

AMENDE HONORABLE AND UBUNTU: AN INTERSECTION OF ARS BONI ET AEQUI IN AFRICAN AND ROMAN-DUTCH JURISPRUDENCE?

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1 Introduction

It is a commonplace that justice and equity, which are rooted in the Greco-Romano and Judaic traditions, are regarded as primary, transcendental principles of Roman-Dutch law.¹ Not surprising, then, “ars boni et aequi” as the backbone of Roman-Dutch law is a recurring theme in judicial decisions and academic writing in South Africa.

Recently, in the decision of *Le Roux v Dey*,² the Constitutional Court of South Africa once again encapsulated this as the essence of Roman-Dutch law when it characterised that legal system as a “rational, enlightened system of law, motivated by considerations of fairness,” continuing that “in virtually every aspect of Roman-Dutch law one will find equitable principles and remedies which give concrete expression to its underlying concern with justice and fairness.”

What makes this specific dictum significant is the context in which it was pronounced. The Court linked the Roman-Dutch defamation remedy of *amende honorable* with the African concept of *ubuntu* against the backdrop of the fundamental constitutional values of human dignity, fairness and reconciliation and the affirmation of these values in restorative justice.

1 This is apparent from the well-known text of Ulpian in D 1 *1pr*: “Iuri operam daturum prius nosse oportet, unde nomen iuris descendat. est autem a iustitia appellatum: nam, ut eleganter celsus definit, ius est ars boni et aequi.”; and the biblical text of Deuteronomy 6:18, King James version, which reads: “Do what is right and good in the sight of the Lord, that it may go well with you and that you may be able to possess the good land that the Lord your God promised an oath to your fathers”; cf, also, Jacob Dolinger “Unconscionability around the world: Seven perspectives on the contractual doctrine (Introduction)” (1992) 14 *International and Comparative LJ* 435-437 at 436.

2 2011 (3) SA 274 (CC) in par [198].

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The compatibility of the Roman-Dutch remedy (which in the field of defamation involves a retraction and an apology to the victim) and *ubuntu* has been explored in a number of academic articles and other judicial decisions over the past decade. It was also considered at length in two minority judgments in the Constitutional Court case of *Dikoko v Mokhatla*.³

It is noteworthy that it was not only where the courts referred to the intersection of the *amende honorable* and *ubuntu*, but also where they considered a possible revival of the Roman-Dutch remedy, that the notion of restorative justice formed the backdrop and constitutional values the meta-norm.⁴ Thus, in *Le Roux v Dey*⁵ the Court commented with relation to apology in cases of defamation that “it is time for our Roman[-]Dutch common law to recognise the value of this kind of restorative justice” in line with the “shared values of fairness that underlie both our common law and customary law, and which form the basis of the values and norms that our constitutional project enjoins us to strive for.”

The most extensive and the boldest discussion of the possible intersection of honorary amends of Roman-Dutch law and the essentially African concept of *ubuntu* was that of Judge Sachs in *Dikoko v Mokhatla*.⁶ He pointed out that while the *amende honorable* and *ubuntu* belong to different legal cultures and are expressed in different languages, they share a common philosophy and ultimate objective: both encourage a personal encounter between the parties, with a view to resolving their dispute in public and restoring harmony in the community.⁷ Like other judges before him, he proposed that the focus of defamation remedies should shift from the predominant concern with monetary awards to apology, which is in consonance with the constitutional ethos of facilitating “interpersonal repair and the restoration of social harmony.”⁸

While the goal of social and personal reconciliation and the introduction of restorative justice in the sphere of private law is commendable, one has to question the premise that this particular Roman-Dutch remedy, the *amende honorable*, could indeed fulfil that purpose in the law of defamation: whether its aim is or was indeed reconciliation, and consequently whether the *amende honorable* and *ubuntu* are in truth compatible or even amenable to comparison.

Accordingly, in this article I shall focus on whether and to what extent the remedy of honourable amends and the concept of *ubuntu* intersect. I shall not, therefore, consider

3 2006 (6) SA 235 (CC).

4 See *idem* in par [69].

5 (n 2) in par [197].

