

The suitability and unsuitability of *ubuntu* in constitutional law – inter-communal relations versus public office-bearing

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OPSOMMING

Die Toepaslikheid en Ontoepaslikheid van *Ubuntu* in die Staatsreg – Inter-gemeenskapsbetrekkinge Teenoor Openbare Ampsbekleding

In hierdie artikel word aangevoer dat *ubuntu* in bepaalde kontekste in die staatsreg van besondere waarde kan wees, maar dat die toepaslikheid daarvan op ander gebiede onder verdenking is. Wat die toepaslikheid daarvan betref, word geredeneer dat daar 'n korpus van reg, genaamd die reg van inter-gemeenskapsbetrekkinge aan die ontwikkel is. Die grondslag hiervan is in die wesensaard van die staat self. Op die keper beskou is die staat die beliggaming van, en waarborg vir die openbare vrede (of behoort dit ten minste so te wees). Die openbare vrede is op sy beurt afhanklik van die instandhouding van gesonde betrekkinge tussen gemeenskappe, by gebreke waarvan die veiligheid van die gemeenskappe in die gedrang kom en die stabiliteit, en trouens die voortbestaan van die staat self, in die gedrang kom. In die bespreking word met verwysing na die beskouing in Suid-Afrikaanse regspraak oor *ubuntu* aangevoer dat *ubuntu* saam met die verbod op haatspraak en dergelike verbodinge wat die openbare vrede kan ontwig, sowel as die internasionale reg rakende volksmoord en verwante internasionale misdade, die ontluikende reg van inter-gemeenskapsbetrekkinge, beliggaam. Daarenteen kan *ubuntu* egter treffend ontoepaslik wees naamlik op die gebied van openbare ampsbekleding. Die kernvraag by openbare ampsbekleding is of die ampsbekleër vir die openbare amp waarin sy/haar aangestel is, geskik is en die pligte wat met die amp vereenselwig word, soos dit in die toepaslike reg beskryf word, getrou (kan) uitvoer. Openbare ampsbekleding hang juis nie primêr van die persoonlike verhoudings van die ampsbekleër met die publiek of met die hoofde of ondersgeskiktes van die ampsbekleër af nie. Inteendeel, warm verhoudings kan juis verkeerdelik voortspruit uit oorwegings wat allermins met die betrokke amp vereenselwigbaar is. Dit kan voorkom omdat die kunsmatige identiteit van openbare ampsbekleding met vermeende *ubuntu*-geïnspireerde knusse betrekkinge wat niks met die nakoming van openbare ampspligte te doen het nie, verwar word. Om hierdie rede is die aanwending van *ubuntu*-geïnspireerde goeie verhoudings in die konteks van openbare ampsbekleding bevraagtekenbaar.

1 Introduction

The value of *ubuntu*, among other things encapsulating the notions of humaneness, human dignity, reconciliation, group solidarity, compassion, the establishment and the maintenance of warm relations and restorative justice is autochthonous to South African law, more in

particular South African constitutional law. Lately it has come to play an increasingly important part in South African constitutional jurisprudence. It is not possible to measure exactly how prominent the place is that *ubuntu* occupies in the public order and in the public service. However, judging by the Constitutional Court, who observed that the spirit of *ubuntu* is part of the deep cultural heritage of the majority of the population,¹ *ubuntu* might be far more important than one might generally tend to assume. This article assesses the relevance or otherwise of *ubuntu* in constitutional law. The discussion proceeds from the jurisprudence of the Constitutional Court on *ubuntu*, thus beginning in section 2 with an overview of the judicial pronouncements on *ubuntu*. This discussion casts light on the definition and the field of application of *ubuntu* as viewed by the courts. There is a corpus of South African academic literature on *ubuntu*.² In this corpus *ubuntu* is generally very favourably viewed. However, there is also stinging critique against *ubuntu* as for example in the thoroughly researched article by Ilze Keevy, who argues that *ubuntu* is fundamentally at odds with the values of equality and tolerance as endorsed by the South African constitution.³ Moreover, even those who generally praised *ubuntu* as a lofty ethical-legal value complex, encounter serious difficulties in their attempts to offer a workable core-definition of *ubuntu*.⁴ Moreover, some attempts to define *ubuntu* were to my mind so airy-fairy that they fail to communicate anything of value about *ubuntu*.⁵ For that reason, but for a few exceptions such as the discussion by Bilchitz, the academic commentary is mainly left aside in this article. The focus instead is on *ubuntu* as assessed by the courts. In the next two sections of the article the rightful place that *ubuntu* should occupy in constitutional law is considered. Hence, if there is a place for *ubuntu*, as the affirming *dicta* of the courts clearly suggest, the question is how to delineate the

1 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC) par 37.

2 See in this regard for example Bennett "Ubuntu: an African equity" 2011 *Potchefstroomse Elektroniese Regsblad (PER/PELJ)* (14); English "Ubuntu: the quest for an indigenous jurisprudence" 1996 *SAJHR* 641-648; Keevy "Ubuntu versus the core values of the South African Constitution" 2009 *Journal for Juridical Science* 34(2) 19-58; Mokgoro "Ubuntu and the law in South Africa" 1998 *Buff Hum Rts L Rev* (4) 15-23; Mokgoro "Ubuntu and the law in South Africa" 1998 *Potchefstroomse Elektroniese Regsblad (PER/PELJ)* 15-26; Cornell "Ubuntu, pluralism and the responsibility of legal academics to the new South Africa" 2009 (20) *Law and Critique* 43-58; Cornell "A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation" 2004 *SAPR/PL* 666-675; Bilchitz "Citizenship and community: explaining the right to receive basic municipal services in Joseph" 2010 *Constitutional Court Review* 45-78.

3 Keevy 2009.

4 Mokgoro 16.

5 The definition offered by Cornell 2009 47 is a striking example of, to my mind, such failed attempt which reads: "For now we may define *ubuntu* as the African principle of transcendence through which an individual is pulled out of himself or herself back towards the ancestors, forward towards the community, and towards the potential each one of us has".

boundaries of its applicability, and how to clarify where *ubuntu* should have a place and a role and where not.

It is argued in section 3, and this leads to the first conclusion, that *ubuntu* could be relevant and even of crucial importance in the sphere of inter-communal relations and for the maintenance of inter-communal peace, which is an essential condition for the very existence and survival of the state. In this context *ubuntu* may be playing an important part in what is here termed (an emerging) law of inter-communal relations, which is in fact a core issue of constitutional law and for the well-being of the state. However, in section 4 it is argued that there is a field of constitutional law where it would be inappropriate to allow *ubuntu* to play any part. This is in the context of certain aspects of public office-bearing, which is an essential aspect of constitutional law and on which the existence and well-being of the state depends. To allow *ubuntu* to play any part in this context could arguably be to the detriment of the state.

2 Judicial Pronouncements on *Ubuntu*

The value of *ubuntu* initially featured in the epilogue to the interim constitution (Constitution of the Republic of South Africa)⁶ under the heading *National Unity and Reconciliation* where it was contrasted with victimization.

