506</sup> Le Roux 2006 *SAPL* 386.

the Electoral Commission made the right decision. The ACDP eventually appealed to the Constitutional Court. The majority of the court held that the purpose of section 14 of the Act was to ensure that parties were serious about running in the election.<sup>507</sup> The court therefore deemed the payment to be at the local office and the ACDP was allowed to be placed on the voting list. In a minority judgment, Skweyiya held that the provisions of the Act was preemptory and could not be deviated from.

Le Roux's<sup>508</sup> first point of contention is that the court paid no mind to the linguistic meaning of the relevant section of the Act and immediately proceeded to the purpose of the Act. He takes issue with the following paragraph:<sup>509</sup>

The purpose of s 14 (and s 17) is to ensure that a deposit is paid by a political party (or ward candidate) to establish that they have a serious intention of contesting the election. There is no central legislative purpose attached to the precise place where the deposit is to be paid. In my view, to interpret ss 14 and 17 in a manner which prohibits the Commission from making such a facility available to political parties would be to read the provision unduly narrowly and to misunderstand its central purpose.

According to Le Roux,<sup>510</sup> the court should first have enquired what the linguistic meaning of "office of the Commission's local representative" is. The court stated that reading the relevant provisions in a purposive manner would be more consistent with constitutional values than a more literal approach.<sup>511</sup> Le Roux takes this statement to mean that every "statutory provision must be read as part of and integrated into a principled legal whole".<sup>512</sup> In the reasoning of the court, the majority held that narrowly

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<sup>507</sup> *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC) para 27. Le Roux 2006 *SAPL* 386.

<sup>508</sup> Le Roux 2006 *SAPL* 386.

<sup>509</sup> *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC) para 27.

<sup>510</sup> Le Roux 2006 *SAPL* 386.

<sup>511</sup> *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC) para 28.

<sup>512</sup> Le Roux 2006 *SAPL* 386.

textual and linguistic approach is to be avoided.<sup>513</sup> In support of this argument, reference was made to the following words of Olivier JA:<sup>514</sup>

Legalistic debates as to whether the enactment is peremptory (imperative, absolute, mandatory, a categorical imperative) or merely directory; whether 'shall' should be read as 'may'; whether strict as opposed to substantial compliance is required; whether delegated legislation dealing with formal requirements are of legislative or administrative nature, etc may be interesting, but seldom essential to the outcome of a real case before the courts. They tell us what the outcome of the court's interpretation of the particular enactment is; they cannot tell us how to interpret. These debates have *a posteriori*, not *a priori* significance.

Le Roux<sup>515</sup> states that his main point of contention is not a teleological approach but that no textual threshold in accordance with section 39(2) of the Constitution was adhered to. He adds that this textual threshold was in place so that adjudicators or other administrative agencies might not disregard a text simply in light of the purpose and spirit of the legislation and the Bill of Rights.<sup>516</sup> Referring to *Daniels v Campbell*, he states that this would result in "confusion and legal uncertainty".<sup>517</sup> Le Roux's additional concern with "teleological judgments" is the "politics of interpretation" and "the nature of judicial responsibility". Furthermore, he refers to De Ville, who states that the purpose of legislation is just as much an aid in interpretation as literal meaning.<sup>518</sup> To further buttress his argument Le Roux<sup>519</sup> refers to Du Plessis, who states that the purpose of a provision should also be discovered through a textual interpretation, meaning that the purpose of a provision cannot be known beforehand.

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<sup>513</sup> *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC) para 25.

<sup>514</sup> *Weenan Transitional Local Council v Van Dyk* 2002 4 SA 653 (SCA) para 13.

<sup>515</sup> Le Roux 2006 *SAPL* 390.

<sup>516</sup> Le Roux 2006 *SAPL* 390.

<sup>517</sup> Le Roux 2006 *SAPL* 390. *Daniels v Campbell* 2004 7 BCLR 735 para 83.

<sup>518</sup> Le Roux 2006 *SAPL* 391. De Ville 1999 *THRHR* 373, 378-379.

<sup>519</sup> Le Roux 2006 *SAPL* 391. Du Plessis 2005 *SALJ* 591, 608. See 2.7.2.1 for a discussion on Du Plessis' viewpoints on the purposive approach.

At this point I want to pause and evaluate Le Roux's arguments in relation to the teleological approach and the ACDP case specifically. Le Roux is cautious of the teleological approach. I agree that the teleological or "so-called" value-laden approach increases the complexity of adjudication and places an increased measure of responsibility on the shoulders of the courts to justify their decisions and to be transparent.<sup>520</sup> I am, however, not of the opinion that the court did not comply with this responsibility in the ACDP case.

Le Roux implies that the court simply decided on the relevant constitutional values on a whim when it set out why the value of enfranchisement is important. In starting off with the interpretation of section 14 and section 17 of the Act, the court stated that it is imperative to interpret these provisions in light of the constitutional values.<sup>521</sup> The court then continues to refer to the foundational value of universal adult suffrage mentioned in section 1 of the Constitution.<sup>522</sup> Furthermore, the court referred to *August v Electoral Commission*<sup>523</sup> where the importance of these foundational values were set out. In *August v Electoral Commission*, the importance of these values were contextualised in relation to the economic disparities in South Africa and their relation to human dignity.<sup>524</sup> The court also emphasised that an interpretation of legislation dealing with voting rights should be interpreted in favour of enfranchisement rather than disenfranchisement.<sup>525</sup>

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<sup>520</sup> This point is made at 2.7.1.

<sup>521</sup> *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC) para 21.

<sup>522</sup> *African Christian Democratic Party v Electoral Commission* 2006 3 SA 305 (CC) para 21. Section 1(d) of the Constitution provides that the Constitution is founded upon, *inter alia*, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government to ensure accountability

<sup>523</sup> *August v Electoral Commission* 1999 3 SA 1 (CC).

<sup>524</sup> *August v Electoral Commission* 1999 3 SA 1 (CC) para 17.

<sup>525</sup> *August v Electoral Commission* 1999 3 SA 1 (CC) para 17.

The court thus made clear that certain values were applicable and how it understood these values.

Le Roux also seems to be of the opinion that there is a pre-determined set of steps that must be followed when approaching legislative interpretation by stating that the court should have looked at the linguistic meaning of the text first. In this regard it is strange that he relies on Du Plessis for his viewpoints, since Du Plessis himself states that there are no ready-made recipes for interpretation.<sup>526</sup>

Le Roux also states that the court's reference to constitutional values in their interpretation of the current case implies that every statutory provision must be applied as part of a whole.<sup>527</sup> Le Roux seems to have a misunderstanding of the function of constitutional values. Firstly, there is a clear mandate for the courts to interpret legislation in light of constitutional values. Secondly, it was not the legislation that had to be tested, it was rather the effect of a specific provision of a piece of legislation against the background of constitutional values, applied to a specific set of facts. The specific set of facts does determine what the outcome will be. Similar to Dworkin's principles, values do not determine a specific outcome, rather they give direction. Had the ACDP, for example, made no payment at all at any office, the court might have come to a different conclusion. They

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<sup>526</sup> Du Plessis 1998 *Acta Juridica* 18 states "Reliance on the five techniques will not guarantee a uniform approach to interpretation. This cannot be a point of criticism, however. A uniform approach to or recipe for interpretation will never be achieved due to, amongst others, the decisive impact of pre-understanding. It is therefore also fallacious to require the five techniques to be invoked in any predetermined order of preference." Many years later he refines his discussion on the five techniques with reference to constitutional values and constitutional leitmotifs but still maintains "that statutes (and the Constitution) ought not to be understood as 'entities' composed of, for instance, grammatical, systematic, purposive or historical 'elements': these 'elements' should rather be seen as simultaneously given, co-equal modes of existence or being that are 'on the move', overlapping and interacting." See Du Plessis 2005 *SALJ* 611.

<sup>527</sup> Le Roux 2006 *SAPL* 386-387.

certainly hinted at that. The matter was also an urgent application, which should be taken into account.

Devenish has written a note on *African Christian Democratic Party v Electoral Commission*<sup>528</sup> and is very much in favour of the majority's reasoning and approach to the case.<sup>529</sup> He too is of the opinion that the majority of the court did not directly skip to the purpose of the provision on a whim. Instead, his view is that the court looked at the ordinary meaning of the provision and is still looking at it from a holistic point of departure by invoking the purpose of the legislation and the values of the Constitution.<sup>530</sup> Devenish also adds that interpretation is an eclectic process where the disposition of the adjudicator, or pre-understanding as Du Plessis refers to it, also plays a role in the process.<sup>531</sup> Devenish also refers to Michelman, who states that<sup>532</sup>

on the constitutional level, legal interpretation succeeds by construing legal words, intentions, and purposes, yes, but construing them decidedly in the light of consequences, and by appraising consequences decidedly in light of an emergent national sense of justice to which the interpretations are themselves, recursively, contributing.

Devenish and Michelman touch upon an important point relating to the focus of values and interpretation. It is my argument, as hinted at above,<sup>533</sup> that values should be used not in light of the provision in abstract, but in light of the actual effect or consequence that a specific provision has. Therefore, Le Roux's criticism that the court "is not pursuing an abstract definition but an operative effect" cannot hold as a post-liberal approach.

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<sup>528</sup> 2006 3 SA 305 (CC).

<sup>529</sup> Devenish 2006 *SALJ* 403.

<sup>530</sup> Devenish 2006 *SALJ* 402-403.

<sup>531</sup> Devenish 2006 *SALJ* 408.

<sup>532</sup> Devenish 2006 *SALJ* 408. Michelman 1995 *SAJHR* 485.

<sup>533</sup> See 2.3.6.

In fact, a teleological approach would look at the operative effect and not just an abstract definition.<sup>534</sup>

#### 2.7.2.4 Christo Botha

Botha,<sup>535</sup> the author of a well-known book on statutory interpretation, supports the teleological approach, but states that the value-laden approach is not easy to implement. He adds that judges should not just pay lip-service to the values of the Constitution.<sup>536</sup> Courts should rather try to implement values through interpretation and application. Botha<sup>537</sup> is of the opinion that if values are not taken seriously, one might as well get rid of the Constitution.

He refers to instances in the pre-democratic era to illustrate how values could possibly affect interpretation. As an example, he refers to the case of *S v F*.<sup>538</sup> In the matter the court had to decide whether a 17-year-old girl could testify in court in the presence of the person who had raped her. The court had to interpret section 158 of the *Criminal Procedure Act*.<sup>539</sup> The court held that section 158 (3) of the Act had to be read conjunctively, meaning that subsections (a) to (e) had to be satisfied. Botha was of the opinion this was a bad interpretation as it was totally text-based and devoid of any consideration of constitutional values, such as human dignity.<sup>540</sup>

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<sup>534</sup> Le Roux 2006 *SAPL* 386

<sup>535</sup> Botha *Statutory Interpretation* 143.

<sup>536</sup> Botha *Statutory Interpretation* 143.

<sup>537</sup> Botha *Statutory Interpretation* 145.

<sup>538</sup> 1999 1 SACR 571 (C).

<sup>539</sup> 51 of 1977. Section 158 (3) provides that "an order to give evidence *via* closed circuit television can be made if it appears to the court that a court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would-(a) prevent unreasonable delay (b) save costs (c) be convenient (d) be in the interest of the security of the State or of public safety or in the interests of justice or the public (e) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings."

<sup>540</sup> Botha *Statutory Interpretation* 146.

Botha has also written about values within the context of the politics of interpretation. In general, he sees the South African legal and judicial culture as formalistic as the courts often fail to embrace more vague legal standards, such as constitutional values, and instead adhere to rules that are perceived to be clearer.<sup>541</sup> This formalism is also evident from the belief that judges can arrive at answers to legal problems in a mechanical manner and without being influenced by their own beliefs or political viewpoints.<sup>542</sup> He sees the metaphor of law as a field of the judge's action, as presented by Kennedy,<sup>543</sup> as useful to understand the constraints and freedom judges experience during the adjudication process. Botha summarises the metaphor as follows:

There, Kennedy describes the process of legal reasoning from the perspective of a hypothetical judge who is assigned a case that initially seems to present a conflict between 'the law' and 'how-he-wants-to-come-out'. The case involves an application for an injunction by a bus company against striking workers, who are lying down in the street outside the bus station to prevent buses (driven by substitute workers) from passing. The judge suspects that there is a rule that prohibits workers from interfering with the owners' use of the means of production during a strike, and that such rule applies to the workers' lie-in. He does not agree with the rule, as he is in favour of a transformation of economic life that would allow workers greater control over the means of production. He would, therefore, like to see the workers get away with the lie-in. He would also like to 'move the law as much as possible in the direction of allowing workers a measure of legally legitimated control over the disposition of the [means of production] during a strike'.<sup>544</sup>

The metaphor above describes the field through which the judge has to move to eventually get to a result.<sup>545</sup> The judge is constrained by the legal rules that he has to follow, but is at the same time free to think of different ways to get to the outcome that he wants.<sup>546</sup>

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<sup>541</sup> Botha 2004 *SAJHR* 260. Botha 2010 *SAPL* 43.

<sup>542</sup> Botha 2004 *SAJHR* 249-250.

<sup>543</sup> Botha 2004 *SAJHR* 260. Kennedy 1986 *Journal of Legal Education* 521.

<sup>544</sup> Botha 2004 *SAJHR* 260.

<sup>545</sup> Botha 2004 *SAJHR* 261.

<sup>546</sup> Botha 2004 *SAJHR* 262.

Botha<sup>547</sup> believes that the Supreme Court of Appeal in particular makes a strong distinction between rules and abstract considerations. Quoting Woolman and Brand,<sup>548</sup> he states that courts rather use rules than values as they pose less of a danger to "certainty, predictability and uniformity". Woolman and Brand<sup>549</sup> add that it comes from the formalistic belief that constitutional values are not neutral and are subjective as they are based on the opinion of the interpreter.<sup>550</sup>

This formalistic viewpoint, Botha argues, is contrary to the transformative aspirations of the Constitution.<sup>551</sup> Furthermore, he mentions that the Constitutional Court has resisted strict definitions when it comes to constitutional norms, although not specifically mentioning values.<sup>552</sup> The Constitutional Court is also in favour of deciding on a case-by-case basis.<sup>553</sup> He also mentions that the Constitutional Court has been criticised for uncritically relying on values without disseminating their meaning. For this he offers many reasons, including "institutional considerations, assumptions about the judicial role, the tendency to see freedom and constraint in absolute terms."<sup>554</sup>

## **2.8 Conclusion**

This chapter set out to determine the nature and function of constitutional values. The scholarly opinions and theoretical foundations on constitutional values in the South African context are limited. The authors discussed and analysed in this chapter are all in agreement that the use of constitutional values is relevant and justified, although there are slight deviations on how

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<sup>547</sup> Botha 2004 *SAJHR* 269.

<sup>548</sup> Botha 2004 *SAJHR* 270. Woolman and Brand 2003 *SAPL* 64-65.

<sup>549</sup> Woolman and Brand 2003 *SAPL* 65.

<sup>550</sup> Woolman and Brand 2003 *SAPL* 65.

<sup>551</sup> Botha 2004 *SAJHR* 270.

<sup>552</sup> Botha 2004 *SAJHR* 277.

<sup>553</sup> Botha 2004 *SAJHR* 277.

<sup>554</sup> Botha 2004 *SAJHR* 279.

values should be used in constitutional interpretation. The justification for constitutional values includes a move away from a discriminatory past, getting on par with international standards and the constitutionally mandated value-laden interpretation by the courts. The importance of constitutional values was furthermore evident from the post-liberal transformative vision of the Constitution.

Apart from the scholarly opinions on constitutional values, the jurisprudence of the courts was explored to see how courts employ constitutional values. As the courts have been silent on the general nature and role of constitutional values, an investigation into their use of specific values was necessary. It is clear that constitutional values play a key role in the interpretation and development of constitutional rights as well as other legislation by the judiciary. The judiciary has frequently referred to constitutional values in the interpretation and application of rights and legislation. Furthermore, it is also clear that constitutional values are flexible terms that do not have ready-made meanings. Thus, the judiciary has discretion in giving content to these values. However, the judiciary often do not give theoretical depth to values and very often engage with constitutional values in a formalistic manner that assumes that the meaning of constitutional values have been determined. There have been instances where courts have given varied interpretations to values, particularly that of dignity. In this regard, the judiciary has based the meaning of dignity on difference, individual autonomy, *ubuntu* and identity, among other things.

Apart from the scholarly and judicial perspectives on constitutional values, this chapter included a general discussion on the approach to statutory and constitutional interpretation. This discussion was relevant as it revealed the importance and role of constitutional values, also known as the teleological approach, to judicial interpretation, particularly in the new constitutional dispensation. The opinions of scholars on statutory and constitutional

interpretation reveal that judges do not only have an interpretive role, but a law-making function as well. Despite the fact that the interpretive role of judges creates a certain sense of uncertainty and open-endedness, it all the more calls for judicial responsibility where the judiciary justifies its decisions and ideological choices.

Although legal scholars seem to have different opinions on the extent to which values should be used during interpretation, they do not doubt the importance of values during the adjudication process. It would appear that the values of human dignity, equality and freedom play particularly important roles. Although one cannot say for sure that there is a specific hierarchy, *ubuntu* is seen as a value that also occupies a higher status as it runs through the entire South African legal system. It has also been established that constitutional values outside the constitutional text do exist, *ubuntu* being one of these values. The next chapter focuses on possible normative meanings of *ubuntu* as a constitutional value.

This chapter concludes that there are important distinctions between values, rights, principles and rules. All of these terms create certain standards within the law. However, values should be distinguished from rights as the former are not enforceable, but rather used as an interpretive guide that gives direction in a matter. Principles are also standards that give direction in a matter, but they are formulated more precisely and often give expression to values. This distinction also has the implication that values do not have to be specifically mentioned or argued by parties as they will always be applicable during interpretation. Principles and values cannot predict a specific outcome, but aid in the weighing up of considerations.<sup>555</sup>

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<sup>555</sup> The argument by Moosa 2018 *South African Mercantile Law Journal* 71-90, for example, that interpreting tax legislation through the prism of *ubuntu* as a constitutional value will always mean that the taxpayer must pay the higher

It is important to note that when courts use values to come to a decision, it is the effect or outcome in a specific case that is measured against constitutional values and constitutional provisions in general.

This chapter attempted to answer some of the issue related to the "form" of *ubuntu* as a constitutional value. The next chapter seeks to answer the question on what the "substance" of *ubuntu* should be. Differently put, it seeks to provide an indication of the possible meaning or meanings that *ubuntu* can have to eventually determine how it can contribute towards social justice.

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amount is thus faulty as it is impossible to know once and for all what the outcome of a case will be every time *ubuntu*, or a constitutional value, is applied.

## Chapter 3 Perspectives on *ubuntu*

### 3.1 Introduction

This study deals with the use of *ubuntu* as a constitutional value in the advancement of social justice in South Africa. Thus far, the general use and function of constitutional values was established by analysing case law and engaging in a critical discussion of scholarly opinions on constitutional values. Chapter 2 engages with many of the trouble issues related to constitutional values in general and in particular with the form of *ubuntu*, as opposed to the substance. This was necessary since *ubuntu* has been used by the courts as a constitutional value. Now that it has been determined what constitutional values should do, it is necessary to determine the possible normative meaning of *ubuntu*, i.e. the substance.

Many of the objections against *ubuntu* are based on the meaning of the term. Some of these objections relate to the vagueness of the term or the sense that *ubuntu* does not have a fixed meaning.<sup>556</sup> The idea that *ubuntu* implies many things also creates discomfort with some authors.<sup>557</sup> Some feel that ideological tensions exist within the term. For example, the term can be understood in a revolutionary way that seeks radical transformation or a more conservative way that does not seek reform.<sup>558</sup> The ideological tension also exists in the sense that traditional versions of the term resists dynamism and change, while other conceptions strive for an understanding that is accommodating of a modern constitutional community.<sup>559</sup>

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<sup>556</sup> Bennett *Ubuntu: An African Jurisprudence* 37. Nkosi 2018 *SAPL* 6. Himonga *et al* 2013 *PELJ* 374. Van der Walt 2005 *SAPL* 256-260.

<sup>557</sup> Kroeze 2002 *Stell LR* 260.

<sup>558</sup> Mokgoro and Woolman 2010 *SAPL* 403-404.

<sup>559</sup> For more traditional conceptions of *ubuntu* see Radebe and Phooko 2017 *South African Journal of Philosophy* 239 – 251 and Ramose discussed hereunder at 3.2.1. For a more modern conception see, for example Metz discussed at 3.2.3 or Cornell discussed 3.2.5.

The purpose of this chapter is to determine the normative meaning as used by scholars and the courts thus far. The concept of *ubuntu* has been approached from various disciplines, as shown below. The literature on the use and meaning of *ubuntu* is far and wide. This chapter explores meanings from various sources, including scholarly opinions and case law. The various understandings of *ubuntu* range from conservative, radical, to moderate understandings of *ubuntu* to engage with the debate on the meaning of this contentious term as far as possible. The analysis commences with a discussion of the views of scholars before focusing on judicial opinions and finally concluding with an appropriate understanding of the notion of *ubuntu* for this study.

### **3.2 Scholarly perspectives on ubuntu**

#### *3.2.1 Ramose: A holy trinity*

Ramose is one of the leading scholars on the concept of *ubuntu*.<sup>560</sup> According to him, *ubuntu* is the basis of African philosophy.<sup>561</sup> It is important to define the concept of African philosophy to understand Ramose's perspective. Wiredu<sup>562</sup> states that the quest of postcolonial African philosophy has been about self-definition. During the colonial period, the lived realities and lives of African people were not taken up in philosophical theories and writings and if they were, it was a derogatory depiction.<sup>563</sup> African people were largely on the periphery. The philosophies that were taught even within Africa were largely based on Western philosophy.<sup>564</sup>

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<sup>560</sup> His work on *ubuntu* includes Ramose 2001 *Polylog: forum for Intercultural Philosophy*; Ramose 2007 *South African Journal of Philosophy* 347; Ramose 2009 "Ecology through *ubuntu*" 308; Ramose 2010 *Journal of Moral Education* 291; Ramose "The Philosophy of uBuntu and uBuntu as Philosophy"; Ramose "Ubuntu: Affirming a Right and Seeking Remedies in South Africa".

<sup>561</sup> Ramose "The Philosophy of Ubuntu and Ubuntu as Philosophy" 230.

<sup>562</sup> Wiredu "Introduction: African Philosophy in Our Time" 1.

<sup>563</sup> Wiredu "Introduction: African Philosophy in Our Time" 1.

<sup>564</sup> Wiredu "Introduction: African Philosophy in Our Time" 1.

African philosophy can therefore be described, generally, as a countermovement for African people to assert themselves as human beings with a specific history worth studying.

African philosophy consists of different schools, including ethnophilosophy,<sup>565</sup> sage philosophy,<sup>566</sup> nationalist-ideological philosophy<sup>567</sup> and professional philosophy.<sup>568</sup> Bondunrin<sup>569</sup> explains that all three these schools arose from new challenges created by the West's colonisation and evangelisation of Africa. These challenges included the creation of a new image of Africans that is not derogatory, a restoration of a sense of pride that had been lost after colonisation, the need for a philosophy that is African and the need to show the relevance of research in Africa.<sup>570</sup> Some authors make a further distinction between traditional African philosophy and contemporary African philosophy.<sup>571</sup>

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<sup>565</sup> Hallen "Contemporary Anglophone African Philosophy: A survey" 123 describes ethnophilosophy as a philosophy that is based on certain peoples. Its sources are poetry, myths and parables, amongst others. It is not a philosophy that changes or develops over time. For a discussion on ethnophilosophy see Hallen 2010 *Thought and Practice* 73-86; Bodunrin 1981 *Philosophy* 161.

<sup>566</sup> Oruka in "Sage Philosophy" xviii states that a sage philosopher is someone that is constantly concerned with the empirical and ethical issues of his community and has the ability to provide solutions to these issues. Oruka's research has largely been about the number of sage philosophers that exist within Africa. For further discussion sage philosophy see Presbey 2007 *Philosophia Africana* 127-160; Hellsten 2007 *Cambridge Quarterly of Healthcare Ethics* 190-191; Bodunrin 1981 *Philosophy* 162.

<sup>567</sup> This philosophy is rooted in liberation movements such as Pan-Africanism and the Black Consciousness Movement. According to Nwosimiri 2017 *SAGE Open* 2 it is about fighting the powers of colonisation. For a discussion on nationalist-ideological philosophy see Bodunrin 1981 *Philosophy* 162.

<sup>568</sup> Bodunrin 1981 *Philosophy* 161. Bodunrin sees professional philosophy as a universal philosophy that is not estranged from other Western philosophical traditions.

<sup>569</sup> Bodunrin 1981 *Philosophy* 162.

<sup>570</sup> Bodunrin 1981 *Philosophy* 164-165.

<sup>571</sup> For example Wiredu "Introduction: African Philosophy in our Time" 4.

Ramose writes from the perspective of the African people that were once excluded and now have to be recognised. He therefore comes from the school of ethnophilosophy. Ramose cites Osuagwa, who states that:<sup>572</sup>

in conducting their historical essay, African philosophies want to rectify the historical prejudice of negation, indifference, severance and oblivion that have plagued African philosophy in the hands of European devil's advocates and their African accomplices. African historical investigations go beyond defense, confrontations and corrections. They are also authentic projects and exercises in genuine scientific construction of African philosophy concerning the diverse matters of identity and difference, problem and project, its objectives, discoveries, development, achievements and defects of failures.

According to Ramose,<sup>573</sup> *ubuntu* philosophy is the lived and living experience of human beings and means that the human dignity of the "Bantu-speaking" peoples must be recognised, protected, promoted and respected. He argues that humanness is a better explanation of *ubuntu* than humanism.<sup>574</sup> Humanness depicts a state of something that is still coming into being, whereas humanism depicts a state of finality.<sup>575</sup> Ramose regards this meaning of the word as apparent in the word itself. The prefix of the word *ubu-* means being and *ntu-* is described as the point at which being takes concrete form.<sup>576</sup> The *ubu-* is always directed at the *ntu-*.

Ramose is not positive about the incorporation of the *ubuntu* philosophy in the legal sphere. He is of the opinion that there are various incompatibilities. Firstly, he argues that the *ubuntu* philosophy is incompatible with constitutional supremacy, which is a Western construct.<sup>577</sup> He uses the right to property as an example to illustrate this incompatibility by arguing that the right to property is central to a dignified human life and that private claims to ownership should not be prioritised over people's basic needs.

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<sup>572</sup> Osuagwa *African Historical Reconstruction* 25.

<sup>573</sup> Ramose "Ubuntu: Affirming a Right and Seeking Remedies in South Africa" 121.

<sup>574</sup> Ramose "Ecology through uBuntu" 69.

<sup>575</sup> Ramose "Ecology through uBuntu " 69.

<sup>576</sup> Ramose *An African Perspective on Justice and Race*  
<https://them.polylog.org/3/frm-en.htm> .

<sup>577</sup> Ramose "Ubuntu: Affirming a Right and Seeking Remedies in South Africa"128.

Secondly, he states that African law cannot be reconciled with a Western sense of justice since the former is based on equilibrium and consensus and the latter on individual rights.<sup>578</sup> He also argues further that constitutional supremacy is incompatible with *ubuntu* philosophy as the Constitution is rigid and unchangeable, whereas *ubuntu* connotes flexibility and change.<sup>579</sup>

Thirdly, a point of disagreement that relates to the above-mentioned difference between a Western sense of justice and *ubuntu* justice, according to Ramose, is prescription.<sup>580</sup> The concept of prescription of a wrong or injustice is unknown in African law as *ubuntu* justice requires a restoration of equilibrium.<sup>581</sup> Ramose opines that in accordance with true African law, law is a continual experience with no point of finality therefore there cannot be any prescription.<sup>582</sup>

Ramose states that two competing paradigms were at play during the transition to democracy in South Africa, namely the democratisation and decolonisation paradigm. Had the decolonisation paradigm been followed, the territory would have been restored to the rightful owners of the land, equilibrium would have been restored and the basis would have been laid for a new state. Instead, the democratisation process was followed, which meant the injustice of colonisation was allowed to continue. Ramose argues that the colonisers, or "conquerors", used the concept of *ubuntu* as a tactic to escape responsibility after 1994.<sup>583</sup> He argues further that a superficial change took place post 1994 in that Westminster and Roman law legal

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<sup>578</sup> Bewaji and Ramose 2003 *South African Journal of Philosophy* 399-400.

<sup>579</sup> Ramose "Ubuntu: Affirming a Right and Seeking Remedies in South Africa" 134.

<sup>580</sup> Ramose *An African Perspective on Justice and Race*.  
<https://them.polylog.org/3/frm-en.htm> .

<sup>581</sup> Ramose *An African Perspective on Justice and Race*.  
<https://them.polylog.org/3/frm-en.htm> .

<sup>582</sup> Ramose *An African Perspective on Justice and Race*.  
<https://them.polylog.org/3/frm-en.htm> .

<sup>583</sup> Ramose *An African Perspective on Justice and Race*.  
<https://them.polylog.org/3/frm-en.htm> .

paradigms were translated into the vernacular languages of the indigenous people without adopting their moral and political convictions.<sup>584</sup> The understanding of *ubuntu* that Ramose heralds therefore not only challenges the conventional understanding of *ubuntu* as humanness and dignity, but challenges many of the basic underpinnings of the South African legal system.

A fourth point of incompatibility for Ramose is the religious aspect of *ubuntu*. According to him, there are three levels of existence including the dead, the living and the unborn.<sup>585</sup> According to Ramose, *ubuntu* is inseparable from this understanding of existence.<sup>586</sup> This version of *ubuntu* that refers to a holy trinity creates an incompatibility with law as the South African legal system is secular and not based on any particular religion.

Ramose's description of *ubuntu* as a concept related to being and interconnectedness with others is unproblematic. His definition also alludes to the dehumanisation that Africans and South Africans have had to endure over the last century. This need to recognise a basic humanity over and against the lack of humanity has been of critical importance in the jurisprudence of the South African courts, as is shown below.

However, an understanding of *ubuntu* that cannot be distinguished from its religious understanding or origins is problematic within the South African legal system. Furthermore, the incompatibilities with some of the basic principles of South African law, for example prescription and the supremacy of the Constitution, makes *ubuntu* difficult to use as a legal concept. Ramose is also rigid in his understanding of *ubuntu*. He prescribes to only one understanding of *ubuntu* and African philosophy, when in fact authors have

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<sup>584</sup> Ramose *An African Perspective on Justice and Race* <https://them.polylog.org/3/frm-en.htm>.

<sup>585</sup> Ramose "The Philosophy of uBuntu and uBuntu as Philosophy" 236.

<sup>586</sup> Ramose "The Philosophy of uBuntu and uBuntu as Philosophy" 236.

had varied understandings of these constructs. Bodunrin, an African philosopher, who falls into the professional school of African philosophy, offers the argument that traditional African concepts (at least not as-is) would be difficult to apply to modern African communities.<sup>587</sup> The realities of urbanisation, migration and diverse populations has made it impossible to stick to traditional African concepts as they were once applied.<sup>588</sup>

Ramose should furthermore be challenged on his statement that the Constitution (and law) is immutable. The Constitution does have an amendment clause and law constantly changes and develops as a result of new legislation and judgments pronounced by courts. Furthermore, Ramose states that *ubuntu* philosophy is about change and flux, but he is not willing to be open to an understanding of *ubuntu* that has developed from its original understanding. My argument is not that institutions and structures such as economic markets, the basis of constitutional principles and the effects of common law rules on people should not be interrogated and critiqued.<sup>589</sup> The argument is rather that the basis of that criticism and interrogation should be situated within the South African constitutional project.

### *3.2.2 Bennett: An African equity*

Bennett has written extensively on the topic of customary law and on *ubuntu* and the law.<sup>590</sup> He is of the opinion that the concept of *ubuntu* can contribute towards society in general, as well as to the legal field.<sup>591</sup> He opposes a strict and rigid meaning of *ubuntu* but nevertheless attempts to

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<sup>587</sup> Bodunrin 1981 *Philosophy* 166-167.

<sup>588</sup> Bodunrin 1981 *Philosophy* 166-167.

<sup>589</sup> The relation between the judiciary and the adjudication of cases dealing with economic exploitation is further discussed at 5.2.5.

<sup>590</sup> Bennett 2011 *PELJ* 30-61; Bennett and Patrick "Ubuntu, The Ethics of Traditional Religion" 223-242. Bennett *Ubuntu: An African Jurisprudence*.

<sup>591</sup> Bennett and Patrick "Ubuntu, The Ethics of Traditional Religion" 223-242.

arrive at some understanding of the term.<sup>592</sup> In an attempt to define *ubuntu*, he avers that although the legal arena often seeks to define terms, there are some terms, such as wrongfulness and reasonableness, that are inherently ambiguous.<sup>593</sup> With these terms judges are granted more discretion in their application.<sup>594</sup> Bennett<sup>595</sup> sees *ubuntu* as such a term. He suggests looking for the sense of the word rather than the strict meaning. The sense approach would entail looking at the manner in which the word is used in legal writing and in connection with other terms.<sup>596</sup> Bennett<sup>597</sup> is of the opinion that *ubuntu* most likely has different functions and uses and therefore cannot be reduced to one single meaning.

In his inquiry Bennett<sup>598</sup> starts off with the general meaning of *ubuntu* before he ventures into *ubuntu* as a legal term. To him *ubuntu* generally connotes a way of life or a proper way of living.<sup>599</sup> Two more meanings come to the fore from this general understanding. Firstly, *umuntu*, which signifies the experience of being a person.<sup>600</sup> Secondly, it indicates the general sense of responsibility and obligation towards the rest of the community.<sup>601</sup> The qualities that are mentioned with regard to the ethical relationship that *ubuntu* requires includes caring, compassion, unity, tolerance, respect, closeness, generosity, genuineness, empathy, consultation, compromise, hospitality, fullness of human life, truthfulness, self-respect and integrity.<sup>602</sup>

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<sup>592</sup> Bennett *Ubuntu: An African Jurisprudence* 31.  
<sup>593</sup> Bennett *Ubuntu: An African Jurisprudence* 30.  
<sup>594</sup> Bennett *Ubuntu: An African Jurisprudence* 30.  
<sup>595</sup> Bennett *Ubuntu: An African Jurisprudence* 31.  
<sup>596</sup> Bennett *Ubuntu: An African Jurisprudence* 31.  
<sup>597</sup> Bennett *Ubuntu: An African Jurisprudence* 31.  
<sup>598</sup> Bennett *Ubuntu: An African Jurisprudence* 32.  
<sup>599</sup> Bennett *Ubuntu: An African Jurisprudence* 32.  
<sup>600</sup> Bennett *Ubuntu: An African Jurisprudence* 32.  
<sup>601</sup> Bennett *Ubuntu: An African Jurisprudence* 32.  
<sup>602</sup> Bennett *Ubuntu: An African Jurisprudence* 32.

Bennett<sup>603</sup> further states that in addition to referring to humanity, *ubuntu* also refers to the interconnectedness of human beings within a community. He states that it brings up images such as group support, acceptance, cooperation, care, sharing, and solidarity.<sup>604</sup> This sense of *ubuntu* is encapsulated in the term *umumntu ngumuntu ngabantu* (I am because we are).<sup>605</sup> He adds that the term "community" has often been abused by people who want to serve their own interests.<sup>606</sup> He prefers an understanding of community where people's interests do not just fortuitously coincide, but where there is connection by powerful interpersonal social and biological bonds.<sup>607</sup>

Bennett<sup>608</sup> points out an essential difference between Western thought and African philosophies in relation to community. Western thought places emphasis on individual autonomy and is based on the adage "I think, therefore I am."<sup>609</sup> African philosophy has more of a relational approach.<sup>610</sup> According to this approach, a human being cannot exist without being in relationship with the people around him/her.<sup>611</sup> Bennett<sup>612</sup> states that the African idea of the individual challenges the Western understanding of the atomised individual with a detached ego. He further argues that there is an advantage in this challenge as it offers a counterbalance to the dehumanised and atomised individual that the modern Western world has created.<sup>613</sup>

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603 Bennett *Ubuntu: An African Jurisprudence* 32.  
604 Bennett *Ubuntu: An African Jurisprudence* 32.  
605 Bennett *Ubuntu: An African Jurisprudence* 33.  
606 Bennett *Ubuntu: An African Jurisprudence* 32.  
607 Bennett *Ubuntu: An African Jurisprudence* 34.  
608 Bennett *Ubuntu: An African Jurisprudence* 35.  
609 Bennett *Ubuntu: An African Jurisprudence* 35.  
610 Bennett *Ubuntu: An African Jurisprudence* 35.  
611 Bennett *Ubuntu: An African Jurisprudence* 35.  
612 Bennett *Ubuntu: An African Jurisprudence* 36.  
613 Bennett *Ubuntu: An African Jurisprudence* 35.

In the legal arena Bennett<sup>614</sup> sees *ubuntu* as a metanorm. He refutes many of the objections that have been lodged against *ubuntu*. Firstly, he argues that the meaning of *ubuntu* is necessarily broad and generalised.<sup>615</sup> *uBuntu* assists in giving other norms and principles their meaning.<sup>616</sup>

Bennett<sup>617</sup> is of the opinion that *ubuntu* need not be criticised for its incompatibility with traditional African culture. He argues that African values and practices are indeed capable of change.<sup>618</sup> Traditional Africa, for example, did not deal with issues such as a homosexual orientation, but today it is one of the cornerstones of equality in South Africa.<sup>619</sup>

A further point of criticism against *ubuntu* has been that it operates to the exclusion of some people and only promotes the interests of certain groups.<sup>620</sup> Bennett refutes this objection and rejects any idea of *ubuntu* that outsiders or certain individuals do not fall within the parameters of *ubuntu*.<sup>621</sup> To support his position he refers to Metz, who sees *ubuntu* as embracing the components of identity and solidarity as the good of the group works to the benefit of the individual and *vice versa*.<sup>622</sup>

As to the criticism that *ubuntu* has been used for ideological and political reasons Bennett<sup>623</sup> admits that this might be the case, but he points out that it does not speak to the core meaning of *ubuntu*. He adds that many other terms, such as equality, have also been subject to abuse but that it is rather

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<sup>614</sup> Bennett *Ubuntu: An African Jurisprudence* 60-61.

<sup>615</sup> Bennett *Ubuntu: An African Jurisprudence* 37.

<sup>616</sup> Bennett *Ubuntu: An African Jurisprudence* 39.

<sup>617</sup> Bennett *Ubuntu: An African Jurisprudence* 39.

<sup>618</sup> Bennett *Ubuntu: An African Jurisprudence* 40-41. Keevy raises this point in 2.2.4.

<sup>619</sup> Bennett *Ubuntu: An African Jurisprudence* 40.

<sup>620</sup> Bennett *Ubuntu: An African Jurisprudence* 38.

<sup>621</sup> Bennett *Ubuntu: An African Jurisprudence* 38.

<sup>622</sup> Bennett *Ubuntu: An African Jurisprudence* 38. Metz 2014 *South African Journal of Philosophy* 311; 71. Metz 2012 *Phronimon* 104. See 3.2.3 for a discussion on Metz's views on *ubuntu*.

<sup>623</sup> Bennett *Ubuntu: An African Jurisprudence* 42.

a problem with the application of a term than the term itself.<sup>624</sup> He figures that *ubuntu* is still in its formative stage and that courts are still developing the term.