6 (n 3) in pars [105]-[121].

7 See par [116]; *cf.* also, the discussion of CJ Visser “The revival of the *amende honorable* as applied to defamation by the media” (2011) 128 *SALJ* 327-351 at 333.

8 In par [105]; see, also, par [116]: “I can think of few processes that would be more amenable in appropriate cases to the influence of the affirming values of *ubuntu-botho* than those concerned with seeking simultaneously to restore a person’s public honour while assuaging inter-personal trauma and healing social wounds. In this connection attention should be paid to the traditional Roman-Dutch law concept of the *amende honorable*.”

the advantages and disadvantages of a revival of the *amende honorable* or its role or whether it is appropriate in defamation cases or could protect the reputation of the plaintiff. Nor, importantly, shall I address the doctrinal distinction between defamation (infringement of reputation) and infringement of dignity;⁹ or whether the *amende honorable* can play a role in balancing the right to reputation and the right to freedom of speech.¹⁰

2 Restorative justice, *ubuntu* and *amende honorable*

2.1 *Ubuntu*

African customary law and its underlying principles are founded on *ubuntu*. Much has been written on what precisely “ubuntu” is. One has to agree with the view that the concept cannot be directly translated into Western terms, and that any attempt to explain it by analogy with Western concepts may force it into “European conceptual pigeonholes”.¹¹ What follows below is just that: an attempt to explain briefly the concept of *ubuntu* in analogous Western terms.

In an article on the written discourse on *ubuntu*, Gade¹² examined the initial written sources, none of them legal materials, in which the term “ubuntu” and many other related words appear, listing their various meanings. In the earliest works, some of which date from the mid-nineteenth century, *ubuntu* and its equivalents were generally described as a “moral quality of a person”, denoting humaneness and personhood.¹³

9 See, in this regard, Visser (n 7) at 349-350.

10 See, generally, *Le Roux v Dey* (n 2), *Dikoko v Mokhatla* (n 3) and *Mineworkers Investment Company (Pty) Ltd v Modibane* 2002 (6) SA 512 (W) and the earlier case law referred to in these seminal decisions; see, further, among others, Visser (n 7) *passim*; A Mukheibir “*Ubuntu* and the *amende honorable* – a marriage between African values and medieval canon law” (2007) 28 *Obiter* 583-589 (hereafter Mukheibir “*Ubuntu* and the *amende honorable*”); A Mukheibir “Reincarnation or hallucination? The revival (or not?) of the *amende honorable*” (2004) 25 *Obiter* 455-463 (hereafter Mukheibir “Reincarnation or hallucination?”); JR Midgley “Retraction, apology and right to reply” (1995) 58 *THRHR* 288-296.

11 Mukheibir “*Ubuntu* and the *amende honorable*” (n 10) at 586; *cf.* also, PD de Kock & JMT Labuschagne “*Ubuntu* as a conceptual directive in realising a culture of effective human rights” (1999) 62 *THRHR* 114-120 at 118.

12 CBN Gade “The historical development of the written discourses on *ubuntu*” (2011) 30(3) *South African J of Philosophy* 303-329. TW Bennett “*Ubuntu*: An African equity” (2011) 14 *Potchefstroom Electronic LJ* 30-61 at 31 traced its first appearance in public discourse to the 1920s when it was used as a slogan in a programme of Inkatha, a Zulu cultural movement, that focused on the revival of traditional values.

13 CBN Gade “What is *ubuntu*? Different interpretations among South Africans of African descent” (2012) 31(3) *South African J of Philosophy* 484-503 at 487-492; see, also, Bennett (n 12); R English “*Ubuntu*: The quest for an indigenous jurisprudence” (1996) 12 *South African J on Human Rights* 641-648.

The first Bishop of Natal, the Reverend John William Colenso,¹⁴ in a work on Zulu grammar written in 1855, translated *umuntu* as “human being”.¹⁵ Some six years later, having worked intensively among the indigenous people and familiarised himself with Zulu culture, he expanded on this description and in a Zulu-English dictionary he denoted *umuntu* as “a humane, kind-hearted person”; *umuntu o umuntu* meaning “a true man, humane”.¹⁶ He explained in his first work that *ubuntu* meant “human nature”;¹⁷ and in the latter one that it meant¹⁸ a “good moral disposition” and “goodness of nature”.