The epilogue proclaimed, amongst other things, that the (interim) constitution lays the secure foundation for the people of South Africa to transcend the divisions of the past. It continued to assert that the past divisions could be overcome on the basis of the value of *ubuntu*. The relevant portion of the epilogue reads: “These can now be addressed on the basis 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 victimisation”.⁷

Notwithstanding its central importance for achieving the avowed goal of the constitutional endeavour, namely of achieving unity and reconciliation, the notion of *ubuntu* was dropped from the text of the present constitution (Constitution of the Republic of South Africa, 1996.) However, its absence from the constitutional text did not foreclose the emergence of an *ubuntu*-based jurisprudence, particularly by the Constitutional Court (hereinafter the “Court”). In the judgments of the Court in which *ubuntu* has been referred to, *ubuntu* played an important part, particularly as a source of law, within the context of strained or

6 Act 200 of 1993 which entered into force in April 1994.

7 The “these” that can now be addressed is, what in the preceding paragraph of the epilogue is described as ‘... the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

broken relationships among individuals or communities and as an aid for mending relations and crafting suitable remedies to that end.

The most important *dicta* on *ubuntu* appeared in *S v Makwanyane and Another*;⁸ *Port Elizabeth Municipality v Various Occupiers*;⁹ *Dikoko v Mokhatla*;¹⁰ *Masethla v President of the RSA*¹¹ and *Union of Refugee Women v Private Security Industry Regulatory Authority*.¹² *Ubuntu* was also referred to, yet not really discussed, in any significant detail, in the judgments of *Hoffmann v South African Airways*;¹³ *Barkhuizen v Napier*;¹⁴ and *Bhe and Others v Magistrate, Khayelitsha, and Others*,¹⁵ *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)*,¹⁶ *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)*,¹⁷ *Van Vuren v Minister for Correctional Services and Others*,¹⁸ *Joseph and Others v City of Johannesburg and Others*¹⁹ and *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*.²⁰

The judicial pronouncements on *ubuntu* in these cases are now dealt with. This forms the basis of a synopsis at the end of this section of what *ubuntu* in terms of this jurisprudence entails.

The first case where *ubuntu* featured prominently was in *S v Makwanyane* in which several justices of the Constitutional Court in part based their conclusions for holding capital punishment unconstitutional on *ubuntu*. Chaskalson P, as he then was, stated as follows with regard to *ubuntu* within the context of the death sentence:

“Although this commitment has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of *ubuntu*, ours

8 1995 (3) SA 391; 1995 (6) BCLR 665 (CC).

9 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC).

10 2006 (6) SA 235; 2007(1) BCLR 1 (CC).

11 2008 (1) SA 566; 2008(1) BCLR 1 (CC).

12 2007 (4) SA 395; 2007 (4) BCLR 339 (CC).

13 2001 (1) SA 1; 2000 (11) BCLR 1211 (CC) par 38.

14 2007 (5) SA 323; 2007 (7); BCLR 691 (CC) par 50.

15 2005 (1) SA 580; 2005 (1) BCLR 1 (CC) parr 45 & 163.

16 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) parr 164-5, 168, 210 & parr 216-8.

17 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) par 200.

18 2010 (12) BCLR 1233 (CC) par 51.

19 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) par 46, fn 39.

20 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) par 62. I leave aside the few judgments of the high courts in which *ubuntu* was mentioned by name. I also leave out judgments that might arguably have been informed by *ubuntu* but in which *ubuntu* was not expressly referred to. For reference to such cases see in general Cornell & Muvangua (2012) *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* Fordham University Press.

should be a society that 'wishes to prevent crime ... [not] to kill criminals simply to get even with them'.^{21 22}

In his judgment in *Makwanyane* Langa J, as he then was, underscored some of the main characteristics of *Ubuntu* and specifically the high regard of *ubuntu* for human life and dignity. He stated:

"An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. 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*".²³

Later on in the same judgment, Langa J noted that *ubuntu* called for the balancing of the interests of society against those of the individual, for the maintenance of law and order but not for dehumanising and degrading the individual.²⁴

In her separate judgment Mokgoro J declared that *ubuntu* was a shared value of all South African communities. On the meaning of *ubuntu* she observed as follows:

"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".²⁵

In *Port Elizabeth Municipality v Various Occupiers* the Court dealt with issues concerning the constitutional rights to property and the right to housing (respectively sections 25 and 26 of the Constitution), as well as

21 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 131.

22 The commitment that is referred to here is the commitment to national unity and reconciliation spelt out in the epilogue to the interim constitution

23 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 225.

24 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 250.

25 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 307 (s 35 refers the quoted passage to the interim Constitution. It was the interpretation clause of the Bill of Rights in that Constitution. Its counterpart in the present Constitution is s 39.)

the Prevention of Illegal Eviction Act (PIE).²⁶ The parties to the dispute were a local authority and a community of illegal occupiers. Sachs J, speaking for a unanimous court, expressed a strong preference for the open communication, mediation and settlement of disputes of this nature. This preference is founded on and motivated by, amongst others, the value of *ubuntu* which according to Sachs J, suffused the whole constitutional order and is the unifying motif of the Bill of Rights. The PIE Act was also read by the court also in this light. The court had the following to say in this regard:

“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 to 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”.²⁷

Possibly the most important judgment on the role of *ubuntu* is that of *Dikoko v Mokhatla*. This was a defamation case, which involved two public figures – an executive mayor and the chief executive officer (CEO) of the same municipality. *Ubuntu* played an important part in the reasoning of the Court on the merits of the case and in the Court eventually reducing the *quantum* of the damages initially awarded by the High Court. Mokgoro J highlighted, amongst others, that *ubuntu* is closely related to respect for the humanity of another and to the emerging concept of restorative justice. Motivated by the concept of *ubuntu* the court stated that it should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties rather than pushing them apart. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity. In a defamation case such as the one the court dealt with here, courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. The Court added that this field of law should be developed in the light of the values of *ubuntu* emphasising restorative rather than retributive justice. The goal should be, the court said, to knit together shattered relationships in the

26 19 of 1998 (generally known by its acronym, “PIE”).

27 2005 (1) SA 5 17; 2004 (12) BCLR 1258 (CC) par 37 237E-238A. In terms of the *amende honorable*, a remedy that was known the Roman-Dutch law, which is now reviving in South African law of defamation (see for example *Mineworkers Investment Company v Modibane* 2002 (6) SA 512 (W)) the plaintiff withdraws his defamation claim on condition that the defendant would retract the defamatory utterances as in fact being untrue and apologised for the publication, acknowledging that he acted wrongful and that asked to be forgiven.

community and encourage across-the-board respect for the basic norms of human and social interdependence.

Paragraphs 68-69 contain the most elaborate exposition of *ubuntu* and are quoted in full:

“In our constitutional democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms. It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish a defendant. 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. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.

The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of the values of *ubuntu* emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social interdependence. It is an area where courts should be proactive, encouraging apology and mutual understanding wherever possible”.²⁸

In a separate minority judgment, Sachs J elaborated on the impact and value of *ubuntu* and amongst others, stated the following:

“In jurisprudential terms, this would necessitate reconceiving the available remedies so as to focus more on the human and less on the patrimonial dimensions of the problem. The principal goal should be repair rather than punishment. To achieve this objective requires making greater allowance in defamation proceedings for acknowledging the constitutional values of *ubuntu-botho*”.²⁹

28 2006 (6) SA 235; 2007(1) BCLR 1 (CC) parr 68-69.