One of the biggest criticisms against *ubuntu* is that it cannot function as a legal concept for a number of reasons. Firstly, the opinion exists that *ubuntu* is a religious term and therefore not suited to the legal arena.<sup>625</sup> Bennett concedes that *ubuntu* has a spiritual dimension. To this Bennett provides the following answer:<sup>626</sup>

In view of the profound spiritual dimension of *ubuntu*, can the concept be accommodated in a modern, secular legal system? The answer is that it can—regular reference to it by courts and law-makers is clear evidence that it does—although no mention may have been made of its spiritual origins. We need only to look to the common law to find comparable rules originating in Christian belief. The oath-taking required of witnesses, for instance, harks back directly to a spiritual sanction, and other rules, such as the celebration of marriages before duly ordained ministers of religion, derive from biblical precepts.

A further criticism against *ubuntu* includes the fact that there is no secular sanction, that it implies no specific duties, and that it is not subject to rationalist thinking.<sup>627</sup> Bennett<sup>628</sup> replies that the courts have not utilised *ubuntu* in the rights/duties dyad, which is a Western and individualistic conception. According to Bennett,<sup>629</sup> the courts have rather used *ubuntu* as a metanorm that influences the manner in which existing rights and duties are interpreted.

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<sup>624</sup> Bennett *Ubuntu: An African Jurisprudence* 42.

<sup>625</sup> Bennett *Ubuntu: An African Jurisprudence* 45.

<sup>626</sup> Bennett *Ubuntu: An African Jurisprudence* 45.

<sup>627</sup> Bennett *Ubuntu: An African Jurisprudence* 45-49.

<sup>628</sup> Bennett *Ubuntu: An African Jurisprudence* 49.

<sup>629</sup> Bennett *Ubuntu: An African Jurisprudence* 49.

He is opposed to a ready-made definition and considers *ubuntu* to be "situationist", meaning that the way it should be applied should depend on the situation and context.<sup>630</sup>

Bennett<sup>631</sup> essentially sees *ubuntu* as similar to the English concept of equity. Equity can be described as a doctrine that eases the results of the strict application of legal rules.<sup>632</sup> The judiciary is then given the discretion to determine a result that would lead to fairer consequences.<sup>633</sup> In later writings, Bennett still argues that *ubuntu* is similar to the notion of equity, but some notable differences between these concepts exist. Firstly, equity is restricted to private law, whereas *ubuntu* is applicable to all areas of law in South Africa.<sup>634</sup> Secondly, in English law equity creates an action in itself. *uBuntu* does not itself give rise to a right or duty, but is an interpretive tool used by the courts to interpret existing rights and duties.<sup>635</sup> Thirdly, Bennett<sup>636</sup> states that equity is a neutral concept, whereas *ubuntu* is a distinctly African term.

Bennett, in attempting to define *ubuntu*, does not see it as a constitutional value but as a metanorm. He therefore never deems it necessary to answer the question of what it should do as a constitutional value. He does, however, venture into the meaning and history of equity. For the purpose of this study, it is not necessary to repeat the entire discussion on the history on equity, but the conclusions that Bennett reaches are relevant to the study. He concludes that *ubuntu* has not altered specific rules in the South African legal system but that:

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<sup>630</sup> Bennett 2011 *PELJ* 31.

<sup>631</sup> Bennett *Ubuntu: An African Jurisprudence* 101. Bennett 2011 *PELJ* 30-61.

<sup>632</sup> Bennett *Ubuntu: An African Jurisprudence* 101.

<sup>633</sup> Bennett 2011 *PELJ* 31.

<sup>634</sup> Bennett *Ubuntu: An African Jurisprudence* 122.

<sup>635</sup> Bennett *Ubuntu: An African Jurisprudence* 122.

<sup>636</sup> Bennett *Ubuntu: An African Jurisprudence* 122.

*ubuntu* has performed an additional teleological function aimed at attaining broader goals for the whole legal system, transforming the law to meet the demands of the Constitution and giving the Bill of Rights an African legitimacy<sup>637</sup>

Although he uses the term metanorm, what Bennett describes as a metanorm is very similar to a constitutional value in the sense that he suggests that *ubuntu* be used for the interpretation of rights. However, Bennett later adds that *ubuntu* should rather be used as:<sup>638</sup>

equity in the civilian tradition of Roman-Dutch law, i.e. as a free floating element with no specific area of application other than to solve the hard cases.

He uses hard cases in the same manner as Hart and Dworkin above, i.e. cases where the law provides no answer or where there is a gap.<sup>639</sup>

Bennett offers a normative understanding of *ubuntu*, namely that it is firstly about the humanity of people, meaning that there is a certain way in which people should be treated, and secondly that it relates to the interconnectedness of the individual and the community, meaning that there are duties that the individual owe the community and obligations that the community has towards the individual.

Bennett has done extensive research on the concept of *ubuntu*, particularly as a legal term. In seeking to find a meaning for the term, he has consulted various sources from various disciplines. He provides a variety of uses and meanings that courts and scholars have attributed to the term. These meanings include compassion, caring, interconnectedness, equity and fairness, among others. His use of *ubuntu* as a metanorm is plausible as well and coincides with the findings in Chapter 2 that *ubuntu* occupies a higher status than other values as a *grundnorm*. However, I disagree with

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<sup>637</sup> Bennett *Ubuntu: An African Jurisprudence* 110.

<sup>638</sup> Bennett *Ubuntu: An African Jurisprudence* 123.

<sup>639</sup> Bennett *Ubuntu: An African Jurisprudence* 123. See 2.6 above for a discussion on Hart, Dworkin and hard cases.

his finding that *ubuntu* is a metanorm to be used in hard cases. It is altogether not clear what Bennett understands as "hard cases". If he refers to cases where the law is not clear, it might be difficult to determine what these types of cases are. It is also not clear whether he is saying that *ubuntu* might be applicable to cases that are not hard, or that other constitutional values will then be applicable. Such an opinion might lead courts to believe that they have a choice in applying the Constitution, which cannot be.<sup>640</sup>

Bennett<sup>641</sup> furthermore refers to one of the functions of *ubuntu* as being instrumental in "constitutional transformation". Bennett states the following:<sup>642</sup>

If we were to look for common factors determining the circumstances in which ubuntu has been invoked in South African law, the most likely would be furthering constitutional transformation and solving hard cases, namely, those where application of the accepted rules of law appeared to work an injustice or hardship. The latter factor suggests a compelling similarity between ubuntu and the conception of equity...

I agree with the general content that Bennett ascribes to *ubuntu*. However, as argued in Chapter 4, I am of the opinion that *ubuntu's* transformative qualities link it with the pursuit of social justice rather than equity.

### *3.2.3 Metz: A moral theory*

Metz<sup>643</sup> is in favour of *ubuntu* as a moral theory in South Africa. By a moral theory he means the standard according to which the rightness or wrongness of an action is measured.<sup>644</sup> A moral theory can be understood as a set of prescripts on how a human being is supposed to act. He avers that a modern account of *ubuntu* need not be confined to the traditional

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<sup>640</sup> See for example the *Mohamed's Leisure Holdings v Southern Sun Hotel Interests* 2018 2 SA 314 (SCA) discussed at 3.14.13.

<sup>641</sup> Bennett *Ubuntu: An African Jurisprudence* 97.

<sup>642</sup> Bennett *Ubuntu: An African Jurisprudence* 123.

<sup>643</sup> Metz 2011 *SAJHR* 532. Metz 2010 *Journal of Human Rights* 81-99. Metz 2015 *Communicatio* 388-403.

<sup>644</sup> Metz 2011 *SAJHR* 536.

understanding of the term for two reasons. Firstly, there was never a single traditional understanding of *ubuntu* and therefore it has always been a contested term.<sup>645</sup> Secondly, some pre-colonial terms can be reproduced in a postcolonial time without reproducing all the habits and ideas associated with it.<sup>646</sup> In this regard Metz mentions the use of Roman-Dutch law as an example of a concept that is still used in South African, but not strictly in its original form.<sup>647</sup> Many Roman-Dutch legal rules had to be adapted to suit the modern South African constitutional state. For these reasons, Metz deems it appropriate to develop an understanding of *ubuntu* that suits the current South Africa.

Metz then moves on to offer a normative-theoretical understanding of *ubuntu*. According to him, the maxim that is associated with *ubuntu*, a person is a person through other persons, makes a statement about what ought to be valued. This would include personhood, selfhood and humanness.<sup>648</sup> This maxim also implies that communal relationships should be valued.<sup>649</sup>

According to Metz, there are two recurrent themes that form part of African thought relating to the ideal of community, namely identity and solidarity.<sup>650</sup> These two concepts are not mutually exclusive as components of *ubuntu*.<sup>651</sup> For people to identify with other people is for people to see themselves as part of the same group or for people to see themselves as a "we".<sup>652</sup> Solidarity on the other hand is to help someone or come to their aid as one

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<sup>645</sup> Metz 2011 *SAJHR* 536.

<sup>646</sup> Metz 2011 *SAJHR* 536.

<sup>647</sup> Metz 2011 *SAJHR* 536.

<sup>648</sup> Metz 2011 *SAJHR* 537.

<sup>649</sup> Metz 2011 *SAJHR* 537.

<sup>650</sup> Metz 2011 *SAJHR* 538.

<sup>651</sup> Metz 2011 *SAJHR* 538.

<sup>652</sup> Metz 2011 *SAJHR* 538.

sympathises with them and cares about their well-being.<sup>653</sup> Having solidarity with a group also means that one should care about their quality of life.<sup>654</sup>

In addition to containing the elements of solidarity and identity, he notes that *ubuntu* sets a standard about what we ought to value.<sup>655</sup> Our duty should be to become more human.<sup>656</sup> In our day-to-day lives we should opt for the action that would build communal relations rather than break them down. Metz<sup>657</sup> stresses that it is not about conforming to the norms of the group, but valuing communal relationships as an objective. Metz is of the opinion that the word friendliness or love is a good English equivalent for *ubuntu*.<sup>658</sup>

He asks what happens when one has to be unfriendly to promote friendliness in the long run.<sup>659</sup> It appears as if he admits that a theory that exclusively focuses on communal relationship cannot be expected, nevertheless *ubuntu* requires that we have communal relationships.<sup>660</sup> To Metz the basis of all human rights is human dignity.<sup>661</sup> He is in favour of a Southern African explanation of *ubuntu* where dignity is based on one's ability to commune with others.<sup>662</sup> He opposes this view with the Kantian view that bases a person's dignity on their autonomy.<sup>663</sup> He stresses the fact that the emphasis is not on the exercise of the capacity, but on the mere fact that the person has the capacity to commune with others.<sup>664</sup> However,

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653 Metz 2011 *SAJHR* 538.

654 Metz 2011 *SAJHR* 539.

655 Metz 2011 *SAJHR* 537.

656 Metz 2011 *SAJHR* 537. Also see Shutte 2001 *Ubuntu: An Ethic for the New South Africa* 30.

657 Metz 2011 *SAJHR* 538.

658 Metz 2011 *SAJHR* 539.

659 Metz 2011 *SAJHR* 539.

660 Metz 2011 *SAJHR* 540.

661 Metz 2011 *SAJHR* 541.

662 Metz 2011 *SAJHR* 544.

663 Metz 2011 *SAJHR* 544.

664 Metz 2011 *SAJHR* 544.

there is a small number of people who lack this capacity and therefore lack dignity. Yet this lack of dignity does not give one permission to treat such a being as one pleases.<sup>665</sup>

Since human dignity is the basis of human rights, Metz<sup>666</sup> argues that human rights violations is the degradation of "people's capacity for friendliness", or differently put, their ability to commune with others. If a person acts in a way that infringes on someone's human rights it is permissible to act "unfriendly" or divisive towards such a person to counteract their divisiveness.<sup>667</sup>

Metz proceeds to discuss a few examples of how an *ubuntu*-based conception of human dignity explains other human rights. The right to be free from torture, slavery and rape, *inter alia*, are all based on an *ubuntu*-based conception of dignity as the people who commit such acts act in an unfriendly way or at the very least hinder the victim's capacity for communal relationships.<sup>668</sup> He adds that criminal justice is based on *ubuntu*-based dignity as many of the rights afforded to arrested persons are aimed at protecting the capacity for communal relations of those who are innocent.<sup>669</sup> Democratic rights, which include the rights to form a political party and the right to vote, are also based on dignity as they respect solidarity and give all people the opportunity to have a say in political matters.<sup>670</sup>

Socio-economic rights elucidate *ubuntu*-based dignity as the state is sympathetic towards its residents and cares for the quality of their lives.<sup>671</sup> The state also fosters a sense of community by realising socio-economic

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<sup>665</sup> Metz 2011 *SAJHR* 545.

<sup>666</sup> Metz 2011 *SAJHR* 545.

<sup>667</sup> Metz 2011 *SAJHR* 547.

<sup>668</sup> Metz 2011 *SAJHR* 548.

<sup>669</sup> Metz 2011 *SAJHR* 548.

<sup>670</sup> Metz 2011 *SAJHR* 550.

<sup>671</sup> Metz 2011 *SAJHR* 550.

rights in the sense that people cannot form proper communal relationships if their basic needs are not met. They may also feel a sense of shame and avoid communal interactions.<sup>672</sup>

To add more clarity to an *ubuntu*-based conception of dignity, Metz explains why *ubuntu* justifies the prohibition of the death penalty. In *S v Makwanyane* the Constitutional Court mentioned that *ubuntu* prohibits the death penalty since it involves one person being treated as more valuable than another. Metz does not agree with this argument as sometimes it might be necessary to act differently towards an aggressor in order to stop that person from hurting other people.<sup>673</sup> In the second instance the court mentioned that the spirit of *ubuntu* requires the possibility of reconciliation. Metz disagrees that this is a reason for prohibiting the death penalty as there are situations when reconciliation is not possible in order to save other people.<sup>674</sup> The Constitutional Court also mentioned that psychological torment is one of the reasons *ubuntu* requires the prohibition of the death penalty. Metz is of the opinion that once again there are reasons that would justify psychologically tormenting someone in order to save another person's life.<sup>675</sup> Metz finally comes to the conclusion that the only reason why the *ubuntu* tradition would not be in favour of the death penalty is that killing a person who committed a crime would not revive the people whom that person had killed.<sup>676</sup> Killing the offender would essentially be vengeance as the action goes beyond simply trying to protect other people's capacity to form communal relations.<sup>677</sup>

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<sup>672</sup> Metz 2011 *SAJHR* 550. For the use of *ubuntu*-based dignity in situations such as land reform, consensus-orientated politics and the use of deadly force see Metz 2011 *SAJHR* 551-558.

<sup>673</sup> Metz 2010 *Journal of Human Rights* 86.

<sup>674</sup> Metz 2010 *Journal of Human Rights* 86.

<sup>675</sup> Metz 2010 *Journal of Human Rights* 87.

<sup>676</sup> Metz 2010 *Journal of Human Rights* 91.

<sup>677</sup> Metz 2010 *Journal of Human Rights* 91-92.

Metz offers an understanding of *ubuntu* that coincides with Bennett's understanding in some ways. They both seem to be of the opinion that *ubuntu* connotes humanness and relates to the ability to interrelate with others, in general. The fact that Metz offers his understanding as a moral theory and not as a legal concept, despite references to law, does detract from the usefulness of the theory. Depicting it as a moral theory seems to suggest that every person has the obligation to act friendly towards their fellow citizens. In other words, a moral theory creates the right to demand others to be friendly or kind towards you. The discussion in Chapter 2 posits that the use of *ubuntu* as a constitutional value does not demand placing this obligation on every individual. Constitutional values are rather used as interpretive tools for existing rights and duties, and not as legal entitlements in themselves.

Metz also only applies the *ubuntu*-lens to the right to human dignity and does not see it as a value that could cover other areas of South African law, such as other rights or pieces of legislation. His understanding of the right to human dignity also seems to be flawed since he conceives of the possibility that a person could not have human dignity, i.e. they do not have the ability to commune with others. The courts and the Constitution itself point to the fact that human dignity is inherent and cannot be taken away from a person.<sup>678</sup> In other words, there is nothing that one could do to get rid of your human dignity.

Furthermore, Metz looks at specific issues such as the criminal justice system and land reform and expressly states that *ubuntu* supposes a very specific outcome. He says the following:<sup>679</sup>

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<sup>678</sup> Section 10 of the Constitution provides that everyone has *inherent* dignity and the right to have their dignity respected and protected.

<sup>679</sup> Metz 2011 *SAJHR* 553.

However, it is a further mistake to suppose that only backward-looking considerations are relevant to determining a just distribution of land at the present time. Above I maintained that respect for people's capacity for friendliness can permit unfriendliness in response to unfriendliness, but most clearly when and only when responding in that way will prevent or make up for harm done to victims of the initial unfriendliness. In the present context, that means that an unfriendly action by the state toward whites, such as expropriation of land they currently hold, is justified only if it is likely to help those harmed by the land being held by whites, that is, dispossessed blacks. And it is unlikely that blacks can expect benefit from a Zimbabwe-style land grab.

In the quotation above, Metz prescribes a very specific outcome to the complex situation of land in South Africa. Furthermore, he reaches this conclusion without any reference to existing statutory or policy provisions regarding land reform in South Africa or an interpretation of the property clause in the Constitution.<sup>680</sup> The manner in which Metz suggests the courts should deal with the value of *ubuntu* is thus problematic and not congruent with the interpretive method suggested in Chapter 2. Nevertheless, Metz's normative account of *ubuntu* that implies a regard for the good of the community and solidarity with members of the community could be useful in understanding what *ubuntu* means.

### *3.2.4 Keevy: An unconstitutional value*

Keevy argues that *ubuntu* is not a suitable South African constitutional value.<sup>681</sup> Her reasoning is that *ubuntu* forms part of African philosophy and that African philosophy forms part of African law.<sup>682</sup> She states that African law is not codified customary law or official African customary law, but largely unwritten, uncodified and dependent on an oral tradition.<sup>683</sup> She also states that African law is dependent on the ancestors and living dead and

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<sup>680</sup> For example, the Green Paper on Land Reform.

<sup>681</sup> Keevy 2009 *Journal for Juridical Science* 21; Keevy 2009 *Journal for Juridical Science* 62-88; Keevy *African Philosophical Values and Constitutionalism* 459.

<sup>682</sup> Keevy 2009 *Journal for Juridical Science* 63.

<sup>683</sup> Keevy 2009 *Journal for Juridical Science* 22.

consists of morals and rules passed down orally from generation to generation.<sup>684</sup>

Keevy<sup>685</sup> argues that there is an inextricable relationship between the living, the living dead and African law. Relying on Ramose, Keevy<sup>686</sup> further argues that *ubuntu* is inherently related to religion as intervention by the living dead or an ancestor is needed. Furthermore, she points out that there is a distinction between African law and customary law. During colonisation in Africa there was a dual system of law, the European legal system and customary law according to the Europeans.<sup>687</sup> The customary law as codified by the Europeans did not reflect the proper living African law and was seen as primitive and inferior to other colonial laws.<sup>688</sup> Keevy argues that customary law has failed to keep up with current legal norms and values and the living African law.<sup>689</sup> Therefore, according to Keevy, courts and other legal scholars are misguided when they simply look at the lofty ideals of *ubuntu* and ignore its patriarchal and discriminatory roots.

Keevy also distinguishes between an African and Western sense of justice.<sup>690</sup> An African sense of justice relies on native courts and the restoration of equilibrium in the community whereas a Western sense of justice relies on punishment, procedures and individual rights.<sup>691</sup> She furthermore states that African law cannot be divided from its patriarchal basis and that the concept of justice is unknown to traditional African societies.<sup>692</sup> In this regard she states the following:<sup>693</sup>

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684 Keevy 2009 *Journal for Juridical Science* 23.

685 Keevy 2009 *Journal for Juridical Science* 23.

686 Keevy *Ubuntu versus the Core Values of the South African Constitution* 61.

687 Keevy 2009 *Journal for Juridical Science* 26.

688 Keevy 2009 *Journal for Juridical Science* 27.

689 Keevy 2009 *Journal for Juridical Science* 28.

690 Keevy 2009 *Journal for Juridical Science* 28-30.

691 Keevy 2009 *Journal for Juridical Science* 61.

692 Keevy 2009 *Journal for Juridical Science* 62.

693 Keevy 2009 *Journal for Juridical Science* 30.

In contrast with Western law, African law is inseparable from its patriarchal basis, the ancestors and group solidarity or strong communitarianism. Western law and justice do not propound these ancient African ideals and remain a foreign concept in traditional African societies.

According to Keevy,<sup>694</sup> *ubuntu* oppresses women, homosexuals, lesbians, witches and outsiders. Keevy also argues that the Constitutional Court is unfairly discriminating since it is using one religious concept, namely *ubuntu*, instead of other religious values, specifically, Christian values since the majority of South Africans are Christians.<sup>695</sup>

There are various points of critique that can be lodged against Keevy's conception of *ubuntu*. Firstly, it should be mentioned that there are several viewpoints on the meaning of *ubuntu* and of communitarianism, if we were to agree that *ubuntu* is a form of communitarianism. Above the point is made by Metz, for example, that there was never a single understanding of *ubuntu* in its traditional sense.<sup>696</sup> Various African scholars have also referred to the different schools of African philosophy.<sup>697</sup> Some schools of African philosophy argue that traditions from more primitive time cannot be applied, as-is, in modern African societies.<sup>698</sup>

Secondly, if *ubuntu* has patriarchal and religious roots that discriminated against certain people it need not be that it should stay that way.<sup>699</sup> Keevy states that Western justice has a strong focus on the protection of individual rights but many Western (legal) concepts have also undergone development, particularly in South Africa, in the last two decades. An obvious example would be marriage which used to be seen as a strictly religious concept but modern day South African legislation allows for

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<sup>694</sup> Keevy 2009 *Journal for Juridical Science* 72-74.

<sup>695</sup> Keevy 2009 *Journal for Juridical Science* 83.

<sup>696</sup> See 3.2.3.

<sup>697</sup> See for example the viewpoints of Bondurin at 3.2.1.

<sup>698</sup> See 3.2.1.

<sup>699</sup> See Cornell 2010 *SAPL* 396 regarding the critique of *ubuntu* as sexist. Cornell's viewpoints are discussed at 3.2.5.

marriages to be concluded that is not necessarily religious. Keevy also to argue that anything that is Western is automatically correct.

Thirdly, Keevy strongly opposes the use of a religious concept by the Constitutional Court. At this point it should be mentioned that the courts have never used *ubuntu* as a religious concept.<sup>700</sup> The fact that Keevy also refers to the fact that the majority of South Africans are Christian raises the question of the sincerity of her argument.<sup>701</sup> Keevy's problem, at times, seems not to be that *ubuntu* is a religious concept but that it is not a Christian religious concept.

Lastly, the courts have consistently stated that customary law and indigenous law form part of the South African legal system but that it must be in line with the values of the Constitution.<sup>702</sup> Section 211 of the

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<sup>700</sup> The judgments of the South African courts dealing with *ubuntu* are discussed later at 3.4.

<sup>701</sup> In Keevy 2009 *Journal of Juridical Science* 83-84 she states the following "The fact that the constitutionality of capital punishment was inter alia determined by utilising only values of *ubuntu* and no other religious values, viz. Christian values which represent the values of the majority of South Africans, constitutes unfair discrimination."

<sup>702</sup> In *Bhe v Magistrate of Khayelitsha* 2005 1 SA 580 (CC) para 41 the Court stated the following: "Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution." *Alexkor Ltd v Richtersveld Community* 2003 12 BCLR 1301 (CC) para 51 the Court stated the following: "While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution." In *S v Makwanyane* 1995 6 BCLR 665 (CC) para 384 Sachs J held the following: "We do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law. Thus, we reject the once powerful common law traditions associated with patriarchy and the subordination of servants to masters, which are inconsistent with freedom and equality, and we uphold and develop those many aspects of the common law which feed into and enrich the fundamental rights enshrined in the Constitution. I am sure that there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order."

Constitution also provides that the Constitution should apply customary law when relevant provided it is in line with the Constitution. It would therefore not be sufficient for Keevy to say that the origins of *ubuntu* are rooted in African law and therefore cannot be utilised. The courts have been active in developing customary law to adjust to the tenets of the Constitution.

### 3.2.5 Cornell: *The ethics of being human*

Cornell, a philosopher and feminist theorist, has written extensively on *ubuntu* and the law during the last ten years.<sup>703</sup> She has founded the *ubuntu* project which deals with the status and importance of indigenous values.<sup>704</sup> It would therefore be amiss to not discuss her viewpoints on the meaning of *ubuntu* and its relationship to the law.

Cornell has generally been an avid supporter of the reception of *ubuntu* into the legal arena. According to Cornell, *ubuntu* underlines two aspects of our "ethical being-human". Firstly, people need other people on their journey of individuation and growth.<sup>705</sup> Secondly, being human is ethical meaning that to be human is to live up to the obligations of other people and for other people to do the same.<sup>706</sup> She argues that although there are differing opinions on *ubuntu* all authors are in agreement that there is an interactive component of *ubuntu* which means that we as human beings are shaped by our interaction with each other.<sup>707</sup>

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<sup>703</sup> Her publications on *ubuntu* include: Cornell and Van Marle 2005 *AHRLJ* 195-220; Muvangua and Cornell *Ubuntu and the Law*; Cornell 2009 *Law and Critique* 43-58; Cornell 2004 *SAPL* 666-675; Cornell and Van Marle 2015 *Verbum et Ecclesia* 1-8; Cornell 2010 *SAPL* 382-399.

<sup>704</sup> University of Pretoria 2018 *Research and Innovation* <http://www.up.ac.za/en/research-innovation/article/2299142/drucilla-lc-cornell>.

<sup>705</sup> Cornell *Law and Revolution in South Africa* 69.

<sup>706</sup> Cornell *Law and Revolution in South Africa* 69.

<sup>707</sup> Cornell and Van Marle 2005 *African Human Rights Law Journal* 205.

According to Cornell,<sup>708</sup> when one acts in accordance with the obligations towards another it should not be regarded as altruistic since the other members of the community must also live up to an obligation towards us so that we may have what Sen and Nussbaum call "capability freedom". Since human beings do not have to sacrifice their individuality when living up to this obligation she furthermore supports the idea that *ubuntu* is not antithetical to individuality nor can it be regarded as communitarian.<sup>709</sup> She states that it is not communitarian since the individual is not dependent on the community but that *ubuntu* is something which the community struggles to bring about with its interactions.<sup>710</sup> She agrees with Sanders who states the following:<sup>711</sup>

The kind of disappropriation figured by *ubuntu* implies that being human in an ethico-political sense, means that one does not enter the public sphere with ready-made rights and duties – any rights and duties have to be claimed and exercised.

Cornell<sup>712</sup> is furthermore of the opinion that *ubuntu* is suitable as a justiciable constitutional principle as it goes beyond the traditional social contract where citizens give up portion of freedom in exchange for protection from the state. It goes beyond in that it lays emphasis on a just and caring community.<sup>713</sup> To support her point Cornell refers to the approach to interpretation preferred by Mokgoro J in *Khosa v Minister of Social Development*.<sup>714</sup> Mokgoro J states the following:<sup>715</sup>

This court has adopted a purposive approach to the interpretation of rights. Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of 'all people in our country', and in the absence of any indication

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<sup>708</sup> Cornell *Law and Revolution in South Africa* 69. Capability is discussed at 4.2.4-4.2.5.

<sup>709</sup> Cornell *Law and Revolution in South Africa* 69.

<sup>710</sup> Cornell *Law and Revolution in South Africa* 69-70.

<sup>711</sup> Sanders *Ambiguities of Witnessing* 27.

<sup>712</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 111.

<sup>713</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 111.

<sup>714</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 111. The facts of the case are discussed in Chapter 2.

<sup>715</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 47.

that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word 'everyone' in this section cannot be construed as referring only to 'citizens'.

Cornell<sup>716</sup> argues that this decision is important as Mokgoro J reasons that the purposive interpretation of the Constitution is rooted in a just and caring community. In *Khosa v Minister of Social Development* Mokgoro J held that the state has a choice in accepting permanent residents into the country and a careful process is followed to ensure that such residents are not a burden to the state.<sup>717</sup> She held further that if a mistake is made in such a process, i.e. the process of granting permanent residency, the state still has an obligation to provide socio-economic rights to residents as it is part of the constitutional commitment to a caring society, particularly so in the case of the elderly and children.<sup>718</sup> Cornell<sup>719</sup> states that Mokgoro J's judgment is part of the *nomos* of new constitutional dispensation. She sees it as important that the manner in which Mokgoro J translates *ubuntu* is by means of a conversion principle.<sup>720</sup> A conversion principle is when one calls to mind the past but also projects an ideal into the future.<sup>721</sup> Cornell<sup>722</sup> argues that at the core of Mokgoro's judgments is an attempt to change *ubuntu* into a constitutional principle and see *ubuntu* as part of the daily practices of customary law.

Cornell furthermore defends Sachs' use of *ubuntu* as a value in some of his judgments. Similarly to Mokgoro, Sachs attempts to give recognition to African values which were not recognised in the previous dispensation.<sup>723</sup>

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<sup>716</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 114.

<sup>717</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 65.

<sup>718</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 65.

<sup>719</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 115.

<sup>720</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 116.

<sup>721</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 116.

<sup>722</sup> Cornell "A Call for Nuanced Constitutional Jurisprudence" 117.

<sup>723</sup> In *PE Municipality v Various Occupiers* 2005 1 SA 517 (CC) para 37 Sachs J held the following: "The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual

However, Cornell<sup>724</sup> is critical of the fact that Sachs J did not decide in favour of the applicant in *Soobramoney v Minister of Health*. I do however, disagree that it is the only value or provision that should have been used during the adjudication process. It is far-fetched to think that *ubuntu* is the only value to be taken into account during constitutional adjudication without any reference to the relevant legislation and constitutional provisions. Cornell seems to be falling into the same trap as Metz above.<sup>725</sup>

Cornell also makes an important distinction between dignity and *ubuntu*. Firstly, she draws a distinction between the Kantian view of dignity and *ubuntu*. She says the following about Kant: <sup>726</sup>

For Kant, a human being is of incalculable worth and has dignity precisely because through our practical reason we can potentially exercise our autonomy and lay down a law unto ourselves, which for Kant is the moral law or the categorical imperative. Kant is not arguing that we actually do exercise our autonomy most of the time in our daily lives. Nor is he defending autonomy as some kind of truth about who we actually are – a common misreading of his argument. Kant argues instead that we are creatures who live our desires and our needs as do all other animals, and yet we are creatures who have the possibility – and let me emphasise the word *possibility*, because it can neither be theoretically demonstrated nor theoretically refuted as a fact about ourselves – that we can act other to the mechanics of those desires and needs.

Cornell<sup>727</sup> argues that the use of pure reason as a condition for dignity is one of the main differences between the Kantian understanding of dignity

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rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern. In *S v Makwanyane* 1995 6 BCLR 665 (CC) para 365 also showed support for the value of *ubuntu* by stating the following: "Above all, however, it means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice. We cannot, unfortunately, extend the equality principle backwards in time to remove the humiliations and indignities suffered by past generations, but we can restore dignity to ideas and values that have long been suppressed or marginalized."

<sup>724</sup> 1997 12 BCLR 1696 (CC). Cornell "A Call for Nuanced Constitutional Jurisprudence" 118. The case involved a patient who was terminally ill and needed dialysis from the state hospital.

<sup>725</sup> See 3.2.3 for a discussion and critique of Metz's viewpoint.

<sup>726</sup> Cornell 2010 *SAPL* 384.

<sup>727</sup> Cornell 2010 *SAPL* 388.

and *ubuntu*. She states that most of us do not always abide by reason. Furthermore, many people often lack the ability to reason because of age, illness or birth, among other things.<sup>728</sup> If our dignity is dependent on our ability to reason what then of the people who cannot reason, she asks.<sup>729</sup> Her second point of critique is that the Kantian understanding of dignity is too individualistic.<sup>730</sup> The social contract that Kant imagines stills sees people as self-determining individuals.<sup>731</sup> Cornell<sup>732</sup> argues that this view fails to take account of the fact that human beings are never really fully self-determining and human fragility is an ongoing reality.

*uBuntu* on the other hand values dignity but is not reliant on our ability to reason.<sup>733</sup> Cornell<sup>734</sup> states that in accordance with *ubuntu* there is a transcendence of the individual but at the same time the individual needs the community in the struggle to define who he or she is.

Cornell is of the opinion that *ubuntu* "thinking" is necessary for the purpose of the South African Constitution. This purpose is to go beyond the traditional social contract where the state simply has to respect people's negative freedoms by not intruding. This argument is in agreement with the statements in Chapter 2 that the use of *ubuntu* as a value is rooted in the teleological interpretive approach used by the courts, informed by a post-liberal Constitution. It is also in agreement with the statements by Klare that the best interpretation would be a post-liberal transformative interpretation that looks to values beyond the constitutional text itself.

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<sup>728</sup> Cornell 2010 *SAPL* 388.

<sup>729</sup> Cornell 2010 *SAPL* 388.

<sup>730</sup> Cornell 2010 *SAPL* 388.

<sup>731</sup> Cornell 2010 *SAPL* 388.

<sup>732</sup> Cornell 2010 *SAPL* 388.

<sup>733</sup> Cornell 2010 *SAPL* 391.

<sup>734</sup> Cornell 2010 *SAPL* 392.

### ***3.3 Reflections on scholarly opinions***

Thus far various scholarly viewpoints on the meaning of *ubuntu* have been discussed. It is evident that there are differing opinions on the concept largely relating to the origin of the concept, the importance of the individual and the extent to which it can be reconciled with the rest of the South African legal order.

Cornell has correctly pointed out that the one point of agreement between authors on *ubuntu* is that it is a concept that deals with the interconnectedness between people.<sup>735</sup> Keevy and Ramose argue that the concept is irreconcilable with the rest of the constitutional order.<sup>736</sup> Keevy is in total support of a Western sense of justice but does not think that a concept with patriarchal African religious roots can be incorporated into the legal system. Ramose on the other hand supports an account of *ubuntu* that is antithetical to Western justice.<sup>737</sup> He also does not see it as a need that *ubuntu* should fit into the world of Western concepts. Metz and Cornell are more optimistic about the incorporation of *ubuntu* into the legal system.<sup>738</sup> Both draw strong links between the value dignity and *ubuntu*. Both have also attempted to indicate how dignity differs from *ubuntu*.

However, I do not think that Metz is successful in providing a good reason for the use of *ubuntu* rather than dignity. He states that an *ubuntu*-based conception of dignity requires that one not do more than what is required to "ward" off an offender. This sounds very much like the proportionality test that is used by the Constitutional Court in any event.

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<sup>735</sup> See 3.2.5.

<sup>736</sup> See 3.2.4 and 3.2.1 respectively.

<sup>737</sup> See 3.2.1.

<sup>738</sup> See 3.2.3 and 3.2.5.

Cornell is much more convincing as to why the value of *ubuntu* goes further than the traditional Kantian view of dignity. Kantian dignity is based on reason and not every person has the ability to reason. It therefore cannot be that our dignity is based on our ability to reason since our dignity is inherent according to the Constitution. An *ubuntu*-based idea of dignity also emphasises our fragility as human beings as emphasised by Cornell. It is perhaps for this reason that Cornell is in favour of a caregiving society as stated by Mokgoro J in *Khosa v the Minister of Social Development*.<sup>739</sup> As fuzzy a concept as caregiving might seem it does seem that this is in line with the transformative vision that the Constitution has.

Ramose's concept of *ubuntu* has to be rejected as it opposes not only certain aspects of Western justice but core concepts such as fundamental rights.<sup>740</sup> An idea of *ubuntu* will have to be used that is consistent with legal and constitutional principles. It is also highly impractical to suggest that the entire South African legal system should start from scratch. An *ubuntu*-based conception of human dignity seems to correspond with the broader aim of the Constitution to create a socially just society.

However, the purpose of this chapter is to get to an understanding of what *ubuntu* as a constitutional value can possibly mean. In this sense the authors are largely congruent and it is possible to draw some conclusions from their statements. Even though there are discrepancies regarding the manner *ubuntu* should be used the scholars agree that the following terms form part of *ubuntu*: an interconnectedness and interdependence with other people; recognising the humanity of other people; having solidarity with members of the community; and a sense of caring. The next section looks at the meaning applied to the value of *ubuntu* by the courts in South Africa.

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<sup>739</sup> 2004 6 SA 505 (CC) para 65.

<sup>740</sup> See 3.2.1.

### **3.4 Judicial perspectives on ubuntu**

The judicial perspectives on *ubuntu* can be discussed in a number of ways, including by way of chronology, theme or court. In this study it is discussed according to chronological order, as this shows the development of the concept of *ubuntu*. There are differing opinions on the amount of cases where *ubuntu* has made an appearance. All the cases are not discussed in depth as *ubuntu* played a varying role in the decisions of the courts. The cases that were deemed the most important are the ones where the courts engaged more with the concepts of *ubuntu*.<sup>741</sup>

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<sup>741</sup> *uBuntu* was referred to in the following cases: *S v Makwanyane* 1995 3 SA 391 (CC); *Azanian People's Organisation v President of RSA* 1996 4 SA 671 (CC); *Ryland v Edros* 1997 2 SA 690 (C); *S v Mandela* 2001 1 SACR 156 (C); *Hoffmann v South African Airways* 2001 1 SA 1 (CC); *Crossley v National Commissioner of South African Police Service* 2004 3 All SA 436 (T); *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC); *Dikoko v Mokhatla* 2006 6 SA 235 (CC); *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC); *PE Municipality v Various Occupiers* 2005 1 SA 517 (CC); *Pharmaceutical Society of South Africa v Tshabalala-Msimang* 2005 3 SA 238 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC); *Masetlha v President of the Republic of South Africa* 2008 1 SA 566; *Fosi v Road Accident Fund* 2008 3 SA 560 (C); *Manyatshe v M&G Media Ltd* 2009 JOL 24238 (SCA); *S v Sibiyi* 2010 1 SACR 284 (GNP); *Koyabe v Minister for Home Affairs* 2010 4 SA 327 (CC); *Law Society, Northern Provinces v Mogami* 2010 1 SA 186 (SCA); *The Citizen v McBride* 2011 4 SA 191 (CC); *Afriforum v Malema* 2011 6 SA 240 (EqC); *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC); *Kiviets Kroon Country Estate v Mmoledi* 2012 33 ILJ 2812 (LAC); *National Lotteries Board v South African Education and Environment Project* 2012 4 SA 504 (SCA); *Dula Investments (Pty) Ltd v Woolworths (Pty) Ltd* 2013 ZAKZDHC 17; *S v Matiwane* 2013 1 SACR 507 (WCC); *NM v Presiding Officer of Children's Court, Krugersdorp* 2013 4 SA 379 (GSJ); *Resnick v Government of the Republic of South Africa* 2014 2 SA 337 (WCC); *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC); *JT v Road Accident Fund* 2015 1 SA 609 (GJ); *Shoprite Checkers v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC); *Savage v Sisters of the Holy Cross, Cape Cross* 2015 6 SA 1 (WCC); *National Union of Metalworkers of SA v Wainwright* 2015 36 ILJ 2097 (LC); *City of Tshwane Metropolitan Municipality v Afriforum* 2016 6 SA 279 (CC); *Rozar CC v The Falls Supermarket CC* 2018 3 SA 76 (SCA); *Road Accident Fund v Mohohlo* 2018 2 SA 65 (SCA); *Du Plessis v Van Niekerk* 2018 6 SA (FB).