But *ubuntu* can also be described as a phenomenon, denoting an abstract concept, a philosophy, an ethos or a world-view.¹⁹ Regarded in this way, *ubuntu* may be seen as the source of African values, and, as the foundation of the underlying principles of African customary law. The essence of this ethos is captured by the African proverb “umuntu ngumuntu ngabantu” (a person is a person through other persons) which, in the words of Justice Mokgoro, encompasses the “key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense [denoting] humanity and morality”.²⁰

With this background in mind, one can understand that restoration of relationships is an inherent feature of African customary law and that the African concept of justice is fundamentally restorative. The purpose of the law is to maintain equilibrium in the community, and legal procedure focuses on reconciliation and integration of disputing

14 John William Colenso (1814-1883) was born in Cornwall, England and became the first Bishop of Natal in 1853. He soon became a champion of the local indigenous people and earned their highest regard. He was called Sobantu which meant “father of the people”. Colenso wrote several books, amongst which were *Ten Weeks in Natal* (1855) in which he raised contentious issues and argued that polygyny was not irreconcilable with Christianity. He further wrote *An Elementary Grammar of the Zulu-Kafir Language Prepared for the Use of Missionaries and other Students* (1955), *First Steps in Zulu* (1859), *Three Native Accounts of a Visit of the Bishop of Natal* (1860) and *Zulu-English Dictionary* (1861). He translated into Zulu the New Testament, various books of the Old Testament and the Book of Common Prayer. See Peter Hinchcliff *sv* “Colenso, John William” *Oxford Dictionary of a National Biography* (2004, online ed 2006) available at <http://www.oxforddnb.com> (accessed 27 Apr 2013).

15 *An Elementary Grammar of the Zulu-Kafir Language Prepared for the Use of Missionaries and other Students* (London, 1955) at 5, 7.

16 *Zulu-English Dictionary* (Pietermaritzburg, 1861) at 353.

17 Colenso (n 15) at 5, 7. Also JW Appleyard *The Kaffir Language Comprising a Sketch of its History* (London, 1850) at 106 described it as “human nature”.

18 Colenso (n 16) at 354.

19 Gade (n 13) at 492-494. In L Mbigi & J Maree *Ubuntu the Spirit of African Transformation Management* (Johannesburg, 1995) at 109 this concept is explained with reference to the Shona proverb “chara chimive hachitswane inda”, meaning a thumb that works on its own is useless, “[i]t has to work collectively with the other fingers to get strength and be able to achieve anything”. See, also, Y Mokgoro “Ubuntu and the law in South Africa” (1998) 1 *Potchefstroom Electronic LJ* 1-12; GJ Van Niekerk “A common law for Southern Africa: Roman law or indigenous African law?” (1998) 31 *CILSA* 158-173 at 162ff; De Kock & Labuschagne (n 11). See IJ Kroeze “Doing things with values II: The case of *ubuntu*” (2002) 13 *Stellenbosch LR* 252-264 for a critique of the interpretation and use of the concept both in academic writing and by the courts.

20 *S v Makwanyane* 1995 (3) SA 391 (CC) in par [308].

parties in the community,²¹ restoring “harmonious human and social relationships where they have been ruptured by an infraction of community norms”.²² The essence of *ubuntu* is thus founded on respect for another’s humanity and it accordingly coincides with the constitutional value of human dignity.

It is not surprising that the courts have on numerous occasions commented on the intersection of *ubuntu* and the fundamental values of the South African constitutional culture,²³ given the fact that *ubuntu* featured in the epilogue to the interim Constitution.²⁴ In judicial decisions it has crystallised as a fundamental value of humaneness, social justice and fairness.