29 *Idem* 112.

Sachs J likened the principles of restorative justice to that of *ubuntu* and stated that these principles should not be restricted to the field of criminal law.³⁰ Specifically within the context of the law of defamation, more particularly in relation to appropriate remedies for defamation, Sachs J compared *ubuntu* and the Roman-Dutch remedy of *amende honourable* and said:

“Although *ubuntu-botho* and the *amende honorable* are expressed in different languages intrinsic to separate legal cultures, they share the same underlying philosophy and goal. Both are directed towards promoting face-to-face encounters between the parties, so as to facilitate resolution in public of their differences and the restoration of harmony in the community. In both legal cultures, the centrepiece of the process is to create conditions to facilitate the achievement, if at all possible, of an apology honestly offered, and generously accepted”.³¹

In his own separate judgment in *Masethla*, in support of the main judgment of Moseneke DCJ that dealt with the implied power of the President in terms of section 209(2) of the Constitution to dismiss the director-general of the National Intelligence Agency, Sachs J stressed the importance of civility and civilized dialogue as values closely linked to *ubuntu-botho*. According to Sachs J, it was also precisely as a result of civilised dialogue that a peaceful constitutional transition could be achieved in South Africa. Sachs stated:

“In this regard it is my view that fair dealing and civility cannot be separated. Civility in a constitutional sense involves more than just courtesy or good manners. It is one of the binding elements of a constitutional democracy. It presupposes tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute. Civility, closely linked to *ubuntu-botho*, is deeply rooted in traditional culture, and has been widely supported as a precondition for the good functioning of contemporary democratic societies. Indeed, it was civilised dialogue in extremely difficult conditions that was the foundation of our peaceful constitutional revolution”.³²

The core content and salient features of *ubuntu*, gleaned from the above pronouncements in judgments of the Constitutional Court, may be summarised as presenting the following salient characteristics:

- *Ubuntu* is contrasted to vengeance;
- *Ubuntu* dictates that a high value be placed on the life of human beings;
- *Ubuntu* is inextricably linked to the values dignity, compassion, humaneness and respect for the humanity on which it places a high premium;
- *Ubuntu* dictates a shift from confrontation to mediation and conciliation;
- *Ubuntu* dictates good neighbourliness and shared concern;
- *Ubuntu* favours the re-establishment of harmony in the relationship between parties on that such harmony should restore the dignity of the plaintiff without ruining the defendant;

30 *Idem* 115.

31 *Idem* 116.

32 *Idem* 238.

- *Ubuntu* favours restorative rather than retributive justice;
- *Ubuntu* operates in the direction of reconciliation and not estrangement of disputants;
- *Ubuntu* works towards sensitizing a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and on changing of such conduct accordingly rather than merely punishing the disputant;
- *Ubuntu* promotes mutual understanding rather than punishment;
- *Ubuntu* favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful;
- *Ubuntu* favours civility and civilized dialogue premised on mutual tolerance.

The mentioned salient features of *ubuntu*, summarized and subscribed to in the High Court judgment of *Afriforum and Another v Malema and Others*³³ could be described as the core content of the value of *ubuntu* in South African positive law (though not necessarily in philosophical theorising about *ubuntu*).³⁴

Ubuntu, as stated in *Dikoko*, is also related to the concept of restorative justice³⁵ which is specifically relevant in the context of sentencing in the criminal courts (but also in other contexts, specifically the law of delict). It is particularly relevant in situations where the offender and the victim are well-known to each other, especially when they are members of the same family and where sentencing is aimed at repairing the damage done to the victim, the victim's family and whoever might have been harmed by the offence. It aims at voluntary compensation of the victim by the offender and eventually restoring the relationship between the victim and the offender and the community. This approach has also recently also been resonated in the South African criminal courts.³⁶

Ubuntu might arguably also be associated with effective public service delivery where the needs of the people take centre stage, that is, with an approach that is sensitive to responds to the needs of the public in general and to that of individual citizens in question.³⁷

33 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC) par 19.

34 For discussions on the meaning of *ubuntu* outside the jurisprudential context see for example Prinsloo "Ubuntu culture and participatory management" in Coetzee and Roux (eds) (1998) *Philosophy from Africa: A text with reading* Thomson 41-51, more in particular 41-43 and in general Cornell and Muvangua (2012) *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* Fordham University Press.

35 See the remark by Sachs J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) par 114.

36 See for example *S v Saayman* 2008 (1) SACR 393 (E), *S v Shilubane* 2008 (1) SACR 295 (T) and *S v Maluleke* 2008 (1) SACR 49 (T).

37 See in this regard the observations in *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) par 46; 2010 (3) BCLR 212 (CC) par 46 & fn 39 and *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) par 62. In this context *ubuntu* is related to the notion of *Batho Pele*, a SeSotho phrase which means that the people must.

In the final analysis, the core content of *ubuntu* emanating from the jurisprudence of the South African courts are compassion, group solidarity, the establishment and maintenance of warm relations, mutual understanding and tolerance and reconciliation instead of retribution and punishment.

3 The (Emerging) Law of Inter-Communal Relations and the Pertinence of *Ubuntu*

3 1 The Concept of the Law of Inter-Communal Relations

The argument presented here is that there is locally and internationally an emerging law of inter-communal relations. This law originates from the very nature of the state. On proper analysis, the state is (or at least ought to be) the embodiment and the guarantor of the public peace. In its turn public peace depends on sustained sound more in particular inter-communal relations among the communities. If such inter-communal relations break down the safety of the communities that together constitute the state population is placed in danger and, moreover, the stability and survival of the state is jeopardised at the same time.³⁸ Hence, the stability and eventually the survival of the state depend on sound inter-communal relations buttressed by the law of inter-communal relations. It might be argued that all law in a sense, either directly or indirectly contribute to the public peace. However, there are certain bodies of law which, in contrast to the rest, are directly and more exclusively designed and developed towards guaranteeing the public peace. These bodies of law are not concerned in the first place with individuals or their rights but with broader communal concerns, that is, with the inter-communal peace and sound inter-communal relations, thus setting them apart from the rest as the building blocks of the law of inter-communal relations.

The most important bodies of law (and there might in fact be more) that constitute the law of inter-communal relations are:

The notion of *Batho Pele* is required the way in which public services are rendered in a way which accounts for their best interests. In this context *ubuntu* also corresponds with s 195 of the Constitution that sets out the values and principles of the public administration which includes in ss (d) that services must be provided impartially, fairly, equitably and without bias; and (e) that people's needs must be responded to, and the public must be encouraged to participate in policy-making. See further Bilchitz 2010 62-67.

38 This construction of the state is not only based upon a Hobbesian view of the state, but appears on proper analysis to be one of the general prerequisites for the existence and maintenance of the state. See the discussion by Malan "The unalienable right to take the law into our own hands and the faltering state" 2007 *TSAR* 642-654 at 646-652.