### 3.4.1 *S v Makwanyane*<sup>742</sup>

As already alluded to *S v Makwanyane* dealt with the constitutionality of the death penalty. It was the first case in which *ubuntu* was used in the context of a constitutional value.<sup>743</sup> Six of the eleven judges referred to *ubuntu* in their judgments.

The majority judgment was written by Chaskalson CJ. The judgment consisted mainly of a discussion on whether the death penalty was a justifiable limitation of the right to human dignity, the right not to be subjected to cruel and inhumane punishment and the right to life. Chaskalson CJ states that *ubuntu* was an important concept in light of the reconciliation that had to take place in South Africa.<sup>744</sup> He refers to the postamble of the Constitution which juxtaposes *ubuntu* with the concept of vengeance.<sup>745</sup> Furthermore, he states that for the South African society to be in line with the value of *ubuntu* it had to pursue the prevention of crime and not retribution.<sup>746</sup> In the final instance, Chaskalson CJ found that the death penalty was inconsistent with the right not to be cruelly and inhumanely punished.<sup>747</sup>

The second judgment dealing with *ubuntu* was that of Langa J. He was in agreement that the death penalty should be outlawed in South Africa because it violated the right to dignity, the right to life and the right not be subjected to cruel and inhumane punishment.<sup>748</sup> He was of the opinion that more emphasis should be placed on the right to life.<sup>749</sup> In his judgment he placed the rights within the context of the recent history of South Africa at

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<sup>742</sup> 1995 6 BCLR 665 (CC).

<sup>743</sup> See 1.2.

<sup>744</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 131.

<sup>745</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 130.

<sup>746</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 131.

<sup>747</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 146

<sup>748</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 216.

<sup>749</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 217.

that point, as well as the constitutional history of South Africa which allowed for parliamentary sovereignty.<sup>750</sup> He added that the new constitutional dispensation created a new value system that implied that dignity and life are to be respected.<sup>751</sup>

Langa J used the bridge metaphor, stating that part of the ethos of the constitutional dispensation was to create a bridge from the past to the future.<sup>752</sup> He added that there was a need for a change in attitude from retaliation to that of *ubuntu*. He acknowledged that *ubuntu* was undefined in our legal system but proceeded to give a description of what he thinks the term connotes. This included: interdependence; communality; sharing and co-responsibility.<sup>753</sup> Langa J states that *ubuntu* especially attaches a significance to life and human dignity.<sup>754</sup> *Ubuntu* also requires that a person sees another person's life at least as valuable as one's own.<sup>755</sup> The opposite of *ubuntu* would be heinous crimes or cruel and inhumane treatment.<sup>756</sup> Langa J also states that *ubuntu* should be seen against the background of the lack of value given to life in the previous dispensation.<sup>757</sup> Langa J held that the death penalty is a cruel and inhumane punishment and violated the right to life and the right to human dignity.<sup>758</sup>

Madala J concurred with the majority judgment. He added a few comments on the importance of *ubuntu*, stating that the concept encapsulated "the ideas of humaneness, social justice and fairness" and that it "permeates the Constitution generally".<sup>759</sup> He states further that the death penalty rejects

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<sup>750</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 216.

<sup>751</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 222.

<sup>752</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 223.

<sup>753</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 216.

<sup>754</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 225.

<sup>755</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 225.

<sup>756</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 225.

<sup>757</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 225.

<sup>758</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 234.

<sup>759</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 237.

rehabilitation and that according to the concept of *ubuntu* an offender could be rehabilitated after a certain time period.<sup>760</sup> Furthermore, he was of the opinion that *ubuntu* requires that the interests between individual and community be balanced.<sup>761</sup> Interestingly, he addressed the extent to which public opinion should inform the court's understanding of African jurisprudence and of the finding in general.<sup>762</sup> His answer to this issue was that the outcome of a case was not to be determined by public opinion nor was the black majority of South Africa to be advised about the content of African jurisprudence used by courts. In the final instance Madala J found that the death penalty was unconstitutional as it was opposed to *ubuntu* and a violation of the right not to be punished in a cruel and inhumane manner.<sup>763</sup>

In finding that the death penalty could not be justified by the Constitution Mahomed J made a brief reference to *ubuntu*. His view was that the constitutionality of the death penalty had to be decided against the background of the new ethos of South Africa.<sup>764</sup> He indicated that *ubuntu* is part of this ethos which encapsulates love towards fellow human beings; recognising people's humanity; reciprocity within the community; creative emotions; and moral energies from giving.<sup>765</sup>

One of the most quoted references to *ubuntu* is that of Mokgoro J in *S v Makwanyane*. She highlighted the importance of utilising indigenous values in assessing constitutionality of laws.<sup>766</sup> She states further that interpretation often involved the task of weighing up constitutional rights and freedoms.<sup>767</sup>

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<sup>760</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 243.

<sup>761</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 250.

<sup>762</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 252-260.

<sup>763</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 260.

<sup>764</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 264.

<sup>765</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 263.

<sup>766</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 300.

<sup>767</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 302.

This weighing up means that courts need to have recourse to values which are often found outside the constitutional text.<sup>768</sup> She proceeded to state that it will be necessary to make value choices.<sup>769</sup> According to Mokgoro J, *ubuntu* runs like a golden thread across cultural lines.<sup>770</sup> In an attempt to describe *ubuntu* she states the following:<sup>771</sup>

Generally, *ubuntu* translates as humaneness. In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit 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 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.

She also reflected on the interpretive duty resting on judges by referring to the difficult value choices that have to be made during adjudication.<sup>772</sup> Issues relating to normative value judgments that arise from the new constitutional interpretive regime were also raised in her judgment. In this regard she said the following:<sup>773</sup>

By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism.

True to this statement Mokgoro J expressly states her understanding of *ubuntu* as mentioned above. She is also the only Justice that cited a source

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<sup>768</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 302.

<sup>769</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 303.

<sup>770</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 307.

<sup>771</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 308.

<sup>772</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 303.

<sup>773</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 304.

for her views on *ubuntu*.<sup>774</sup> Similar to Langa J, she emphasises that *ubuntu* places importance on dignity and life and adds to the reason for the abolishment of the death penalty.<sup>775</sup>

Sachs J devotes a specific section to a discussion of the source of values. In a similar vein to Mokgoro J he mentions that the source of values should include African legal thinking.<sup>776</sup> However, he goes further than Mokgoro J in that he not only states that African values should influence constitutional interpretation but that certain sources of customary law outlaw the death penalty.<sup>777</sup> He continued to state that similar to the common law, African law should be developed that the good is retained and the bad discarded.<sup>778</sup> In the following quotation he thus makes the point that not everything is to be taken from African values and that these values need to conform with the Constitution:<sup>779</sup>

We do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law. Thus, we reject the once powerful common law traditions associated with patriarchy and the subordination of servants to masters, which are inconsistent with freedom and equality, and we uphold and develop those many aspects of the common law which feed into and enrich the fundamental rights enshrined in the Constitution. I am sure that there are many aspects and values of traditional African law which will also have to be discarded or developed in order to ensure compatibility with the principles of the new constitutional order.

In *S v Makwanyane* there was a clear commitment from the court to the value of *ubuntu*, not just as an underlying value but one that runs through the entire legal order. Except for Mokgoro J the justices did not expressly state what the philosophical underpinnings were of their use of *ubuntu*.

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<sup>774</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 308. She cites Mbigi *uBuntu: the Spirit of African Transformation Management* 1-16. Sachs J refers to some general sources on African law but does not refer to a specific source on the meaning of *ubuntu*.

<sup>775</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 313.

<sup>776</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 365.

<sup>777</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 376.

<sup>778</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 383.

<sup>779</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 383.

However, most gave an indication of how they understood it. These understandings related the concept of *ubuntu* to restorative justice, reconciliation, a respect for life and human dignity, fairness and social justice.

### 3.4.2 *The Azanian People's Organisation v The President of RSA*<sup>780</sup>

This case dealt with the *Promotion of National Unity and Reconciliation Act*.<sup>781</sup> This Act was enacted to promote national unity and reconciliation in South Africa. In terms of the Act amnesty would be allowed for people who came to the fore and disclosed facts with a political objective. Section 20(7) of the Act provides that once amnesty has been granted that the person cannot be held liable for civil or criminal liability. The applicants contended that section 20(7) of the Act is unconstitutional in that it is inconsistent with section 22 of the Interim Constitution which provides that every person has the right to settle judicial disputes in a court of law or any other appropriate forum.

The court found that the provision was not unconstitutional and referred to the epilogue of the Interim Constitution which states that "there is a need for understanding and not for vengeance, a need for reparation and not retaliation, a need for *ubuntu* and not for vengeance". The court held that the provisions of the Act must be read in line with the broader objectives of the Interim Constitution which envisions a transition from an oppressive to society to a more equal and just society.<sup>782</sup>

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<sup>780</sup> 1996 4 SA 671 (CC).

<sup>781</sup> 34 of 1995.

<sup>782</sup> *The Azanian People's Organisation v The President of the RSA* 1996 4 SA 671 (CC) para 19.

If it were not for the deliberate choice to include the particular phrasing of the epilogue the transition might not have been possible.<sup>783</sup> In this matter the court established the connection between *ubuntu* and reconciliation in criminal and civil matters.<sup>784</sup>

### 3.4.3 *Barkhuizen v Napier*<sup>785</sup>

In this case the Constitutional Court had to decide on the constitutionality of time limitation clauses.<sup>786</sup> Time-limitation clauses refer to a clause in a contract that sets a limit on the amount of time allowed to institute legal action.<sup>787</sup> Ngcobo J held that in deciding on the constitutionality of contractual terms it had to be determined whether it is contrary to public policy.<sup>788</sup> Ngcobo J states further that public policy refers to the convictions of the community and that these convictions can be found in the Constitution and the values contained in it.<sup>789</sup>

*uBuntu* was specifically mentioned in the matter when Ngcobo J states that public policy is informed by *ubuntu*.<sup>790</sup> There was no further elaboration by the court on what *ubuntu* meant or entailed. Ngcobo J goes on to state that the time-clause would be fair if, firstly, the time-clause itself is reasonable or, secondly, if the circumstances relating to the time-clause is unreasonable.<sup>791</sup> The second set of circumstances refers to a situation where a party to the contract might have a valid reason for not complying with the time-clause. Ngcobo J states that the unequal bargaining power of the

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<sup>783</sup> *The Azanian People's Organisation v The President of the RSA* 1996 4 SA 671 (CC) para 19.

<sup>784</sup> For a criticism of the case that does not necessarily deal with the meaning of *ubuntu* see Lenta 2005 *SAPL* 335-364; Moellendorf 1997 *SAJHR* 283.

<sup>785</sup> 2007 5 SA 323 (CC).

<sup>786</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 1.

<sup>787</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 1.

<sup>788</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 1.

<sup>789</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 28.

<sup>790</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 51.

<sup>791</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 57

parties might be a factor that could affect public policy. He further emphasises that unequal bargaining power would be particularly relevant to South Africa where a large number of people are poor, illiterate and uninformed of their rights.<sup>792</sup> Ngcobo J holds that there was no evidence before the court to indicate that there was unequal bargaining powers between the parties or that it was not freely entered into.<sup>793</sup>

The court states clearly that vulnerability of people should be taken into account when determining whether contracts concluded were in line with public policy. The court, however, never makes the link between *ubuntu* or any of the constitutional values and the factors that are considered for the validity of the contract even though the court expressly states that public policy is determined by constitutional values. This is a link that the court easily could have made. However, the court simply leaves the topic of *ubuntu* and constitutional values in the air, as if it is simply an add-on. However, in the matter the court broadens the use of *ubuntu* by not restricting it to issues of reconciliation or restorative justice but the value of *ubuntu*, indirectly, to vulnerability.

*Barkhuizen v Napier* was also one of the first cases to spark debate around the influence of the Constitution (and constitutional values) on private law or matters affecting private individuals. Some authors are of the opinion that it has been more challenging to incorporate constitutional values into areas of private law as opposed to public law.<sup>794</sup> Even more authors see the *Barkhuizen* judgment as a disappointment as the court relied too strongly on the "sanctity of contract" and failed to take into account the vulnerabilities of people that are not in the same bargaining position, despite mentioning constitutional provisions in general and *ubuntu* as a

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<sup>792</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 64.

<sup>793</sup> *Napier v Barkhuizen* 2007 5 SA 323 (CC) para 66.

<sup>794</sup> See for example Sutherland 2008 *Stell LR* 395.

value specifically.<sup>795</sup> These (contractual) arguments aside, in *Barkhuizen v Napier* the court missed an opportunity to develop the jurisprudence on *ubuntu*.

#### 3.4.4 *Joseph v City of Johannesburg*<sup>796</sup>

The applicants in this matter had been tenants whose electricity supply was disconnected after the landlord had failed to pay the electricity bill.<sup>797</sup> The applicants sought an order that their electricity supply be reconnected.<sup>798</sup> One of the questions that was raised in this matter was whether there was a duty on the municipality to supply the residents with electricity. This was a difficult matter in the case since the contract to supply electricity had been concluded between City Power and the landlord.<sup>799</sup>

Skweyiya J stressed the importance of providing municipal services to citizens. He linked the duty to provide municipal services with the objects on local government contained in section 152 of the Constitution, which includes the provision of services in a sustainable manner. He also states that in terms of section 153 of the Constitution the municipality has a developmental duty which entails prioritising the basic needs of the community and catering for the social and economic development of the community.<sup>800</sup> He refers to *The Local Government: Municipal Systems Act*<sup>801</sup> (Municipal Systems Act) which reiterated the duty on local government to provide the community with basic municipal services and the developmental duty on municipalities.<sup>802</sup> Lastly, he refers to the *Housing Act* which provides that all municipalities must take reasonable and necessary steps to ensure

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<sup>795</sup> Woolman 2008 *SALJ* 10-24; Bhana 2007 *SALJ* 269-280; Calitz 2011 *Stell LR* 62-63.

<sup>796</sup> 2010 4 SA 55 (CC).

<sup>797</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 1.

<sup>798</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 1.

<sup>799</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 2.

<sup>800</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 36.

<sup>801</sup> 32 of 2000.

<sup>802</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) paras 37, 38.

that certain services, including electricity, is provided in an economically sufficient manner.<sup>803</sup>

Skweyiya J continues to take these provisions and interpret them through the prism of the values and principles of the Constitution. In a footnote, he refers in particular to the *Batho Pele* principles which he links with *ubuntu*.<sup>804</sup> He states that *Batho Pele* was an expression of the value of *ubuntu*.<sup>805</sup> Furthermore, he notes that courts should go beyond the common law conception of rights that are solely dependent on individual entitlements.<sup>806</sup>

Thus, when the Constitution and legislation was interpreted in light of the value of *ubuntu* the court found that the applicants had a right to receive electricity as a basic municipal service. In this case *ubuntu* was seen to mean that people come first, thus meaning that the provision of basic services to the community should be prioritised over purely economic considerations.

### 3.4.5 *Afriforum v Malema*<sup>807</sup>

In 2010 Julius Malema had made certain statements at a function.<sup>808</sup> These statements can be translated as "shoot the boers, shoot the farmers. They are rapists/robbers".<sup>809</sup> The complainant in the matter, Afriforum, had argued that these statements amounted to hate speech as it was specifically aimed at Afrikaners and Afrikaans farmers with the intention to incite hurt on the basis of their ethnic, language or culture.<sup>810</sup> Malema's defence was

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<sup>803</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 39.

<sup>804</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46.

<sup>805</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46.

<sup>806</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46.

<sup>807</sup> 2011 6 SA 240 (EqC).

<sup>808</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 49.

<sup>809</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 52.

<sup>810</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 49.

that the song was not about killing individuals but was instead about dismantling the system of apartheid.<sup>811</sup>

In the matter the Equality Court affirmed that *ubuntu* is an important source of South African law.<sup>812</sup> The court emphasised that the value of *ubuntu* is particularly relevant where there are strained or broken relationships between communities or individuals.<sup>813</sup> It furthermore set out an elaborate list containing the functions/uses of *ubuntu* based on the South African courts' jurisprudence.<sup>814</sup> The court furthermore established that despite the fact that *ubuntu* is not mentioned in the final Constitution that it is still recognised within the South African court's jurisprudence.<sup>815</sup> It states the following regarding *ubuntu*:<sup>816</sup>

Ubuntu is a concept which:

1. is to be contrasted with vengeance; dictates that a high value be placed on the life of a human being;
2. is inextricably linked to the values of and which places a high premium on dignity, compassion, humaneness and respect for humanity of another;
3. dictates a shift from confrontation to mediation and conciliation;
4. dictates good attitudes and shared concern; favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant;
5. favours restorative rather than retributive justice; operates in a direction favouring reconciliation rather than estrangement of disputants;
6. works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant; promotes mutual understanding rather than punishment;
7. favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful; favours civility and civilised dialogue premised on mutual tolerance.

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<sup>811</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 79.

<sup>812</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

<sup>813</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

<sup>814</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

<sup>815</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

<sup>816</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

The court continued to discuss the statements made by Malema at length and whether or not a reasonable person would be hurt by the statements. Eventually, the court found that the song constituted hate speech.<sup>817</sup> The court made the following statement regarding the ethos of *ubuntu*.<sup>818</sup>

The message which the song conveys namely destroy the regime and "shoot the Boer" may have been acceptable while the enemy, the regime, remained the enemy of the singer. Pursuant to the agreements which established the modern, democratic South African nation and the laws which were promulgated pursuant to those agreements, the enemy has become the friend, the brother. Members of society are enjoined to embrace all citizens as their brothers. This has been dealt with more fully above in the context of the written laws and agreements. It must never be forgotten that in the spirit of *ubuntu* this new approach to each other must be fostered. Hence the Equality Act allows no justification on the basis of fairness for historic practices which are hurtful to the target group but loved by the other group. Such practices may not continue to be practised when it comes to hate speech. I accordingly find that Malema published and communicated words which could reasonably be construed to demonstrate an intention to be hurtful to incite harm and promote hatred against the white Afrikaans speaking community including the farmers who belongs to that group. The words accordingly constitute hate speech.

*Afriforum v Malema*<sup>819</sup> is one the small number of cases where the Court elaborates on the meaning of *ubuntu* or possible uses by providing an extensive list of possible direction it can give in the case. However, the Court does not make a specific link between its finding and the elaborate list, references to legislation and the Constitution and reference to *ubuntu* jurisprudence. Perhaps this link is missing as the Court directly uses *ubuntu*, not as an interpretive tool but as an enforceable right which it also then applies to the rest of South African citizens with the following statement

Persons who are not parties to the proceedings must be dealt with by way of structuring the order so that society knows what conduct is acceptable. Persons who are aware of the line which has been drawn by the Court are as a matter of both law and *ubuntu* obliged to obey it. There may be no immediate criminal sanction. Their breach of the standard set by this Court

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<sup>817</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 108.

<sup>818</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 108.

<sup>819</sup> 2011 6 SA 240 (EqC).

will however surely result in the appropriate proceedings under the Equality Act being taken against them.<sup>820</sup>

### 3.4.6 *Everfresh Market Virginia v Shoprite Checkers*<sup>821</sup>

The appellant in the matter leased property from the respondent.<sup>822</sup> The contract concluded between the two parties contained a clause that stated the contract could be renewed within five years.<sup>823</sup> After five years had passed the respondent notified the appellant that they would not be renewing the contract.<sup>824</sup> The appellant averred that there should be a duty of good faith on parties that require them to negotiate the renewal of a contract.<sup>825</sup> The appellant added that such an approach would be in line with section 39 of the Constitution and the values of the Constitution.<sup>826</sup> The court thus had to decide what the role was that constitutional values had on the law of contract.<sup>827</sup>

The court specifically referred to the value of *ubuntu*. In this regard it states the following:<sup>828</sup>

The values embraced by an appropriate appreciation of *ubuntu* are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.

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<sup>820</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 111.

<sup>821</sup> 2012 1 SA 256 (CC).

<sup>822</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 2.

<sup>823</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 3.

<sup>824</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 5.

<sup>825</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 16.

<sup>826</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 16.

<sup>827</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 1.

<sup>828</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 23.

The court seems to go in a strange direction here as it is conflating the constitutional value of *ubuntu* with customary practices in South Africa.

However, in the next paragraph it does make the link between *ubuntu* and vulnerability which the court fails to do in *Barkhuizen v Napier*.<sup>829</sup> The court specifically stated that cognisance should be had of vulnerable people who are poor who enter into contracts with powerful companies.<sup>830</sup> It was further held that in such instances *ubuntu* is relevant.<sup>831</sup> The matter was referred back to the High Court as the court found that the court *a quo* did not sufficiently determine whether the common law could be developed.<sup>832</sup>

*Everfresh Market Virginia v Shoprite Checkers* was one of the cases which received a rather large amount of commentary from academics and the judiciary, largely because it stopped short of developing the maxim of *pacta sunt servanda* to conform to the Constitution.<sup>833</sup>

#### 3.4.7 *Resnick v Government of RSA*<sup>834</sup>

In accordance with section 4 of the *Prevention of Illegal Evictions from and Unlawful Occupation of Land Act* an eviction order can only be granted if the person who is evicted is an unlawful occupier and secondly if the order is just and equitable. In this matter the Court had found that the appellant had been an unlawful occupier of the property of the respondent.<sup>835</sup> In

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<sup>829</sup> 2007 5 SA 323 (CC).

<sup>830</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 24.

<sup>831</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 16.

<sup>832</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 42.

<sup>833</sup> For example Bhana and Broeders 2014 *Journal of Contemporary Roman –Dutch Law* 164-176; Mupangavanhu 2013 *Speculum Juris* 148-173; Rautenbach 2016 *Journal of South African Law* 479.

<sup>834</sup> 2014 2 SA 337 (WCC).

<sup>835</sup> *Resnick v Government of RSA* 2014 2 SA 337 (WCC) page 14.

deciding whether the eviction order was just and equitable the Court stated the following:<sup>836</sup>

In this connection, it is relevant to note that *ubuntu* promotes a normative notion of humanity, of human beings who recognise the 'other', of values of solidarity, compassion and respect for human dignity. These serve as important guides. They are no less important when the person is involved, is in the position of the appellant, who has tenaciously tried to hold onto her home, so as to provide an education for her child within a stable environment, as it would be for a larger community of applicants.

The Court specifically noted that certain factors have to be taken into account. The specific factors that the court set out included the fact that the appellant was divorced, that she occupied the space for quite a long time, that her son is still in high school in the area and that despite the fact that she was struggling to make ends meet she grew her own vegetable garden to stretch her means further.<sup>837</sup>

The court considered what grace and compassion might mean in these circumstances and found that it would mean that the appellant be given six months to find alternative accommodation but not that the eviction be overturned.<sup>838</sup>

The meaning of *ubuntu* set out in this case coincides with that set out in *PE Municipality v Various Occupiers*. One that speaks of compassion and understanding.<sup>839</sup>

#### *3.4.8 PE Municipality v Various Occupiers*<sup>840</sup>

In this matter a number of people had occupied land unlawfully that had been privately owned within the Port Elizabeth Municipality.<sup>841</sup> After a

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<sup>836</sup> *Resnick v Government of RSA* 2014 2 SA 337 (WCC) page 15.

<sup>837</sup> *Resnick v Government of RSA* 2014 2 SA 337 (WCC) page 17.

<sup>838</sup> *Resnick v Government of RSA* 2014 2 SA 337 (WCC) page 18.

<sup>839</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.

<sup>840</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>841</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 1.

petition was signed by somewhat 1600 people in the neighbourhood and the owners the municipality sought an eviction order.<sup>842</sup> The occupiers were willing to leave the property provided they were given alternative accommodation and reasonable notice to leave.<sup>843</sup> The occupiers rejected the alternative accommodation offered by the Municipality as they had regarded it as unsafe and over-crowded.<sup>844</sup> The Municipality submitted that they were in the process of developing a housing programme and if the occupiers were provided with alternative housing it could be regarded as queue-jumping.<sup>845</sup>

The High Court held that it was in the public interest that the occupiers should vacate the land.<sup>846</sup> The order was set aside on appeal where the Supreme Court of Appeal held that the eviction order should not have been granted had the court not been satisfied that alternative housing was available.<sup>847</sup> The Municipality appealed to the Constitutional Court and the matter centred around whether the party seeking an eviction order is constitutionally bound to provide alternative accommodation.

Sachs J started the judgment with a contextual background into the history of evictions in South Africa. In short, the background centred around the predecessors of the current legal framework on evictions. He explained that the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* (PIE)<sup>848</sup> had repealed the *Prevention of Illegal Squatting Act* (PISA).<sup>849</sup> PISA allowed for criminal prosecution of illegal squatting. PISA was also instrumental in executing the apartheid government's policy of special

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<sup>842</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 1.

<sup>843</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 2.

<sup>844</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 2.

<sup>845</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 3.

<sup>846</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 4.

<sup>847</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 5.

<sup>848</sup> 19 of 1998.

<sup>849</sup> 52 of 1951.

segregation as it assisted in forced removals.<sup>850</sup> One of the main changes of PIE has been to be aligned with the constitutional values of human dignity, equality and freedom and to take account of the plight of black South Africans.<sup>851</sup> In applying the provisions of PIE to the matter before the court, the court had recourse to *ubuntu*. Sachs J states the following:

Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>852</sup>

It is evident from the above-mentioned quotation that the court saw *ubuntu* as part of the legal order of South Africa. The court furthermore acknowledged that the Constitution has a communitarian nature to it. In the final instance the court found that it would not be a just and equitable order to grant an order of eviction against the residents.<sup>853</sup>

#### 3.4.9 *Dikoko v Mokhatla*<sup>854</sup>

In this matter a municipal councillor had been called before the North West Provincial Public Accounts Standing Committee to explain an excessive cell phone account.<sup>855</sup> At the meeting Mr Dikoko made certain defamatory statements against Mr Mokhatla (CEO of the Council).<sup>856</sup> Mr Mokhatla instituted an action for damages against Mr Dikoko.<sup>857</sup> The question before

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<sup>850</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 9.

<sup>851</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 11.

<sup>852</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 37.

<sup>853</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 59.

<sup>854</sup> 2006 6 SA 235 (CC).

<sup>855</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 5.

<sup>856</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 7.

<sup>857</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 7.

the court was whether or not Mr Dikoko could claim immunity for the statements made in his capacity as a councillor.

In the High Court it was found that Mr Dikoko's statements were indeed defamatory and that he does not enjoy immunity as it was a meeting of the provincial legislature and not of the Council of the Municipality.<sup>858</sup> The High Court awarded Mr Mokhatla damages in the amount in the amount R110 000.<sup>859</sup> In the Supreme Court of Appeal the matter was dismissed without costs.<sup>860</sup> The Constitutional Court found that the immunity of the provincial legislature did not extend to Mr Dikoko.<sup>861</sup>

In assessing the quantum of the damages Mokgoro J, writing for the majority of the court, held that the *amende honorable* should be considered as an appropriate remedy.<sup>862</sup> The *amende honorable* had been an action that originated from the Roman-Dutch law which consisted of an apology towards the person who had been defamed.<sup>863</sup> Mokgoro J did not come to a conclusion on whether or not the *amende honorable* still forms part of the South African law but that an apology is an important part of assessing the quantum of damages.<sup>864</sup> In considering the quantum that should be awarded Mokgoro J holds that the remedy that is used should be based on *ubuntu* which is closely related to the value of human dignity.<sup>865</sup> The goal of *ubuntu* and the remedy should be to restore harmony to relationships.<sup>866</sup> She held further that the aim of the remedy, particularly in defamation cases, is to restore the dignity of the wronged party and not to punish the

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<sup>858</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) paras 19-20.

<sup>859</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 20.

<sup>860</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 21.

<sup>861</sup> The discussion of this case that is relevant to the study focuses on the quantum of damages therefore the matter of immunity and privilege of councillors are not discussed in depth.

<sup>862</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 66.

<sup>863</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 65.

<sup>864</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 67.

<sup>865</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 68.

<sup>866</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 68.

person who had done the wrong.<sup>867</sup> An apology could also serve this purpose.<sup>868</sup>

Mokgoro J also made a more profound point on the nature of South African law of defamation by saying that the law should develop in this regard.<sup>869</sup> The development that should emphasise the value of *ubuntu* which emphasises restorative and not retributive justice.<sup>870</sup> Although Mokgoro J does not use section 39 of the Constitution specifically it does appear that the development that Mokgoro J refers to was development of common law in terms of section 39. Mokgoro J took various factors into account in determining the quantum of the damages, including the fact that Mr Dikoko did not extend an apology for his statements. She found that the amount should be R50 000.<sup>871</sup>

In this matter Mokgoro J related *ubuntu* back to the concept of restorative justice. Although the matter was not seen in a positive light by some, it is submitted that the case moves in a positive direction as a constitutional value is utilised to develop the common law and bring it (the common law) in line with the Constitution. Bennett is furthermore of the opinion that this case was the only one where the value of *ubuntu* played a significant role.<sup>872</sup> This case also indicates a trend to incorporate common law legal standards and principles, such as fairness and good faith, into the concept of *ubuntu*.

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<sup>867</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 66.

<sup>868</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 66.

<sup>869</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 69.

<sup>870</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 69.

<sup>871</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 80.

<sup>872</sup> Bennett 2011 *PELJ* 44.

*3.4.10 The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority*<sup>873</sup>

In this matter the Union of Refugee Women and a number of refugees brought an application to the Constitutional Court to challenge section 23 of the *Private Security Industry Regulation Act*.<sup>874</sup> In terms of section 23 of the Act provides that in order for a person to render security services they have to be registered with a security services provider. One of the requirements for being registered with such a provider is being a South African citizen or permanent resident. The court thus had to decide whether the Act unfairly discriminated against refugees.

The majority of the court admitted that refugees occupied a vulnerable position in society but held that the security industry involves dangerous risks.<sup>875</sup> The majority held further that the discrimination in the Act was justifiable as it would be easier for residents and citizens to prove their trustworthiness.<sup>876</sup> There were two dissenting judgments. Mokgoro J and O'Regan J disagreed with the majority on refugees being less trustworthy.<sup>877</sup> They held further that there are ways to determine the trustworthiness of refugees e.g. providing clearance certificates.<sup>878</sup> They were also of the opinion that excluding refugees from working could increase a xenophobic climate, especially given the fact that refugees are vulnerable people in

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<sup>873</sup> 2007 4 BCLR 339 (CC).

<sup>874</sup> 56 of 2001.

<sup>875</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 31.

<sup>876</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 38.

<sup>877</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 118.

<sup>878</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 119.

society.<sup>879</sup> For these reasons they were of the opinion that section 23 of the Act unfairly discriminated against refugees.<sup>880</sup>

In the second minority judgment Sachs J found that section 23 of the Act was not unconstitutional if it was applied correctly.<sup>881</sup> He holds further that refugees should be given the opportunity to present the proper proof of trustworthiness.<sup>882</sup> He emphasises that the purpose of refugee law was to help refugees overcome the trauma and displacement.<sup>883</sup> He related the caring to the spirit of *ubuntu*.<sup>884</sup> He states that people are interdependent but this interdependence stretches beyond just South Africans.<sup>885</sup>

#### *3.4.11 Khosa v Minister of Social Development*<sup>886</sup>

The facts of this matter have already been touched on several times above. In short, the matter dealt with whether or not Mozambican nationals qualify for social assistance for their children.<sup>887</sup> There was no place in the judgment where *ubuntu* was by name but various authors agree that the "spirit" or idea behind *ubuntu* can be read in the case.<sup>888</sup>

Mokgoro J holds the following:<sup>889</sup>

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<sup>879</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 118.

<sup>880</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 123.

<sup>881</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 134.

<sup>882</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 131.

<sup>883</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 144.

<sup>884</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 145.

<sup>885</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 145.

<sup>886</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).

<sup>887</sup> See 2.3.2.

<sup>888</sup> See Cornell at 3.2.5. Mokgoro and Woolman 2010 *SAPL* 403.

<sup>889</sup> *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 65.

At the time the immigrant applies for admission to take up permanent residence the state has a choice. If it chooses to allow immigrants to make their homes here it is because it sees some advantage to the state in doing so. Through careful immigration policies it can ensure that those admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent resident becomes a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times. The category of permanent residents who are before us are children and the aged, all of whom are destitute and in need of social assistance. They are unlikely to earn a living for themselves. While the self-sufficiency argument may hold in the case of immigrants who are viable in the job market and who are still in the process of applying for permanent resident status, the argument is seemingly not valid in the case of children and the aged who are already settled permanent residents and part of South African society.

The court clearly links the role of the government to that of a caring society. In some of the cases mentioned above *ubuntu* has been linked to the concept of care. That particular duty to care is once again to linked to vulnerability. The court also confirms, contrary to the previous judgment discussed, that foreign nationals fall within the "protection" awarded by *ubuntu*.

#### *3.4.12 Bhe v Magistrate of Khayelitsha*<sup>890</sup>

A parallel system of intestate succession had existed in South Africa whereby succession took place according to a person's race. According to section 23 of the *Black Administration Act*,<sup>891</sup> when a black person dies all moveable property had to be devolved according to customary law and all land had to be left to a male heir.<sup>892</sup> In *Bhe v Magistrate of Khayelitsha* the two issues before the court were the constitutionality of section 23 and the constitutionality of male primogeniture.<sup>893</sup>

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<sup>890</sup> 2005 1 SA 580 (CC).

<sup>891</sup> 38 of 1927.

<sup>892</sup> Section 23 of the *Black Administration Act* 38 of 1927.

<sup>893</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 3.

The court held that section 23 of the Act was inconsistent with sections 9 and 10 of the Constitution.<sup>894</sup> This section was found to be overtly racist and discriminated on the basis of race, colour and ethnic origin.<sup>895</sup> The rule of male primogeniture was found to be inconsistent with the Constitution as it discriminated against extra-marital children and women.<sup>896</sup>

In the judgment the court placed great emphasis on the fact that customary law is recognised as part of the South African legal system in accordance with section 211 (3) of the Constitution.<sup>897</sup> Langa J is of the opinion that customary law did not get the opportunity to develop in the same manner that Roman-Dutch law could develop.<sup>898</sup> He is furthermore of the opinion that the more patriarchal aspects of customary law has been over-emphasised.<sup>899</sup> He holds that *ubuntu* could be seen as one of the positive aspects of customary law that emphasises sharing and working together.<sup>900</sup>

In an attempt to answer the questions before the court Langa J thought it important to explain the rationale behind the rules of customary succession. The rules had not been there to establish patriarchy but to guarantee fairness in a communitarian way of life.<sup>901</sup> Each person in the family unit had a role and the role of the heir was to keep the property in the family.<sup>902</sup> The heir also had to support the family and make sure that everyone was looked after.<sup>903</sup> Langa J went on to explain that the structures of families have changed since families often do not live together anymore.<sup>904</sup> Furthermore, women are often the head of society and expend large a large amount of

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<sup>894</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 60.

<sup>895</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 60.

<sup>896</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 93.

<sup>897</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 148.

<sup>898</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 90.

<sup>899</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 89.

<sup>900</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 45.

<sup>901</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 89.

<sup>902</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 75.

<sup>903</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 76.

<sup>904</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 80.

their day to take care of their family.<sup>905</sup> He also drew a distinction between the customary law in statutes and the living customary law. In the meantime, the customary law mentioned in the statutes is not necessarily what is practiced in real life.<sup>906</sup>

In the final instance the rule of male primogeniture was found to be unconstitutional as it violated the right to equality and human dignity. However, in this matter *ubuntu* did not influence the eventual decision of the court. In other words, *ubuntu* did not function as a constitutional value used to develop or interpret customary law. Rather, the court merely referred to *ubuntu* as a part of customary law that has positive aspects.

#### *3.4.13 City of Tshwane v Afriforum*<sup>907</sup>

This matter concerned the changing of names in the municipality of Tshwane. The City of Tshwane had resolved to change 25 of the 100 old street names in the city.<sup>908</sup> Afriforum had brought an interdict to stop the changing of names in the municipality, the municipality then agreed not to continue with these matters for six months while Afriforum had to bring the decision of the municipality under review within ten days.<sup>909</sup> After six months the municipality continued with the decision to change the street names while Afriforum had still not brought the decision under review.<sup>910</sup> Afriforum then again launched an urgent application and started with review proceedings. At the centre of Afriforum's case was that temporary removal of street names would "do violence to the very being of Afrikaner people as well as their healthy and peaceful existence".<sup>911</sup> The interdict was granted

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<sup>905</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 190.

<sup>906</sup> *Bhe v Khayelitsha Magistrate* 2005 1 SA 580 (CC) para 87.

<sup>907</sup> 2016 6 SA 279 (CC).

<sup>908</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 21.

<sup>909</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 23.

<sup>910</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 24.

<sup>911</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 26.

in the High Court while awaiting the decision from the review proceedings. The municipality had appealed the order, stating that Afriforum had not suffered harm by the temporary removal of the street names. The matter was dismissed by the Supreme Court of Appeal and eventually landed in the Constitutional Court.

This case concerns a number of issues including the constitutional right to culture contained in section 31 of the Constitution, the municipality's decision to change the street names and the process of public participation.<sup>912</sup> These issues are not discussed in depth, but only so far as they relate to the court's statements on *ubuntu*. The court had to decide whether there was a right that could be infringed, whether there was irreparable harm and whether the balance of convenience favours the order. The court found that the balance of convenience weighed against the order being granted. The court was furthermore baffled that Afriforum could suffer harm from the temporary removal of street signs. It stated the following in this regard:<sup>913</sup>

The emotional harm that Afriforum relies on is grounded on a one-sided notion of a sense of belonging. The significance of a change of 25 old street names, out of the many that lauds their heritage, must be taken into account. This is necessary because it also gives some sense of belonging to the previously disadvantaged South Africans who are the overwhelming majority of the citizens of Pretoria and South Africa. Regard must be had to the fact that places like Pretoria were a part of what was known as "white South Africa" during the apartheid era. And it is that legacy that is now sought to be tenaciously held onto with the aid of an interdict. Whatever harm Afriforum would suffer as a result of not granting the interim order, would be significantly neutralised by an equally important sense of belonging of the previously disregarded.

At the outset of the case Mogoeng J wrote extensively about the oppressive past and history of South Africa. He made reference to the importance of the constitutional values in general and *ubuntu* in particular not only for

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<sup>912</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 34.

<sup>913</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 64.

constitutional interpretation but also for all South Africans. In this regard he said the following:<sup>914</sup>

All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision must embrace the African philosophy of 'ubuntu'. 'Motho ke motho ka batho ba bangwe' or 'umuntu ngumuntu ngabantu' (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, including name-changing. White South Africans must enjoy a sense of belonging. But unlike before, that cannot and should never again be allowed to override all other people's interests. South Africa no longer "belongs" to white people only. It belongs to all of us who live in it, united in our diversity. Any indirect or even inadvertent display of an attitude of racial intolerance, racial marginalisation and insensitivity, by white or black people, must be resoundingly rejected by all South Africans in line with the Preamble and our values, if our constitutional aspirations are to be realised.

Mogoeng J positioned *ubuntu* not only as important as an African concept but a concept that is important to the whole South African constitutional order. The judgment also links the concept of *ubuntu* to the recognition aspect of social justice and not just the distributive aspect. The minority of the court found this aspect of the judgment problematic and stated the following:<sup>915</sup>

There are other portions of the first judgment that suggest that the national project of attaining inclusivity, unity in diversity and reconciliation makes suspicious or doubtful the kind of sense of space and belonging that Afriforum claims. We have already pointed out that the Constitution generally does not mandate the imposition of a particular conception of this national project by the courts, and particularly not in relation to a local government competency to rename streets. But, on its own terms, this conception also carries within it the destruction of its objective of inclusivity. Consider this. What is the effect of a failure to embrace *ubuntu*, by evincing appreciation of and respect for others? Does the person lose his or her constitutional protections? The first judgment seems to suggest Yes. This lies in its finding that even if Afriforum members had the kind of right they claimed – a sense of historic belonging and space – their loss of that sense can never qualify as irreparable harm. But this denial of that kind of possibly irreparable harm is not extended in our law to other infringements of rights whose loss cannot be quantified in material terms.