In the context of this article it is also important to reflect very briefly on the role of apology in cases concerning the infringement of personality rights in African customary law. In customary law, apology generally formed part of the ritual of reconciliation of the individual parties themselves and with their community (or communities) as a whole, including the ancestors and those still to be born. For verbal insults, the goal was in the main the making of amends and the cleansing of the plaintiff’s name by payment of damages in the form of a beast.²⁵ In lesser cases, the court merely ordered an apology

- 21 See, eg, I Eberечи “Who will save these endangered species? Evaluating the implications of the principle of complementarity on the traditional African conflict resolution mechanisms” (2012) 20 *African J of International and Comparative Law* 22-41 at 29-34; AN Allott “African Law” in JDM Derrett (ed) *An Introduction to Legal Systems* (London, 1968) 131-156 at 145; GJ van Niekerk “Pre-contact African judicial procedure and the *legis actio* procedure of early Roman antiquity: A comparative analysis” (2009) 4 *Studia Iurisprudentia (Universitatis Babes-Bolyai)* available at <http://studia.law.ubbcluj.ro/articole.php?an=2009> (accessed 28 Apr 2013). The following anthropological writings explore the ancient African customary law of procedure: AT Bryant *The Zulu People* (Pietermaritzburg, 1948); TO Elias *The Nature of African Customary Law* (Manchester, 1956); P Bohannan *Justice and Judgment among the Tiv* (London, 1957); HA Junod *The Life of a South African Tribe* (New York, 1966); E Cotran & NN Rubin (eds) *Readings in African Law* vol 1 (London, 1970); I Schapera *A Handbook of Tswana Law and Custom* (London, 1938); I Schapera *Ethnographic Survey of Africa. Southern Africa Part 3 The Tswana* (London, 1971); HO Mönnig *The Pedi* (Pretoria, 1978); AC Myburgh *Papers on Indigenous Law* (Pretoria, 1985); AC Myburgh & MW Prinsloo *Indigenous Public Law in KwaNdebele* (Pretoria, 1985); SE van der Merwe “Accusatorial and inquisitorial procedures and restricted and free systems of evidence” in AJGM Sanders (ed) *Southern Africa in Need of Law Reform* (Durban, 1981) 141-150.
- 22 See Mokgoro J in *Dikoko v Mokhatla* (n 3) in par [68].
- 23 To name but a few, *Le Roux v Dey* (n 2) in pars [197], [200]; *Dikoko v Mokhatla* (n 3) in pars [68], [69], [86], [112]-[116], [118], [121]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) in par [37]; *Azanian Peoples Organisation v President of the Republic of South Africa* 1996 (4) SA 671 (CC) in par [48]; *S v Makwanyane* (n 20) in pars [227], [237], [263], [308].
- 24 Constitution of the Republic of South Africa Act 200 of 1993; Mokgoro J in *Dikoko v Mokhatla* (n 3) in par [68]. Gade (n 12) points out that by 2011 the term “ubuntu” had appeared in more than twenty Constitutional Court cases: see at 311-313, esp n 10 on 313; cf, also, Drucilla Cornell & Nyoko Muvangua (eds) *Ubuntu and the Law African Ideals and Postapartheid Jurisprudence* (New York, 2012) part 1 “Legal cases” at 31-285.
- 25 GMB Whitfield *South African Native Law* (Cape Town, 1948) at 413; Myburgh (n 21) at 22. On apology and forgiveness in Malawi customary law, see JO Ibik “The customary law of wrongs and injuries in Malawi” in M Gluckman (ed) *Ideas and Procedures in African Customary Law* (London, 1969) 305-317 at 313.

and berated the defendant:²⁶ according to the Sotho saying, an insult is wiped out by an apology.²⁷ It was only in serious cases that the court would award damages. However, that the ultimate objective of the court and of the parties themselves was reconciliation is illustrated by the fact that in South Sotho law, for example, the court would order the payment of a fine in addition to the payment of damages and that the plaintiff would then ask the court to remit the damages once his or her name or reputation had been cleared.²⁸

A nineteenth-century narrative of Fanti (Ghana) customary law yields an interesting description of a defamation case involving an imputation of witchcraft. In Fanti law, too, in less serious cases, the defamatory words had to be retracted and the defendant had to pay a small fine. But accusation of witchcraft was regarded in a very serious light and treated differently to other forms of defamation: the perpetrator was punished in a manner that evokes the earliest descriptions of the *amende honorable* in England. In this case the perpetrator had to walk through the village carrying a heavy stone. An “official” walked with him and at regular intervals beat a gong, at which stage the slanderer had to recant what he had said and confess to his disgraceful behaviour. Importantly, the community jeered and ridiculed him:²⁹ ridicule being regarded as punishment in African culture. Like banishment,³⁰ the gravity of the punishment of ridicule lay in the fact that the perpetrator experienced separation from the community, physical or otherwise.