- “(1) The constitutional prohibition of hate speech and incitement to imminent violence, read with the right to freedom from violence (in the case of South Africa, protected in section 12(1)(c) of the Constitution);
- (2) The prohibition of genocide and crimes against humanity, recognised in international law and subscribed to by South Africa;
- (3) The locally cultivated value of *ubuntu* as recognised and rehearsed above in South African constitutional jurisprudence”.

My contention is that these bodies of law should not be separately interpreted and understood, but understood and interpreted together as branches of a single broader complex of law of inter-communal relations. Approached as branches of the law of inter-communal relations, securing a common aim – namely sound inter-communal peace and the stability of the state – each of these bodies of law assumes a mutually supporting meaning and function that they otherwise would not have had or would not have had to the same extent. Informed by its interpretation as part of the law of inter-communal relations, in concert with the other bodies of law, serving the same end, the suitable place and function of *ubuntu* will also clearly emerge.

The bodies of law comprising the law of inter-communal relations will now be discussed from the perspective of their belonging to this law of inter-communal relations and of simultaneously buttressing sound inter-communal relations and the stability of the state.

3 2 The Prohibition of Hate Speech and Other Forms of Expression Endanger the Public Peace and the Right Against Freedom from Violence

The prohibition of hate speech is generally not a measure for the protection of individuals in their individual capacity. On the contrary, it emerges primarily from the concern with and protection of communities and for the promotion of the public peace.³⁹ Groups, not so much individuals, are targeted by hate speech. If specific individuals are in the immediate firing line of hate speech, they are targeted in their capacity as members of communities and presenting communal traits such as race, religion, ethnicity, language etc. Thus, even though hate speech may in given circumstances constitute an offence for example *crimen iniuria*, criminal defamation or a statutory offence requiring *mens rea*⁴⁰ or may be specifically prohibited by provisions of criminal law as in the

39 See in general the leading Canadian judgment of *R v Keegstra* (1990) 3 S.C.R. 697, the US judgment of *Virginia v Black et al* 538 U.S. 343 (2003) 359 as well as the South African judgment of *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294; (2002 (5) BCLR 433 (CC).

40 The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA) itself also acknowledges that hate speech (or any of the other conduct over which it exercises jurisdiction) may constitute a criminal offence. This in s 21(2) it provides that the court may make an appropriate order that may include an order directing the clerk of the equality court to

case of some foreign jurisdictions⁴¹ or may attract delictual liability, if the requirements for such liability are met, the prohibition of hate speech should essentially be viewed as a constitutional-law measure, sustaining sound inter-communal relations and safeguarding the stability of the state. This construction of the prohibition of hate speech (and related forms of socially repugnant expression) is borne out also by section 16(2) of the Constitution and by the prohibition of hate speech in section 10 of the Promotion of Equality and Elimination of Unfair Discrimination Act, 4 of 2000.

Section 16(2) of the Constitution of the Republic of South Africa excludes certain forms of speech from the general guarantee of the right to freedom of expression, namely (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The aim and effect of denying constitutional protection of these forms of expression are quite clearly to sustain and promote sound inter-communal relations and in doing so, to safeguard the stability of the state. The advocacy of hatred that is based on the specifically mentioned communal characteristics of race, ethnicity, gender and religion, (and which constitutes incitement to cause harm) clearly underscores this contention because such hatred could easily erupt into open inter-communal violence, affecting entire communities, thus destabilising the state. The two other forms of non-protected expression namely propaganda for war and incitement of imminent violence also guard against inter-communal conflict and the disruption of the state, since war (interstate or civil) obviously involves inter-communal violence, while the

submit the matter to the Director of Public Prosecutions for the possible institution of criminal proceedings in terms of the common law or relevant legislation.

41 In England, Wales, and Scotland, the Public Order Act of 1986, prohibits expressions of racial hatred. Racial hatred means "... hatred against a group of persons defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.

S 18 of the Act provides:

"A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—

(a) he intends thereby to stir up racial hatred, or

(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby".

Part 3A of the Racial and Religious Hatred Act of 2006, which provides for freedom of expression further provides in s 29J that:

"Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system".

The Criminal Justice and Immigration Act of 2008 includes the offence of inciting hatred on the ground of sexual orientation.

notion of incitement of imminent violence encompasses both violence against individuals and communities.

The prohibition of hate speech by section 10 of the Promotion of Equality and the Elimination of Unfair Discrimination Act⁴² (PEPUDA) also reveals that hate speech, even though in given conditions it may constitute an offence and/or a delict,⁴³ is primarily a measure for the sustenance of inter-communal relations and safeguarding the stability of the state. Section 10 provides that:

“(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, *that could reasonably be construed* to demonstrate a clear intention to–

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.” (Own emphasis added).

The emphasised phrase “*that could reasonably be construed*,” clearly shows that intent is not a requirement for hate speech (and the presence or absence thereof should come into play only when an appropriate remedy is considered). The emphasis is therefore not on the subjective state of mind of the utterer/s of the impugned matter but on the way it might be understood and reacted to by anyone taking notice of the utterances (irrespective of the actual *mens rea* of the utterer/s), and regardless of the consequences of the utterances. Hence, if the utterances could reasonably be construed by the target group of the utterances, or by anyone else, as showing a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred, prohibited hate speech as envisaged in this section is established, regardless of the actual (subjective) intention of the utterer/s and regardless of the fact that there might be other persons or groups who interpret the utterances differently.

The fact that intent is not required, but rather that the matter hinges on whether the utterances are reasonably susceptible for the interpretation as described in the provision, makes it demonstrably clear that the emphasis of the prohibition is not the individual *mens rea* of the utterer in question, but the way in which it is understood by the addressees of the utterances or by third parties. It should also be clear

42 Act 4 of 2000.

43 For example the delicts of *iniuria* and defamation and the crimes of *crimen iniuria*, criminal defamation and incitement to commit crimes such as murder and other violent crimes. The fact that hate speech may constitute crimes such as these is also acknowledged in PEEPUDA itself, with s 10(2) providing that:

“(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation”.

that there need not be general interpretive consensus that the utterances fall within the scope of the prohibition.

This shows that the prohibition of section 10 of PEPUDA is not primarily aimed at the criminal or delictual liability of the utterer (in which case intent would obviously have been required) but rather generally at the maintenance of public peace and the prevention of the breakdown of inter-communal relations. As such, the provision also gives expression to the state guaranteeing the public peace and safeguarding itself against the destabilising consequences of the breakdown inter-communal peace. This construction also shows that the prohibition of hate speech has the character rather of a preventative than a remedial measure.