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<sup>914</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 11.

<sup>915</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) paras 138-139.

The minority judgment raised two important questions pertaining to *ubuntu*: Is there a particular conception of the national project of inclusivity and secondly what is the effect if everyday citizens do not embrace *ubuntu*?

One could argue that the minority has erred in reasoning that there is no particular conception of inclusivity. The courts have stated that the values of the Constitution should be upheld and it has already been established that *ubuntu* is a constitutional value. If the majority argued that the national project of inclusivity should be in line with *ubuntu*, it would make sense. The second question relates to the obligation that *ubuntu* places on people. One could also ask the question 'Is the value of *ubuntu* of importance only as a tool of interpretation or is it enforceable on everyday citizens as well in the same way that the infringement of a right is enforceable?' This particular case dealt with the powers and functions of local government to name streets which meant that the court focused on the obligations of a sphere of government as opposed to everyday citizens. As mentioned above, the jurisprudence of the courts is that a constitutional value is not enforceable as a right but the majority of the court in this matter seems to suggest that it is.

#### *3.4.14 Mohamed's Leisure Holdings v Southern Sun Hotel Interests*<sup>916</sup>

In this matter Mohamed Leisure Holdings had concluded a lease agreement with Southern Sun International.<sup>917</sup> The agreement contained a cancellation clause in terms of which the lease could be cancelled if rent was not received on time.<sup>918</sup> After the lessee had failed to pay the rent on time the appellant applied for an eviction order in the High Court.

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<sup>916</sup> 2018 2 SA 314 (SCA).

<sup>917</sup> *Mohamed's Leisure Holdings v Southern Sun Hotel Interests* 2018 2 SA 314 (SCA) para 1.

<sup>918</sup> *Mohamed's Leisure Holdings v Southern Sun Hotel Interests* 2018 2 SA 314 (SCA) para 1.

In the High Court the respondent argued that the failure to pay had been a mistake on the part of the bank, the bank wrote a letter that it had indeed been an error on their part.<sup>919</sup> Van Oosten J, in the High Court, made it clear that there had been no obligation on the applicant to notify or remind the debtor of the payment.<sup>920</sup> He continued to state that the cancellation clause within the contract had not been unfair.

However, the question still remained whether the effect of implementing the cancellation clause in these specific circumstances was unreasonable and against public policy. The High Court found that the order was against public policy and unreasonable in the specific circumstances. As part of its reasoning the court provided an exposition of instances where *pacta sunt servanda* had been relaxed pre and post the Constitution.<sup>921</sup> Prior to the Constitution the matter of *Venter v Venter*<sup>922</sup> had a similar issue where a lessee had defaulted in payment on a lease agreement on the account of a fault by the bank. In *Venter v Venter* the court found it reasonable that the debtor should still be held liable even if it was the fault of the bank.<sup>923</sup>

According to Van Oosten J, in *Mohamed Leisure Holdings v Southern Sun Hotel Interests*, in a post constitutional era the landscape of the law of contract has changed.<sup>924</sup> He continued to refer to various judgments post the Constitution where the values of the Constitution were utilised or simply

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<sup>919</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 9.

<sup>920</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 19.

<sup>921</sup> The Court referred to the following cases as examples where the *pacta sunt servanda* maxim was relaxed: *Robinson v Randfontein Estates* 1925 AD 173; *Schierhout v Minister of Justice* 1925 AD 417; *Magna Alloys and Research SA v Ellis* 1984 4 SA 874 (A) and *Sasfin v Beukes* 1989 1 SA 1 (A).

<sup>922</sup> 1949 1 SA 768 (A).

<sup>923</sup> *Venter v Venter* 1949 1 SA 768 (A) 784-785. Also see *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 22.

<sup>924</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 1.

referred to by the courts.<sup>925</sup> The court makes the point that the provision itself was not unfair or against public policy.<sup>926</sup> Rather, it held that it was the implementation of the clause on the facts of the matter that had to be measured against the Constitution.<sup>927</sup>

The court specifically referred to *Everfresh Market Virginia v Shoprite Checkers*<sup>928</sup> where it was held that the law of contract should be infused with constitutional values, in particular the value of *ubuntu* which included the notions of "humanness, social justice and fairness".<sup>929</sup> The court came to the conclusion that it had been part of its role to make a value judgment in the matter based on constitutional values. In making this judgment it held that certain factors were important to consider and these included: the prejudice suffered by the parties as a result of eviction and the fact that it was a mistake on the part of the bank. The court thus held that the precedent that had been set in *Venter v Venter*<sup>930</sup> had been wrong seen against the background of the Constitution and its values, particularly that of *ubuntu*.<sup>931</sup>

The matter went on appeal to the Supreme Court of Appeal (SCA). The SCA had a different conception of the issues before the court. The court held that based on *Barkhuizen v Napier*<sup>932</sup> the following factors had to be taken into account: that the terms of the contract were not on the face of it against

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<sup>925</sup> These include *Juglal v Shoprite Checkers* 2004 5 SA 248 (SCA); *Barkhuizen v Napier*; *Everfresh Market v Shoprite Checkers*. For a discussion on *Barkhuizen v Napier* and *Everfresh Market v Shoprite Checkers*, see 3.4.3 and 3.4.5.

<sup>926</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 27.

<sup>927</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 27.

<sup>928</sup> 2012 1 SA 256 (CC).

<sup>929</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 35.

<sup>930</sup> 1949 1 SA 768 (A).

<sup>931</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 35.

<sup>932</sup> 2007 5 SA 323 (CC).

public policy, bargaining position of the parties and the fact that it was possible to have made the payment on time by e.g. electronic fund transfer. The SCA held that at times a contract may be unfair but this is not necessarily infringe the values of the Constitution.<sup>933</sup>

This SCA judgment is a good example of confusion between values and rights. The SCA was of the opinion that the value of *ubuntu*, or the other values in the Constitution, for that matter should not have been used because the right to dignity or equality was not infringed.<sup>934</sup>

The court is correct in stating that constitutional issues should be avoided as far as possible. But it is not the same with constitutional values as they should guide the judiciary in interpretation all the time. The issue of constitutional subsidiarity and that of interpretation are entirely different issues.<sup>935</sup> The judiciary does not have a choice in whether or not it chooses to interpret legislation or contracts in line with the Constitution.

### **3.5 Reflections on judicial opinions on ubuntu**

The above-mentioned discussion on case law has firstly established that *ubuntu* is very much still being used by courts whether by a reference in passing or as a rationale for the judgment. The courts have thus abated arguments that the use of *ubuntu* is only a phase.<sup>936</sup>

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<sup>933</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 30.

<sup>934</sup> *Mohamed Leisure Holdings v Southern Sun Hotel Interests* 2017 4 SA 243 (GJ) para 30.

<sup>935</sup> The idea of constitutional subsidiarity determines that if the court can avoid a constitutional issue it should do so. In other words, cases should not be based on constitutional provisions if non-constitutional provisions have not been exhausted. This principle was set out in, amongst others, *S v Mhlungu* 1995 3 SA 867 CC; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC). For a discussion on constitutional subsidiarity see Du Plessis 2006 *Stell LR* 207-231; Klare 2008 *Constitutional Court Review* 129-154.

<sup>936</sup> 1995 6 BCLR 665 (CC). See 3.4.7.

As far as meaning is concerned all of the above-mentioned cases meaning it ascribes to *ubuntu* in some way coincides with the concepts the scholars agreed upon in the previous section. These meanings include: At the beginning of the new constitutional dispensation *ubuntu* was used to incorporate and effect restorative justice and unity. This is understandable, as South Africa had just emerged from a transitional period. These uses of *ubuntu* are clearly evident from *S v Makwanyane*,<sup>937</sup> *The Azanian People's Organisation v President of RSA*<sup>938</sup> and later on the *Afriforum v Malema*<sup>939</sup> as well. *uBuntu* as a value has also been used to refer to solidarity and unity, particularly with cases relating to race relations in South Africa. This is evident from *Malema v Afriforum*<sup>940</sup> as well as *City of Tshwane v Afriforum*.<sup>941</sup>

In *PE Municipality v Various Occupiers*<sup>942</sup> the Court started to apply aspects of *ubuntu* related to compassion and caring, particularly towards vulnerable parties, these aspects had already been mentioned in *S v Makwanyane*.<sup>943</sup> Since *PE Municipality v Various Occupiers* courts have used the notion of *ubuntu* to evaluate what a just and equitable order should be during eviction orders.<sup>944</sup>

There has also been a marked effort by the courts to incorporate the notions of "fairness", "good faith" and "public policy" within the concept of *ubuntu*. In this sense *ubuntu* is used as a counterbalance against strong individualistic conceptions of the law of contract, such as *pacta sunt servanda*, for example.<sup>945</sup>

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<sup>937</sup> 1995 3 SA 391 (CC). See 3.4.1.

<sup>938</sup> 1996 4 SA 671 (CC). See 3.4.2.

<sup>939</sup> 2011 6 SA 240 (EqC). See 3.4.4.

<sup>940</sup> 2011 6 SA 240 (EqC).

<sup>941</sup> 2016 6 SA 279 (CC).

<sup>942</sup> 2005 1 SA 517 (CC).

<sup>943</sup> 1995 3 SA 391 (CC).

<sup>944</sup> See for example, *Resnick v Government of RSA* 2014 2 SA 337 (WCC).

<sup>945</sup> Bennett also touches on this point in 3.2.2.

From these examples one can conclude that *ubuntu* is many things. To some, like Kroeze, this is a negative point as she states "*ubuntu* simply collapses under the weight of the expectations".<sup>946</sup> This might be *ubuntu's* strong point that it is many things, but it is many things that emphasise relationality. As a constitutional value *ubuntu* thus creates an interpretive standard of relationality between individuals as well as individuals and the state. As for hard and fast definitions of *ubuntu* I am inclined to agree with Bennett that *ubuntu* need not be strictly defined. In fact, there is no constitutional value that is. The importance though is that courts be transparent in their reasoning and line of thought as far as possible. This might include being open about their understanding of *ubuntu*. It is impractical for a court to do in-depth historical analysis on extra-legal sources every time it uses a constitutional value. It is expected that the jurisprudence on constitutional values will develop and at some point, more reference might be made to previous cases. The courts, however, seem to be stuck in developing this jurisprudence. This is evident from the number of cases where the courts simple refer to *ubuntu*, or constitutional values for that matter, without elucidating their understanding of it or its link to the decision. As a standard, one would also not expect it to have a rigid meaning. Although many have lamented that *ubuntu* is a vague concept, scholars and the courts are of the opinion that it refers to a sense of relationality between people that emphasises compassion, caring and humanity.

Other than being inconsistent with revealing their normative understanding of *ubuntu*, the courts have also been inconsistent with their understanding of rights and values. This is evident from cases like *Mohamed Holdings v*

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<sup>946</sup> Kroeze 2002 *Stell LR* 260.

*Southern Sun Hotel Interests*<sup>947</sup> and *City of Tshwane v Afriforum*.<sup>948</sup> Furthermore, constitutional values are always relevant during interpretation whereas reliance on a specific constitutional right might not be. The former is interpretation and the latter is known as constitutional subsidiarity.

It can also be observed from the above-mentioned cases that the courts do not measure the relevant provisions in the abstract against *ubuntu*, but rather the effect and outcome. This is important to note as it implies that every situation should be looked at from a case to case basis.

### **3.6 Conclusion**

After Chapter 2 established the meaning and function of constitutional values in general this chapter has sought to determine the normative meaning of *ubuntu* as a constitutional value. Various scholarly viewpoints and judicial precedents were scrutinised. From the scholarly viewpoints it was clear that all the scholars mention certain aspects that they thought encapsulated *ubuntu*. These aspects included interconnectedness and interdependence between members of the community. Interconnectedness implies that the relationships and the way we interact with other people are important to us as human beings. In this sense *ubuntu* goes beyond dignity as the emphasis is not on the individual as an atom or individual entity but as a person who is always within community. For this reason, *ubuntu* necessarily encapsulates the concept of solidarity as well. It says something about what the individual owes the community and what the community owes the individual. This implies the inclusion of people rather than exclusion. Furthermore, as *ubuntu* values community it also values the restoration of the relationship between individuals. For this reason, *ubuntu* also included restorative justice. Other concepts that the authors deem part

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<sup>947</sup> 2017 4 SA 243 (GJ).

<sup>948</sup> 2016 6 SA 279 (CC).

of *ubuntu* were caring and compassion. The conclusion was also reached that *ubuntu* connotes a general sense of relationality. It need not be strictly defined as it is an interpretive standard and constitutional value which is generally phrased in vague terms.

However, authors differed on other points. Ramose, for example, was of the opinion that the *ubuntu* community related to the Bantu-speaking people of Africa.<sup>949</sup> Within the current constitutional state of South Africa it would be impractical to take such a position. The courts have also affirmed that the *ubuntu* responsibilities extends to foreigners as well. A conception of *ubuntu* would thus have to apply to everyone in South Africa.

Courts and some of the authors, such as Keevy and Ramose<sup>950</sup>, note that the concept of *ubuntu* originated from African law. Both these authors therefore deem the concept inappropriate for the South African legal system. However, it has to be emphasised that *ubuntu* can still be used divorced from its oppressive and patriarchal roots.

It can be used as a value to incorporate the relational nature of rights. In addition, in this chapter it was found that even though *ubuntu* need not have a rigid definition, for purposes of transparency and so as to promote the rule of law courts need to be explicit regarding their understanding of the concept and how it relates to the rest of the judgment.

The next chapter explores the concept of social justice, where after a link is established between *ubuntu* and the pursuit of social justice in South Africa.

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<sup>949</sup> See 3.2.1.

<sup>950</sup> See 3.2.1 and 3.2.4.

## Chapter 4 Perspectives on social justice

### 4.1 Introduction

As alluded to above the preamble of the Constitution envisages a socially just society.<sup>951</sup> Furthermore, it was established in Chapter 1 that the realisation of social justice falls within the broader aims of the role of the judiciary and of transformative constitutionalism.<sup>952</sup> The general aim of this study is to specifically conceive how the judiciary can do so by using the constitutional value of *ubuntu*. In order to establish the possible links between the concept of *ubuntu* and social justice an exploration of the concept of social justice is needed. While this chapter looks at the most prominent contemporary theories on social justice generally and globally it also specifically looks to situate social justice within the history of South Africa.

The South African courts have referred to the importance of social justice as well as its link to the value of *ubuntu* without alluding to a specific conception or understanding of social justice.<sup>953</sup> Justice Theron<sup>954</sup> has indicated a direct link between the provision of services and socio-economic rights such as water, healthcare, electricity and other social services. She continues to point out that human rights litigation is an important means to achieve social justice.<sup>955</sup> Other issues that she mentions relate to social justice, language, poverty and student hunger.<sup>956</sup> However, the meaning of social justice seems to have been taken for granted although the exact scope and meaning is not entirely clear.

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<sup>951</sup> See Chapter 1.

<sup>952</sup> See 1.3.

<sup>953</sup> See for example *S v Makwanyane* 1995 3 SA 391 (CC).

<sup>954</sup> Theron 2018 *PELJ* 3.

<sup>955</sup> Theron 2018 *PELJ* 3.

<sup>956</sup> Theron 2018 *PELJ* 6 - 7.

Social justice is generally described as the manner in which the benefits and burdens of society should be distributed and also how institutions should deal with inequality in society. It is often agreed that social justice is a laudable objective but the content of such an objective, and even what the objective of social justice should be, has been a point of debate for centuries over.<sup>957</sup>

The aim of this chapter is to investigate various theories on social justice to come to an understanding as to what the aim of the South African government, specifically the judiciary should be. This chapter then continues to look at the specific South African historical and social context within which to situate an understanding of social justice.

## **4.2 Scholarly opinions on social justice**

### *4.2.1 John Rawls*

John Rawls' general understanding of social justice can succinctly be taken up in the following quotation:<sup>958</sup>

Our topic, however, is that of social justice. For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political institution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions.

John Rawls' "A Theory of Justice" has been called the most important work on political philosophy in the 20th century.<sup>959</sup> It is most likely called that as

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<sup>957</sup> In 2009, for example, the General Assembly of the United Nations proclaimed that 20 February would be World Social Justice Day. <https://www.gov.za/WorldDayofSocialJustice> .

<sup>958</sup> Rawls *A Theory of Justice* 6.

<sup>959</sup> Strauss 2008 *Politeia* 29; Talisse *On Rawls* 5; Meadon 2009 *South African Journal of Philosophy* 171.

it departs from the traditional theories on social justice.<sup>960</sup> Rawls' theory is essentially a thought experiment that involves a variation of the social contract.<sup>961</sup> He asks us to imagine people in an original position.<sup>962</sup> The people in the original position are also behind a veil of ignorance meaning that they are ignorant of their race, gender, social position and so forth.<sup>963</sup> The people in the original position have to decide on the rules of the society that they will live in.<sup>964</sup>

The people in the original position are rational and mutually disinterested which means that these people look out for their interests and do not have an agenda against other people.<sup>965</sup> According to Rawls,<sup>966</sup> the veil of ignorance ensures that no person is advantaged or disadvantaged by the choices they make. Furthermore, it ensures fairness as the agreement was made under fair conditions.<sup>967</sup>

Rawls is of the opinion that the people in the original position will necessarily decide on certain principles. The people in the original position will not make decisions based on utilitarianism as they might end up as part of a minority group in society. The first principle entails equality of rights and duties.<sup>968</sup> Each person will thus have certain primary social goods which include basic rights and freedoms.<sup>969</sup> The second principle, the difference principle, entails that social and economic inequalities exist as long as it benefits the worst

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<sup>960</sup> These theories include utilitarianism and intuitionism.

<sup>961</sup> A social contract is an agreement between people in a society regarding the rules and powers between the citizens and the government.

<sup>962</sup> Rawls *A Theory of Justice* 12.

<sup>963</sup> Rawls *A Theory of Justice* 12. Johnson et al *Jurisprudence* 180.

<sup>964</sup> Rawls *A Theory of Justice* 12.

<sup>965</sup> Rawls *A Theory of Justice* 13. Johnson et al *Jurisprudence* 182.

<sup>966</sup> Rawls *A Theory of Justice* 12.

<sup>967</sup> Rawls *A Theory of Justice* 12.

<sup>968</sup> Rawls *A Theory of Justice* 14.

<sup>969</sup> Johnson et al *Jurisprudence* 183.

off person in society.<sup>970</sup> Rawls<sup>971</sup> sees this scheme as fair since what he calls 'natural endowment' is only an accident. Everyone in the society should also have equal opportunities. Rawls theory places a great amount of emphasis on substantive equality and the equal distribution of resources.

Many authors have critiqued Rawls' theory.<sup>972</sup> The critique that seems most obvious is that the theory is based on a fictitious position. To this Rawls<sup>973</sup> states that one should not be misled by the original position as it simply points out that people should not be disadvantaged because of the hand that they were dealt in life.

Sandel's first point of critique against Rawls' theory is that he (Rawls) assumes that consent and agreement would necessarily lead to fairness.<sup>974</sup> Sandel<sup>975</sup> is of the viewpoint that just because two people decided on something does not make it fair. The people to the agreement might not have equal bargaining power or one might be a better negotiator.<sup>976</sup> Sandel thus argues that the social contract in Rawls' theory does not necessarily lead to fairness solely based on the fact that consent was present by all parties. He continues to state that no social contract or constitution is guaranteed to provide fairness.<sup>977</sup>

One of the major points of critique against Rawls' theory is that it is based on a neoliberal capitalist society. Johnathan Wolff says the following with reference to the primary goods in Rawls' society:<sup>978</sup>

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<sup>970</sup> Johnson et al *Jurisprudence* 183.

<sup>971</sup> Rawls *A Theory of Justice* 14.

<sup>972</sup> Sandel *Liberalism and the Limits of Justice*; Nozick *Anarchy, State and Utopia*; Nussbaum 2004 *Oxford Development Studies* 3-18.

<sup>973</sup> Rawls *A Theory of Justice* 16.

<sup>974</sup> Sandel *Justice* 142.

<sup>975</sup> Sandel *Justice* 142.

<sup>976</sup> Sandel *Justice* 143.

<sup>977</sup> Sandel *Justice* 143.

<sup>978</sup> Wolff *Introduction to Political Philosophy* 188.

It has been said that these goods are not neutral. These goods are particularly suitable for life in modern capitalist societies, built on profit, wages, and exchange. Yet surely there could be non-commercial, more communal forms of existence, and hence conceptions of the good in which wealth and income—even liberty and opportunity—have lesser roles to play. So, runs the criticism, Rawls' original position is biased in favour of a commercial, individualist organization of society, ignoring the importance that non-commercial, communal goods could have in people's lives.

Meyerson<sup>979</sup> points out that communitarians are against living in a state that is neutral, as in Rawls' society. Communitarians are of the opinion that people are not self-determining or autonomous beings that can sever themselves from their social and cultural context.<sup>980</sup> Meyerson further states that communitarians believe that Rawls' theory creates a flawed conception of the self. Sandel says in a similar vein: <sup>981</sup>

Certain moral and political obligations that we commonly recognize—such as obligations of solidarity, for example, or religious duties—may claim us for reasons unrelated to a choice. Such obligations are...difficult to account for if we understand ourselves as free and independent selves, unbound by moral ties we have not chosen.

There is no doubt that the liberties and rights that Rawls suggest every citizen should have is needed in any society. Indeed, the South African Constitution grants many of the rights that he speak of. However, a purely libertarian view of justice such as Rawls' is problematic within South Africa or any country. It is hard to conceive of a conception of social justice that is not in some way defined about justice by a country's history or a person's position in society. This is certainly true of South Africa. How, for example, should substantive equality be realised with neutral principles of justice? Applying a theory that supposes a neutral state becomes problematic when the very notion of justice is informed by the country's social and historical context. Rawls' theory also seems to assume rationality on the part of the citizens and places a high premium on rationality. The theories that follow

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<sup>979</sup> Meyerson *Jurisprudence* 322.

<sup>980</sup> Meyerson *Jurisprudence* 322.

<sup>981</sup> Sandel "Review of Political Liberalism" 461. Also see Meyerson *Jurisprudence* 323.

on social justice can generally be seen as a critique against Rawls' liberal egalitarian society.

#### 4.2.2 Iris Young

Young<sup>982</sup> asserts that she does not have a theory of justice but seeks to speak of justice in a manner that goes beyond the distributive paradigm. She does not deny that distributive aspects are important to justice but seeks an explanation of justice that goes beyond the distributive aspects.<sup>983</sup> Young<sup>984</sup> is of the viewpoint that there are various important issues relating to social justice that do not relate to the distributive paradigm. In order to illustrate non-distributive social justice issues she proffers the example of citizens of a town who organise a group to convince people to shut down a hazardous waste treatment plant in their town.<sup>985</sup> These citizens feel that they were not given the choice of rejecting the plant.<sup>986</sup> Another example relates to black citizens who criticise the media for not depicting enough black people in roles of authority, glamour or virtue.<sup>987</sup> These two cases of injustice do not relate to issues of distribution but decision making and cultural recognition respectively.<sup>988</sup>

She is critical of liberal, egalitarian and welfarist justice theorists who aim to conceptualise a universal theory of justice that can be applied to any person or society.<sup>989</sup> Such a universal theory would include Rawls' theory mentioned above. The idea that certain universal principles apply to people

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<sup>982</sup> Young *Justice and the Politics of Difference* 3. A distributive paradigm refers to a focus on distribution of wealth, income, rights and other goods in society. For a discussion on the distributive paradigm see Keddie 2013 *Race Ethnicity and Education* 515-534; Olson 2001 *Critical Horizons* 5-32.

<sup>983</sup> Young *Justice and the Politics of Difference* 3.

<sup>984</sup> Young *Justice and the Politics of Difference* 19.

<sup>985</sup> Young *Justice and the Politics of Difference* 19.

<sup>986</sup> Young *Justice and the Politics of Difference* 19.

<sup>987</sup> Young *Justice and the Politics of Difference* 20.

<sup>988</sup> Young *Justice and the Politics of Difference* 20.

<sup>989</sup> Young *Justice and the Politics of Difference* 3.

and societies is part of the traditional liberal paradigm. In accordance with such a paradigm institutions should ignore differences such as gender and race, for example, and treat every person equally.<sup>990</sup> Her main point of contention is that these traditional theories do not take the politics of difference into account. She believes that liberal institutions that do not take account of difference contributes to the *status quo* of injustice. She argues further that it is imperative that institutions take account of social groups, particularly oppressed social groups in order to respond appropriately.

Central to Young's reflections on justice is that social (in)justice is structural.<sup>991</sup> It is structural since social justice should look further than the simple distributions of goods but to the institutional context and structures that lead to such distribution.<sup>992</sup> Young<sup>993</sup> argues that theories of social justice that focus on the distributive aspect do not take into account these structural realities and institutional contexts. Young defines structural inequality as:<sup>994</sup>

a set of reproduced social processes that reinforce one another to enable or constrain individual actions in many ways. What we refer to by group differentiations of gender, race, class, age, and so on, in the context of evaluating inequalities as unjust, are structural social relations that tend to privilege some more than others.

According to Young,<sup>995</sup> injustice also refers to oppression and domination. Young<sup>996</sup> states that while many would use the word oppression to refer to a tyrant it can also refer to 'the injustice some people suffer as a result of everyday practices of a well-intentioned liberal society'. Young<sup>997</sup> maintains

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990 Young "Structural Injustice and the Politics of Difference" 362.

991 Young *Justice and the Politics of Difference* 3. Young 2001 *Journal of Political Philosophy* 9-15.

992 Young *Justice and the Politics of Difference* 18.

993 Young *Justice and the Politics of Difference* 20.

994 Young 2001 *Journal of Political Philosophy* 2.

995 Young *Justice and the Politics of Difference* 40-42.

996 Young *Justice and the Politics of Difference* 41.

997 Young "Structural Injustice and the Politics of Difference" 362.

that the prohibition of discriminatory laws alone is not enough to bring about change. This oppression is not as a result of a tyrant but because of certain norms, habits and symbols of certain institutions.<sup>998</sup> Young<sup>999</sup> also mentions that many people in institutions do not realise that they are agents of oppression. She specifically identifies five types of oppression namely exploitation, marginalisation, powerlessness, violence and cultural imperialism.

Young<sup>1000</sup> sees exploitation, the first form of oppression, as a form of class domination with specific legally entrenched economic classes. Capitalist society remains an injustice as the workers in such a system use their skills and capacities for the benefit and enrichment of other people in such a system.<sup>1001</sup> Exploitation is not only unjust because of the distributive aspect, i.e. that workers do not get to see what they have worked hard for, but because it creates a hierarchy in society that dictates who should do which type of work.<sup>1002</sup> Young's use of the term exploitation is in reference to the way in which Marx used it i.e. that even without legal categories of classes that class structures still exist within society.<sup>1003</sup> However, she argues that Marx's idea of exploitation lacks " explicit normative meaning".<sup>1004</sup> For this reason she prefers the explanation of Macpherson on how exploitation of workers work and says the following:<sup>1005</sup>

The injustice of capitalist society consists in the fact that some people exercise their capacities under the control, according to the purposes, and for the benefit of other people. Through private ownership of the means of production, and through markets that allocate labor and the ability to buy goods, capitalism systematically transfers the powers of some persons to others, thereby augmenting the power of the latter. In this process of the

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<sup>998</sup> Young *Justice and the Politics of Difference* 41.

<sup>999</sup> Young *Justice and the Politics of Difference* 41.

<sup>1000</sup> Young *Justice and the Politics of Difference* 48.

<sup>1001</sup> Young *Justice and the Politics of Difference* 48.

<sup>1002</sup> Young *Justice and the Politics of Difference* 49-50.

<sup>1003</sup> Young *Justice and the Politics of Difference* 48-53.

<sup>1004</sup> Young *Justice and the Politics of Difference* 49.

<sup>1005</sup> Young *Justice and the Politics of Difference* 49.

transfer of powers, according to Macpherson, the capitalist class acquires and maintains an ability to extract benefits from workers. Not only are powers transferred from workers to capitalists, but also the powers of workers diminish by more than the amount of the transfer, because workers suffer material deprivation and a loss of control, and hence are deprived of important elements of self-respect. Justice, then, requires eliminating the institutional forms that enable and enforce this process of transference and replacing them with institutional forms that enable all to develop and use their capacities in a way that does not inhibit, but rather can enhance, similar development and use in others.

The injustice with exploitation then is that the power of the capitalist class is maintained as the capacities of the working class is never developed.

Young<sup>1006</sup> continues to argue that Marx's general conception of exploitation is too narrow and that issues of race and gender should also be incorporated, or vulnerable groups for that matter. She uses the example of feminism. The exploitation of women can be seen by the fact that women work for men by transferring the fruit of their labour to men and the transferring of their nurturing and sexual energies to men, by for example birthing children and doing housework that they are not paid for.<sup>1007</sup> She also mentions that specific racial classes are also exploited as most servants, at least in the United States, are usually Latino or black.<sup>1008</sup> To her the answer, or justice, is not in a redistribution of goods but in a change in the division of labour, decision making, institutional, cultural and structural change.<sup>1009</sup>

Marginalisation is the second form of oppression. To Young<sup>1010</sup> marginal people are people that the labour market cannot or will not use. These people would typically include the aged, mentally disabled and the sick.

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<sup>1006</sup> Young *Justice and the Politics of Difference* 50.

<sup>1007</sup> Young *Justice and the Politics of Difference* 50. On the topic of motherhood as exploitation also see Grace 2001 *Just Policy* 46-53; Ayon *et al* 2018 *Violence Against Women* 879-900.

<sup>1008</sup> Young *Justice and the Politics of Difference* 50.

<sup>1009</sup> Young *Justice and the Politics of Difference* 52.

<sup>1010</sup> Young *Justice and the Politics of Difference* 53.

Marginalisation is an injustice beyond distribution as it firstly deprives certain rights of the deprived people and secondly hinders the marginalised to exercise certain capacities.<sup>1011</sup> Most nations have constitutions and legislation granting all citizens rights, however, Young<sup>1012</sup> explains that the marginalised are deprived of certain rights underneath the surface. Marginalised people are dependent on institutions for services, whether it is medical services, municipal services or grants. As these people are dependent they are often subjected to demeaning and unfair treatment.<sup>1013</sup> This then often results in a situation where certain basic rights are suspended.<sup>1014</sup>

The next form of oppression Young calls powerlessness. Young<sup>1015</sup> maintains that power relations still remain uneven in society on account of class distinctions. She makes a specific distinction between professionals and non-professionals.<sup>1016</sup> She adds that professional people are often not part of the capitalist class but still benefit from the exploitation of non-professional people.<sup>1017</sup> Young<sup>1018</sup> states that powerlessness takes place when people cannot take part in the decisions that affect their lives and often professional people have power over non-professional people as they often supervise them. Professional people also have power over non-professional people as they are treated as more respectable.<sup>1019</sup> Young continues to describe the specific ways in which non-professional people are oppressed as opposed to professional people. Firstly, many professions have a progressive character meaning that a professional person has a

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<sup>1011</sup> Young *Justice and the Politics of Difference* 53-54.

<sup>1012</sup> Young *Justice and the Politics of Difference* 54.

<sup>1013</sup> Young *Justice and the Politics of Difference* 54.

<sup>1014</sup> Young *Justice and the Politics of Difference* 54.

<sup>1015</sup> Young *Justice and the Politics of Difference* 56.

<sup>1016</sup> Young *Justice and the Politics of Difference* 57.

<sup>1017</sup> Young *Justice and the Politics of Difference* 56.

<sup>1018</sup> Young *Justice and the Politics of Difference* 57-58

<sup>1019</sup> Young *Justice and the Politics of Difference* 58.

degree and starts off in a job with opportunities to expand their career or to be promoted.<sup>1020</sup> Non-professional people often do not have these opportunities to progress in their employment.<sup>1021</sup> Secondly, professional people have people supervising them but very often they supervise other people, who are most likely non-professional people, and they (professional people) still have relative day-to-day autonomy, whereas non-professional people are usually only under the supervision of other people.<sup>1022</sup> Third, Young<sup>1023</sup> states that these two groups differ in their "respectability". This respectability emanates from the way people dress, the food they eat and the places they frequent, for example.<sup>1024</sup> Young<sup>1025</sup> argues that people often see professional people as more respectable than non-professional people based on these habits and behaviours.

Borrowing from the terminology of Lugones and Spelman, Young<sup>1026</sup> calls the fourth face of oppression cultural imperialism. Cultural imperialism takes place when the norms and meanings of a dominant group in society oppress minority groups.<sup>1027</sup> These dominant norms make minorities feel invisible and different.<sup>1028</sup> Cultural imperialism can be present in the means and mode of communication, a universalisation of an experience, cultural products and the interpretation of events.<sup>1029</sup> This can result in a type of "othering". Young<sup>1030</sup> names the following examples of minority groups that could suffer under dominant groups: "American Indians or Africans from Europeans, Jews from Christians, homosexuals from heterosexuals, workers from

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<sup>1020</sup> Young *Justice and The Politics of Difference* 57.

<sup>1021</sup> Young *Justice and The Politics of Difference* 57.

<sup>1022</sup> Young *Justice and The Politics of Difference* 57.

<sup>1023</sup> Young *Justice and The Politics of Difference* 57.

<sup>1024</sup> Young *Justice and The Politics of Difference* 57.

<sup>1025</sup> Young *Justice and The Politics of Difference* 58.

<sup>1026</sup> Young *Justice and The Politics of Difference* 58. Also see Lugones and Spelman 1983 *Women's Studies International Forum* 573-581.

<sup>1027</sup> Young *The Politics of Difference* 58.

<sup>1028</sup> Young *Justice and The Politics of Difference* 59.

<sup>1029</sup> Young *Justice and The Politics of Difference* 57.

<sup>1030</sup> Young *Justice and The Politics of Difference* 59.

professionals". Young<sup>1031</sup> explains that cultural imperialism causes what WEB Du Bois calls "double consciousness". Double consciousness can be described as the state when the "culturally oppressed" look at themselves through the eyes of the dominant group but also maintains their own perspective.<sup>1032</sup> To Young<sup>1033</sup> the core of the injustice of cultural imperialism is that "othered" groups' experience does not penetrate the lives of the dominant group but the dominant group imposes their experience on the "othered" group.

The fifth and final form of oppression is violence. Young<sup>1034</sup> is of the opinion that certain people and groups of people are often the targets of violence. Young states further that this type of violence is an injustice as it is systematic.<sup>1035</sup> It is systematic because it is aimed at people by virtue of the fact that they belong to a certain group.<sup>1036</sup> She mentions the examples of rape against women, racism and homophobia.<sup>1037</sup> The structural violence that Young<sup>1038</sup> speaks of is also characterised by its irrationality. To explain this irrationality she uses the example of xenophobia by stating that violence against a person striking might be rational in the sense that it is done to maintain control over that person or group.<sup>1039</sup> Xenophobia, in contrast, is not rationally motivated as it is based on hatred towards a particular group.<sup>1040</sup>

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<sup>1031</sup> Young *Justice and The Politics of Difference* 60. Du Bois *The Souls of Black Folk* 45.

<sup>1032</sup> Young *Justice and The Politics of Difference* 59.

<sup>1033</sup> Young *Justice and The Politics of Difference* 60.

<sup>1034</sup> Young *Justice and The Politics of Difference* 61.

<sup>1035</sup> Young *Justice and The Politics of Difference* 62.

<sup>1036</sup> Young *Justice and The Politics of Difference* 62.

<sup>1037</sup> Young *Justice and The Politics of Difference* 62.

<sup>1038</sup> Young *Justice and The Politics of Difference* 62.

<sup>1039</sup> Young *Justice and The Politics of Difference* 62.

<sup>1040</sup> Young *Justice and The Politics of Difference* 62.

As social justice is a structural issue to Young<sup>1041</sup> her proposed solutions to social injustices also lie within structures. In this regard she says the following:<sup>1042</sup>

Structural inequality, then, consists in the relative constraints some people encounter in their freedom and material well-being as the cumulative effect of the possibilities of their social positions, as compared with others who in their social positions have more options or easier access to benefits. These constraints or possibilities by no means determine outcomes for individuals in their ability to enact their plans or gain access to benefits. Some of those in more constrained situations are particularly lucky or unusually hardworking and clever, while some of those with an open road have bad luck or squander their opportunities by being lazy or stupid. Those who successfully overcome obstacles, however, nevertheless cannot be judged as equal to those before whom few obstacles have loomed, even if at a given time they have roughly equivalent incomes, authority or prestige. Unlike the individualized attributes of native ability that often concern equality theorists, moreover, structural inequalities are socially caused. For this reason there is an even stronger argument that in the case of given individual attributes for social institutions to remedy these inequalities.

Young<sup>1043</sup> continues to state that the solution lies in empirical investigation into the structural inequalities that exist. She states further that once this inequality has been discovered it does not necessarily follow that specific strategies or policies have to be in place that target specific people, for example affirmative action policies.<sup>1044</sup> Instead her viewpoint is that independent analysis and argument must be offered to justify the manner in which policy should deal with these inequalities.<sup>1045</sup> The objective of determining structural inequalities for Young<sup>1046</sup> is to create awareness of structural inequalities and find ways to intervene in institutional processes and individual actions that limit substantive opportunities for individuals to develop their capacities and legitimate aims.

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<sup>1041</sup> Young 2001 *Journal of Political Philosophy* 15.

<sup>1042</sup> Young 2001 *Journal of Political Philosophy* 15.

<sup>1043</sup> Young 2001 *Journal of Political Philosophy* 17.

<sup>1044</sup> Young 2001 *Journal of Political Philosophy* 18.

<sup>1045</sup> Young 2001 *Journal of Political Philosophy* 18.

<sup>1046</sup> Young 2001 *Journal of Political Philosophy* 18.

It should be pointed out that the notion of identifying particular "social groups" is of importance to Young. To her one cannot deal with structural inequalities and injustices if one does not compare the well-being of particular groups.<sup>1047</sup> These social groups are identified based on a pattern of inequality.<sup>1048</sup> The systemic nature of inequality is determined by the average difference in well-being based on a number parameters which include income, mortality rate and education, among others.<sup>1049</sup>

Considering Young's theory of justice there are a few observations to be made. Firstly, her conception of social justice clearly goes beyond the traditional liberal paradigm in that it takes people's personal, social and historical context into account. Therefore, it does away with the sense of neutrality that Rawls speaks of. Her conception also takes account of particular vulnerable groups in society such as women and the poor. The social group that she speaks of is also not limited to a particular group but requires evidence of systematic discrimination. The faces of oppression that she mentions strikes at the centre of a post-liberal account of adjudication in Chapter 2. As an institution, the judiciary and the legal system itself can fall prey to these five faces of oppression. A post-liberal and transformative account of adjudication would take into account structural inequalities, class distinctions, powerlessness and class distinctions. At this stage, Fraser's conception of social justice seems more suitable and comprehensive than that of Rawls.

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<sup>1047</sup> Young 2001 *Journal of Political Philosophy* 15.

<sup>1048</sup> Young 2001 *Journal of Political Philosophy* 15.

<sup>1049</sup> Young 2001 *Journal of Political Philosophy* 16.