2 2 *Amende honorable*

In Roman-Dutch law the *amende honorable* and *profitable*, remedies rooted in canon law, replaced the Roman-law *actio iniuriarum* as the means of recovering sentimental damages as satisfaction for injured feelings in defamation and thus became part of South African law.

However, in 1865, the Cape Supreme Court held that the *amende honorable* had fallen into disuse because the courts were not in favour of enforcing it through civil imprisonment, the only way in which it could be enforced.³¹ Nevertheless, in spite of the generally highly persuasive value of decisions of the Cape Supreme Court, other courts continued applying the remedy in numerous subsequent cases in Natal, the Orange Free

26 See *Mokopo v Motinyane* (Feb 1936) reported in H Ashton *The Basuto* (London, 1967) at 265, in which the court sympathised with the plaintiff and “ordered the parties to go home and live together in peace”. In the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law (Proc R155 of 1987) provision is made for a retraction of defamatory words and a public apology. This is regarded as a defence in an action for defamation. J Burchell *The Law of Defamation in South Africa* (Cape Town, 1985) at 316; and NJJ Olivier, NJJ Olivier & WH Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (Durban, 1989) at 363-364 hold that this was received from the common law. However, one should bear in mind, as explained above, that apology formed an integral part of traditional African customary law.

27 Ashton (n 26) at 264.

28 See, eg, *Paul v Masekesela* (Jun 1936) in Ashton (n 26) at 265.

29 John Mensah Sarbah *Fanti Customary Laws* (London, 1897) at 113-114.

30 AC Myburgh “Punishment” in AC Myburgh (ed) *Indigenous Criminal Law in Boputhatswana* (Pretoria, 1980) 43-60 at 48-50, 51, 58.

31 *Hare v White* (1865) 1 Roscoe 246 at 247, 250.

State and the Zuid-Afrikaansche Republiek as well as in the different territories of the Cape Colony itself.³² More than a century later, in 2002, the courts started showing a renewed interest in the *amende honorable* and there is today an ongoing debate about its place in the law of defamation.³³

Based as it is on the notion of Christian forgiveness, the *amende honorable* is generally regarded as being conciliatory in nature, and thus different from the *amende profitable* which is characteristically punitive.³⁴ However, a superficial perusal of the roots of the remedy casts some doubt on the premise that it is conciliatory and fits into the paradigm of restorative justice – a feature that is a *sine qua non* if one wants to bring it into the fold of *ubuntu*, as the courts seemingly want to do. As will be shown below, viewed as a whole this remedy, like the Roman-law *actio iniuriarum*³⁵ (a claim for compensation by way of money), had punitive features – even though the sanction did not entail monetary recompense or incarceration – and was by and large retributive.

There were various facets to the *amende honorable*. Firstly, the person who uttered or published the injurious words had to declare that he or she had acted in the heat of the moment and had not intended the injury (the *declaratio honoris*). This part originated in