This interpretation of the prohibition of hate speech is supported by section 15 of the PEPUDA, which provides that in cases of hate speech (and harassment) considerations of fairness do not apply. Hence, a defendant in a hate-speech matter whose utterances may reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm or to promote or propagate hatred, cannot escape liability on account of other considerations that point to the fairness of such speech. This once again underscores that the prohibition of hate speech is not designed in the first place to establish individual liability of the utterer/s of alleged hate speech, in which the fairness or the unfairness of the utterances might be relevant as it is in the law of defamation. The emphasis is on the maintenance of sound inter-communal relations, the public peace and the stability of the state. The measure is therefore a fully-fledged public law, more pertinently constitutional law measure, not concerned with the particulars and intricacies of individual criminal or delictual liability, but with the well-being of the commonwealth.⁴⁴ South African jurisprudence also construes the prohibition of hate speech as a measure aimed at the maintenance of public peace, sound relations among communities and the maintenance of the constitutional order. Hence in *Islamic Unity Convention v Independent Broadcasting Authority and Others*⁴⁵ the Constitutional Court emphasised that there are categories of expression not compatible with the values of an open and democratic society. The Court stated:

“The pluralism and broadmindedness that is central to an open and democratic society can, however, be undermined by speech which seriously threatens democratic pluralism itself. Section 1 of the Constitution declares

44 The discussed interpretation rejects by implication that afforded De Vos & Freedman (eds) 2014 *South African Constitutional Law in Context* Cape Town Oxford 546. It stand to reason that care should be exercised not to abuse the prohibition of hate speech in such a way that causes undue infractions of the right to freedom of expression, more in particular of political speech. However, I do not subscribe to the view that s 10 of PEPUDA is incompatible with the right to freedom of expression under s 16 of the Constitution as the prohibition of hate speech is susceptible for an interpretation that conforms with s 16.

45 2002 (4) SA 294; (2002 (5) BCLR 433 (CC) par 29.

that South Africa is founded on the values of 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. Thus, open and democratic societies permit reasonable proscription of activities and expressions that pose a real and substantial threat to such values and to the constitutional order itself".

In *Freedom Front v South African Human Rights Commission*⁴⁶ it was noted that by accentuating racial divisions, the impugned slogan in that case (*Kill the Boer*) which was held to be hate speech, exacerbates the fault lines in this society and by so doing runs counter to the spirit and the vision underlying our constitutional order. It is precisely for that reason as Langa CJ observed in *Du Toit v Minister of Safety and Security*⁴⁷ that sound inter-communal relations as an on-going and not a mere transitional project.

This construction of hate speech as a measure preventing the breakdown of inter-communal relations and safeguarding the state finds strong support in comparative foreign case law.

A survey of international and comparative law reveals that there is a general trend among democratic states to prohibit hate speech and other forms of expression that could lead to inter-communal conflict and the disruption of the public peace and the instability of the state. This trend is in step with the prohibition of hate speech as outlined in article 20 of the International Covenant on Civil and Political Rights (ICCPR), a treaty signed and ratified by the majority of states.

In the Canadian judgment of *R v Keegstra*,⁴⁸ the court had to decide on the constitutionality of the prohibition of hate speech in section 319(2) of the Canadian Criminal Code,⁴⁹ more particularly, whether it was compatible with the constitutional right of freedom of expression in the Canadian Charter of Rights and Freedoms of 1982.⁵⁰ The majority of the Court held the prohibition compatible with the right to freedom of expression. The majority stated that the international commitment to eradicate hate propaganda and, most importantly, the special role given to equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, prevalent in the United States at that stage,

46 2000 (11) BCLR 1283 (SAHRC) 1299F.

47 2009 (12) BCLR 1171; 2009 (6) SA 128 (CC) par 15.

48 [1990] 3 S.C.R. 697.

49 S 319 of the Canadian Criminal Code provides as follows:

"(2) Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction".

(In this section, "identifiable group" means any section of the public distinguished by colour, race, religion or ethnic origin).

50 This right is provided for in s 2(b) of the Charter providing that everyone has freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

that the suppression of hate propaganda is incompatible with the guarantee of free expression.⁵¹ The majority also made the following statement which is of particular importance for the construction of hate speech as an element of the law of inter-communal relations:

“The derision, hostility and abuse encouraged by hate propaganda therefore have a severely negative impact on the individual's sense of self-worth and acceptance. *This impact may cause target group members to take drastic measures in reaction, perhaps avoiding activities which bring them into contact with non-group members or adopting attitudes and postures directed towards blending in with the majority.* Such consequences bear heavily in a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society”.⁵² (Own emphasis added).

The interpretation of the prohibition of hate speech as part of the law of inter-communal relations proposed in the present argumentation is clearly echoed and supported in *Keegsta* as it appears from the emphasised passage of the *dictum* above. The prohibition has to prevent communities from antagonistically being pitted against one another in a manner that could ignite communal conflict, thus disrupting the inter-communal peace and the stability of the state.

Significantly, notwithstanding the exceptionally high premium on freedom of speech in the United States and the accompanying reluctance to prohibit utterances on the basis of hate speech, the US courts have on various occasions ruled that prohibitions of certain utterances were in fact not inconsistent with the First Amendment right to freedom of speech. Of particular importance is the judgment of the US Supreme Court in *Virginia v Black et al.*⁵³ in which the court stated that it has also long been recognised in the US that the protection rendered by the First Amendment is not absolute. The court referred to its own jurisprudence that the state may legitimately punish words which by their very utterance inflict injury or tend to incite an immediate breach of the peace

51 [1990] 3 S.C.R. 697 743g-i. The court found psychological harm to be sufficient to constitute hate speech and also noted that the failing to control hate speech might cause the target group to take drastic measures in defence of itself.

52 [1990] 3 S.C.R. 697 at parr 746h-747a. The court also highlighted that the prohibition of hate propaganda does not restrict the democratic credentials of a society but support and protect it when it stated that (par 764): “Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee. Indeed, one may quite plausibly contend that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression, while simultaneously demonstrating dislike for the vision forwarded by hate-mongers” (parr 746h-747a).

53 538 U.S. 343 (2003).

and that the state is therefore not prohibited by the First Amendment, to proscribe the advocacy of the use of force or of the violation of the law where such advocacy is directed to incite or produce imminent lawless action and is likely to produce such action. Threats of violence are therefore outside the protection of the First Amendment.⁵⁴

The prohibition of hate speech as an ingredient of the law of inter-communal relations is closely interwoven with the state's obligation to protect its inhabitants against violence and threats of violence, which is an essential obligation and characteristic of the state itself.⁵⁵ In South African law this obligation is positivised in section 12(1)(c) of the Constitution which provides that for the right to be free from all forms of violence from either public or private sources. This right places a corresponding obligation on the state to protect its inhabitants effectively against actual violence or threats of violence, caused by, so it is submitted here, also by the prohibited forms of expression envisaged in section 16(2) of the Constitution and in section 10 of PEPUDA. Failure by the state on this score entails failure to protect the rights of inhabitant and failure to uphold the law of inter-communal relations. Its failure to maintain the law of inter-communal relations also entails that the state fails itself as the guarantor of the public peace, since the target community of hate speech, as the Canadian Supreme Court also notes in *Keegstra* above, in the face of the defaulting State is left with no option but to take the law into their own hands in order to protect themselves. In this way the state places its own stability in jeopardy. This argumentation resonates in the statement by Ackermann J in *S v Makwanyane and Another* who stated as follows:

"I refer to the fact that in a constitutional State individuals agree (in principle at least) to abandon their right to self-help in the protection of their rights only

54 The jurisprudence that the court referred to was *R.A.V. v City of St Paul* 505 US at 382. *Virginia v Black et al* 538 U.S. 343 (2003) 359. Also see the discussion by Rosenfeld "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" 2002-2003 (24) *Cardozo Law Review* 1523-1567 at 1528 who underscored the need to curb hate speech especially in inter-communal situations (present in most modern states) where the effect of such speech could be much more serious than in intra-communal situations.