### 4.2.3 Nancy Fraser

Similar to Young, Fraser<sup>1050</sup> is supportive of a conception of social justice that goes beyond the distributive aspect. According to Fraser,<sup>1051</sup> justice requires a distributive and recognition aspect. She takes gender as an example to highlight the difference between the distributive and recognition aspect. A woman, for example, will not be remunerated for certain household chores, such as childrearing and cleaning.<sup>1052</sup> This is an example of the distributive aspect of justice. In terms of the recognition perspective of justice, the institutionalisation of male norms is an injustice, for example.<sup>1053</sup> She notes that there is increasingly a polarisation between the distribution and recognition aspect of justice.

She mentions that combining these two perspectives raises a number of issues in many areas: in moral philosophy a conception of justice has to be created that combines social equality and recognition of difference; in social theory the relations between class and status, economy and culture has to be understood; in political theory the appropriate institutional arrangements and associated policy reforms have to be devised.<sup>1054</sup> However, she limits herself to the first area which is a bivalent conception of social justice that combines distribution and recognition. In approaching the aforementioned conceptualisation she states that three questions have to be addressed. Firstly, she asks the question whether recognition is a matter of justice or self-realisation?<sup>1055</sup> She asks this question as various theorists, for example Honneth and Taylor,<sup>1056</sup> on recognition have posed the problem of recognition as an issue of self-realisation. These theorists mean to say that

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<sup>1050</sup> Fraser *Social Justice in the Age of Identity Politics* 1.

<sup>1051</sup> Fraser *Social Justice in the Age of Identity Politics* 1.

<sup>1052</sup> Fraser *Social justice in the Age of Identity Politics* 2.

<sup>1053</sup> Fraser *Social justice in the Age of Identity Politics* 2.

<sup>1054</sup> Fraser *Social justice in the Age of Identity Politics* 1.

<sup>1055</sup> Fraser *Social justice in the Age of Identity Politics* 3.

<sup>1056</sup> Fraser *Social justice in the Age of Identity Politics* 3.

misrecognition is wrong because it impedes the process of self-realisation of the person or as Fraser says elsewhere, for theorists such as Taylor and Honneth misrecognition is wrong as it denies them the basic prerequisite for human flourishing.<sup>1057</sup> Taylor, for example, says the following:<sup>1058</sup>

Nonrecognition or misrecognition....can be a form of oppression, imprisoning someone in a false, distorted, reduced mode of being. Beyond simple lack of respect, it can inflict a grievous wound, saddling people with crippling self-hatred. Due recognition is not just a courtesy but a vital human need.

Fraser<sup>1059</sup> disagrees with this notion as she argues that recognition denies some individuals and groups the status of equal partners in social interactions because of the cultural value placed on certain differences. She prefers this understanding as it firstly caters for societies where value pluralism exists.<sup>1060</sup> According to Fraser,<sup>1061</sup> recognition that is based on self-realisation will necessarily be sectarian as there will be some dominant idea as to what that self-realisation must entail.

Secondly, she prefers to see recognition as an issue of justice as the injury that is suffered is located in social relations and not in individual psychology.<sup>1062</sup> Placing the injury to status in social relations means that misrecognition is not simply an issue of being looked down by some but to be deprived of equal interaction in social life. If it is seen as an issue of the internal perspective and feelings of the individual it is much easier to blame the victim of misrecognition.<sup>1063</sup> Lastly, she states that seeing misrecognition from a justice perspective avoids the viewpoint that everyone has the right to social esteem.<sup>1064</sup> Instead her understanding of recognition entails that

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<sup>1057</sup> Fraser 2001 *Theory, Culture and Society* 26.

<sup>1058</sup> Taylor "The Politics of Recognition" 25.

<sup>1059</sup> Fraser *Social Justice in the Age of Identity Politics* 3. Fraser 2001 *Theory, Culture and Society* 26.

<sup>1060</sup> Fraser *Social Justice in the Age of Identity Politics* 3.

<sup>1061</sup> Fraser *Social Justice in the Age of Identity Politics* 3.

<sup>1062</sup> Fraser *Social Justice in the Age of Identity Politics* 3.

<sup>1063</sup> Fraser *Social Justice in the Age of Identity Politics* 3.

<sup>1064</sup> Fraser *Social Justice in the Age of Identity Politics* 3.

everyone has an equal right to pursue social esteem under fair conditions of equal opportunity.<sup>1065</sup>

Turning to the second question in relation to her bivalent conception of justice she asks whether recognition and distribution constitute two separate and distinct conceptions of justice.<sup>1066</sup> In answering this question she firstly makes the point that standard theories on distributive justice do not adequately incorporate issues of distribution.<sup>1067</sup> These theories often assume that a distribution of resources will automatically prevent misrecognition.<sup>1068</sup> She proffers the example of a black wealthy Wall Street banker who struggles to find a taxi cab to pick him up to illustrate that a theory of justice that focuses on distribution does not necessarily take care of issues of recognition.<sup>1069</sup> She adds that similarly theories of social justice that focus on recognition generally neglect distributive aspects.<sup>1070</sup> Maldistribution is not always caused by misrecognition.<sup>1071</sup> Here she makes the example of a skilled white male industrial worker who loses his job as a result of a corporate merger to illustrate that maldistribution is not always related to misrecognition.<sup>1072</sup> She argues that even though many theorists have failed to combine the two aspects it is imperative that an approach to social justice should be bivalent.

The central part of Fraser's normative framework is called participatory parity.<sup>1073</sup> In terms of this framework all adult members of society should be able to interact with each other as equals.<sup>1074</sup> Fraser names two

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<sup>1065</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1066</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1067</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1068</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1069</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1070</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1071</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1072</sup> Fraser *Social Justice in the Age of Identity Politics* 4.

<sup>1073</sup> Fraser *Social Justice in the Age of Identity Politics* 5.

<sup>1074</sup> Fraser *Social Justice in the Age of Identity Politics* 5.

requirements for participatory parity. Firstly, material resources must be distributed in such a way that every person has a voice and independence.<sup>1075</sup> Secondly, every person must have equal opportunity and respect.<sup>1076</sup> She states that justice does not require that every single aspect of a person that makes them different be taken into account. Difference should only be taken into account so far as it is needed for the relevant party to interact in society as an equal.<sup>1077</sup> She argues that her conception of participatory parity subsumes aspects of distribution and recognition.<sup>1078</sup>

Her third and final question is whether justice requires the recognition of what is different about people over and above people's humanity.<sup>1079</sup> Fraser avers that it is impossible to say once and for all which types of recognition people will need.<sup>1080</sup> She suggests approaching this question from the perspective that recognition is a remedy for injustice not a human need.<sup>1081</sup> She adds that this perspective implies that the types of recognition that would be needed is directly related to the forms of misrecognition to be redressed.<sup>1082</sup> The essential point to Fraser<sup>1083</sup> is what currently misrecognised people need to participate in social life. These might be different things for different people. Some people might not want their distinctiveness emphasised while others would want their distinctiveness taken into account.<sup>1084</sup> In later writings Fraser<sup>1085</sup> makes the point that misrecognition is not related to group-specific identity but the status of group members as partners of social interaction.

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<sup>1075</sup> Fraser *Social Justice in the Age of Identity Politics* 5.  
<sup>1076</sup> Fraser *Social Justice in the Age of Identity Politics* 5.  
<sup>1077</sup> Fraser *Social Justice in the Age of Identity Politics* 5.  
<sup>1078</sup> Fraser *Social Justice in the Age of Identity Politics* 4.  
<sup>1079</sup> Fraser *Social Justice in the Age of Identity Politics* 4.  
<sup>1080</sup> Fraser *Social Justice in the Age of Identity Politics* 5.  
<sup>1081</sup> Fraser *Social Justice in the Age of Identity Politics* 5.  
<sup>1082</sup> Fraser *Social Justice in the Age of Identity Politics* 5.  
<sup>1083</sup> Fraser *Social Justice in the Age of Identity Politics* 5.  
<sup>1084</sup> Fraser *Social Justice in the Age of Identity Politics* 5-6.  
<sup>1085</sup> Fraser 2001 *Theory, Culture and Society* 24.

Fraser<sup>1086</sup> argues that maldistribution and misrecognition can also not be seen as separate issues of justice as they always overlap in some way. She mentions that in idyllic pre-state societies where the society is organised based on affiliation or kinship there is a direct relation between one's status and distribution.<sup>1087</sup> Equally so in a society that is organised based on economic structure distribution has a direct effect on recognition.<sup>1088</sup> Fraser<sup>1089</sup> proposes perspective dualism which entails that cognisance must be taken of redistribution and recognition simultaneously. In other words, one can never look at issues of recognition without looking at issues of distribution.

To my mind, Fraser and Young seem to be saying very much the same thing. Their focus is on a broader conception of social justice that takes into account recognition as well as distribution. The main difference, as stated by Fraser as well, is that Fraser does not see recognition and distribution as antithetical.<sup>1090</sup> Fraser and Young have the same idea for an understanding of social justice i.e. one that takes into account issues of recognition and distribution.<sup>1091</sup>

#### 4.2.4 Amartya Sen

Poverty has traditionally been defined exclusively in economic terms. Sen developed a conception of social justice that critiques this traditional viewpoint. He avers that a country's economic well-being does not necessarily predict individual well-being.<sup>1092</sup> To illustrate this point he uses

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<sup>1086</sup> Fraser *Social Justice in the Age of Identity Politics* 2.

<sup>1087</sup> Fraser *Social Justice in the Age of Identity Politics* 6.

<sup>1088</sup> Fraser *Social Justice in the Age of Identity Politics* 6.

<sup>1089</sup> Fraser *Social Justice in the Age of Identity Politics* 8.

<sup>1090</sup> Fraser *Social Justice in the Age of Identity Politics* 15-16.

<sup>1091</sup> See however Fraser 1995 *Journal of Political Philosophy* 166-180 where Fraser states that even though Young conceives of justice as containing aspects of recognition and distribution that she (Young) fails to execute that idea in her book *The Politics of Difference*.

<sup>1092</sup> Sen "Development as Capability Expansion" 42.

South Africa and China as examples, among others.<sup>1093</sup> South Africa has a higher GNP (Gross National Product) than China but the life expectancy at birth of a person born in South Africa is 55 whereas it is 69 in China.<sup>1094</sup> From this set of facts Sen<sup>1095</sup> firstly emphasises that economic well-being does have a role to play in people's lives but that it is only one of the ways to enrich people's lives. It is thus a means to an end but not an end in itself.<sup>1096</sup> Secondly he emphasises that economic means might not be enough to fulfil valuable ends in people's lives, policy and development planning thus has to take into account what people's ends are.<sup>1097</sup>

According to Sen,<sup>1098</sup> poverty or well-being should not just be measured in terms of income but the ability that people have to live a life that they value. To address the issues mentioned in the previous paragraph, Sen distinguishes between functionings and capabilities. Capabilities are the freedoms people have and functionings are the states they are in when they do the things which they value.<sup>1099</sup> People thus need certain functionings to have capability. According to Sen,<sup>1100</sup> functionings include, *inter alia*, escaping morbidity, being well-nourished, having self-respect, appearing in public without shame.

Sen<sup>1101</sup> points out that his capability approach is not only an alternative to an approach of social justice that measures well-being solely in terms of economic terms ("commodity fetishism") but that it also contrasts a utilitarian approach which measures well-being in terms of pleasure or

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<sup>1093</sup> Sen "Development as Capability Expansion" 42.

<sup>1094</sup> Sen "Development as Capability Expansion" 42.

<sup>1095</sup> Sen "Development as Capability Expansion" 42.

<sup>1096</sup> Sen "Development as Capability Expansion" 42. See 2.3.1 for an explanation of Kant's concept of means and ends.

<sup>1097</sup> Sen "Development as Capability Expansion" 42.

<sup>1098</sup> Sen "Development as Freedom" 528. Frediani 2007 *Journal of Human Development* 136.

<sup>1099</sup> Sen "Development as Capability Expansion" 42. Sen *Equality of What?* 218-219.

<sup>1100</sup> Sen "Development as Capability Expansion" 42.

<sup>1101</sup> Sen "Development as Capability Expansion" 42.

feelings of happiness. Sen<sup>1102</sup> opposes a utilitarian approach as in situations of hardship and poverty many people adapt and display pleasure and thankfulness for the small things in life. In these situations, the person's real deprivation will go unseen.<sup>1103</sup> He also argues that a utilitarian approach might be problematic as it assumes that people are the same and that the same things will bring all people enjoyment or pleasure.<sup>1104</sup>

Unlike Nussbaum, Sen has not set up a list that contains a minimum amount of capabilities that a person should have. Sen<sup>1105</sup> feels strongly about the fact that democratic processes should take place and that setting up a list is a process where everyone should be involved in. Sen,<sup>1106</sup> however, states that a list could be developed if it was for a specific purpose, for example evaluating poverty. He argues that one cannot create a list with capabilities that is set in stone as conditions might change.<sup>1107</sup> However, Sen<sup>1108</sup> points out that one would have to discriminate between certain functionings that are more important than others. Being well-nourished and well-sheltered might be some of the more important functionings.<sup>1109</sup> In this regard he is somewhat critical of Rawls' theory of justice.<sup>1110</sup> In Rawls' theory of justice each person should be secured with certain primary goods which would include wealth and income, basic rights and freedoms. Sen<sup>1111</sup> agrees with Rawls' conception of justice that does not determine what people's ends

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<sup>1102</sup> Sen "Development as Capability Expansion" 45.

<sup>1103</sup> Sen "Development as Capability Expansion" 45.

<sup>1104</sup> Sen *Equality of What?* 202.

<sup>1105</sup> Sen 2004 *Feminist Economics* 77. Frediani 2007 *Journal of Human Development* 137. In Sen 2004 *Feminist Economics* 77-80 Sen elaborates on his reasons for not having a basic list of capabilities.

<sup>1106</sup> Sen 2004 *Feminist Economics* 79.

<sup>1107</sup> Sen 2004 *Feminist Economics* 79.

<sup>1108</sup> Sen "Development as Capability Expansion" 46.

<sup>1109</sup> Sen "Development as Capability Expansion" 46.

<sup>1110</sup> Sen "Development as Capability Expansion" 47. See 4.2.1 for a description of Rawls' theory of justice.

<sup>1111</sup> Sen "Development as Capability Expansion" 47.

should be but focuses on the means to achieve those ends. Sen<sup>1112</sup> argues that Rawls' theory, similar to the capability approach, focuses on freedom but falls short as it fails to take into account that people's ability to convert certain primary goods into achievement differs. Thus simply comparing the primary goods that people have does not give a good indication of their real freedoms.<sup>1113</sup> Sen refers to various examples to illustrate this problem, for example, a pregnant woman who might need very different things than a man to live a comfortable life.

He continued to develop his ideas on capabilities by linking it to "Development as Freedom". In "Development as Freedom" he argues that in order to have freedom people need to have certain unfreedoms removed from their lives.<sup>1114</sup> These unfreedoms include, *inter alia*, poverty, poor economic opportunities, neglect of public facilities and repressive states.<sup>1115</sup> To Sen,<sup>1116</sup> freedom is important as it is firstly a measure of evaluating the progress made in terms of equality and secondly freedom is a constitutive part of development as people's agency is an essential part of development. He identifies five instrumental freedoms that increases the capability of people which include political freedoms, economic facilities, social opportunities, transparency guarantees and protective security.<sup>1117</sup> The link between these freedoms are also emphasised, for example, social opportunities in the form of education facilitate economic participation.<sup>1118</sup>

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<sup>1112</sup> Sen "Development as Capability Expansion" 48.

<sup>1113</sup> Sen "Development as Capability Expansion" 48.

<sup>1114</sup> Sen *Development as Freedom* 3.

<sup>1115</sup> Sen *Development as Freedom* 3.

<sup>1116</sup> Sen *Development as Freedom* 4.

<sup>1117</sup> Sen *Development as Freedom* 10.

<sup>1118</sup> Sen *Development as Freedom* 11.

#### 4.2.5 Martha Nussbaum

Nussbaum<sup>1119</sup> proposes a theory of capabilities (also known as the development approach) in terms of which a person has to have a certain amount of capabilities to live a dignified life. Similar to Sen, she argues that it is not only about what people have but about what people can do with what they have.<sup>1120</sup> She argues that people need different things to have a dignified life. A disabled person, for example, has different needs from a fully abled person and a mother has different needs from someone who is not.<sup>1121</sup>

In her book, "Creating Capabilities" she refers to the lived experience of women and the inability of development approaches only focused on the GDP to meaningfully change people's lives.<sup>1122</sup> She illustrates the ineffectiveness of economic-centred approaches by referring to the case study of Vashanti who she describes as "a small woman in her early thirties who lives in Ahmedabad, a large city in the state of Gujarat in north-western India".<sup>1123</sup>

Nussbaum<sup>1124</sup> sees the capabilities approach as an alternative to the GDP that defines development solely in monetary terms. The approach is not only applicable to developing countries but also to developed countries as all countries struggle with equality and justice although certain issues such as poverty might be more prevalent in less developed countries.<sup>1125</sup>

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<sup>1119</sup> Nussbaum 2004 *Oxford Developmental Studies* 13.

<sup>1120</sup> Nussbaum *Creating Capabilities* preface x.

<sup>1121</sup> Nussbaum 2011 *Feminist Economics* 36.

<sup>1122</sup> Nussbaum *Creating Capabilities* 13.

<sup>1123</sup> Nussbaum *Creating Capabilities* 3.

<sup>1124</sup> Nussbaum *Creating Capabilities* 15.

<sup>1125</sup> Nussbaum *Creating Capabilities* 16.

As alluded to above Sen has a similar capabilities theory which Nussbaum<sup>1126</sup> supports but points out specific differentiating aspects. Firstly, she points out that her theory provides space for human as well as non-human animals.<sup>1127</sup> Secondly, she notes that the capabilities theory can be used for creating a theory of social justice or as an assessment of the quality of life.<sup>1128</sup> Her version of the capabilities theory focuses the former. In doing so it consists of a basic list of capabilities which Sen's theory does not contain.<sup>1129</sup>

Nussbaum<sup>1130</sup> defines capabilities as "not just abilities residing inside a person but also the freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment." She calls the aforementioned freedoms "substantial freedoms" which she distinguishes from "internal capabilities".<sup>1131</sup> "Internal capabilities" refer to certain characteristics of a person that can be changed such as bodily fitness or intellectual capacities.<sup>1132</sup> Nussbaum<sup>1133</sup> argues that society should aim to promote internal capabilities but to also create the correct opportunity and environment to function with that capability which is in essence combined capability. Some states create the environment and opportunity to practice certain freedoms but do not actively nurture the innate capabilities of people.<sup>1134</sup> Nussbaum<sup>1135</sup> names India as an example of a state which creates opportunities to participate in but fail at delivering basic services which enable people to participate. In order to speak of innate capabilities

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<sup>1126</sup> Nussbaum *Creating Capabilities* 17-18. See 4.2.4.

<sup>1127</sup> Nussbaum *Creating Capabilities* 17-18.

<sup>1128</sup> Nussbaum *Creating Capabilities* 19.

<sup>1129</sup> Nussbaum *Creating Capabilities* 19.

<sup>1130</sup> Nussbaum *Creating Capabilities* 20.

<sup>1131</sup> Nussbaum *Creating Capabilities* 21.

<sup>1132</sup> Nussbaum *Creating Capabilities* 21.

<sup>1133</sup> Nussbaum *Creating Capabilities* 21-22.

<sup>1134</sup> Nussbaum *Creating Capabilities* 22.

<sup>1135</sup> Nussbaum *Creating Capabilities* 22.

Nussbaum<sup>1136</sup> prefers to speak of basic capabilities. She defines basic capabilities as "the innate faculties of the person that make later development and training possible".<sup>1137</sup> Directly related to capabilities are functionings which refer to the realisations of capabilities.<sup>1138</sup> In other words functioning is what people do and capabilities are what people are able to do. Nussbaum<sup>1139</sup> stresses this point as the focus should be on the freedoms that people have rather than the actual choices they end up making. She says the following in this regard:<sup>1140</sup>

But capabilities have values in and of themselves, as spheres of freedom and choice. To promote capabilities is to promote areas of freedom, and this is not the same as making people function in a certain way. Thus the Capabilities Approach departs from a tradition in economics that measure the real value of a set of options by the best use that can be made of them. Options are freedoms, and freedom has intrinsic value

In constructing a list of the most important capabilities the question is asked what is the absolute minimum that is needed to live a dignified life?<sup>1141</sup> Nussbaum<sup>1142</sup> prescribes a list of ten capabilities that is needed to live a dignified life. These capabilities include life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; concern for other species; play and control over one's environment.<sup>1143</sup> She adds that it is a general list and that it might be changed to the specific needs of each society but a society that does not provide these capabilities is not a just society.<sup>1144</sup> Secondly, she states that room must be left for the specific activities of nations' legislatures and courts.<sup>1145</sup> Thirdly, the list is not

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1136 Nussbaum *Creating Capabilities* 24.  
1137 Nussbaum *Creating Capabilities* 24.  
1138 Nussbaum *Creating Capabilities* 25.  
1139 Nussbaum *Creating Capabilities* 25.  
1140 Nussbaum *Creating Capabilities* 25.  
1141 Nussbaum *Creating Capabilities* 29.  
1142 Nussbaum 2011 *Feminist Economics* 41.  
1143 Nussbaum 2011 *Feminist Economics* 40.  
1144 Nussbaum 2011 *Feminist Economics* 40.  
1145 Nussbaum 2011 *Feminist Economics* 42.

meant to divide people in terms of culture and religion.<sup>1146</sup> Fourthly, having a list of capabilities does not force anyone to do something that is against their convictions.<sup>1147</sup> For example, having the right to vote does not mean that one must vote.<sup>1148</sup> The list is seen as a minimum threshold for social justice.<sup>1149</sup>

Nussbaum<sup>1150</sup> starts from the point of departure that the social contract theory is not an adequate theory of social justice for the present inequalities in the world. Her capabilities theory is presented as an alternative to more traditional theories such as the GDP approach, utilitarian approach and other resource-based approaches.<sup>1151</sup>

According to Nussbaum,<sup>1152</sup> the capabilities theory supplements the human rights approach. Firstly, it sees human agency as the basis of human rights rather than rationality thereby catering for people with cognitive disabilities.<sup>1153</sup> Secondly, it elucidates the relationship between human dignity and human rights.<sup>1154</sup> Thirdly, it sets out a certain set of duties.<sup>1155</sup>

Nussbaum's theory of capability is particularly appealing as it focuses on care and goes beyond the classical liberal paradigm.<sup>1156</sup> She is critical of liberal theories such as that of Kant and Rawls as it assumes rationality and furthermore assumes that people are in equal positions of power.<sup>1157</sup> She argues that classical liberal theories do not take account of the fact that

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<sup>1146</sup> Nussbaum 2011 *Feminist Economics* 42.

<sup>1147</sup> Nussbaum 2011 *Feminist Economics* 40.

<sup>1148</sup> Nussbaum 2011 *Feminist Economics* 40.

<sup>1149</sup> Nussbaum *Creating Capabilities* 40.

<sup>1150</sup> Nussbaum 2004 *Oxford Developmental Studies* 13.

<sup>1151</sup> Nussbaum *Creating Capabilities* 46-68.

<sup>1152</sup> Nussbaum *Creating Capabilities* 63.

<sup>1153</sup> Nussbaum *Creating Capabilities* 63.

<sup>1154</sup> Nussbaum *Creating Capabilities* 63.

<sup>1155</sup> Nussbaum *Creating Capabilities* 63.

<sup>1156</sup> See 2.6.1 for a discussion on the classical liberal paradigm and adjudication.

<sup>1157</sup> Nussbaum *Capabilities and Social Justice* 134. Nussbaum *Creating Capabilities* 149-150.

human beings spend at least some of their time being dependent on other and needing care whether in early childhood or old age.<sup>1158</sup> Many other people need care throughout their whole lives as a result of disabilities.<sup>1159</sup> Nussbaum is not in favour of Rawls' theory of justice that is based on a social contract where all the members in the original position are independent adults. Instead she argues for a theory of justice that takes into account dependency and need from the beginning that most people deal with throughout their lives.<sup>1160</sup> Society thus needs to provide care to people in states of extreme dependency but also not exploit the people who provide the care, who are often women.<sup>1161</sup>

Nussbaum's theory is useful as it specifically talks about the relationship between constitutional law and capabilities. She specifically mentions that the rights in the South African Constitution connects the idea of human dignity to capability.<sup>1162</sup> With reference to the US Constitution she explains how rights and adjudication can be used to realise capabilities. She uses the example of "free exercise of religion".<sup>1163</sup> This right was contained in the original Constitution of the United States providing that the Congress should not make any laws in respecting a particular religion nor should they prohibit the free exercise of religion.<sup>1164</sup> Nussbaum<sup>1165</sup> is of the opinion that the clause should be interpreted generously. Attention should be paid to specific elements in the interpretation and application of the right including inequality and particular challenges faced by minorities.<sup>1166</sup> The provision on the exercise of religion in the US Constitution has been developed over a

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<sup>1158</sup> Nussbaum *Capabilities and Social Justice* 134.

<sup>1159</sup> Nussbaum *Capabilities and Social Justice* 134.

<sup>1160</sup> Nussbaum *Capabilities and Social Justice* 135.

<sup>1161</sup> Nussbaum *Capabilities and Social Justice* 134.

<sup>1162</sup> Nussbaum *Creating Capabilities* 166.

<sup>1163</sup> Nussbaum *Creating Capabilities* 170.

<sup>1164</sup> Nussbaum *Creating Capabilities* 170.

<sup>1165</sup> Nussbaum *Creating Capabilities* 171.

<sup>1166</sup> Nussbaum *Creating Capabilities* 171.

number of years.<sup>1167</sup> The US courts developed the principle of reasonable accommodation meaning that where a law places a specific burden on religious minorities those minorities should be exempted if there is no "compelling state interest".<sup>1168</sup>

Nussbaum notes that it is possible for capabilities to be judicially implemented and that this interpretation should have certain characteristics. Firstly, it must be treated separately and as a right on its own. In the religious cases for example, the courts saw the right as something important in itself and did not deem it as something that could be replaced by compensation.<sup>1169</sup> Secondly, the rights should be interpreted with "cautious incrementalism".<sup>1170</sup> Content should thus developed gradually rather than sudden drastic changes. Thirdly, she states that contextualisation is important. The history and social reality of people are important to take into account during the adjudication of rights.<sup>1171</sup> Fourthly, during the adjudication process the rights of minority groups deserve special protection.<sup>1172</sup> Nussbaum goes on to explain that the judiciary is not the only branch of government that realises entitlements. The legislature and executive has specific has specific duties relating to the realisation of capabilities too.<sup>1173</sup> This point has been mentioned in Chapter 1. However, she makes the point that the judiciary and their interpretation and application of rights are an important part of realising social justice as it deals with the specific capabilities of people.

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<sup>1167</sup> Nussbaum *Creating Capabilities* 171.

<sup>1168</sup> Nussbaum *Creating Capabilities* 171.

<sup>1169</sup> Nussbaum *Creating Capabilities* 175.

<sup>1170</sup> Nussbaum *Creating Capabilities* 175.

<sup>1171</sup> Nussbaum *Creating Capabilities* 176.

<sup>1172</sup> Nussbaum *Creating Capabilities* 176-177.

<sup>1173</sup> Nussbaum *Creating Capabilities* 178.

### ***4.3 Reflections on theories of social justice***

It is trite that social justice is a legitimate aim of the South African Constitution. Thus far we have only been getting hints from the courts as to what social justice should be by references to socio-economic rights and so on. From the discussion above one can see that there has been a very clear move away from utilitarian approaches to justice in the first place (an aspect which is clear from Rawls' theory) and in the second place most of the theorists move away from the oft-mentioned "liberal paradigm" which emphasises universality, individuality and neutrality.

The theories proposed by Young, Fraser, Nussbaum and Sen present a much broader conception of social justice and are to be preferred. I do not think that the goals suggested by these theories need to be mutually destructive.

Firstly, the theories do not seem to imply that the rights granted to citizens in the Rawlsian society be vanquished or replaced. Having libertarian rights are still very much important. The issue seems to be how institutions deal with and realise those rights.

The second point to make then is that that these rights are not realised by themselves or automatically turn into capabilities. What Young, Fraser and Sen seem to suggest is that law, policy and adjudication need to take into account individual differences and marginalised groups. They need to do this as certain differences impact people's ability to turn rights into capabilities. Social justice cannot therefore remain neutral and universal.

Thirdly, these theories recognise that people are socially and historically constituted. Any theory of social justice needs to take into account preceding social and historical events that have influenced that society.

Fourthly, social justice needs to take into account recognition and distribution aspects. Social justice can therefore not be solely focused on improving people's material well-being but needs to take into account other forms of injustices such as cultural imperialism, systemic violence and marginalisation, among others.

The theories differ in the details, but broadly speaking the aim of social justice should be to better people's lives by taking into account aspects such as oppressive structures and marginalised groups.

#### **4.4 Law and social justice in South Africa**

The theorists mentioned above have each developed a conception of social justice. In order to determine which of these theories are most suitable to South African context and what the realisation of social justice would look like in South Africa it is necessary to explore the history of social injustice in South Africa.

It is important to note that the historical context has been important in a contextual interpretation by the South African courts. In many of the cases referred to above courts have started off with a particular version of history which ultimately contributed to how they saw the particular matter at hand. As mentioned in Chapter 2 the historical contextualisation plays a part in the process of statutory and constitutional interpretation.<sup>1174</sup> The historical and social context may also determine who the court sees as vulnerable, oppressed and marginalised and it is this very "difference" which influences an understanding of social justice. However, Brown presents an important caveat to a re-telling of history and particularly a re-telling of history by judges:<sup>1175</sup>

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<sup>1174</sup> See 2.7.2.1.

<sup>1175</sup> Brown 2012 *SAJHR* 316.

Histories are true stories, and any attempt to evaluate them must take into account both parts of that phrase. The truth of the history is paramount, and can be established by reference to documents, testimonies, and other primary sources. But the story-ness of the history – the way it narrates the events of the past, ties them together, and explains them – must also be examined. After all, every history is an interpretation, a set of claims and an argument about the meaning of connected and contested events. This is true whether the history is written by a professionalised academic, a political provocateur, or a sitting judge. Of course, each of these ways of stating histories has a particular context. Judges' histories, for example, are contained within relatively-lengthy judgments – which themselves are explicitly engaged with resolving contemporary disputes. The decision to incorporate a historical narrative within a legal judgment is not an innocent one: histories frame and contextualise the legal issues discussed, and provide the atmosphere within which those issues are discussed and understood – not only by lawyers, but also by those of us located outside the legal profession.

De Vos, in a similar vein, adds another important caveat to using historical context during constitutional adjudication:<sup>1176</sup>

...history is inevitably a product of the present and reflects our understanding of the present. The past is always being created in the light of the present. Any rendition of the past that we call history is therefore a reflection of how we see ourselves in the present. History helps to situate ourselves in the present and provides us with our identities.

De Vos<sup>1177</sup> continues to argue that history is a social construct and cautions against the use of a static "grand narrative" of history by the courts. He concedes as well that using history "may be a valuable tool in the hands of a judge that wishes to provide an ethically responsible interpretation".<sup>1178</sup>

The points made by Brown and De Vos are true and this section is no attempt to create a conclusive and neutral grand narrative of the history of South Africa. At the outset of this study it was indicated that adjudication is neither neutral nor objective, not when choosing a version of history nor when choosing an ideological basis for constitutional values.<sup>1179</sup> This is one of the central themes of post-liberal transformative adjudication.

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<sup>1176</sup> De Vos 2001 *SAJHR* 20.

<sup>1177</sup> De Vos 2001 *SAJHR* 5.

<sup>1178</sup> De Vos 2001 *SAJHR* 32.

<sup>1179</sup> See 2.7.

However, one of the points of critique against the post-modern viewpoints is that (there are multiple versions of the truth) it leads to nihilism. As Kroeze<sup>1180</sup> states that does not mean "if everything goes, anything goes". In the midst of difficult ideological and political choices to be made during adjudication the answer is not to avoid decision making but to provide thorough reasoning for the choices made. Kroeze<sup>1181</sup> states that it is not about what is right and wrong forever but what is better or worse for now.

This section is thus an attempt to get a better understanding of a concept of social justice in South Africa, while knowing that it cannot be complete and final historical view. This section thus looks at issues relation to social justice from a historical perspective and new issues of social justice that have emerged post-1994.

#### *4.4.1 Colonial Time Period*

Much of the history of social injustice focuses on the apartheid time period in South Africa. However, the history of South Africa itself and the history of oppression and marginalisation dates back to the colonial period in South Africa.<sup>1182</sup>

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<sup>1180</sup> Kroeze 2007 *SAPL* 335.

<sup>1181</sup> Kroeze 2007 *SAPL* 335.

<sup>1182</sup> Crais *Poverty, War and Violence in South Africa* 17. Crais argues that "violence prosecuted by colonial forces during the nineteenth century produced a crisis with African communities that led to long-term irreversible historical changes. These changes entailed the emergence of new forms of inequality and the creation of modern poverty, as well as basic shifts in the ways people organized agricultural production and managed vulnerability...the origins of poverty, in other words, are to be found in the violence of colonial conquest." In a similar vein Ross states in *A Concise History of South Africa* that South Africa is "an African country, and the social structures and, as important, modes of thought of pre-colonial African societies continue to shape its present. Modern family structures and ideas about governance and the reasons for misfortune, for instance, still owe much to a pre-colonial past".

The oldest remnants of human history had been in South Africa.<sup>1183</sup> South Africa was occupied by a number of inhabitants prior to the first colonial conquest. Later inhabitants were divided into three groups and consisted of the San, the Khoi and agriculturalists who spoke Bantu languages.<sup>1184</sup>

#### 4.4.1.1 Dutch Colonisation (1652-1795)

The first Europeans to arrive in South Africa were the Dutch in 1652.<sup>1185</sup> The Dutch had used the Cape as a halfway station for their ships that would travel to India.<sup>1186</sup> The Dutch had brought slaves to South Africa from East Africa, Madagascar and East Indies.<sup>1187</sup> The co-existence between the Dutch and native inhabitants had been peaceful for a while but conflicts arose later between these two parties as the Khoikhoi had been unable and unwilling to provide meat and supplies to the sailors and soldiers from the VOC.<sup>1188</sup> Giliomee and Mbenga<sup>1189</sup> note that during this period four groups were identified namely: the company servants, free burghers, slaves and natives.

From this situation the Dutch decided to use a part of the land in the Cape and colonise a part of the Cape. Ross<sup>1190</sup> argues that the colonisation required that the Dutch firstly had to take the land forcibly and secondly a social order had to be created that would rule the inhabitants of the colony. This initial process of colonisation consisted of the militias that "extirpated" the Khoi and the San during the 18<sup>th</sup> century.<sup>1191</sup> Later on the Dutch moved

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<sup>1183</sup> Ross *A Concise History of South Africa* 6. Gilomee and Mbenga *New History of South Africa* 5 state that some of the first fossils of modern humans were found at Klasies River and Border Cave in South Africa.

<sup>1184</sup> Ross *A Concise History of South Africa* 8.

<sup>1185</sup> Ross *A Concise History of South Africa* 22.

<sup>1186</sup> Ross *A Concise History of South Africa* 22.

<sup>1187</sup> Ross *A Concise History of South Africa* 24.

<sup>1188</sup> Ross *A Concise History of South Africa* 23. These conflicts had started around 1659-1660. See Giliomee and Mbenga *A New History of South Africa* 4.

<sup>1189</sup> Giliomee and Mbenga *A New History of South Africa* 45.

<sup>1190</sup> Ross *A Concise History of South Africa* 23.

<sup>1191</sup> Ross *A Concise History of South Africa* 23.

further into the Cape. In 1688 a number of French Huguenots had also arrived in the Cape who received the status of free burghers and were assimilated into the Dutch culture of the Cape.<sup>1192</sup> During the period up until 1795 the colony in the Cape continued to become gentrified with various free burghers and a number of other communities existing on the margins. The conflict between the Dutch and Khoi had also continued.

Terreblanche makes a number of points in relation to the inequality that existed during the time period of Dutch colonisation. Firstly, he points out that the land that was seized from the Khoisan started "a colonial process of land deprivation that continued for more than 250 years, and sparked many violent conflicts".<sup>1193</sup> The possession of land enabled exploitation and created a demand for free black labour.<sup>1194</sup>

Secondly, he points out the effect that the slave trade in the Cape has had on the current South Africa. The slaves created a further economic advantage for farms owners.<sup>1195</sup> According to Terreblanche<sup>1196</sup>

Slave labour not only created a society divided along racial lines, but also a socio-economic stratification between the wealthy landed gentry and merchants in the Western Cape on the one hand, and poorer white farmers in the Western Cape and in frontier areas who could not afford slaves on the other.

Terreblanche<sup>1197</sup> states that it is not entirely clear whether a racist ideology existed during the Dutch period of colonisation. Keegan, for example, claims that even though prejudice existed in terms of colour that a racist ideology

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<sup>1192</sup> Giliomee and Mbenga *A New History of South Africa* 60.  
<sup>1193</sup> Terreblanche *A History of Inequality in South Africa* 155.  
<sup>1194</sup> Terreblanche *A History of Inequality in South Africa* 155.  
<sup>1195</sup> Terreblanche *A History of Inequality in South Africa* 159.  
<sup>1196</sup> Terreblanche *A History of Inequality in South Africa* 159.  
<sup>1197</sup> Terreblanche *A History of Inequality in South Africa* 170.

did not exist.<sup>1198</sup> Ross is also of the opinion that a racist ideology did not exist until the 18<sup>th</sup> century.<sup>1199</sup>

#### 4.4.1.2 British Rule (1795-1910)

A major change was brought about in the Cape when the British seized the Cape. From 1795 the Cape was under British rule. The British kept the legal system Roman-Dutch in the Cape during the British occupation.<sup>1200</sup> Slavery had been outlawed in Britain and this influenced the policies in the Cape. One of the biggest changes that took place under British rule was thus that slavery was outlawed in 1808.<sup>1201</sup> Many of the Dutch slave owners subsequently suffered great financial loss and did not have the resource of black labour.<sup>1202</sup> The Dutch inhabitants were aggrieved by this and started moving, from approximately 1834, to the North of the country where they encountered other African tribes and established their own states.<sup>1203</sup> Despite the abolishment of slavery, slaves had nothing after they received their freedom, their only option was to enter into labour agreements with landowners once again.<sup>1204</sup> Therefore, despite the slaves' legal freedom, a system of repressive labour practices still continued.<sup>1205</sup> Many authors argue that it was British rule that created the beginning of a racist ideology.<sup>1206</sup>

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<sup>1198</sup> Keegan *Colonial South Africa and the origin of the racial order* 24-25. Terreblanche *A History of Inequality in South Africa* 171.

<sup>1199</sup> Ross *Beyond the Pale* 72, 74, 90. Terreblanche *A History of Inequality in South Africa* 171.

<sup>1200</sup> Department of Justice and Constitutional Development 2019 <http://www.justice.gov.za/sca/historysca.htm>.

<sup>1201</sup> Giliomee and Mbenga *A New History of South Africa* 89.

<sup>1202</sup> Terreblanche *A History of Inequality in South Africa* 220.

<sup>1203</sup> Terreblanche *A History of Inequality in South Africa* 219. In *A New History of South Africa* Giliomee and Mbenga make the following statement: "The causes of the trek were complex but can be summarised in a single sentence. The trekkers left because of a lack of land, labour and security, which they felt unable to address due to a lack of representation, giving rise to a profound sense of marginalisation."