55 See in this regard the discussion Malan "The inalienable right to take the law into our own hands and the faltering state" *TSAR* 2007 (4) 642- 654. These provisions reflect one of the features of the modern constitutional state which should be regarded as part of the basic structure of the contemporary constitutional state. The constitutional state, including the South African constitutional order, is (supposed to be) the embodiment and the guarantor of the public peace, in which inhabitants have relinquished any rights to take to law into their own hands in order to protect life, limb and property in favour of the State, which bears the obligation to guard over these rights on behalf of the inhabitants. It is on this basis that individuals are not entitled to take the law into their own hands, since governments through the effective administration of the law protect life, body and property on behalf of the individuals. On this basis the State has a monopoly over the exercise of legitimate force in order to guard over the rights of its inhabitants.

because the State, in the constitutional State compact, assumes the obligation to protect these rights. If the State fails to discharge this duty adequately, there is a danger that individuals might feel justified in using self-help to protect their rights. This is not a fanciful possibility in South Africa.”⁵⁶

3 3 The International Law Relating to Genocide and Related Offences

The international law relating to genocide and related offences may be regarded as the second ingredient of the law of inter-communal relations. Pertinent in this regard are relevant provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), which should be read with the Rome Statute of the International Criminal Court (1998); the Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965); and the International Covenant on Civil and Political Rights (ICCPR) (1966).⁵⁷

Having provided for the right to freedom of expression in article 19, the International Covenant on Civil and Political Rights proceeds to prohibit hate speech in article 20, providing that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

In its turn article 4 of the Convention on the Elimination of All Forms of Racial Discrimination provides that state parties must declare as a punishable offence racial hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin. The provision reads as follows:

“State Parties condemn all propaganda and all organizations... which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as

56 1995 (3) SA 391 (CC) 459 par 168. The obligations on the state emanating from s 12(1)(c) have been interpreted quite broadly by the Constitutional Court. See in this regard: *S v Baloyi* 2000 (2) SA 425 (CC) par 11 (93C-F); *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC) 1070E-F; *Carmichele v Minister of Safety and Security* 2001 (10) BCLR 995 (CC) par 44 (1009F-G) and *Law Society v of South Africa v Minister of Transport* 2011 (2) BCLR 150 (CC) par 63, 175C.

57 These instruments are of general importance, but specifically pertinent to South Africa having signed and ratified all of them thus incurring international obligations under these conventions as recently explained expounded in detail in the judgment of *Glenister v President of the RSA (Helen Suzman Foundation, Amicus Curiae)* 2011 (7) BCLR 651; 2011 (3) SA 347 (CC) parr 179-202.

well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof”.

Article 3 of The Convention on the Prevention and Punishment of the Crime of Genocide, defines genocide as follows:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group”.

Article 4 then proceeds to provide the following acts to be punishable: Genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.

These provisions of the Genocide Convention should be read with article 6 and 7 of the Rome Statute of the International Criminal Court, which defines the crime of genocide and crimes against humanity (two of the crimes over which the International Criminal Court exercises jurisdiction).

Article 6 provides that for the purpose of the Statute, “genocide” includes, amongst others, killing members of the group with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. Genocide basically denies the right of existence of an entire human group in the same way as homicide is a denial of the existence of an individual human being. It is a crime committed simultaneously against individual victims as well as the group to which they belong (and against human diversity).⁵⁸ As such, it represents the most extreme failure of the law of inter-communal relations.

Article 7 provides that for the purpose of this Statute, “crime against humanity” means amongst others murder when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. This crime represents almost as extreme a failure of the law of inter-communal relations as genocide.

The above mentioned treaty provisions on genocide and related international crimes reveal a close affinity with the prohibition of hate speech and incitement to commit violence. The hate speech prohibitions and the prohibition of genocide and related crimes are premised on the common realisation that sound inter-communal relations are the core

⁵⁸ Cryer, Friman, Robinson & Wilmschurst (2007) *An Introduction to international criminal law and procedure* Cambridge at 165.

condition for the public peace and the maintenance of the stability of the state, and that the eventualities that could disrupt the public peace and the stability of the state should therefore carefully be guarded against. The hate speech prohibition and the law relating to genocide and related crimes in international law may therefore be regarded as mutually strengthening bodies of law that together each in its own way and its own domain, contribute to the same end, namely the maintenance of healthy inter-communal relations and fending against the same threat, namely the breakdown of these relations. The Appeal Judgment of the International Criminal Tribunal for Rwanda (ICTR) in *The Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*⁵⁹ (often referred to as the *Media case*) renders further support for this argument.

3 4 The Pertinence of *Ubuntu*

The above account of the law of inter-communal relations clarifies the interpretive context of *ubuntu*. Apart from its importance as is apparent from some of the referred cases in individual relations, the discussion reveals that the value of *ubuntu* should be viewed as an additional ingredient of the law of inter-communal relations. With respect to content, more particularly in terms of detail, the judicial pronouncements in 2 above reveal that *ubuntu* might arguably not add much to the existing branches of the law of inter-communal relations.⁶⁰ This, however, does not detract from its importance, which is contained in the fact that it is a locally coined notion, phrased moreover in conspicuously indigenous terms, thus arguably commanding a distinctive legitimacy and making a singularly persuasive rhetorical appeal.

Of particular interest in the present discussion, that deals with the place of *ubuntu* in constitutional law, is that even though *ubuntu* has hitherto, as the brief rehearsal in 2 above shows, been employed in a variety of contexts, it has, as Chaskalson P, quite correctly pointed out, its primary application in the field of political reconciliation,⁶¹ thus, in the phraseology of the present argument, in the field of inter-communal relations. It is precisely its political significance that renders it of great importance to constitutional law. It is a significant legal, more in particular constitutional notion buttressing inter-communal harmony, which is one of the vital prerequisites for the maintenance of a

59 ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007 available at: <http://www.refworld.org/docid/48b5271d2.html> par 988 (accessed 2014-03-04).

60 *Ubuntu*, as it appears from these *dicta* of the Constitutional may also play an important part in interpersonal relations and therefore in private law. That, however, does not detract from its core inter-communal function.

61 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 131. The political applicability is based in the first place in the postscript to the interim constitution, quoted in 2 above. The political value of *ubuntu* also resonates in Mokgoro J's statements in 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 307 and, though much less pronounced, in a number of the other citations in 2 above.

constitutional dispensation. That is not to say that it will necessarily feature that prominently in litigation, but the importance of a matter for constitutional law is not necessarily to be gauged by its prominence in disputes and more in particular in litigation. After all, constitutional law, including the law of inter-communal relations and thus also *ubuntu*, is regulatory and preventative in nature rather than adversarial or litigious. To the extent that *ubuntu* may play a part in actual (inter-communal) disputes, it is enlisted with the view to restore and to mend disturbed relations and to lay a solid basis for sound future relations rather than producing a winner as opposed to a loser on account of successful litigation. This, on close analysis and as illustrated in the rehearsed judicial pronouncements and the summary of *ubuntu* in 2 above, is essential to *ubuntu* irrespective of the context in which it is featuring (thus also applicable in individual relations within the purview of private law).