<sup>1204</sup> Terreblanche *A History of Inequality in South Africa* 190-191.

<sup>1205</sup> Terreblanche *A History of Inequality in South Africa* 195.

<sup>1206</sup> Terreblanche *A History of Inequality in South Africa* 194-195. See also Crais *The making of a colonial order* 125-146. Keegan *Colonial South Africa* chapter 9.

Since the 1800s there had been an increase in Christian missionaries in South Africa.<sup>1207</sup> These missionaries had been responsible for much of the schooling that had taken place in the colony, particularly for black people.<sup>1208</sup> Although it is argued that some of the missionaries were in favour of equality between the races, some authors argue that the missionaries favoured the system of segregation. Terreblanche,<sup>1209</sup> for example states that, the missionaries were responsible for creating better conditions for the Khoi, elsewhere he states that they acquiesced with the British racist policies at the time and aligned the missionaries with the "ideology of the emerging industrial bourgeoisie in Britain".<sup>1210</sup> Giliomee and Mbenga state that with the exception of a few, most missionaries tried to keep neutral with regard to the race relations.<sup>1211</sup> Nevertheless, it seems to be common cause that the missionaries contributed towards the education of African people and transferred agricultural skills.

In 1853 Britain had established a legislative assembly where every person who occupied property above £25 or earned a salary of £50 could vote.<sup>1212</sup> Giliomee and Mbenga<sup>1213</sup> aver that the £25 restriction was created to create indirect discrimination on the basis of race as could not be done expressly as the Cape Ordinance 50 of 1828 prohibited discrimination on the basis of race.

The discovery of diamonds and gold gave way to competitive markets and harsh labour conditions.<sup>1214</sup> Diamonds were discovered in 1867 and gold in

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<sup>1207</sup> Ross *A Concise History of South Africa* 23. Lewis and Lemmer 2004 *Journal for Christian Scholarship* 57.

<sup>1208</sup> Lewis and Lemmer 2004 *Journal for Christian Scholarship* 61-63. Giliomee and Mbenga *A New History of South Africa* 101 report that by 1911, 176 000 pupils of colour were studying in mission schools.

<sup>1209</sup> Terreblanche *A History of Inequality in South Africa* 172.

<sup>1210</sup> Terreblanche *A History of Inequality in South Africa* 180, 189.

<sup>1211</sup> Giliomee and Mbenga *A New History of South Africa* 100.

<sup>1212</sup> Trapido 1964 *The Journal of African History* 37.

<sup>1213</sup> Giliomee and Mbenga *A New History of South Africa* 141.

<sup>1214</sup> Terreblanche *A History of Inequality in South Africa* 9.

1886.<sup>1215</sup> The population of the colony increased exponentially as there was a need for more labour. Approximately 2000 diggers were present at Kimberley when diamonds were discovered in South Africa, the situation however changed when it was discovered that advanced machinery was needed to expropriate diamonds.<sup>1216</sup> Cecil John Rhodes had provided much of this capital and in such a way could control the industry and create a monopoly capital.<sup>1217</sup> The discovery of precious minerals in South Africa also led to the beginning of a system of migrant labour in South Africa.<sup>1218</sup>

In the period prior to the formation of the union of South Africa a number of pieces of legislation existed that enforced segregation. The forerunner to the *Natives Land Act*<sup>1219</sup> was the *Glen Grey Act*.<sup>1220</sup> This Act was initiated by the Prime Minister of the time Cecil John Rhodes.<sup>1221</sup> In accordance with this Act the Glen Grey Area was marked as an area for African farmers. The opinion of some authors was that the purpose of the Act was not to uplift African people but to speed proletarianisation in the Eastern Cape,<sup>1222</sup> and to segregate Africans from other racial groups.<sup>1223</sup> Some authors argue that the Act should have been seen within the context of that time and place.<sup>1224</sup>

The *Franchise and Ballot Act* of 1892 raised the amount of property franchise from £25 to £75.<sup>1225</sup> This Act had the effect that a number of non-

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<sup>1215</sup> Terreblanche *A History of Inequality in South Africa* 9.

<sup>1216</sup> Giliomee and Mbenga *A New History of South Africa* 160.

<sup>1217</sup> Giliomee and Mbenga *A New History of South Africa* 160-162.

<sup>1218</sup> Giliomee and Mbenga *A New History of South Africa* 162.

<sup>1219</sup> 27 of 1913.

<sup>1220</sup> 25 of 1894.

<sup>1221</sup> Terreblanche *A History of Inequality in South Africa* 251.

<sup>1222</sup> Terreblanche *A History of Inequality in South Africa* 251.

<sup>1223</sup> Giliomee and Mbenga *A New History of South Africa* 206.

<sup>1224</sup> See, for example, Bouch 1984 *Canadian Journal of African Studies* 1-24.

<sup>1225</sup> Terreblanche *A History of Inequality in South Africa* 251.

white people and poorer white people in the Cape were not allowed to vote.<sup>1226</sup>

The Natal Legislative Assembly Bill proposed to disenfranchise Indian people in the Natal province.<sup>1227</sup> Although the Act received resistance it was eventually passed.<sup>1228</sup> The General Pass Regulations Bill of 1905 denied the right to vote to black people.<sup>1229</sup> The *Asiatic Registration Act* of 1906 was an Act in the Transvaal colony requiring pass laws to be applied to Asian people.<sup>1230</sup>

In 1899 the Afrikaners had gone to war with the British, where the Afrikaners were defeated.<sup>1231</sup> Giliomee and Mbenga<sup>1232</sup> argue that even though there are differing opinions on the cause of the war that the "mining wealth of the Witwatersrand" was at the centre of the conflict between the British and the Afrikaners.

#### 4.4.1.3 The Union of South Africa (1910-1948)

The Union of South Africa had been formed in 1910 by the South Africa Act which was passed in Britain.<sup>1233</sup> The Union had essentially been an alliance between the Boer and British Republics to maintain the supremacy of whites

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|------|--|------|
| 1226 | South African History Online   | 2016 |
|      | <a href="https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10">https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10.</a> |      |
| 1227 | South African History Online   | 2016 |
|      | <a href="https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10">https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10.</a> |      |
| 1228 | South African History Online   | 2016 |
|      | <a href="https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10">https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10.</a> |      |
| 1229 | South African History Online   | 2016 |
|      | <a href="https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10">https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10.</a> |      |
| 1230 | South African History Online   | 2016 |
|      | <a href="https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10">https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10.</a> |      |
| 1231 | Giliomee and Mbenga <i>A New History of South Africa</i> 206.  |      |
| 1232 | Giliomee and Mbenga <i>A New History of South Africa</i> 207.  |      |
| 1233 | Giliomee and Mbenga <i>A New History of South Africa</i> 232.  |      |

and power.<sup>1234</sup> Although the Union was a self-governing territory it was still under the authority of the crown in Britain. Since 1910 a policy of segregation and separate development had been implemented in South Africa. During this time period various segregationist policies and pieces of legislation were created in addition to the ones that already existed. One of the most far-reaching pieces of legislation that was enacted during this time period was the *Natives Land Act*<sup>1235</sup> which created reserves for black people and prohibited the sale of land to black people.<sup>1236</sup> This Act also set aside less than 8% of South African land for black people.<sup>1237</sup>

The *Native (Urban Areas) Act*<sup>1238</sup> essentially controlled the movement of black people in urban areas. Black people were only allowed into urban areas when it related to work.<sup>1239</sup> *The Wage Act*<sup>1240</sup> reserved certain jobs for white people and secured better wages for white people.<sup>1241</sup> These are only some of the pieces of legislation that had existed at the time.

A poor white labour force had existed during this time period. The Afrikaans people had suffered much after the war with a post-war depression in 1919 and various droughts.<sup>1242</sup> During this time period Afrikaner nationalist political parties also began to have uptake as a reaction against the powerlessness and defeat of the Afrikaner people.<sup>1243</sup>

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1234 Terreblanche *A History of Inequality in South Africa* 251.

1235 27 of 1913.

1236 Giliomee and Mbenga *A New History of South Africa* 233.

1237 Giliomee and Mbenga *A New History of South Africa* 233. Terreblanche *A History of Inequality in South Africa* 260.

1238 21 of 1923.

1239 Terreblanche *A History of Inequality in South Africa* 255.

1240 27 of 1925.

1241 Terreblanche *A History of Inequality in South Africa* 273.

1242 Bottomley *Poor White* 34.

1243 South African History Online 2016  
<https://www.sahistory.org.za/article/constructing-union-south-africa-negotiations-contestations-1902-10>.

As many non-white people had gradually been disenfranchised and lost political influence and power, resistance movements had started to form from non-white groups. The African National Congress (ANC) was formed in 1923.<sup>1244</sup> A passive resistance campaign had been formed by Mohandas Ghandi and the African Political Organisation had been formed by coloured people in the early 1900s already.<sup>1245</sup> Afrikaans political organisations also existed with their main concern the upliftment of the poor white Afrikaans community.

#### 4.4.2 *Apartheid (1948-1994)*

In 1948 the Nationalist Party was elected and it was the official start of apartheid as state policy. It is reported that it came as a surprise that the National Party won the national elections.<sup>1246</sup> One of the main aims of the apartheid government was white supremacy in a social, political and economic sense.<sup>1247</sup> The apartheid state relied on cheap black labour. This distinguished it from other racist regimes such as the Nazis, for example.<sup>1248</sup> During this time services were sub-standard. Black people were marginalised, politically, economically and socially.

Posel,<sup>1249</sup> in *the Cambridge history of South Africa*, sets out a number of features that defined the apartheid project. Firstly, there was the "ubiquity of race". Everything within the South African society was defined and

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<sup>1244</sup> The original name of the black opposition group had been South African Native National Congress. This Congress had already convened in 1909. The name of the opposition group was changed to African National Congress in 1923. See Giliomee and Mbenga *A New History of South Africa* 236.

<sup>1245</sup> Giliomee and Mbenga *A New History of South Africa* 193, 266.

<sup>1246</sup> Dubow *Apartheid 1948 -1994* 1.

<sup>1247</sup> Posel "The Apartheid Project 1948-1970" 321. Some authors argue that even with the existence of racist legislation, that the apartheid state was not as calculated and organised as it may seem to some currently. See, for example, Dubow *Apartheid 1948 -1994* 290-291.

<sup>1248</sup> Posel "The Apartheid Project 1948-1970" 322.

<sup>1249</sup> Posel "The Apartheid Project 1948-1970" 331.

regulated on the basis of race. This is evident from the number of pieces of legislation that arbitrarily distinguishes between people on the basis of race.<sup>1250</sup> Secondly, there was a strict "regulation of family, gender and sexuality", or in other words the private sphere of life.<sup>1251</sup> White people had to replicate the idea of racial purity within their private lives.<sup>1252</sup> Examples of this type of control included the *Immorality Act*<sup>1253</sup> and the *Mixed Marriages Act*.<sup>1254</sup> Outside of the private sphere the *Groups Areas Act*<sup>1255</sup> and PISA served to physically separate different races.<sup>1256</sup> Posel<sup>1257</sup> is also of the opinion that the apartheid project was designed to "produce disciplined, economically active and law-abiding subjects. This was particularly applicable to white people who had to form part of the workforce and modernisation of South Africa."<sup>1258</sup> The strict regulation was also evident from the curtailment of media as well as the role that religion had to play within people's lives, particularly that of white Afrikaner people.<sup>1259</sup>

Apartheid was also characterised by its "economic engineering".<sup>1260</sup> Certain jobs had been reserved for white people to sustain white economic

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<sup>1250</sup> See 4.4.1.3 and 4.4.2.

<sup>1251</sup> Posel "The Apartheid Project 1948-1970" 334. Bilchitz 2011 *SAJHR* 237 supports this statement by stating that "Indeed one of the key elements of apartheid was the fact that the ideology itself was atleast partly 'pseudo theological'. Religious groupings-and particularly the Dutch Reformed Church (DRC) –played a crucial role in legitimating the apartheid system."

<sup>1252</sup> Posel "The Apartheid Project 1948-1970" 335.

<sup>1253</sup> 23 of 1957.

<sup>1254</sup> 55 of 1949. Posel "The Apartheid Project 1948-1970" 335.

<sup>1255</sup> 41 of 1950.

<sup>1256</sup> Posel "The Apartheid Project 1948-1970" 335.

<sup>1257</sup> Posel "The Apartheid Project 1948-1970" 335.

<sup>1258</sup> Posel "The Apartheid Project 1948-1970" 335.

<sup>1259</sup> Posel "The Apartheid Project 1948-1970" 335. Merett 2001 *Critical Arts* 52 writing about media censorship states that "underlying this weight of security legislation was a foundation of official secrecy that affected every significant aspect of South Africa's political economy and severely curtailed investigative journalism. Indeed, so distorted was the national information system that not even those with the vote were able to exercise it in a meaningful way, as so much data and decision-making was hidden from the public."

<sup>1260</sup> Posel "The Apartheid Project 1948-1970" 336.

privilege.<sup>1261</sup> Job reservation was directly related to "Bantu education" which had only allowed education for black people up to a certain level.<sup>1262</sup> In addition to only allowing education up to a certain age for black people the *Bantu Education Act*<sup>1263</sup> provided that all educational institutions had to be segregated.<sup>1264</sup> The government controlled the content of the curriculum as well as the teachers who were appointed.<sup>1265</sup> Posel<sup>1266</sup> also sees the apartheid project as a "modernising project" in that it created a state with the necessary apparatus that moved away from more traditional forms of government. There was a strong "interconnectedness between law and violence" as the apartheid state used strict forms of violence to enforce obedience to the law.<sup>1267</sup> Although, Posel<sup>1268</sup> states that the apartheid state was never a totalitarian state. It operated as a form of parliamentary democracy, the law within this system was, however, used to effect certain ideologies.<sup>1269</sup> For example, even though there was an independent judiciary their powers were greatly curtailed in terms of what they could do.<sup>1270</sup> Part of the apartheid project of separate development was "the politics of ethnicity".<sup>1271</sup> This involved the division of the African population into various ethnic groups with their own territory and power of government.<sup>1272</sup>

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1261 Posel "The Apartheid Project 1948-1970" 339. Terreblanche *A History of Inequality in South Africa* 63. Also see Dubow *Apartheid 1948 -1994* 36-37 on the reservation of jobs for white people, particularly white Afrikaans people.

1262 Posel "The Apartheid Project 1948-1970" 339.

1263 47 of 1953.

1264 Posel "The Apartheid Project 1948-1970" 340. Dubow *Apartheid 1948 -1994* 55 states that "the intention of the Act was to suffocate independent thought and crush the aspirations of the improving elite."

1265 Posel "The Apartheid Project 1948-1970" 340.

1266 Posel "The Apartheid Project 1948-1970" 344.

1267 Terreblanche *A History of Inequality in South Africa* 400-406.

1268 Posel "The Apartheid Project 1948-1970" 346.

1269 Posel "The Apartheid Project 1948-1970" 346. See 1.1 and 2.7 for a discussion on the development of the judiciary's powers and functions.

1270 Posel "The Apartheid Project 1948-1970" 346.

1271 Posel "The Apartheid Project 1948-1970" 348.

1272 Posel "The Apartheid Project 1948-1970" 350. According to Terreblanche, *A History of Inequality in South Africa* 300 "At the end of the 1950s, Dr Hendrik Verwoerd – who had become prime minister in 1958 – was astute enough to realise that the

Various protests and uprisings took place during the apartheid era. One of the biggest uprisings in South Africa was the Soweto uprising.<sup>1273</sup> On 16 June 1976 high school students in Soweto had started to protest against the use of Afrikaans in schools and a sub-standard system of Bantu education.<sup>1274</sup> The police used extreme force in the protest resulting in the death of various people.<sup>1275</sup>

There are some differing opinions on the intentions of the apartheid government and the exact nature of the extent of calculatedness.<sup>1276</sup> Nevertheless, any person would be hard pressed to argue that the apartheid government did not have far-reaching effects on the status of equality in South Africa. Moreover, it left many people feeling dehumanised and instrumentalised.

The system of apartheid eventually came to an end in the late 80s and early 90s. The system had obviously left a state with various challenges for a new democratic government. The next section briefly looks at the aftermath of apartheid and the current South African state.

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1273 notion of the upliftment of poor Afrikaners – as the alleged victims of British imperialism and foreign capitalism – was no longer an adequate justification for the system of Afrikaner power and privilege. Consequently, he announced that the policy of apartheid would be replaced with the 'non-racist' policy of separate development. According to Verwoerdian ideology, 'national' sovereignty and political freedom would be granted separately to each of the nine African ethnic groups. This ideology was propagated with evangelic zeal. It is a prime example of an ideological travesty, and represented the pinnacle of Afrikaner self-delusion" Giliomee and Mbenga *A New History of South Africa* 353-356. Dubow *Apartheid 1948-1994* 179-180.

1274 Giliomee and Mbenga *A New History of South Africa* 362. Dubow *Apartheid 1948-1994* 179-180.

1275 Giliomee and Mbenga *A New History of South Africa* 362.

1276 See 4.4.2.

#### 4.4.3 Post-Apartheid

Ross,<sup>1277</sup> in *A Concise History of South Africa*, looks at various "costs" of apartheid. The first major cost has been a steep increase in poverty.<sup>1278</sup> Poverty had already been prevalent in the reserves in the 1950s but the effects only worsened as the number of South Africans and particular black South Africans increased.<sup>1279</sup> The rates of poverty continue to increase within South Africa.<sup>1280</sup>

Post-apartheid South Africa has also been characterised as a violent society. Ross attributes this violence to three causes. Firstly, colonial conquest and the violence that was needed to maintain the social order remained part of many levels of South African society.<sup>1281</sup> Secondly, the social degradation in the townships and informal settlements contributed towards violence in these spaces.<sup>1282</sup> This social degradation led to the establishment of gangs and what was known as *tsotsis* in Johannesburg.<sup>1283</sup> In the final incidence he ascribes the prevalence of violence to a patriarchal culture that urged young men to foster aggression, competition and bravery.<sup>1284</sup> Terreblanche<sup>1285</sup> shares the sentiment that one of the biggest challenges facing South Africa, post-apartheid, is violence. He is also of the viewpoint that South Africa has always been a violent society. He states the following:<sup>1286</sup>

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<sup>1277</sup> Ross *A Concise History of South Africa* 154-173.

<sup>1278</sup> Ross *A Concise History of South Africa* 154. Terreblanche *A History of Inequality in South Africa* 382-384. Giliomee and Mbenga *A New History of South Africa* 433.

<sup>1279</sup> Ross *A Concise History of South Africa* 154-155.

<sup>1280</sup> StasSA *Poverty Trends* <http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf>.

<sup>1281</sup> Ross *A Concise History of South Africa* 161.

<sup>1282</sup> Ross *A Concise History of South Africa* 162.

<sup>1283</sup> Ross *A Concise History of South Africa* 162.

<sup>1284</sup> Ross *A Concise History of South Africa* 162.

<sup>1285</sup> Terreblanche *A History of Inequality in South Africa* 402.

<sup>1286</sup> Terreblanche *A History of Inequality in South Africa* 401.

Not surprisingly, the social injustice enforced and maintained by violent measures regularly provoked fierce resistance and counterviolence from the oppressed indigenous groups. It is against this background that we should understand that South Africa's history is one of institutionalised or systemic violence.

South Africa is also a country that is marked by unequal distribution of income. Ross<sup>1287</sup> notes that in the 1970s already the richest 20% owned 75% of the country's wealth. The income inequality remains very much the same in the country in 2019.<sup>1288</sup> Ross<sup>1289</sup> is furthermore of the opinion that the apartheid Bantu education system had a direct effect on people's chances of employment later on as it gave people an education "that was useless to the modern world". Furthermore, many of the teachers in African schools were ill-trained and only about half had the requisite qualifications.<sup>1290</sup>

Coupled with high rates of poverty South Africa struggles with high unemployment rates.<sup>1291</sup> The high unemployment rates have been attributed to various factors including population growth, the legacy of apartheid

South Africa eventually became a democratic state with a democratic Constitution. But the narrative above is important to the conception of social justice in South Africa as it gives context to current social injustices in South Africa. As a post-apartheid state South Africa has very specific challenges in relation to social justice. The National Development Plan currently sets out a few of these challenges.<sup>1292</sup> Without taking away responsibility from any

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<sup>1287</sup> Ross *A Concise History of South Africa* 165.

<sup>1288</sup> The World Bank *Gini Index*  
<https://data.worldbank.org/indicator/SI.POV.GINI?locations=ZG-EG-MA-NG-ZA> .

<sup>1289</sup> Ross *A Concise History of South Africa* 172.

<sup>1290</sup> Ross *A Concise History of South Africa* 172.

<sup>1291</sup> In the second quarter of 2019, the unemployment rate stood at 29%.

<sup>1292</sup> <https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20%20make%20it%20work.pdf>.  
According to the National Development Plan, these challenges consist of the following: unemployment; a sub-standard quality of education for black people; poor infrastructure; spatial divides; a resource-intensive economy; the quality and

democratic government in South Africa, it has become evident that many of the challenges faced by South Africa is related to structural inequality. South Africa has endured a long history of distributive inequality and marginalisation of black people. Inequality has also existed in non-material ways, for example, the fact that black people were disenfranchised, this has an impact on justice as recognition.

Any understanding of social justice in South Africa has to take into account the historical injustices in South Africa. In the above-mentioned discussion it becomes evident that the memory of racial segregation and discrimination still haunts the present in South Africa. It also becomes evident that many of the social injustices in South Africa are structural and systemic. Against the historical context of South Africa it seems that *ubuntu* as a value becomes increasingly important as there exists a history of dehumanisation and instrumentalisation of people.

#### **4.5 Conclusion**

As stated in the introduction, the aim of this chapter is to reach a suitable understanding of social justice. The ultimate aim, which is addressed in the next chapter, is to suggest ways in which courts can use the value of *ubuntu* to promote social justice in South Africa. This chapter has revealed that within South Africa there is no specific understanding of social justice followed by the judiciary although it is mentioned as a legitimate aim. For this reason various theories on social justice were discussed.

Certain observations were made after considering these theoretical positions. The first of which is that Rawls' theory of justice, even though it was the first to provide a comprehensive overview of justice critiquing

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demand of public health; poor quality of public services; corruption and a divided society.

utilitarianism, is outdated and overemphasises the role of rationality and individualism.<sup>1293</sup>

Theories post-Rawls, which included those of Young, Fraser, Nussbaum and Sen all seemed to be post-liberal approaches that want to go beyond the narrow liberal approach that simply focuses on the distributive aspects or economic aspects of social justice.<sup>1294</sup>

All of the contemporary theories of social justice are in agreement that a narrow approach that solely focuses on GDP or economic well-being of people is inadequate, although having ones basic needs fulfilled was regarded as important too. The capabilities approach followed by Sen and Nussbaum focused on what people could do with what they had.<sup>1295</sup> In this regard, the personal circumstances of people were relevant, as this very often gave an indication of what people's capabilities would be, or in which instances they were vulnerable.

Fraser and Young emphasise the point that when it comes to theories on social justice, distribution is just as important as aspects of recognition.<sup>1296</sup> All the post-Rawlsian theories thus emphasise the importance of difference and vulnerability. Importantly, the theories, except Sen's account to some extent indicate that responses to social justice lie at a structural level, which includes the judiciary and the law, *inter alia*.

This chapter further looked at the South African social and historical context to get a better understanding of what the aims of social justice should be in South Africa. There is a history of exclusion and marginalisation in South Africa and still continues to exist in many instances.<sup>1297</sup> The distribution of

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<sup>1293</sup> See 4.2.1.

<sup>1294</sup> See 4.2.2, 4.2.3, 4.2.4 and 4.2.5.

<sup>1295</sup> See 4.2.4 and 4.2.5.

<sup>1296</sup> See 4.2.4 and 4.2.3.

<sup>1297</sup> See 4.4.

resources and essential services still remain problematic. Furthermore, South Africa continues to struggle with high levels of inequality and poverty.<sup>1298</sup> Issues regarding recognition are equally important given the history of racial ideologies in South Africa and the continuous divided nature of the country as expressed by the National Development Plan.<sup>1299</sup>

From the above-mentioned the conclusion can be reached that social justice is undoubtedly about improving the quality of people's lives. A conception of social justice in South Africa should have as its aim to do this. However, it is not simply a matter of realising socio-economic rights (i.e. as a component of distributive justice), although this is undoubtedly a part of social justice. A capabilities perspective is welcomed as social justice is ultimately about bettering people's lives. However, a capabilities approach to social justice should take into account the five aspects mentioned by Young which include oppression, marginalisation, powerlessness, violence and exploitation.

The next chapter argues that *ubuntu* serves the purpose of a constitutional value that can promote social justice in judicial disputes. It serves this purpose as its relational nature connects it to each of the elements of social justice mentioned above.

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<sup>1298</sup> See 4.4.3.

<sup>1299</sup> See 4.4.3.

## Chapter 5 *uBuntu* and social justice

### 5.1 Introduction

The previous chapter established the meaning of social justice as a goal of the South African Constitution and judiciary. The conclusion was reached that social justice must be a multivalent concept that takes into account more than simply the distribution of economic or material resources, although these considerations are important, but also non-material aspects that contribute towards recognition.<sup>1300</sup> However, in answering the question what *ubuntu* can do as a constitutional value in the pursuit of social justice from a judicial perspective this chapter aims to look at the link between *ubuntu* and each of the components of social justice mentioned above by the various scholars on social justice.<sup>1301</sup>

The aim on the one hand is to position the judgments that have already been delivered by the courts within these subcategories but also to look at other potential uses of these components of social justice with particular reference to *ubuntu*. These components include capability, distribution, marginalisation, powerlessness, exploitation, violence, cultural imperialism and participatory parity.<sup>1302</sup>

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<sup>1300</sup> See 4.5.

<sup>1301</sup> See 4.2.2 to 4.2.5.

<sup>1302</sup> Other categories of social justice do exist but for purposes of this study these categories are deemed useful for the reasons mentioned in 4.5.

## ***5.2 uBuntu and the different aspects of social justice***

### *5.2.1 uBuntu and justice as capability*

In Chapter 4 it was established that the capability approach can be seen as one of the possible frameworks for the pursuit of social justice.<sup>1303</sup> It is prudent to briefly recap what is meant by capability.

The capabilities approach can broadly be described as an approach that goes beyond measuring people's well-being simply in economic terms. This approach does not only look at what people have but what people can do with what they have.<sup>1304</sup> Social justice is therefore not just about giving people certain rights or entitlements but about improving people's capability. Capability can be linked with the idea of substantive equality as it looks at the subjective position of people in society, particularly vulnerable people.

Nussbaum<sup>1305</sup> mentions a number of differences between her and Sen's understanding of capability. The most important part of these differences, to my mind, is whether there should be a list of basic capabilities. I am in agreement with Nussbaum that there should be a list with minimum or core capabilities. Sen's point that the context of each jurisdiction differs and that people should democratically decide what is important in each country is valid, but there are certain things that people need and cannot go without, let alone thrive without. These things include the things mentioned on Nussbaum's list including water, food and shelter, safety and affiliation, among other things.

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<sup>1303</sup> See 4.3.

<sup>1304</sup> See 4.2.4 and 4.2.5.

<sup>1305</sup> See 4.2.5.

Nussbaum points out that rights in the South African Constitution links rights to capabilities. She is correct that the South African Constitution contains many rights that provide entitlements for many basic needs of people. The South African Constitution is progressive as it provides for many socio-economic rights and the justiciability thereof.<sup>1306</sup> Nussbaum<sup>1307</sup> also states that many of the rights in the US Constitution protects many capabilities. However, she makes the following important point regarding the judiciary and capabilities: <sup>1308</sup>

... a strong judicial role is an important part of realising the CA [capabilities approach] in some areas. Legislators are often fond of formal rules driven by majority preferences, and are often insufficiently sensitive to the burdens faced by small minority groups who may also be unpopular. Judges have time to hear the entirety of a minority person's story, and their job is understood as involving the careful consideration of it in all its particularity. The individualized nature of the judicial process prompts a CA-style inquiry.

In the quotation Nussbaum rightly states that although provision is made for the protection of capabilities in legislation that the judicial process allows for a unique opportunity to realise social justice.

However, I would go further and argue that capabilities are only created during the adjudication process. As rights stand in the Constitution and legislation they only exist in the abstract. One cannot speak of them as creating capabilities as they have not been applied to real people and real situations. We cannot therefore speak of rights realising capabilities in the abstract. It is only through the adjudication process that social justice, and capability, as a part of social justice is realised as it is then applied to a particular case and to people's particular set of circumstances. The particular term "capability" has thus far not been used by the courts, but as I illustrate, the jurisprudence of the South African courts has various

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<sup>1306</sup> For a discussion on the interrelationship between rights and capabilities see Nussbaum 1997 *Fordham Law Review* 273-300.

<sup>1307</sup> Nussbaum 2007 *Harvard Law Review* 320.

<sup>1308</sup> Nussbaum 2007 *Harvard Law Review* 322.

examples where the courts have delivered judgments that contributed towards improving people's capability. At times *ubuntu* was used as value and other times not.

This is not the first time someone has attempted to link *ubuntu* with the capability approach. Rapatsa<sup>1309</sup> writes that *ubuntu* and the capabilities approach shares the principle of humanity. Although his contribution is restricted to the area of humanitarian action, I agree that "humanity" is something that *ubuntu* and capability has in common. However, Rapatsa does not delve into what this means, and particularly not in a legal sense. In Chapter 3 it was established that a core component of *ubuntu* is relationality.<sup>1310</sup> It is not just about a person's sense of individual autonomy but about "solidarity" and "interconnectedness" between the individual and the community, and the implications of that relationship. The question is then what is the link between *ubuntu* and capability? My argument is that as a result of our relationality with other human beings there exists a duty to care about their capabilities, i.e. the ability to lead the lives that they value, which is not harmful to anyone else of course. Therefore, if something is hindering a person's capability, one could argue that *ubuntu* requires that it be provided where reasonably necessary and possible.

*uBuntu*, as a constitutional value gives direction in a particular case as concluded in Chapter 2. The link between the capabilities approach and *ubuntu* is thus that, *ubuntu* leads to the improvement of people's capability as it sends the court in the direction of providing for the things that would improve people's capability, the things that are needed to be human. It is not just the more individual element of human dignity that is present but *ubuntu* is present as the action to improve other's capability arises from an interconnectedness with others and a solidarity with their plight. Hoffmann

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<sup>1309</sup> Rapatsa 2016 *European Review of Applied Sociology* 18.

<sup>1310</sup> See 3.5.

and Metz<sup>1311</sup> argue for "an *ubuntu*-based capabilities approach". Their approach is in short that a core part of *ubuntu* is being able to relate to others and that people's capability should be improved in order to improve their relationality.<sup>1312</sup> My argument on the other hand is that *ubuntu* values the fact that people's capabilities are improved, in other words that their lives be improved in such a way that they have the freedom to live the lives they want to lead and do so with dignity.

The courts have already done this in many instances, although not necessarily referring to *ubuntu* or the capabilities approach. There is, for example, a definite link between capabilities and socio-economic rights as socio-economic rights relate to some of the basic needs of people. In this regard the cases on eviction indicate the link between *ubuntu*, socio-economic rights and capability as being evicted deprives people of many resources such as shelter, water and adequate sanitation.<sup>1313</sup>

In many of the eviction cases the courts generally took the approach based on solidarity and care towards people faced with an eviction order.<sup>1314</sup> To suddenly be told to leave the place where you are staying or to find alternative shelter is unsettling. When it comes to vulnerable groups the courts have particularly looked at what would be a just and equitable order. In some other cases the courts have looked at the particular circumstances of the plaintiff and whether there was a rightful claim against the Road Accident Fund. For example, in *Road Accident Fund v Mohohlo*<sup>1315</sup> the court had to decide whether the plaintiff, the aunt of the deceased, was entitled to claim from the Road Accident Fund. Firstly, the court had to determine

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<sup>1311</sup> Hoffmann and Metz 2017 *World Development* 159-162.

<sup>1312</sup> Hoffmann and Metz 2017 *World Development* 159-163.

<sup>1313</sup> See, for example, *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17 where Sachs J elaborates on the importance of shelter and housing.

<sup>1314</sup> See 3.4.7 and 3.4.8.

<sup>1315</sup> 2018 2 SA 65 (SCA).

whether there was a duty of support and whether the aunt could be regarded as indigent. Seeing that the aunt cared for her nephew for most of her life, which he reciprocated when he became independent, the court held that there was indeed a duty of support on the deceased nephew.<sup>1316</sup> The court held that there was a relationship of *ubuntu* between the two parties.<sup>1317</sup> Regarding the indigent status of the aunt the court had indicated that the evidence revealed that it was indeed the necessities, such as food and transport that the son had to help his aunt with.<sup>1318</sup> In this instance, one could say that the court looked at the capability of the plaintiff as she was elderly and had no one to support her. The court also alluded to the fact that the plaintiff grew up during apartheid and had been struggling her whole life to provide a better life for her nephew.<sup>1319</sup>

The courts have also linked *ubuntu* with capability when it comes to the rights of foreigners, or at least "a sense of care" towards foreigners. For example, in *Khosa v Minister of Social Development*<sup>1320</sup> the court stated that there was a duty to provide social assistance to immigrants awaiting a residence permit, particularly children and the aged who cannot earn a living themselves.

In actual fact, when one thinks of the concept of capability it reaches beyond just the distributive aspect which is very often what socio-economic rights refer to. On the one hand it should be mentioned that as Fraser states one cannot divide issues of recognition and distribution.<sup>1321</sup> Social justice is about more than just distribution, but sometimes issues of recognition have an effect on distribution. For example, in the cases of *Khosa v Minister of*

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<sup>1316</sup> *Road Accident Fund v Mohohlo* 2018 2 SA 65 (SCA) para 17.

<sup>1317</sup> *Road Accident Fund v Mohohlo* 2018 2 SA 65 (SCA) para 14.

<sup>1318</sup> *Road Accident Fund v Mohohlo* 2018 2 SA 65 (SCA) para 23-24.

<sup>1319</sup> *Road Accident Fund v Mohohlo* 2018 2 SA 65 (SCA) para 22.

<sup>1320</sup> 2004 6 SA 505 (CC) para 65.

<sup>1321</sup> See 4.2.3.

*Social Development and Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority*, an aspect that relates to recognition, i.e. one's nationality, has a direct effect on a distributive aspect, i.e.. a person's chance of getting a job which would enable them to improve their capability.

The list of essential capabilities created by Nussbaum is instructive as it indicates certain aspects of capability that relate to recognition. These aspects include imagination and thought, emotions and affiliation.<sup>1322</sup> Same-sex marriage, for example, is an example of an issue that relates to recognition but still improves a person's capability. The recognition of one's sexual orientation is related to capability as it has a direct effect on what a person can do with the freedom they have.

There are still many cases where it would have been possible for the courts to use *ubuntu* as a value, particularly relating to capability. Capability is thus about creating the right set of circumstances for people to have certain basic freedoms. *uBuntu* as a constitutional value creates the direction towards that capability in a matter before the court. *uBuntu* as a constitutional value also indicates to the court that people's capability is an important matter to consider.

### *5.2.2 uBuntu and justice as distribution*

In Chapter 4, a number of points of critique was lodged against conceptions of social justice that only focused on distributive aspects. These points include the fact that distributive justice does not take into account aspects of recognition and often tend to ignore structural inequalities.<sup>1323</sup> However, it should be mentioned once again that issues of distribution are

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<sup>1322</sup> See 4.2.5 for a list of Nussbaum's ten capabilities.

<sup>1323</sup> See 4.3.

nevertheless important, particularly within South Africa where a large part of society's basic needs are not met and high levels of poverty exist.<sup>1324</sup> As mentioned in Chapter 4 distributive justice basically concerns itself with the distribution of wealth, income, rights and other goods in society.<sup>1325</sup> Therefore, distributive justice concerns itself with what people get in society. Even though, as the capabilities approach prescribes, it is not just about what people get but about what they can do with what they have, people actually receiving certain resources and services remains important. Moreover, all the post-Rawlsian theories discussed above had some distributive aspect.<sup>1326</sup>

*uBuntu* as a constitutional value, as well as the general ethos of *ubuntu* has been invoked by the courts involving distributive aspects. One should keep in mind that while there are different theories on social justice there are also different approaches to distributive justice.<sup>1327</sup> At this juncture it is sensible to reflect on the type of approach to distributive justice that is present within the South African legal system. Firstly, South Africa has aspects of egalitarianism since equal rights and freedoms are guaranteed to everyone within the Constitution. Egalitarianism<sup>1328</sup> can also be observed from the egalitarian aspirations in the Constitution.<sup>1329</sup> Secondly, there are aspects of libertarianism as there is a strong focus on individual rights as

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<sup>1324</sup> See 1.1 regarding statistics on poverty in South Africa.

<sup>1325</sup> See 4.2.2.

<sup>1326</sup> See 4.2.1 to 4.2.5.

<sup>1327</sup> On different approaches to distributive justice see Lamont *Distributive Justice*.

<sup>1328</sup> Egalitarianism is generally the belief that people should be treated equally. For discussions on egalitarianism see Patten 1999 *The Monist* 387-410.

<sup>1329</sup> In 1998 *SAJHR* 150-151 Klare argues that the South African Constitution should be read in accordance with a post-liberal interpretation that pursues egalitarian social transformation. These egalitarian aspirations can be observed from the right to equality in section 9 of the Constitution and the value of equality which appears as a foundational value (section 1 of the Constitution) and interpretive value (section 39 of the Constitution). The courts have also referred to the egalitarian aspirations of the Constitution. See, for example, *S v Makwanyane* 1995 3 SA 391 (CC) para 262.

well as property rights.<sup>1330</sup> Thirdly, there is also a communitarian aspect in the Constitution that caters for fulfilling certain needs of the community and caring about vulnerable persons. One could argue that *ubuntu* occupies this communitarian aspect as it is neither strictly egalitarian nor strictly libertarian.<sup>1331</sup> Therefore, when courts adjudicate on distributive issues they are weighing up liberal, egalitarian communitarian interests.

Some of the following cases illustrate how the courts have dealt with issues of distribution. The eviction cases mentioned above are examples of instances where people were placed in a position where they would be cut off from certain basic services. In *PE Municipality v Various Occupiers*<sup>1332</sup> the court considered a number of factors in deciding whether an eviction order was just and equitable.<sup>1333</sup> In coming to this decision the court relied on

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<sup>1330</sup> The rights in the Bill of Rights afford rights to individuals. The South African government has stated that it intends to amend section 25 of the Constitution to allow for expropriation without compensation. Section 25 of the Constitution protects the rights of property owners not to be arbitrarily deprived of their property and to be compensated for if expropriation were to take place. If the South African government were to be successful in amending section 25 of the Constitution to allow for expropriation without compensation the Constitution would have a much less "liberal" character. See Phakathi 2019 <https://www.businesslive.co.za/bd/national/2019-07-25-expropriation-without-compensation-law-likely-to-be-finalised-in-2020/>. In 1998 *SAJHR* 169 Klare describes a classical liberal constitution as "individualistic, highly protective of private property, exceedingly few socio-economic rights, few affirmative governmental duties, little 'horizontal' (in our parlance, a very strong 'state action' doctrine), no communitarian or caring ethos, and no affirmative commitment to deepening democratic culture."

<sup>1331</sup> Although *ubuntu* is not expressly mentioned in the Constitution it has been recognised in case law. See 3.4. A communitarian or caring aspects can be seen by the redistributive nature of the Constitution present in the large number of socio-economic rights as well as the pursuit of substantive as opposed to formal equality. See 2.3.2 on substantive equality. See also Klare 1998 *SAJHR* 169 for a discussion of the communitarian and caring aspects of the South African Constitution.

<sup>1332</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>1333</sup> Section 4 of PIE provides that where the person unlawfully occupied the land for less than six months the court should take into account the relevant considerations, including the rights and needs of the elderly, children, disabled persons and households headed by women. Where the unlawful occupation lasted for more than six months the court has to consider all relevant circumstances including whether land is made available by the municipality, any organ of state or another

legislation setting out the various factors that need to be taken into account when deciding whether an order is just and equitable, namely PIE. The court pointed out that in deciding whether an order is just and equitable, courts must infuse elements of grace and compassion into the law.<sup>1334</sup> The court continued to state that there was a duty on municipalities to progressively provide housing to all within its area of service.<sup>1335</sup> This service delivery should be done while taking cognisance of the socio-economic difficulties in South Africa, particularly those that are coupled with unlawful occupation of land in South Africa.<sup>1336</sup> The issue of land and property remains a contentious and difficult issue within South Africa. When it comes to landlessness the courts have utilised the value of *ubuntu* to ease the effects of strict libertarian provisions relating to property rights.

In *Joseph v City of Johannesburg*<sup>1337</sup> the court linked municipal services to the principles of *Batho Pele*, the idea of "people first", which it found was an expression of the constitutional value of *ubuntu*.<sup>1338</sup> Furthermore, referring to De Ville the court stated that *ubuntu* embraced the relational aspect of rights and that courts should move beyond the common law understanding of rights as individual entitlements.<sup>1339</sup> This matter concerned the delivery of municipal services to a number of tenants who rented a block of flats from a certain owner. The owner had not paid the electricity on time and the electricity was disconnected. The court had to decide whether there was a duty on the municipality to provide basic municipal services to the tenants. Utilising the Constitution, the *Promotion of Administrative Justice*

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person, for the unlawful occupier, including the rights and needs of the elderly, children, disabled persons and households headed by women.

<sup>1334</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 36.

<sup>1335</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 56.

<sup>1336</sup> *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 56.

<sup>1337</sup> 2010 4 SA 55 (CC).

<sup>1338</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46. See 1.3 for a list of the *Batho-Pele* principles.

<sup>1339</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46. Footnote 39.

*Act*,<sup>1340</sup> *The Local Government: Municipal Systems Act*,<sup>1341</sup> the *Housing Act*<sup>1342</sup> and constitutional values (including *ubuntu*) the court found that the provision of electricity fell under the duty of municipalities to provide basic municipal services to the community.<sup>1343</sup> In this instance the court thus utilised the value of *ubuntu* to distribute essential resources to citizens of the community.

I would argue that there is more space to utilise *ubuntu* in cases of distribution of resources. Issues of distribution often affect indigent and vulnerable persons. Naturally, courts have to consider all relevant constitutional and legislative provisions, but interpreting these provisions in light of *ubuntu* and putting people's basic needs at the centre could be useful in realising distributive justice. It could be that courts have utilised the value of dignity from a more relational perspective instead of using *ubuntu*. Liebenberg mentions this relational perspective towards dignity. She states the following:<sup>1344</sup>

To value human dignity is not to create zero-sum trade-offs between negative liberty and welfare, but to constitute positive social relationships which both respect autonomy and foster the conditions in which it can flourish. Dignity as a relational value can help us to perceive the limits of individual claims on social resources with reference to the needs and equal worth of others and the available resources of the society. But the corollary is a collective acknowledgement that we are diminished as a society to the extent that any of our members are deprived of the opportunities to develop their basic capabilities to function as individual and social beings.<sup>1345</sup>

She continues to state how this relational perspective towards dignity can be seen in the judgments of *Khosa v Minister of Social Development*<sup>1346</sup> and

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<sup>1340</sup> 3 of 2000.

<sup>1341</sup> 32 of 2000.

<sup>1342</sup> 107 of 1997.

<sup>1343</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 46.

<sup>1344</sup> Liebenberg 2005 *SAJHR* 11.

<sup>1345</sup> Liebenberg 2005 *SAJHR* 11-12.

<sup>1346</sup> 2004 6 SA 505 (CC).

*S v Makwanyane*.<sup>1347</sup> The references to the two cases, which were also discussed above,<sup>1348</sup> and the quotation seem to point to an understanding that is better suited under the heading of *ubuntu*. There are obvious overlaps between human dignity and *ubuntu* but, the relational element that Liebenberg describes is more characteristic of *ubuntu*. Courts have thus been using *ubuntu* without expressly endorsing it. In *Joseph v City of Johannesburg*,<sup>1349</sup> as mentioned above the court similarly stated that courts should go beyond the confines of individual entitlements as prescribed by common law and consider community interests.<sup>1350</sup> Human dignity would be a better value to utilise when dealing with issues of individual autonomy as it deals with issues of a more individual nature.

There is thus space for the utilisation of *ubuntu* as a constitutional value when dealing with aspects of distributive justice, particularly when dealing with vulnerable persons and their basic needs. *uBuntu* as a value is furthermore also important as a large part of the South African legal system protects the interests of individuals. This is evident from many private law provisions.<sup>1351</sup> Over and above considering the "distributive effects" in private law disputes, *ubuntu* also brings to the fore many of the basic needs

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<sup>1347</sup> 1995 3 SA 391 (CC). Liebenberg 2005 *SAJHR* 11.

<sup>1348</sup> See 3.4.11 and 3.4.1 respectively.

<sup>1349</sup> 2010 4 SA 55 (CC) para 46. Also see 3.4.4.

<sup>1350</sup> See 3.4.4.

<sup>1351</sup> Davis and Klare 2010 *SAJHR* 508 are of the opinion that it is disappointing that courts have been hesitant to interrogate the distributive effects of private law rules. Referring to Liebenberg, Moseneke (2009 *Stell LR* 11) argues that private contracts entered into have a considerable impact on parties. Liebenberg (2008 *TSAR* 464-465) says the following: "In South Africa (as is the case in other societies based on a market economy) powerful private actors such as landlords, banks, medical aid schemes, insurance companies and utility companies delivering public services such as water exercise significant control over people's access to socio-economic rights. Common law rules and institutions structure access to socio-economic resources in diverse areas of contract law, property law, delict, family law and succession."

of people when it comes to the provision of services by the state, as a powerful actor.

Government has a constitutional mandate to progressively realise the rights in the Bill of Rights.<sup>1352</sup> Many of these rights are socio-economic rights protecting the basic needs of people. Legislation that has been promulgated to give effect these rights acknowledge the importance of putting people and their needs first. *The Municipal Systems Act* provides that a municipality must give priority to the basic needs of the community.<sup>1353</sup> Municipalities also have to be developmentally orientated which means that it must structure its planning in such a way that the needs of the community are given priority.<sup>1354</sup>

In 1997 the *White Paper on Transforming Public Service Delivery* was adopted. This White Paper provides for the *Batho Pele* principles, meaning in short that people should be put first. The White Paper was enacted so that public service could be improved, and people's basic needs could be provided.<sup>1355</sup> As mentioned above, *ubuntu* has been linked to the principles of *Batho Pele* in relation to service delivery in *Joseph v City of Johannesburg*. These two concepts, namely *Batho Pele* and *ubuntu*, were also linked in *Koyabe v Minister for Home Affairs*.<sup>1356</sup> This case concerned the withdrawal of two residence permits granted to two Kenyan nationals by the Department of Home Affairs. The applicants approached the court to set aside the order. Mokgoro J holds that where people's rights have been

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<sup>1352</sup> Section 7(2) of the Constitution.

<sup>1353</sup> Section 73 of the *Municipal Systems Act*.

<sup>1354</sup> Section 153 of the Constitution.

<sup>1355</sup> *White Paper on Transforming Public Service Delivery*, 1997 para 1.1.2. For a discussion on *Batho Pele* principles and municipalities see Nzimakwe and Mpehle 2012 *Journal of Public Administration* 279-290; Ingle 2011 *Journal for New Generation Sciences* 67-80; James and Miza 2015 *Curationis* 1-9; Mofolo and Smith 2009 *Journal of Contemporary Management* 430-440. Bennett *uBuntu: An African Jurisprudence* 86.

<sup>1356</sup> 2010 4 SA 327 (CC).

adversely affected they should be provided with adequate reasons. She continued to state that the principles of *Batho Pele* and the value of *ubuntu* implies that public services should be provided in a manner that treat people with respect and dignity.<sup>1357</sup>

The legislation and constitutional provisions mentioned in this section<sup>1358</sup> indicate the importance of people in distributive aspects, particularly in relation to (natural) resources. These provisions further buttress the notion that one of the prescriptions of *ubuntu* as promoting distributive justice is that basic services to the community and they should be prioritised.

### 5.2.3 *uBuntu and injustice as marginalisation*

Fraser and Young have been instrumental in bringing issues of recognition to the social justice agenda. As mentioned in Chapter 4, Young identifies oppression as a form of structural inequality.<sup>1359</sup> She identifies five forms of oppression, the first of which is marginalisation.<sup>1360</sup> Marginalisation involves the exclusion of certain people from meaningful participation in social life. In short, she describes marginalisation as the phenomenon where certain people cannot access certain services or occupy certain positions within the labour market, within a given society.<sup>1361</sup>

The most obvious examples that have already been mentioned, in the context of *ubuntu*, include instances of foreign nationals who cannot occupy certain positions or access certain services. Foreign nationals, particularly refugees, were very clearly marginalised in *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority*<sup>1362</sup> by

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<sup>1357</sup> *Koyabe v Minister for Home Affairs* 2010 4 SA 327 (CC).

<sup>1358</sup> See 5.2.2.

<sup>1359</sup> See 4.2.2.

<sup>1360</sup> See 4.2.2.

<sup>1361</sup> See 4.2.2.

<sup>1362</sup> 2007 4 BCLR 339 (CC).

having to be South African permanent residents or citizens before they could provide security services in South Africa. Even though the majority of the court did not find in the applicant's favour the use of *ubuntu* in cases of marginalisation appeared in the minority judgment. Sachs J said the following regarding refugees and their marginalisation:<sup>1363</sup>

Today the concept of human interdependence and burden-sharing in relation to catastrophe is associated with the spirit of *ubuntu-botho*.

He continued to state that *ubuntu* is a norm that runs through the entire South African constitutional order and that the relationship of interdependence and burden-sharing extends towards the rest of the African continent as well.<sup>1364</sup> There is furthermore a special obligation towards refugees as a vulnerable group in South Africa.<sup>1365</sup>

Similarly, in the case of *Khosa v Minister of Social Development*<sup>1366</sup> the court held that there is an obligation to provide social assistance towards immigrants who are awaiting the status of their permanent residency, especially children and the elderly who cannot earn a living themselves.

Cases of marginalisation also extend to South Africans who cannot be employed in certain positions or are "othered" as a result of their beliefs or practices. For example, in *Hoffmann v South African Airways*<sup>1367</sup> a cabin attendant was denied a position despite complying with all the minimum requirements of the position as a result of his HIV positive status. The court held that we need to show *ubuntu* towards people who are HIV positive and

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<sup>1363</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 145.

<sup>1364</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 145.

<sup>1365</sup> *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC) para 146.

<sup>1366</sup> 2004 6 SA 505 (CC) para 65.

<sup>1367</sup> 2001 1 SA 1 (CC).

recognise that they are still human beings who need to earn an income and be economically active.<sup>1368</sup>

Although Young focusses mostly on the material effects of marginalisation, or what she calls "serious issues of distributive justice,"<sup>1369</sup> marginalisation also has effects that reach beyond the material realm. Marginalisation also takes place when people are not recognised by society for certain reasons which include, among others, gender, sexual orientation, race, belief and culture. There are various cases where people were marginalised as a result of their identity where *ubuntu* was not invoked as a constitutional value. For example, in *MEC for Education: Kwazulu-Natal v Pillay*<sup>1370</sup> a Hindu girl was marginalised as a result of her cultural practices. Also in *Fourie v Minister of Home Affairs*<sup>1371</sup> same-sex couples were marginalised as a result of their sexual orientation.

Of all the forms of oppression, marginalisation is probably the easiest to link to *ubuntu*. Over and above having relationality at its core, *ubuntu* is about humanity, compassion, community and inclusion. The value suggests that there is a core to every person that always makes them part of the community of human beings and untetherable from the basic protection of the law. Even if they commit unspeakable acts such as murder and robbery, as in *S v Makwanyane*,<sup>1372</sup> this core still requires that they be treated in a certain way, which in *S v Makwanyane*<sup>1373</sup> meant not being subjected to cruel and inhumane punishment.

Similarly, marginalisation is a form oppression, or one might say social injustice, as it leaves certain people on the periphery of society who are

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<sup>1368</sup> *Hofmann v South African Airways* 2001 1 SA 1 (CC) para 38.

<sup>1369</sup> Young *Justice and The Politics of Difference* 20.

<sup>1370</sup> 2008 2 BCLR 99 (CC).

<sup>1371</sup> 2006 3 BCLR 355 (CC).

<sup>1372</sup> 1995 3 SA 391 (CC).

<sup>1373</sup> 1995 3 SA 391 (CC).

undeserving of being there. Structures of society might not be able to provide everything to them but there is a basic form of care or regard that should be given to them. These people include, among others, the poor, the elderly, children, homeless people, refugees and generally groups that have been subjected to discrimination. Importantly, as Young points out, their "difference" as vulnerable groups need to be taken account of, and very often the recognition of the difference is the "care". Recognition here does not simply imply good behaviour between people but that these differences be taken account of in law, policy and adjudication.

One of the aims of social justice is to address marginalisation as a form of structural inequality. One can see from some of the cases as mentioned above<sup>1374</sup> that *ubuntu* has had the aim of inclusivity and taking note of the differences of people who have been marginalised as well. This is evident from the judgment of Sachs J in *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority*.<sup>1375</sup>

#### *5.2.4 ubuntu and injustice as powerlessness*

Young's following form of oppression is powerlessness. She links powerlessness to (economic) class distinctions in society.<sup>1376</sup> People have varying degrees of power in society depending on their economic position. Young<sup>1377</sup> specifically distinguishes between professional and non-professional people. She states that the powerless are those people who have no say or influence over decision making in their own lives.<sup>1378</sup> Young sees non-professional people as suffering from powerlessness as a result of their class position in society. Terms and conditions are usually decided for

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<sup>1374</sup> See 3.4.

<sup>1375</sup> 2007 4 BCLR 339 (CC).

<sup>1376</sup> See 4.2.2.

<sup>1377</sup> See 4.2.2.

<sup>1378</sup> See 4.2.2.

them and they have very little, if any bargaining power. The cleaner, at a company, for example, does not have much bargaining power when it comes to the remuneration he/she is to receive. The owner of the company in this situation obviously has more power.

A key part of addressing structural inequality<sup>1379</sup> is thus providing mechanisms to protect people who are powerless. In a neoliberal society,<sup>1380</sup> such as South Africa, it is particularly important to take account of the powerless given the huge discrepancy in economic classes in the country. As a value, *ubuntu* has been invoked in some cases to balance out the interactions between the very rich and powerful and the very poor and powerless. This aspect of *ubuntu* also relates to its use as a mid-point between strict egalitarianism which focuses on community aspirations and strict liberalism, which focuses on individual interests.

In Chapter 4 Young's reasons for distinguishing between professional and non-professional people were discussed.<sup>1381</sup> These reasons are all valid and legitimate. However, it should be mentioned, that in contrast to Young's theory, powerlessness does not only involve non-professional people. An employee might feel powerless against a powerful employer even if that employee is a professional person. A professional individual who concludes a contract with a powerful multi-million-dollar company might feel powerless when it comes to setting up the terms of the contract. It is true that non-professional people who mostly form part of the working class might feel less powerful than professionals, but powerlessness is pervasive and can take many forms. My suggestion is that powerlessness still be seen as a form of oppression and injustice but that it not be limited to non-

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<sup>1379</sup> See 4.2.2.

<sup>1380</sup> For arguments that South Africa is a neoliberal state see Desai 2003 *Monthly Review* 16-29; Narsiah 2002 *GeoJournal* 3-13; Cheru 2001 *Third World Quarterly* 505-527.

<sup>1381</sup> See 4.2.2.

professional people as it is a form of injustice that does not only affect non-professional people.

To my mind, areas where *ubuntu* has been used to counteract powerlessness is in the interpretation of contracts and also when determining the state's duties towards individuals. These are typically situations where there would be a power imbalance between the parties, although obviously not restricted to these situations.

The court alluded to this link in *Everfresh Market Virginia v Shoprite Checkers* where the court stated the following:<sup>1382</sup>

It may be said that a contract of lease between two business entities with limited liability does not implicate questions of *ubuntu*. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates *ubuntu*.

Here the court noted the importance of the bargaining positions and positions of power between contracting parties. Furthermore, it is significant that the court made a direct link between *ubuntu* and the recognition of the powerlessness of parties. However, I do not agree with the court's first sentiment that contracts between two business entities with limited liability does not implicate *ubuntu*. A court would need to take into account the circumstances of each case. It might be that contracts between two rich and powerful companies has an effect on other less powerful and vulnerable people. *Mohamed's Leisure Holdings v Southern Sun Hotel Interests*<sup>1383</sup> illustrates this point. This case involved a lease contract between two businesses. Even though the decision was overturned in the SCA, in the

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<sup>1382</sup> *Everfresh Market Virginia v Shoprite Checkers* 2012 1 SA 256 (CC) para 24.  
<sup>1383</sup> 2017 4 SA 243 (GJ).

High Court it was pointed out that the cancellation of that lease would have a much greater impact on the one party as it provided hospitality services to people within a particular area and more importantly employed 91 people for a number years. Therefore, such as in this case, even though rich and powerful companies are the parties to a contract, *ubuntu* may still be used as a constitutional value to take into account people who stand powerless against the unfair effects of contracts concluded.

There are many cases that involve the powerlessness of people beyond a situation of employment or contract. Indeed, any case where people have not sufficiently been involved in decisions that affect them is about powerlessness. It is submitted that when courts utilise *ubuntu* in such instances to give a voice to the powerless they are realising social justice.

#### *5.2.5 uBuntu and injustice as exploitation*

Young's next form of oppression is exploitation.<sup>1384</sup> There is a strong link and intersection between exploitation and powerlessness as it is more likely to affect people in lower economic classes. Exploitation deals with the fact that certain people use their services to enrich other people and never see the fruits of their labour and hard work.<sup>1385</sup> Exploitation also keeps certain structures in place that determine who does what type of work. As mentioned above, Young uses exploitation in the Marxist sense.<sup>1386</sup>

It would be useful to pause here and explain Marx's idea of economic exploitation. In his famous *Das Capital* he states that man is seen simply as an instrument of labour.<sup>1387</sup> People are thus, in the production process, as a means to an end rather than an end in themselves. The fact that the worker

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<sup>1384</sup> See 4.2.2.

<sup>1385</sup> See 4.2.2.

<sup>1386</sup> See 4.2.2.

<sup>1387</sup> Ward *An Introduction to Critical Legal Theory* 122.

is seen as an object and not as a human essentially created the foundation for economic exploitation.<sup>1388</sup> At the end of the day the labour of the worker is transferred to the capitalist, the worker receives a wage but it does not equal what the product that has been created is worth, because the profit that will be received will go to the capitalist.<sup>1389</sup> The exploitation lies therein that the worker stays in the same economic position in society and does not develop himself, and continues to transfer his power to the capitalist.

Legal systems and structures are able to maintain and perpetuate this structure of economic exploitation. Marx has the same sentiment and says the following about contracts concluded between capitalists and the working class:<sup>1390</sup>

The bargain concluded, it is discovered that he was no 'free agent', that the time for which he is forced to sell his labour power is the time for which he is forced to sell it, that in fact the vampire will not loose its hold on him so long as there is a muscle, nerve, a drop of blood to be exploited. For protection against the serpent of their agonies, the labourers must put their heads together, and, as a class, compel the passing of a law, an all powerful social barrier that shall prevent the workers from selling, by voluntary contract with capital, themselves and their families into slavery and death. In place of the pompous catalogue of the 'inalienable rights of man' comes the modest Magna Charta of a legally limited working-day, which shall make clear when the time which the worker sells is ended, and when his own begins.

Marx is thus of the viewpoint that even though there are rights, or notions such as a contract that speaks of freedom of contract that the working class are still not free until they do not feel forced to sell their labour.

Marx's and McPherson's viewpoints are written from a socialist perspective.<sup>1391</sup> It is tempting to make the argument that South Africa is not a socialist state or does not follow a socialist ideology. One could also argue that there is not much courts can do about the economy as it is not law that

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<sup>1388</sup> Ward *An Introduction to Critical Legal Theory* 122.

<sup>1389</sup> Ward *An Introduction to Critical Legal Theory* 123.

<sup>1390</sup> Marx *Capital* 330. Also see Ward *An Introduction to Critical Legal Theory* 123.

<sup>1391</sup> Cunningham *The Political Thought of CB McPherson* 39-56.

decides whether a state should be capitalist, liberal or socialist but rather other structures and the markets. However, although the judiciary cannot change the economic regime overnight, the very idea that courts should take into account the economic reality of many people's lives and inequality of distribution patterns during the adjudication process lies at the heart of transformative constitutionalism and a post-liberal reading of the Constitution.<sup>1392</sup> Davis and Klare<sup>1393</sup> have proffered the opinion that for certain economic systems to exist within a state there must be rules to establish them and give them legitimacy. They make the following remark about law's complicity in economic markets:<sup>1394</sup>

... no market can exist without legal ground rules that define capacity to contract, allocate property entitlements, distinguish voluntary exchange from coerced transfer, divide the outputs of joint productive activity, and so on. There is no such thing as 'the' market. There are only 'markets', discrete institutional arrangements, each structured by a particular set of background rules. Likewise, there cannot be a 'free market', if by that is meant a market unregulated by law. Legal decision makers do not face a choice between 'staying out of' or 'intervening in' markets. Law is always 'in' from the start. The important questions are what approach the law should take in constructing and regulating markets and with what effects.

Thus courts, as structures who apply the law, cannot argue that they have no power with regard to the economy or markets. Furthermore, the transformative and post-liberal interpretation espoused in Chapter 2 requires that the judiciary be cognisant of the exploitation that occurs within capitalist societies and at economic class struggles that happen within that society.<sup>1395</sup> Davis and Klare<sup>1396</sup> further state that even though certain rules

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<sup>1392</sup> Klare 1998 *SAJHR* 154 states that one of the transformative aspects of the South African constitution is that it envisions a substantive approach to equality which recognises that the law cannot be neutral regarding the redistribution of social and economic power. Davis and Klare also state in 2016 *SAJHR* 403 that one of the shortcomings of the South African judiciary's approach to developing common law has been the reluctance to interrogate the distributive and economic effect of private law rules on people's lives.

<sup>1393</sup> Davis and Klare 2016 *SAJHR* 444.

<sup>1394</sup> Davis and Klare 2016 *SAJHR* 444.

<sup>1395</sup> See 2.7.

<sup>1396</sup> Davis and Klare 2016 *SAJHR* 449.

exist, that the normative lens through which they are interpreted can change their application. They maintain that we forget that many of the social structures that we know today were first formulated as legal rules.<sup>1397</sup> For example, that property law determines that an employer owns the commodities owned by the joint action of management and labour.<sup>1398</sup> They state that the rules can be interpreted in such a manner that "they reflect an ethos of *ubuntu*".<sup>1399</sup>

Exploitation is an important issue on the social justice agenda in South Africa since there has been a long history of exploitation and instrumentalisation of people in South Africa. Chapter 4 mentions that the success of the mining industry relied upon the labour of poor and mostly black South Africans.<sup>1400</sup> In the post-apartheid period there is a variety of constitutional rights and legislation relating to labour and employment that has brought about and continues to bring about many structural changes.<sup>1401</sup> However, within any neoliberal capitalist society the possibility for the exploitation of people in lower economic classes still exists and many of the structures that were created during the apartheid era are still reflected in the South African society. Despite the protection afforded to employees by the Constitution and labour legislation there are still various groups vulnerable to exploitation. These groups would include people who do non-standard forms of work such as temporary work, outsourcing, part-time work and work in the informal economy.<sup>1402</sup>

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<sup>1397</sup> Davis and Klare 2016 *SAJHR* 449.

<sup>1398</sup> Davis and Klare 2016 *SAJHR* 449.

<sup>1399</sup> Davis and Klare 2016 *SAJHR* 449.

<sup>1400</sup> See 4.4.2.

<sup>1401</sup> The fundamental rights contained in the Constitution applies to all employees, section 23 of the Constitution specifically protects the right to fair labour practices which includes the right to join a trade union. Specific legislation has also been enacted in South Africa to protect the rights of employees including the *Labour Relations Act* 66 of 1995, the *Basic Conditions of Employment Act* 75 of 1997 and the *Employment Equity Act* 55 of 1998.

<sup>1402</sup> Mathekgwa 2016 *South African Journal of Labour Relations* 139-140.

Exploitation is often also linked with other forms of marginalisation such as gender discrimination and racism. Young mentions that this is an area where Marx's explanation falls short as it does not take into account these type of group differences.<sup>1403</sup> Irrespective of legislation on employment equity, vulnerable groups such as women and disabled people still remain marginalised in the South African labour market, particularly in positions of top management.<sup>1404</sup>

Against the background of the above-mentioned discussion on exploitation it becomes clear that there exists a link between the instrumentalisation of people, *ubuntu* and exploitation. In *S v Makwanyane*,<sup>1405</sup> Mokgoro J mentioned with reference to the value of *ubuntu* that even if it could be found that the death penalty deters criminals that the means would not justify the ends as such an approach would instrumentalise people. In a similar vein it can be argued that *ubuntu* requires that people not be exploited as it uses people in a manner that people should not be used. In cases of exploitation, *ubuntu* as a constitutional value will remind courts that people are not simply commodities in the production process, as Marx argues.<sup>1406</sup> There is furthermore a link that exists between transformative constitutionalism, economic exploitation as social injustice and *ubuntu*. However, my argument is that by using *ubuntu* as a constitutional value, courts should, among other things, take into account the economic

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<sup>1403</sup> See 4.4.2.

<sup>1404</sup> *The Employment Equity Report 2018-2019* released by the Department of Labour reports that women are not well represented at the senior and top levels of management [https://www.scribd.com/document/423367615/19th-CEE-Annual-Report#from\\_embed](https://www.scribd.com/document/423367615/19th-CEE-Annual-Report#from_embed) . On the marginalisation of women in the labour force in South Africa see Cooper 2009 *SAJHR* 573-605; Du Plessis 2016 *Obiter* 652-665; Dugard and Mohlakoana 2009 *SAJHR* 546-572; Jaga *et al* 2017 *Community, Work & Family* 429-444.

<sup>1405</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 313.

<sup>1406</sup> See 5.2.5.

exploitation of certain vulnerable groups. By doing so they are moving towards the realisation of social justice.

### *5.2.6 uBuntu and injustice as violence*

The next form of oppression that Young speaks of is violence.<sup>1407</sup> She talks about violence as structural as it is often aimed at specific groups. It might be that violence is directed towards certain groups of people because of them being perceived as being part of that group, for example homophobic attacks against homosexual people. It might also be that certain groups are more vulnerable against violence, for example sexual violence being directed against women. Either way, the structural injustice lies therein that their difference and vulnerability is not always taken enough account of.

The first question that comes to mind is what Young's understanding of violence entails. Young<sup>1408</sup> specifically speaks of systematic violence. Systematic violence is when groups experience violence as a result of them simply being part of that group. These groups might include a certain race, gender, sexual orientation or class. When referring to violence Young<sup>1409</sup> uses words such as "rape", "beating", "killing" and "harassment" which indicates more physical actions. However, she also refers to "degradation", "stigmatisation" and "humiliation" which refer to non-physical forms of violence as well.<sup>1410</sup>

One of the biggest crises in post-apartheid South Africa is the increasing levels of crime and particularly violent crime. In Chapter 4, Ross mentioned that South Africa had always been a country of violence whether by the state departments such as the police or in townships such as gang

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<sup>1407</sup> See 4.2.2.

<sup>1408</sup> See 4.2.2.

<sup>1409</sup> Young *Justice and The Politics of Difference* 62.

<sup>1410</sup> Young *Justice and The Politics of Difference* 61.

violence.<sup>1411</sup> In the post-apartheid era South African society is filled with various forms of violence and in particular various forms of systemic violence. There are obvious groups such as women and children who face systemic violence. It is reported that 1 in 2 women in South Africa face violence in their lifetime in South Africa.<sup>1412</sup> Women are particularly vulnerable to sexual violence.<sup>1413</sup>

There are various other groups in South Africa who experience continued violence as a result of being in that group. These groups include homeless people,<sup>1414</sup> homosexual people,<sup>1415</sup> transgender people,<sup>1416</sup> people suffering from albinism,<sup>1417</sup> farmers<sup>1418</sup> and foreigners,<sup>1419</sup> among others. This is of course is not a closed list and it would be untenable to create a closed list since it impossible to determine which types of systematic violence might occur in future. Young<sup>1420</sup> also has various arguments on the identification of a vulnerable social group. This argument becomes relevant when one looks at the occurrence of violence and the varied forms it takes in South

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<sup>1411</sup> See 4.4.3.

<sup>1412</sup> Naidoo 2018 *New Agenda* 40.

<sup>1413</sup> Statistics South Africa's 2018 Report on Crime Against Women reveal that the number of women raped per 100 000 people in South Africa is approximately 138 which is amongst the highest in the world <https://www.statssa.gov.za/publications/Report-03-40-05/Report-03-40-05June2018.pdf>.

<sup>1414</sup> Sadiki "Experiences of Homeless People as Victims of Crime in Urban and Rural Settings" MA dissertation. Akoob 2017 <https://mg.co.za/article/2017-05-10-i-cant-do-anything-to-protect-myself-homeless-women-on-dangers-they-face>.

<sup>1415</sup> Naidoo and Karels 2012 *Obiter* 236-259; Collison 2016 Mail and Guardian <https://mg.co.za/article/2016-12-08-00-lesbian-activists-murder-puts-spotlight-on-hate-crime-new-shocking-statistics>. Fletcher 2016 <https://www.bbc.com/news/magazine-35967725>.

<sup>1416</sup> It is reported that 5 transgender people were murdered in South Africa in 2017. See Collison 2018 <https://mg.co.za/article/2018-09-07-00-desire-for-love-mingles-with-fear>.

<sup>1417</sup> Mswela 2017 *African Human Rights Law Journal* 114-133. Possi and Possi 2017 *African Disability Rights Yearbook* 118-140.

<sup>1418</sup> Swart 2003 *Acta Criminologica* 40-44. Van Zyl 2008 *Acta Criminologica* 134-149.

<sup>1419</sup> South Africa had two major xenophobic attacks in 2008, where, 62 people died and in 2015. Langa and Kiguwa 2016 *Agenda* 75-85.

<sup>1420</sup> See 4.2.2.

Africa. Young seems to be arguing that if violence is not systematic, it is not an issue of social justice. This begs the question, what about incidences of violence that are not systematic in South Africa.

Irrespective of whether violence is systematic, the South African courts have spoken out against the scourge of violence in South Africa. In the much-discussed case of *Carmichele v Minister of Safety and Security*<sup>1421</sup> a woman had been brutally attacked by a man who was released on bail. The investigating officer had failed to inform the magistrate's court that the accused had been involved in a previous crime. The woman then sued the Minister of Safety and Security for damages as she argued that they had acted negligently in their duty to protect her. The matter eventually ended in the Constitutional Court and the court found in her favour. The court held that there was a duty on the police to protect the public, women and children in particular, against the infringement of their rights by perpetrators of violent crime.<sup>1422</sup> Furthermore, the court found that there are few things that are more important to a woman's dignity than being free from the threat of violence.<sup>1423</sup>

The first legal reference in the postamble of the Interim Constitution juxtaposes *ubuntu* with revenge and victimisation, which can be seen as violent acts. In relation to *ubuntu* the courts have also held that *ubuntu* is antithetical to violence. In *S v Makwanyane* Langa J specifically made a link between violence and a lack of *ubuntu*. He was of the opinion that there is a connection between violence and the loss of the worth of human in the

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<sup>1421</sup> 2001 4 SA 938 (CC).

<sup>1422</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 62.

<sup>1423</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 62.

judgment.<sup>1424</sup> He also states that *ubuntu* values life and dignity.<sup>1425</sup> He makes the following statement about violence of *ubuntu*:<sup>1426</sup>

During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of *ubuntu*. Thus heinous crimes are the antithesis of *ubuntu*. Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*.

Furthermore, he states that the protection against cruel and inhuman treatment applies to all people including criminals and other vulnerable groups.<sup>1427</sup>

Is violence only an issue of social justice when it deals with specific groups? I would argue that any form of violence triggers the question of its legality. If violence is found to be unlawful in the sense that there is no justification or defence for the violent behaviour, it should be illegal and victims of any illegal violence deserve protection from the law. It also deserves mentioning that in such an instance it does not mean that *ubuntu*, as a value that refutes violence, is not relevant. However, it does seem that when violence is involved that is systemic, and when we use the word systemic the question of "whom it affects" becomes important, that in such an instance *ubuntu* links with social justice.

Young, out of all the social justice theorists, focuses on the link between group difference, structural inequality and social justice. However, the capabilities approach, even though it focuses on individual differences does seem to be congruent with Young's idea of social justice and groups. There are certain groups whose differences make them more vulnerable, such as women, the poor, children and disabled people.

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<sup>1424</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 225.

<sup>1425</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 225.

<sup>1426</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 225.

<sup>1427</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 30.

The conclusion that can be reached here is that even though *ubuntu* includes all of humanity within its idea of community, when it comes to the adjudication of issues of violence, social justice is implied when the violence is systemic.

### *5.2.7 uBuntu and injustice as cultural imperialism*

Cultural imperialism is the last form of oppression identified by Young.<sup>1428</sup> She describes cultural imperialism as the phenomenon when the norms of dominant groups oppress minority groups.<sup>1429</sup> South Africa still faces many challenges in this regard as a result of its history with colonisation and segregation. Apart from the obvious struggles in relation to race and a colonial history various other groupings also suffer from hegemonic oppressive norms. These include among others: women in a patriarchal society, homosexual people in a heteronormative society, transgender people in a gendered society and disabled people in a society catering for able-bodied people.

*uBuntu* has been invoked to shed light on norms that exclude certain groups. In *Afriforum v Malema*<sup>1430</sup> the court found that certain statements made by Mr Malema were hurtful towards the Afrikaner community in South Africa and that these statements constituted hate speech. The court linked *ubuntu* with the need to restore broken relationships.<sup>1431</sup> This case links up with cultural imperialism as the court stated that it is no justification for hate speech if certain utterances are made which are loved by one group and hurts another group.<sup>1432</sup>

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<sup>1428</sup> See 4.2.2.

<sup>1429</sup> See 4.2.2.

<sup>1430</sup> 2011 6 SA 240 (EqC). See 3.4.4 for a discussion on this case.

<sup>1431</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 18.

<sup>1432</sup> *Afriforum v Malema* 2011 6 SA 240 (EqC) para 108.

This statement by the court becomes particularly relevant and raises a number of questions when one compares it with the case of *City of Tshwane v Afriforum*.<sup>1433</sup> Here, the respondents averred that their sense of belonging and right to culture would be infringed if certain street names of Afrikaner people were removed from the streets. In *City of Tshwane v Afriforum* the court invoked *ubuntu* and referred to the importance of reconciliation and making space for each in South Africa.<sup>1434</sup>

The similarities between *Afriforum v Malema*<sup>1435</sup> and *City of Tshwane v Afriforum*<sup>1436</sup> lies therein that in both cases the actions and statements of individuals and groups were found to be hurtful by a particular group. In *Afriforum v Malema* the court stated that if utterances are loved by one group and hurts another it (those statements) cannot be tolerated. One does not have to look far to see how similar the situation is in *City of Tshwane v Afriforum*. Here, the street names that are much loved and honoured by the Afrikaner people are at the same time a symbol of exclusion and hurt for many black South Africans. The court reasoned this way and found in favour of City of Tshwane as Afriforum relies on a "one-sided notion of a sense of belonging".<sup>1437</sup>

These two cases sheds light on the difficulty in relation to cultural imperialism, social justice and *ubuntu*. *uBuntu* conjures up the idea solidarity, reconciliation and the restoration of broken relationships. In relation to race relations in South Africa, there is a dominant narrative that exists that we must forget about race and the complexities of race, that we have reached a certain point in our history where we are able not to see

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<sup>1433</sup> 2016 6 SA 279 (CC).

<sup>1434</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 11. See 3.4.13 for my critique on the use of *ubuntu* in this case.

<sup>1435</sup> 2011 6 SA 240 (EqC).

<sup>1436</sup> 2016 6 SA 279 (CC).

<sup>1437</sup> *City of Tshwane v Afriforum* 2016 6 SA 279 (CC) para 64.

colour or difference anymore.<sup>1438</sup> Concepts such as structural inequality, social justice and substantive equality on the other hand calls to the fore the importance of indicating certain differences and indicating the lived experience of certain vulnerable groups in South Africa. How does one reconcile these two narratives that both seem to talk about social justice?

Throughout this study the importance of difference, vulnerability and lived experiences have been pointed out. Firstly, in Chapter 2 in relation to a general approach to adjudication and secondly as a central part of all the post-Rawlsian theories of justice. Therefore, a view of *ubuntu* that does not take into account people's position in society and the historical and social context of South Africa cannot be accepted. Strangely enough the courts do not always take this colour-blind approach when invoking *ubuntu*.<sup>1439</sup>

*Afriforum v Malema* has been critiqued for its narrow approach to *ubuntu*. Modiri, for example, states the following:<sup>1440</sup>

This judgment is not only poor because of its unreflective, conservative and alarmist reading of the *Equality Act*, but also because of its insensitivity to the true racial experience in South Africa and its failure to concede the inability of legal rules to be determinate, neutral and objective. The sensational language used, the conservative appropriation of *ubuntu*, together with the empty and coercive reconciliation and nation building rhetoric employed and the colour-blind reading of the Constitution and *Equality Act* that run through the judgment appear, in my view, to elaborate the interests of whites through an unconscious rhetorical appeal to, and reliance on, a reactionary neoconservative racial politics clothed in the formal language of law.

This judgment illustrates how *ubuntu* can also be invoked in a manner that silences people's lived experience. Furthermore, it illustrates, as explained by Modiri,<sup>1441</sup> that the manner in which the South African courts approach

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<sup>1438</sup> Modiri 2015 *PELJ* 229.

<sup>1439</sup> For example, in *PE Municipality v Various Occupiers* 2005 1 SA 517 paras 10 and 56 Sachs mentioned that when it comes to evictions the plight of the homeless and the landlessness of many black South Africans were at the heart of many complex socio-economic issues.

<sup>1440</sup> Modiri 2013 *SALJ* 289. This case was also critiqued in Buitendag and Van Marle 2014 *PELJ* 2893-2914 and Brown 2012 *SAJHR* 316-327.

<sup>1441</sup> Modiri 2013 *SALJ* 289.

adjudication in general and the use of constitutional values will determine its use of *ubuntu*. Differently put, there is still a formalist and traditional manner to use *ubuntu* that runs counter to transformative constitutionalism and substantive equality.