The pertinence of *ubuntu* in the context of inter-communal relations – a core constitutional matter as we have argued – was vividly illustrated in the much publicised hate speech case of *Afriforum and Another v Malema and Others*.⁶² The dispute in this matter was a full-fledged inter-communal dispute. It did not only involve one individual in the person of Malema as the then leader of the Youth League of the African National Congress in opposition to one or a few individuals feeling aggrieved of Malema's uttering of inflammatory phrases during public occasions in the song known as *Dubula Ibhunu* (Shoot the Boer).⁶³ On the contrary, on close analysis two communities were in fact clashing as a result of the uttering of the impugned slogans. On the one end there were the African National Congress (who was the second respondent in the matter) and Malema. They were representing large numbers of black people claiming to legitimately use the slogan as part of the heritage of the erstwhile campaign against the minority white government and who claim to use the slogan not to incite violence but purely for commemorative purposes. On the opposite side were sizable numbers of Afrikaners aggrieved and feeling threatened by the slogan and whose feelings and interests were articulated by the applicants in the matter. Hence, being inter-communal in nature, this dispute clearly called for application of and resolution in accordance of the law of inter-communal relations as outlined in the present argumentation.⁶⁴ The inter-communal nature of the dispute also made it next to impossible to resolve the matter by way of a court order. A court order would have to be enforced against large numbers of people – the constituents and supporters of the respondents, instead of one or a

62 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC).

63 The offensive phrases apart from the offensive name of the song were *Awudubula iBhunu, dubula amabhunu baya raypha*. The English translations of the phrases are: "They are scared the cowards you should 'Shoot the Boer' the farmer! They rob these dogs").

64 This was the view argued on behalf of the amicus curiae in *Afriforum and Another v Malema and Others* 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC) set out in the heads or argument of the amicus on file with the author.

few persons,⁶⁵ which is practically impossible and legally inappropriate. The dispute needed to be resolved in a manner that enjoyed the voluntary support of all the parties concerned (and the constituencies represent).

In this judgment, the Court strongly, and to my mind quite aptly, subscribed to the applicability of *ubuntu* as a relevant source governing the dispute and also based its judgment to a considerable extent on *ubuntu*.⁶⁶ The court also drew to a considerable extent on the international law that was in the present discussion cited as an important part of the law of inter-communal relations. The order of the court was nevertheless flawed in that it precisely amounted to the kind of enforceable order made against a numberless amount of people. Hence, although the court's argumentation was correct to the extent that it was premised on dealing with the matter as an inter-communal dispute, the outcome in the form of the unenforceable order was still undesirable because it did not bring this fundamentally constitutional dispute involving strained inter-communal relations to a generally acceptable conclusion in the form of restored inter-communal relations.

On appeal and shortly before the matter was to be heard by the Supreme Court of Appeal (SCA), the President of the SCA instructed the parties to submit the matter to mediation. The mediation process proved successful and led to an agreement reached between the parties that was also made an order of the Supreme Court of Appeal.⁶⁷ To my mind, the settlement bears all the essential ingredients of the resolution of an inter-communal dispute in terms of the law of inter-communal relations presently discussed, including *ubuntu*. The parties agreed to a full and final settlement of their dispute on the basis that it is crucial to mutually recognize and respect the right of all communities to celebrate and protect their cultural heritage and freedom. They further recognized that certain words in certain struggle songs may be experienced as hurtful by members of minority communities. They further agreed as follows:

"Therefore, in the interests of promoting reconciliation and to avoid intercommunity friction, and recognizing that the lyrics of certain songs are often inspired by circumstances of a particular historical period of struggle which in certain instances may no longer be applicable, the ANC and Mr Malema commit to counselling and encouraging their respective leadership and supporters to act with restraint to avoid the experience of such hurt".

The parties also commit themselves to deepening dialogue among leaders and supporters of their respective organizations and formations to promote understanding of their respective cultural heritages and for the purpose of contributing to the development of a future common

65 This would be a *brutum fulmen* not capable of enforcement and thus contrary to the procedural-law principle of effectiveness.

66 *Afriforum and Another v Malema and Others* 2011 (6) SA 240; 2011 (12) BCLR 1289 (EqC).

67 Supreme Court of Appeal Case number 815/2011, order made on 1 November, 2012.

South African heritage. They further committed themselves to continued formal dialogue amongst leaders of the ANC and leaders of Afriforum and TAU-SA and other role players to promote understanding of their respective cultural heritages and aspirations. In conclusion the parties agreed that the mediation agreement be made and order of court.⁶⁸

4 Public Office-Bearing and the Inappropriate Application of *Ubuntu*

Thus far I have sought to illustrate the relevance of *ubuntu* for constitutional law. In doing so the importance of *ubuntu* as an aspect of the law of inter-communal relations has specifically been dealt with. It was noted that *ubuntu* could be playing a part as a value, guiding the way in which organs of state render services to the public in a manner that is sensitive to and responds to the needs of the public in general and to that of individual citizens in question.⁶⁹ In this context, *ubuntu* is pertinent for the way in which public office should be discharged – public services are rendered. However, *ubuntu* should not be applicable to all aspects of public office. In fact, there is one crucial aspect of public office where it would be inappropriate to allow a role for *ubuntu*. That is that ubuntu should not be allowed to serve as an excuse or justification for countenancing the execution of public office-bearing outside the description of the office in question.⁷⁰

Hence, as appropriate and important as *ubuntu* is in the context of inter-communal relations, so impertinent would it be to allow core characteristics identified with *ubuntu* (as outlined towards the end of 2 above) to play any part in the above mentioned context of public office-bearing. These core characteristics are:

“Compassion, humaneness, reluctance to confrontation and an inclination towards mediation and conciliation, good neighbourliness, the re-establishment of harmony in the relationship between individuals, a favouring of restorative, rather than a retributive approach to justice, reconciliation instead of estrangement, the promotion of mutual understanding and the reparation rather than punishment and dialogue premised on mutual tolerance”.

These ingredients of *ubuntu* are crucially important for inter-communal and individual relations, as well as for the way in which public services are rendered. Further, when an incumbent of a public office is being dealt with in his personal capacity, that is, in relation to issues that

68 Para 3(a)-(g) of the Mediation Agreement which was made an order of the Supreme court of Appeal Case number 815/2011, order made on 1 November 2012.

69 See n 33.

70 There are indications of exactly this inappropriate application of *ubuntu* within the context of public office-bearing in South Africa. See for example Malan “The rule of law versus *decisionism* in the South African constitutional discourse” *De Jure* 45 (2012) 272-305 at 296-300.

fall outside his (official) responsibilities as a public office-bearer, *ubuntu* might be relevant in the same way as ordinary well-mannered civilised conduct is relevant. However, these factors should be of no consequence when a public office-bearer who has acted outside the description of the office concerned, is to be dealt with. I now proceed to demonstrate why this is so.