Young<sup>1442</sup> speaks of cultural imperialism as norms enforced by the majority in a society. However, even though black people are the majority in South Africa, they can still be regarded as a vulnerable group that has suffered the effects of cultural imperialism during apartheid. Modiri, with reference to Durrheim *et al*, says the following with reference to white people in South Africa as a minority:<sup>1443</sup>

So even though they are, statistically speaking, 'minorities', they are in the majority in every other sense of the word given the structural poverty, low social mobility, lack of adequate education, and generally poor standard of living experienced by blacks as a result of over 300 years of colonial apartheid.

The aim is not to state that white people can never feel the effects of cultural imperialism in South Africa. The point is rather that cultural imperialism is not always restricted to minorities. Given the history of South Africa race remains a challenge. However, there are many other issues of cultural imperialism in South Africa.

*MEC for Education: Kwazulu-Natal v Pillay*<sup>1444</sup> also illustrates cultural imperialism as a matter of social justice. The facts of the case are discussed above<sup>1445</sup> but in short the matter involves a dispute between a Hindu girl, who was not allowed to wear a nose stud as part of her culture, and the school, who had not reasonably accommodated the practice of her culture.

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<sup>1442</sup> See 4.4.2.

<sup>1443</sup> Modiri 2013 *SALJ* 289. Also see Durrheim et al. *Race Trouble: Race, Identity and Inequality in Post-Apartheid South Africa* 16-24.

<sup>1444</sup> 2008 2 BCLR 99 (CC).

<sup>1445</sup> See 2.3.1.

Langa J said the following to indicate the dominant norms had discriminated against Ms Pillay:<sup>1446</sup>

I hold that there is an appropriate comparator available in this case. It is those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised. The ground of discrimination is still religion or culture as the Code has a disparate impact on certain religions and cultures. The norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them.

Langa J continued to refer to the phrase "*umuntu ngumuntu ngabantu*"<sup>1447</sup> which has been described as the expression of *ubuntu*.<sup>1448</sup> He invoked the notion of *ubuntu* to indicate how important a sense of community is for individual development and a sense of identity.<sup>1449</sup> He explained that it was important for Ms Pillay to belong to her cultural community.

This case has also been commented on by Du Plessis. Drawing on the work of Young, Du Plessis<sup>1450</sup> speaks of a "jurisprudence of difference". "Jurisprudence of difference" refers to an approach by the courts that celebrates and affirms otherness. Du Plessis<sup>1451</sup> heralds the judgment as he is of the opinion that it promoted Young's "thick conception of equality" which sees social justice as social equality, and this social equality has as its goal the inclusion and full participation of everyone in the major institutions of society and the opportunity to develop and exercise those capacities to develop those choices. Du Plessis<sup>1452</sup> opines further that

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<sup>1446</sup> *MEC for Education: Kwazulu Natal v Pillay* 2008 2 BCLR 99 (CC) para 44.

<sup>1447</sup> This phrase means I am a person through other people. See 1.2.

<sup>1448</sup> *MEC for Education: Kwazulu Natal v Pillay* 2008 2 BCLR 99 (CC) para 53. *S v Makwanyane* 1995 6 BCLR 665 (CC) para 308.

<sup>1449</sup> *MEC for Education: Kwazulu Natal v Pillay* 2008 2 BCLR 99 (CC) para 53.

<sup>1450</sup> Du Plessis 2008 *AHRLJ* 378.

<sup>1451</sup> Du Plessis 2008 *AHRLJ* 401. Young *Justice and The Politics of Difference* 173.

<sup>1452</sup> Du Plessis 2008 *AHRLJ* 378. For a discussion on memorial constitutionalism, see 2.7.2.1.

"jurisprudence of difference" feeds into "memorial constitutionalism". Differently put, the history of segregation and marginalisation in South Africa informs the courts' jurisprudence of difference as it warns of the dangers of marginalising vulnerable groups.

In *MEC for Education: Kwazulu-Natal v Pillay*<sup>1453</sup> Langa J uses the value of *ubuntu* to indicate that relationality and belonging to a community are important. In this instance he refers to the religious and cultural community that Ms Pillay belonged to. However, I am of the opinion that *ubuntu* can be used to refer to the general society as a community. Young states that the core of the injustice of cultural imperialism is that certain people's experiences and perceptions are side-lined, marginalised and seen as deviant. The social justice of *ubuntu* lies therein that it promotes the inclusion of cultural "otherness". This "otherness" must obviously comply with the values of the Constitution.

### *5.2.8 uBuntu and justice as participatory parity*

Fraser<sup>1454</sup> firstly conceives of social justice as comprising elements of distribution and recognition. Secondly, she notes that these two elements are often interacting in the sense that distribution might have consequences for a person's recognition and that suffering from misrecognition might have distributive consequences. Central to Fraser's theory is the notion of participatory parity, which implies that people should be able to interact with each other as equals in society.<sup>1455</sup>

There is a strong sense of democracy that emanates from Fraser's theory. People should be involved in the decisions that will affect their lives. As noted above, a distinction can be made between representative and

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<sup>1453</sup> 2008 2 BCLR 99 (CC).

<sup>1454</sup> See 4.2.3.

<sup>1455</sup> See 4.2.3.

participatory democracy.<sup>1456</sup> Representative democracy is provided for by regular national and local elections. However, citizens also need to be heard during the other decision-making processes that will affect their lives. For this reason, public participation is one of the principles of government and in particular local government.<sup>1457</sup>

There have been no cases directly linking *ubuntu* to participatory parity. However, it should not be too difficult for courts to make this link. Firstly, participatory parity involves material distribution. The link between the issues of distribution and *ubuntu* were discussed above.<sup>1458</sup> On the other hand participatory parity deals with people's "voice" and not being marginalised by institutions. Many of the issues of marginalisation were discussed under Young's concept of injustice as marginalisation and cultural imperialism. Importantly though, as Fraser suggests, these two issues should not be seen as separate. It is thus imperative for courts to recognise how these two aspects feed into each other. The following example might illustrate the interaction between these material and material issues. An elderly woman lives in a rural township in South Africa. She is indigent and depends on a monthly grant by the state. The local municipality have recently decided to build toilets outside of the RDP house that she lives. In accordance with the provisions on public participation the municipality decides to have a meeting at the town hall to facilitate meaningful engagement and hear inputs from the community. On the one hand there is the issue of being recognised and heard. Despite being elderly and poor the woman needs to be heard and not be side-lined by institutions. This is provided for by the municipality. However, her material condition also needs to be taken into account. She cannot make her voice heard if she has no

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<sup>1456</sup> See 2.3.4.

<sup>1457</sup> Chapter 4 of the *Municipal Systems Act* is dedicated to fostering a culture of public participation within the community.

<sup>1458</sup> See 5.2.2.

means to get to the townhall, or for example, if the meeting is held late at night and she has to walk at night when she feels unsafe.

Fraser's theory of social justice thus specifically speaks to the manner in which state institutions should provide for services. Participatory justice links up with *ubuntu* as people's needs and lived reality need to be placed at the forefront of considerations by the state.

### ***5.3 uBuntu, social justice and the judiciary***

My suggestion in Chapter 4 was that the courts should approach the concept of social justice from a broad perspective.<sup>1459</sup> I am of the view that the aims of social justice include the concepts of capability, recognition and distribution. The sub-categorisation of Young to indicate the different forms of oppression that indicate the various ways in which structural inequality functions has been helpful to indicate ways in which social injustice occurs. Using certain social justice frameworks might be helpful when looking at one particular situation or area of law. Fuo,<sup>1460</sup> for example, is of the viewpoint that Fraser's framework of participatory parity is useful when looking at local government indigent policies. However, this study did not look at one particular area of law, but an approach by the judiciary in general. The different frameworks were thus used to elucidate how *ubuntu* as a constitutional value has the potential to promote social justice in a variety of situations. The different frameworks can all be used depending on the situation at hand. The discussion above illustrated various possible links between *ubuntu* and the different frameworks on social justice.<sup>1461</sup>

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<sup>1459</sup> See 4.5.

<sup>1460</sup> Fuo 2014 *Stell LR* 187-208.

<sup>1461</sup> See 5.2.

It might seem that *ubuntu* and social justice seems to apply everything and is everything. In one piece Woolman<sup>1462</sup> has criticised the Constitutional Court for simply referring to constitutional values and then being able to justify any decision. He refers to this as the Constitutional Court "speaking in values".<sup>1463</sup> Van der Walt offers the following reply:<sup>1464</sup>

These are strong words. If the decisions criticised by Woolman indeed indicate a tendency to free the Constitutional Court from the text of the Constitution so that it can decide each case as it pleases, on the basis of 'value-speak', and if that tendency does undermine the Bill of Rights and the rule of law, then we are perhaps indeed seeing the fruits of normative anarchy. What Woolman is suggesting is that the decisions in *Barkhuizen, NM* and *Masiya* represent decision making at more or less the same level as Mr Davies senior's ruling that Robin could not arrange a visit with a friend in the afternoon when he already had another social engagement for that evening, with his parents — the decision is arbitrary because it is based on unilateral pronouncement of vaguely defined values that are neither substantiated by foundation nor open to debate. In the absence of foundation, normative pluralism calls for deliberation and politics, not flaccid but arbitrary and inflexible rules.

The question arises what exactly the link is between *ubuntu*, social justice and the judiciary. As explained in Chapter 2, the new constitutional dispensation requires a less formalistic and traditional approach to adjudication.<sup>1465</sup> Adjudication, not simply at the constitutional level too, has become a value-laden exercise. As a result of the value-laden nature of adjudication the judiciary is empowered with more discretion. However, this discretion is not without limits. True to Dworkin's words, discretion is the hole in the doughnut, there is always a circumference of restriction.<sup>1466</sup> So while values give direction in cases they do not prescribe specific outcomes and they are used to interpret other legal provisions such as legislation and the Constitution. As Van der Walt<sup>1467</sup> opines this freedom given to the judiciary might create more uncertainty but that does not call for strict

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<sup>1462</sup> Woolman 2007 *SALJ* 763.

<sup>1463</sup> Woolman 2007 *SALJ* 763.

<sup>1464</sup> Van der Walt 2008 *Constitutional Court Review* 97.

<sup>1465</sup> See 2.7.

<sup>1466</sup> Dworkin *Taking Rights Seriously* 31.

<sup>1467</sup> Van der Walt 2008 *Constitutional Court Review* 97.

arbitrary rules but rather "foundation". Various judges and authors mention that *ubuntu* connotes social justice but have never explained this link. That has been the main concern of this study.

It is clear from section 39 (2) of the Constitution that there rests a duty on the judiciary to interpret customary law, common law and all legislation in light of the spirit, purpose and object of the Bill of Rights. Furthermore, the Bill of Rights should be interpreted in light of the values of human dignity, equality and freedom. Although courts are not the only sphere of government dealing with legal provisions, Davis and Klare are of the opinion that courts simply cannot just defer matters to the legislature anymore.<sup>1468</sup> They further state that the judiciary now has an obligation to further the "constitutional project".<sup>1469</sup> Social justice is at the heart of this constitutional project.

It was found that social justice has to do with the division of benefit and burdens in society.<sup>1470</sup> From the Rawlsian perspective one might say that social justice deals with inequality as a fact of life and how social institutions should deal with inequality. Rawls had a classical, liberal and distributive approach to this question. His theory was also a universal conception of justice. The theories of Young, Fraser, Nussbaum and Sen were preferred, even though they saw social justice as the manner in which social institutions dealt with inequality, their conceptions went beyond the classical liberal paradigm and was more suited towards the constitutional project in South Africa. These theories were also not universal theories of justice and needed to take local factors into account. They recognised various forms of

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<sup>1468</sup> Klare and Davis 2010 *SAJHR* 422.

<sup>1469</sup> Klare and Davis 2010 *SAJHR* 422.

<sup>1470</sup> See 4.2.

injustice, recognised the interdependence between people and their community and had substantive equality at its core.

The judiciary is a key actor in realising social justice. *uBuntu* as a constitutional value gives courts the ability to utilise it to direct cases towards a more socially just outcome. Links between the different frameworks of social justice were pointed out above.<sup>1471</sup> *uBuntu* coincides with the post-liberal conception of transformative constitutionalism which is aimed at bettering people's lives. *uBuntu* does this more than any other value as it has relationality at its core. This relationality enables it to direct the court's attention to issues of social justice.

#### ***5.4 Conclusion***

This chapter set out to make the link between *ubuntu*, social justice and the judiciary. More specifically to see the possibilities in *ubuntu* to promote social justice. With relationality at its core *ubuntu* presented a number of connections with social justice.

The different components of the frameworks identified in Chapter 4 were separately discussed. It was found that *ubuntu* recognises the importance of improving people's capability by taking into account people's basic needs. Courts have mostly focused on the distributive aspect of people's capability but it was recommended that the courts take into consideration that capability stretches beyond material needs. It was found that *ubuntu* contains elements of distributive justice. This aspect of social justice was found to be particularly present in matters dealing with socio-economic rights.

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<sup>1471</sup> See 4.3.

Links were made between Youngs' forms of oppression and *ubuntu*. *uBuntu* counteracts marginalisation and powerlessness as emphasises inclusion. Furthermore, *ubuntu* opposes economic exploitation as an injustice as it rejects the instrumentalisation of people. *uBuntu* rejects and in particular systemic violence as violent acts are "bereft of *ubuntu*".

The possibilities for using *ubuntu* to promote Fraser's participatory parity was also explored. It was found that there exists many opportunities to utilise *ubuntu* to promote participatory parity, particularly relating to service delivery any decision making by government that affects people. Both the concepts of participatory and *ubuntu* place people's needs and lived experience at the forefront.

In the final instance it was found that *ubuntu* acts as an expression of the different aspects of social justice that were mentioned is aligned with the vision of transformative constitutionalism, and by correlation transformative adjudication, as it aids in keeping the judiciary cognisant of structural inequality and the manner in which institutions and structures can oppress and exclude people.

The next chapter concludes the study, offers recommendations and discusses possible future research questions.

## Chapter 6 Conclusion

### 6.1 Background

From the preceding chapters it is evident that the advancement of social justice remains an important endeavour in the South African society. The judiciary is one of the institutions encumbered with the responsibility to promote social justice. It does so by developing the law, and in particular interpreting fundamental rights, statutory law, customary law and common law in terms of the spirit, purport and objects of the Bill of Rights. Constitutional values as standards of interpretation inform the spirit, purport and objects of the Bill of Rights. Courts have on occasion referred to social justice. However, with very little explanation.<sup>1472</sup>

Social justice has also been linked to the constitutional value of *ubuntu*.<sup>1473</sup> This seems to be quite an important link given the imperative of social justice and the responsibility of judges. According to my knowledge, there has been no research on this specific link. Much of the literature on *ubuntu*, from within and outside of the legal discipline, focuses on the meaning of *ubuntu* and its origins.<sup>1474</sup> Moreover, although many theories on social justice exist no study has been done on the possibility of *ubuntu* being an expression of social justice.<sup>1475</sup> There is thus a gap in the literature on the specific ways in which *ubuntu* as a constitutional value could aid the judiciary in contributing towards the realisation of social justice in South Africa.

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<sup>1472</sup> Social justice is often only referred to in reference to the preamble of the Constitution. For example in *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 1.

<sup>1473</sup> In *S v Makwanyane* 1995 6 BCLR 665 (CC) para 237 Madala J states, in reference to the concept *ubuntu*, that "the concept carries in it the ideas of humaneness, social justice and fairness".

<sup>1474</sup> See 3.2 and 2.2.

<sup>1475</sup> See 4.2.

## **6.2 Research question and objectives**

The central research question this study aimed to answer was whether the utilisation of *ubuntu* as a constitutional value can contribute towards the realisation of social justice in South Africa by the judiciary. In answering this question each separate chapter dealt with the following objectives:<sup>1476</sup>

- (a) to determine what the meaning and purpose of constitutional values are;<sup>1477</sup>
- (b) to determine if *ubuntu* is a justiciable constitutional value;<sup>1478</sup>
- (c) to arrive at a legal understanding of *ubuntu*;<sup>1479</sup>
- (d) to arrive at an understanding of social justice;<sup>1480</sup>
- (e) to indicate that *ubuntu* as a justiciable constitutional value can contribute to the interpretation of issues of social justice;<sup>1481</sup> and
- (f) to make recommendations regarding the use of *ubuntu* as a justiciable constitutional value in the pursuit of social justice by the judiciary.<sup>1482</sup>

## **6.3 Key findings**

In relation to the above-mentioned research question and objectives the following are the key findings of this study.

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<sup>1476</sup> See 1.4.  
<sup>1477</sup> See Chapter 2.  
<sup>1478</sup> See Chapters 2 and 3.  
<sup>1479</sup> See Chapter 3.  
<sup>1480</sup> See Chapter 4.  
<sup>1481</sup> See Chapter 5.  
<sup>1482</sup> See 6.4.

### *6.3.1 The meaning and purpose of constitutional values*

Chapter 2 sought to establish the meaning and purpose of constitutional values. The general purpose of constitutional values were found to be an aid in the interpretation and application of constitutional and statutory provisions to specific cases.<sup>1483</sup> Constitutional values were found to be particularly important in the post-1994 constitutional dispensation. Firstly, as the South African constitutional project aims to create a more egalitarian society is rooted in transformative constitutionalism, which requires a post-liberal interpretation.<sup>1484</sup> A post-liberal interpretation would require a legal culture and interpretive method that goes beyond the traditional and formalistic method that is reminiscent of the apartheid era. A post-liberal interpretation calls for a more a creative interpretation of the South African Constitution that acknowledges the open-endedness and uncertainty of adjudication.<sup>1485</sup> As the meaning is created by the judge, the role of values, and the meaning given to those values become important. A post-liberal interpretation also requires a consideration of the interplay between the law, political goals and the lived experience of people.<sup>1486</sup> Secondly, modern theories on South African statutory interpretation, emphasise the importance of a value-laden interpretation, also known as a teleological interpretation.<sup>1487</sup>

The justification for the prominence of constitutional values includes the movement away from a discriminatory past, getting on par with

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<sup>1483</sup> See 2.8.

<sup>1484</sup> See 2.7.

<sup>1485</sup> See 2.7.

<sup>1486</sup> See 2.7 and 5.2.

<sup>1487</sup> See 2.7.2.

international standards as well as the fact that the importance of values appear in the constitutional text.<sup>1488</sup>

Apart from the purpose of constitutional values, Chapter 2 also found that the meaning and content given to specific values affords a great deal of discretion to the judiciary. In this regard Chapter 2 also found that there is a lack of a theoretical basis provided for constitutional values and very often the link between the constitutional values and outcome of the judgments are not clear. The conclusion was reached that it would be acceptable for judges to find the theoretical basis for constitutional values in extra-legal or philosophical sources provided there is a justification for this basis.<sup>1489</sup>

Chapter 2 concluded that it is part of the reality of adjudication in the constitutional era that interpretation would be marked by unpredictability and uncertainty that can be overcome, provided the outcome is justified.<sup>1490</sup> It also concludes that one will never be able to have a pre-determined formula for adjudication.<sup>1491</sup>

It was determined that values do exist outside of the constitutional text.<sup>1492</sup> The values of human dignity, equality and freedom seem to occupy a higher status. However, it was argued that *ubuntu* should act like a *grundnorm* that "suffuses the entire legal order".<sup>1493</sup>

### *6.3.2 The justiciability of ubuntu as a constitutional value*

This objective was dealt with in Chapters 2 and 3. Central to the issue of *ubuntu's* justiciability is the distinction between values and rights. Chapter 2 concludes that constitutional values are not enforceable rights. Parties can

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<sup>1488</sup> See 2.2.

<sup>1489</sup> See 2.7.

<sup>1490</sup> See 2.8.

<sup>1491</sup> See 2.7 and 2.7.1.

<sup>1492</sup> See 2.4.

<sup>1493</sup> See 2.5.

thus not rely on values to exercise a right. However, values are used by the courts in the interpretive process. It was found that courts often conflate these two terms.<sup>1494</sup>

Chapter 3 specifically investigated some of the cases where *ubuntu* was utilised. Although *ubuntu* is not used by the courts as an enforceable right and, although, some argue that it is incompatible with the South African legal system,<sup>1495</sup> it is relevant as a legal concept as it aids the judiciary during adjudication by adding a more nuanced approach to adjudication that is not just focused on individual rights but takes into account the relationality between people and more communitarian aspects such as the plight of poor and vulnerable people.

### *6.3.3 A legal understanding of ubuntu*

Chapter 3 set out to arrive at an acceptable legal understanding of *ubuntu*. It was observed that meaning had been given to *ubuntu* from a variety of disciplines. The concept had been viewed as a cultural, religious, spiritual, moral and an ethical term. It was furthermore observed that some authors could not conceive of an understanding of *ubuntu* beyond its traditional African roots. Ramose and Keevy were of the opinion that even though *ubuntu* connotes terms such as humanity and community that it could not be separated from its patriarchal and exclusionary roots.<sup>1496</sup> They also saw this term as incompatible with the Western sense of justice which they believed were encapsulated by the Constitution.

In Chapter 3 the conclusion is reached that it is entirely possible to conceive of *ubuntu* as a term that developed from its traditional roots. This conclusion is firstly based on the fact that many legal concepts, such as marriage for

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<sup>1494</sup> See 2.6.

<sup>1495</sup> For example Ramose and Keevy. See 3.2.1 and 3.2.4.

<sup>1496</sup> See 3.2.1 and 3.2.4.

example, have undergone development. There is no reason why *ubuntu* cannot undergo similar development. Secondly, the recognition of customary law is recognised by the Constitution provided it is in line with the values and rights in the Constitution. Thirdly, this conclusion is supported by the court's jurisprudence on customary law which has clearly stated that customary law can be developed to be aligned with the Constitution.<sup>1497</sup> A static, rigid and traditional understanding of *ubuntu* is thus not preferred but a contextual, dynamic conception of *ubuntu* that is consistent with the rights in the Constitution should be followed.

Chapter 3 found that a suitable legal understanding could still be distilled from various other writers. Although it is concluded in Chapter 2 that the use of *ubuntu* as a legal term should be rooted in the constitutional legal paradigm, meaning that it should function as a constitutional value, meanings from other authors could still be used. It was determined that *ubuntu* invokes several constructs that relate to the interdependence between the individual and the community this individual finds him or herself in. These phrases include harmony, community, compassion, solidarity, interconnectedness and humanity, among others. At the core of these phrases is relationality. In other words, a relationship exists between people and between people and a community. This view of humans and of human rights goes beyond the traditional Kantian view of rights as only individual entitlements. There may be instances that recognise the autonomy and individual needs of people but people are always situated within a community. The relationality between the individual and the community brings about a never-ending connection between the individual and the community. This relationality also recognises that people are not

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<sup>1497</sup> See 3.2.4.

"fully self-determining" in the words of Cornell<sup>1498</sup> or self-constitutive in the words of Sandel echoed by Young.<sup>1499</sup>

In Chapter 3 it was also observed that the phrases used by the scholars were used by the judiciary as well when referring to *ubuntu*.<sup>1500</sup> The conclusion was made that the courts needed to add more theoretical depth to their understanding of *ubuntu*. It was furthermore found that courts tended to use the concept of *ubuntu* in relation to parties that were vulnerable or in a less powerful position.<sup>1501</sup> The courts also related the term *ubuntu* to "fairness", "public policy", "restorative justice" and "reconciliation".<sup>1502</sup>

#### *6.3.4 The concept of social justice*

Chapter 4 continued with a discussion of the opinions of various prominent scholars on social justice. It was found that social justice deals with how the institutions and structures of society distribute different rights and burdens in society.<sup>1503</sup> This idea is inextricably linked with how institutions and structures deal with inequality in society and improve the quality of people's lives.

Rawls' understanding of social justice is based on a modified version of the social contract that emphasizes liberal rights.<sup>1504</sup> The liberal conception of social justice as expounded by Rawls was rejected as it was universal in nature and did not take cultural and individual differences into account. Rawls' idea of social justice is decided upon before individual differences

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<sup>1498</sup> See 3.2.5.

<sup>1499</sup> Sandel *Liberalism and the Limits of Justice* 62-63. Also see Young *Justice and The Politics of Difference* 228; 230.

<sup>1500</sup> See 3.4.1-3.4.14 and 3.5.

<sup>1501</sup> See 3.5.

<sup>1502</sup> See 3.5.

<sup>1503</sup> See 4.5.

<sup>1504</sup> See 4.2.1.

can be known and this seems far removed from people's reality. Rawls' theory also seems contrary to the concept of substantive equality, which deems people's position in society, especially that of vulnerable and marginalised as important.<sup>1505</sup>

Chapter 4 also contains a discussion on the major theories of social justice that were developed post-Rawls. Young devised an understanding of social justice that took into account issues of distribution and recognition.<sup>1506</sup> Young sees social justice as an issue of structural inequality as it is not only distributive patterns that determine inequality but the reasons those distributive patterns exist in the first place. To Young certain social groups seemed to be targeted and if equality were to be pursued, structures and institutions had to take difference into account. Young sees this type of structural inequality as oppressive and she identifies five forms of oppression which includes marginalisation, powerlessness, exploitation, violence and cultural imperialism.<sup>1507</sup> Chapter 4 found that Young's categorisation is one of the frameworks that could work to conceptualise social justice as it is congruent with the post-liberal interpretation in Chapter 2 which aims to question not only discriminatory and oppressive rules and rights but also the structures that keep those rules and rights in place.

Chapter 4 also found that Frasers's idea of participatory parity is as a satisfactory explanation of social justice.<sup>1508</sup> Similar to Young, Fraser deems recognition as an important part of social justice. Fraser's understanding of social justice is suitable as it, similarly to Young, goes beyond the traditional liberal paradigm and looks at issues of distribution as well as recognition.<sup>1509</sup> The biggest differences between Fraser and Young are the aspects they

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<sup>1505</sup> See 2.3.2.

<sup>1506</sup> See 4.4.2.

<sup>1507</sup> See 4.2.2.

<sup>1508</sup> See 4.2.3.

<sup>1509</sup> See 4.2.2.

emphasise. Young seems to be more specific about the types of oppression and Fraser emphasises the aspects relating to making oneself heard and being able to participate in social life as an equal.

The capabilities approach seems to be an acceptable framework for social justice. The viewpoints of Nussbaum and Sen in this regard are relevant.<sup>1510</sup> Briefly put, the capabilities approach looks not only at what people get but at what they can do with what they have. The capabilities approach to social justice is to be welcomed as once again it goes beyond the classical liberal paradigm. The capabilities also sees society as a caregiving and a care-receiving society in that it takes account of people's dependency and vulnerability. The capabilities approach, as set out by Nussbaum, links constitutional law and the promotion of capabilities by the enforcement of rights by the judiciary.<sup>1511</sup>

The specific history of law and social justice in South Africa is also investigated in Chapter 4.<sup>1512</sup> Although the conclusion was reached that there can never be a final version of history, the historical context plays an important role in how cases are and should be adjudicated. The context of law and social justice is relevant in order to get an idea of the context within South Africa but also the importance *ubuntu* against the background of injustice in South Africa. Chapter 4 found that South Africa is not different from many other countries in being colonised. This period of colonisation was marked by violence and imperialism. This colonial period was followed by a history of apartheid that was marked by racial segregation, economic exploitation of black people, sub-standard services delivery and poor

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<sup>1510</sup> See 4.2.4 and 4.2.5.

<sup>1511</sup> See 4.2.5.

<sup>1512</sup> See 4.4.

education. In the post-apartheid era the country struggles to come to grips with inequality and harsh socio-economic conditions.<sup>1513</sup>

Chapter 5 concludes that the frameworks set forth by Fraser, Young, Sen and Nussbaum need not be mutually destructive.<sup>1514</sup> In general, the aim of social justice should be to better people's lives. The obligation towards social justice rests with institutions and structures in society. The focus of this study has been the particular institution of the judiciary. The pursuit of social justice cannot be universal and neutral, it is always informed by a particular social and historical context. An understanding of social justice must take into account group differences, meaning groups that have been perpetually adversely affected by structural inequality. Social justice should also include aspects of distribution as well as aspects of recognition. It was concluded that in the pursuit of social justice in South Africa there are few aspects that give context to this goal. These aspects include a history of racial segregation, discrimination, poverty and violence.

### *6.3.5 The link between ubuntu and the pursuit of social justice*

Having set out the meaning of constitutional values, *ubuntu*, and social justice, Chapter 5 illustrates how courts could utilise *ubuntu* to contribute towards the pursuit of social justice in South Africa. The three possible frameworks of social justice are the capabilities approach, Young's five forms of oppression and Fraser's participatory parity. The approaches are used to indicate the links between social justice and *ubuntu*.

*uBuntu* as a constitutional value considers people's capability as it considers other people's needs and has solidarity with their plight to live a dignified life, particularly vulnerable people who need the help of the state. The

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<sup>1513</sup> See 4.4.

<sup>1514</sup> See 4.3.

capabilities approach is often linked with the adjudication of socio-economic rights. There is space for courts to use the concept of capabilities in relation to aspects beyond socio-economic rights, where the improvement of vulnerable people's capability is involved.<sup>1515</sup>

*uBuntu* promotes distributive justice particularly in instances where there is a strict and rigid libertarian legal provisions which would disadvantage vulnerable parties.<sup>1516</sup> The distributive element of *ubuntu* comes to the fore in relation to matters dealing with socio-economic rights as well as service delivery.<sup>1517</sup> The approach by the courts that uses *Batho Pele* as a principle of *ubuntu* in the adjudication process is welcomed.<sup>1518</sup>

Chapter 5 concludes that *ubuntu* can be useful as a value that acts against marginalisation as it encapsulates inclusion. Marginalisation can take place in terms of material and non-material aspects. The South African courts' jurisprudence indicates the use of *ubuntu* to resist the marginalisation of foreign nationals, minority religions, HIV positive employees and homosexual people, among others.<sup>1519</sup>

Many people face powerlessness within society, particularly non-professional people.<sup>1520</sup> In Chapter 5 it was found that *ubuntu* promotes social justice by taking account of the power relationships between people and the parties in a matter before the court. This element of *ubuntu* could be particularly useful when dealing with contracts between unequal power positions and the relationship between the state and its citizens.

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<sup>1515</sup> See 5.2.1.

<sup>1516</sup> See 5.2.2.

<sup>1517</sup> See 5.2.2.

<sup>1518</sup> See 5.2.2.

<sup>1519</sup> See 5.2.3.

<sup>1520</sup> See 5.2.4 and 4.2.2.

Exploitation speaks of the powerlessness of the working class. Chapter 5 concludes that legal rules have the ability to keep in place the *status quo* of markets and economic practices.<sup>1521</sup> Furthermore, a transformative and post-liberal interpretation requires that the judiciary take into account exploitation within capitalist societies and economic class struggles. A specific link exists between instrumentalisation of people, *ubuntu* and exploitation. *uBuntu* runs counter to economic exploitation as it emphasises that people are not mere cogs in a wheel used for production but at their very core human beings. By using the value of *ubuntu* courts should take into account the economic exploitation of vulnerable groups.<sup>1522</sup>

*uBuntu* promotes social justice by acting against the systemic violence as an injustice. Systemic violence is particularly relevant to South Africa. The courts have stated that *ubuntu* is bereft of violence.

It was established that South Africa faces a number of challenges in relation to cultural imperialism.<sup>1523</sup> *uBuntu* promotes inclusion of people. It was also established that *ubuntu* should not be invoked in a superficial manner where group differences and the historical context of South Africa is not taken account. Sometimes *ubuntu* requires a "celebration of difference" while calling to mind the past.<sup>1524</sup>

It was also found that *ubuntu* can promote social justice when manifesting as participatory parity as espoused by Fraser.<sup>1525</sup> The first part of participatory parity links up with the distributive aspect of justice. Fraser's idea of social justice also indicates how people's needs and lived reality need to be prioritised by structures and institutions. Fraser's idea of social justice

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<sup>1521</sup> See 5.2.5 and 5.4.

<sup>1522</sup> See 5.2.5.

<sup>1523</sup> See 5.2.7.

<sup>1524</sup> See 5.2.7.

<sup>1525</sup> See 5.2.8.

also encompasses *ubuntu* as it values the involvement of people in decision making.<sup>1526</sup>

#### ***6.4 Recommendations for the use of ubuntu in the pursuit of social justice by the judiciary***

The findings above has led to the following recommendations directed at the judiciary.

##### *6.4.1 The need for a clear understanding of the nature and function of constitutional values*

The discussion in Chapter 2 and Chapter 3 reveal that even though some judgments have dealt with the content of specific values that courts, generally, are not familiar with the nature and functioning of constitutional values.<sup>1527</sup> Judges need to be cognisant of the fact that statutory and constitutional interpretation is value-laden. The use of values need not be argued by parties before the court, it is the duty of the courts to be mindful of constitutional values during the adjudication process.<sup>1528</sup>

The need for a clearer understanding of the nature and function of constitutional values emanates from the finding that the nature of adjudication through a transformative lens has an indeterminate nature.<sup>1529</sup> As mentioned by Van der Walt,<sup>1530</sup> "in the absence of foundation, deliberation and politics is needed" and not arbitrary and inflexible rules. Importantly, the judiciary should also keep in mind that although there are leitmotifs, rules, values and standards that guide interpretation that there can never be hard and fast rules or "ready-made" recipes, as du Plessis

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<sup>1526</sup> See 5.2.8.

<sup>1527</sup> See 2.3 and 3.4.

<sup>1528</sup> See 2.6 and 2.7.

<sup>1529</sup> See 2.7 and 6.3.1.

<sup>1530</sup> See 5.3.

states,<sup>1531</sup> as to how constitutional and legislative interpretation is to take place.

The judiciary should also be mindful of the difference between constitutional values and constitutional rights. Although both would fall under the phenomena of standards, values do not create the same obligations as rights.<sup>1532</sup> It is furthermore suggested that constitutional values be understood as aids that give direction during the complex process of adjudication without determining a specific outcome.<sup>1533</sup> Constitutional values set a normative standard as to the important considerations when interests have to be weighed in judicial matters.

In Chapter 3 it was found that the principle of constitutional subsidiarity has been used in some cases against the use of constitutional values.<sup>1534</sup> While the principle of constitutional subsidiarity is recognised as a valid principle that justifies that cases not always be based on constitutional rights it does not justify the avoidance of constitutional values altogether.<sup>1535</sup>

#### *6.4.2 Courts should give more of an in-depth explanation of their understanding of specific constitutional values*

In Chapter 2 it was found that, as part of the linguistic turn, terms do not come with ready-made meanings, as explained by Kroeze and Du Plessis,<sup>1536</sup> the meaning of a text is thus created during the interpretation of a legal text. With the understanding of the nature and function of constitutional values courts comes the understanding that utilising constitutional values requires an explanation in the first place of the understanding of a value

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<sup>1531</sup> See 2.7.2.1.

<sup>1532</sup> See 2.6.

<sup>1533</sup> See 2.6 and 2.8.

<sup>1534</sup> See 3.4.14

<sup>1535</sup> See 3.4.14.

<sup>1536</sup> See 2.2.1.

and the specific conception that is chosen. The judiciary needs to be mindful of the fact that ideological choices need to be made between the meaning of values. It should not be taken for granted that the meaning is clear and evident and courts need to clearly indicate which ideological basis it relies on when referring to values.

In the second instance, courts should explicitly indicate the link between the mentioning and use of constitutional values and the eventual judgment in the case. In the above discussion it was revealed that courts often mention constitutional values that stand separate and disconnected from the rest of the decision.<sup>1537</sup>

#### *6.4.3 uBuntu as a constitutional value*

In Chapter 2 and 3 it was found that although *ubuntu* is not explicitly mentioned in the constitutional text that it is a relevant legal concept and should be recognised as an extra-textual constitutional value.<sup>1538</sup> It is recommended that *ubuntu* be viewed as a term that has evolved from its traditional origins, whether that be a patriarchal and exclusionary origin or not, to one that is in line with the rights and values of the Constitution. *uBuntu* should also not have a rigid and static meaning but generally refer to the relationality between people and connote a term that goes beyond the classical liberal understanding of rights and individual autonomy.<sup>1539</sup> *uBuntu* should thus not be seen as a strictly communitarian term where the needs and interests of individuals are subservient to that of the community but the value should embody the recognition that human beings are not self-constitutive but form and are formed by their respective communities and are therefore continuously interlinked with and dependent on, to

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<sup>1537</sup> See 3.4.3 and 3.4.5.

<sup>1538</sup> See 6.3.2 and 2.4.

<sup>1539</sup> See 3.6.

varying degrees, fellow human beings. This relationality and interlinkage between human beings implies a certain sense of social justice as it requires that certain vulnerable groups be paid attention to.

#### *6.4.4 A broad conception of social justice*

Linked to the previous recommendation is the suggestion that courts embrace a broad understanding of social justice. In its understanding of social justice courts should not be restricted to a specific definition or framework.

Social justice should generally be understood as the ways in which the structures and institutions in a society better people's lives while being cognisant of oppressed and marginalised groups.<sup>1540</sup> The understanding should be historically and socially contextualised.<sup>1541</sup> Within the South African context it is recommended that particular attention be paid to segregation, unfair discrimination, poverty and violence. The discussion above revealed that courts often regard social justice as restricted to socio-economic issues and material deprivation, while it is that, it is also more than that and should include non-material and non-distributive issues as well.

#### *6.4.5 Courts should explore the ways in which ubuntu could promote social justice*

In the final instance, as it was found that there are definite correlations between social justice and *ubuntu*,<sup>1542</sup> it is recommended that courts embrace their creative role more eagerly by looking at ways in which *ubuntu* can promote social justice. The different possibilities have been pointed out

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<sup>1540</sup> See 4.3.

<sup>1541</sup> See 4.4 and 4.5.

<sup>1542</sup> See 6.3.5 and 5.2.

in Chapter 5.<sup>1543</sup> Courts need to engage with their mandate to realise social justice and discover the transformative potential of the value of *ubuntu*. By focusing on the relational core of *ubuntu* courts should find many opportunities to promote social justice. It is thus recommended that courts use the notion of capabilities recommended by Sen and Nussbaum, the five forms of oppression suggested by Young and Fraser's idea of participatory parity. The value of *ubuntu* should be used more prominently to give due consideration to people's capability when dealing with issues of socio-economic rights and service delivery. As it is part of the mandate of transformative constitutionalism and post-liberal interpretation that courts address structural inequalities it is recommended that *ubuntu* as a constitutional value can also be utilised to address oppression in the form of marginalisation, powerlessness, exploitation, violence and cultural imperialism as suggested by Young. The value of *ubuntu* should also be used to give due consideration to the involvement of people in instances where decisions have to take place that will affect their lives.

### **6.5 Future research**

This study has established that *ubuntu* as a constitutional value can aid courts in the promotion of social justice in South Africa. Although it does not fall within the scope of this study various questions are contingent to the study that create opportunities for future research. These issues include:

- (a) the obligation on other spheres of state to promote social justice
- (b) the obligation that *ubuntu* creates for other spheres of state; and

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<sup>1543</sup> See 5.2

- (c) a comparison between *ubuntu* and communitarian ethics in other jurisdictions.

Law by its very nature protects the rights and interests of individuals. For centuries over legal systems have attempted to counteract a strictly libertarian system with communitarian values. It has taken the form of principles such as good faith, equity and public policy. The South African legal system has begun to use *ubuntu* as such a mechanism to counteract the dangers of strict liberalism. The value of *ubuntu* is welcomed as it is not simply about individuals submitting to the interests of the community. It is about recognising that there is an untetherable link between human beings, either as individuals or as parts of the broader community. *uBuntu* recognises that vulnerable people cannot be forgotten. This recognition is at the heart of the transformative constitutional project and indeed the realisation of social justice in South Africa.

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