The terms of each public office describes the responsibilities that the office-bearer owes to the public in general in pursuance of the public good. Public office-bearing creates a new *artificial* relationship between the office-bearer and the public. This relationship is governed by the terms of each position of office-bearing. In this relationship the office-bearer ceases to be a private individual and acts solely in accordance with the description of his public office. Individuals with whom the public office-bearer engages in the execution of his office also assume a different, more particularly, public identity. They are also in an official relationship with the office-bearer. This official relationship is not governed by any inter-individual (private) categories that could range from utter animosity to passionate intimacy; it is governed solely by the description of the office-bearing concerned.

The state is premised on this notion and practice of public office-bearing for the common good. Unlike the inherently particularist and voluntary nature of formations of the private domain and the particularist, voluntary and often partisan formations of commerce and civil society, the state is overarching, non-voluntary and non-particularist, serving the common good. Public office-bearing is the essential instrument embodying this salient feature of the state and giving effect to its pursuing of the common good instead of partial or segmental concerns or interests.

All public office-bearers from the president, the chief justice, ministers, directors general, judges right down to the most junior public servant or police officer are to fulfil their duties in terms of the Constitution and legislation (and often in terms of agreements by virtue of empowering legislation). Their suitability as public office-bearers, the terms of their duties of public office and the evaluation of the quality of their discharging of their public duties are regulated by and evaluated in terms of the description of the legal instruments governing the public office concerned. Each position of public office sets its own requirements for those aspiring to fill that particular position of public office and defines the duties and responsibilities attached to such public office and assigned to the incumbent. Public office-bearing demands public office-bearers to adopt an artificial public identity as it were, in terms of which the public office concerned has to play an (artificial) role in terms of the script, that is, in terms of the legally defined duties attaching to the public office concerned.

Ubuntu as a value for promoting the sound interpersonal relations might be constructive in the law of defamation, the assessment of

sentence, etc. Likewise *ubuntu* is important as argued above, as an ingredient of the law of inter-communal relations. *Ubuntu* might also enhance the quality of public service of a public office-bearer who acts within the description of her/his office to all members of the public. Public office-bearing, however, is not relationally-centred in the first place: neither individually nor inter-communally. In contrast, public office-bearing, based on the description of each public office, is duty-based. The rationale for appointing someone to a position of public office is the ability of the appointee to meet the demands of such office; and his/her remaining in that office depends on his/her acting in terms of the prescribed script – the relevant law regulating the execution of that office.

There might be a close pre-existing relationship between the office-bearer authorised to make the appointment and the appointee. That, however, should clearly not be decisive for making the appointment. The decisive factor is the ability of the appointee to comply with the responsibilities of the public office concerned and actually conducting himself in accordance with the requirements of the public office concerned. The way in which a public office-bearer executes his duties may give rise to his cultivating of excellent relations with colleagues, government and (sectors of) society that are to be served by the execution of such public office. This will enhance the quality of the discharging of the office.⁷¹ However, that is not essential to the suitability or otherwise for public office-bearing. The pertinent question from the point of view of public office-bearing, is whether or not the duties associated with each position of public office, as set out in the applicable law governing such public office, are faithfully discharged. If sound relations emanate from the devoted *ubuntu*-orientated way in which the public office is executed and if the office-bearer cultivates sound relations in the process of executing such public office, and if, moreover, he earns himself the trust of the public and respect of colleagues, that, it is a certainly a bonus as it amounts not the office-bearer discharging his/her office in an exemplary way. However, sound relations and popularity may sprout lavishly for the opposite, and often incorrect, reasons. There might be very warm relations, mutual understanding, compassion, solidarity and a sense of tolerance between a corrupt government and the incumbents of anti-corruption agencies, who are reluctant to confront such corruption and who prefer rather to turn a blind eye to it; there will be companionship, mutual understanding and obviously no estrangement between a crooked police commissioner or police force co-operating with or acquiescently responding to the machinations of the criminal underworld; there will be a pleasing comradeship between political-minded senior office-bearers in the public service appointing likeminded, yet professionally incompetent friends not fit for the office concerned; the senior public servant repeatedly failing to act against his lazy and inept juniors, may possibly be hailed for his humaneness,

71 See the observations made in n 36 above.

compassion and tolerance; if office-bearers who have made well-founded accusations of serious misconduct in contravention of their office-bearing each other, decide to settle the acrimony arising from (well-based) accusations and if a tribunal that was supposed to adjudicate the matter accept their settlement, it would once again give rise to good relations between the parties among themselves and the parties and tribunal.

In all these cases there will be sound and cordial relations, yet a complete failure of public office. The essential reason for this is that public office-bearing and private relations are conflated instead of being kept apart. In all these cases the desire for warm private relations are allowed to contaminate the standards for faithful public office-bearing. The artificial identity of public office-bearing governed by the terms of each public office (and for the sake of the common good) is side-lined for the sake of cordial individual relations and private benefit.

In all these and the many more examples that might be cited the standards of public office-bearing are contaminated and public office-bearing destroyed by private relational considerations that are of no relevance to public office-bearing. Precisely on account of this there should in fact be no room for the kind of relational considerations mentioned above in the context of public office. The crucial point is that (*ubuntu*-inspired) sound relations are not decisive for public office-bearing. What is crucial is the description of the office-bearing that sets out the duties of each office for the benefit of the general public and with a view of promoting the public good.

If *ubuntu* is understood to allow these relationally private-inspired assault and destruction of public office-bearing, *ubuntu* is nothing less than a noxious value that undermines the very foundations of the state - a highway to the destruction of public office-bearing and the undermining of the state. In that case it must be vigorously resisted for the menace it is. The immediate indignant retort to this view however, is that *ubuntu* does not permit all these instances of malfunctioning of public office and therefore does not pose a danger to the state. Thus, this malfunctioning and corruption do not flow from any of *ubuntu*'s salient attributes, but from a grave misinterpretation of these attributes and therefore of an egregious misuse of *ubuntu*. This retort is justified. *Ubuntu* is certainly not inherently to blame for the malfunctioning of public office and to undermining the state. On the contrary, in a different context, namely in the field of inter-communal relations (as the discussion in 3 above has shown) *ubuntu*, as an important element of the law of inter-communal relations, is an essential prerequisite for the state and thus particularly relevant for constitutional law.

However, *ubuntu* can easily be misused with very grave consequences for the state if it is enlisted to play a part in the wrong place - in the context of judging public office-bearers who have acted unlawfully, that is outside the description of the public office that he/she occupies. That

amounts assessing persons suitability for public office-bearing in terms of considerations of cordial inter-personal relations instead of in terms of the description and criteria of each public office concerned.

In the final analysis, two of the vital characteristics of the state clarify the appropriate place of *ubuntu* in constitutional law. The first is that the state is the embodiment of the public peace and as such is premised on the principle and reality of inter-communal relations. The second is that the state is premised on the notion and proper functioning of public office-bearing based on the description of and compliance with each public office. *Ubuntu* is pertinent with regard to the first, yet inapposite in the second.