- 32 See, eg, *Hart v Robinson* (1897-1898) 12 EDC 24; *Matthews v Hartley and Son* (1882) 1 HCG 13; *Sauer v Radford and Roper* (1883) 2 HCG 518; *W Jefferies v Jos W Shaw* (1867-1868) NLR 22; *Fradd v Jacquelin* (1882) 3 NLR 144; *SH Harker ca RJF Michaelis* 1879 ORC 24; *HAI Bier v W Barratt* 1883 ORC 31; *Bok v Erasmus and Toerien* (1885-1888) 2 SAR 164; *Van Reenen v Mollett* (1885-1888) 2 SAR 5. In *Queen v Houghton and Wright* (1881-1882) 2 EDC 35 at 40 the Court said: “*Van der Linden*, one of the latest authorities on the Roman-Dutch Law, whose text-book is in constant use in this Colony, says in his *Institutes of the Laws of Holland*, p. 340: ‘Crimes, against the honour of our fellow-men, otherwise termed defamation (*injuriën*) generally afford only ground for a civil action for the *amende honorable et profitable*.’” Also after Union, the courts applied the remedy: eg, in *Ward-Jackson v Cape Times, Ltd* 1910 WLD 257 at 263 the Court held that “although the practice seems to have fallen into desuetude – a plaintiff might sue for an apology, or the *amende honorable*, as it is called”.
- 33 See, eg, *Le Roux v Dey* (n 2); *Dikoko v Mokhatla* (n 3); *Mineworkers Investment Company v Modibane* (n 10); *Young v Shaikh* 2004 (3) SA 46 (C) at 57. Cf, eg, R Zimmermann “The law of obligations – character and influence of the civilian tradition” (1992) 5 *Stellenbosch LR* 5-31; CJ Roederer & J Grant “Law of delict” (2002) *Annual Survey of South African Law* 376-465 at 460-463; Midgley (n 10); Mukheibir “Reincarnation or hallucination?” (n 10); Mukheibir “*Ubuntu* and the *amende honorable*” (n 10); J Neethling & JM Potgieter “Herlewing van die *amende honorable* as remedie by laster: *Mineworkers Investment Company (Pty) Ltd v Modibane* 2002 (6) SA 512 (W)” (2003) 66 *THRHR* 329-333; J Neethling “Laster: Die *amende honorable*, apologie en die *quantum solatium* *Young v Shaikh* 2004 (2) SA 46 (K)” (2004) 67 *THRHR* 698-702; Thino Bekker “The re-emergence of *ubuntu*: A critical analysis” (2006) 21 *SA Public Law* 333-344; Visser (n 7).
- 34 In *Gray v Poutsma* 1914 TPD 203 at 218, referring to Grotius *Inleiding tot de Hollandsche rechtsgeleertheyd* 3 35 2 and Sande *Decisions Frisicae* 5 8, the Court pointed out that the *amende honorable* was compensation, and the money payment (the *amende profitable*) a penalty. Cf, also, R Zimmermann *The Law of Obligations – Roman Foundations of the Civilian Tradition* (Cape Town, 1990) at 1072; Mukheibir “*Ubuntu* and the *amende honorable*” (n 10) at 284.
- 35 On the penal nature of the *actio iniuriarum*, see G 4 112: WM Gordon & OF Robinson *The Institutes of Gaius* (Trowbridge, 1988) at 485; F de Zulueta *The Institutes of Gaius* vol 2 (Oxford, 1953) at 198, 229-230, 279; Zimmermann (n 34) at 1061-1062; Melius de Villiers “The Roman law of defamation” (1918) 34 *LQR* 412-419.

Germanic law.³⁶ Then followed a retraction and a statement that the words were untrue (the *palinodia*, *recantatio* or *retractio*).³⁷ The last stage was the apology (*deprecatio*), which involved an admission that he or she had done wrong and a plea for forgiveness.³⁸ These two stages originated in medieval canon law. Because defamation was regarded as a sin, the Church had jurisdiction over defamation cases *ratione peccati*, in accordance with the doctrine of the *ultramontani*.³⁹ It was thus the ecclesiastical courts that first established an apology as a remedy for defamation.⁴⁰

Zimmermann⁴¹ points out that the original aim of the *palinodia*, which became the dominant feature of the *amende honorable*, was reparation of the injured person's honour, and that it was not purely penal.⁴² But there is also support for the view that the remedy was principally punitive.

In the earliest examples of the *amende honorable*, its retributive character is foremost and it has been described as an "ignominious punishment" aimed "to expose the offender to the contempt of the spectators, and to make him be looked upon as unworthy the society of his old friends".⁴³ Similarly, in the 1771 edition of the *Encyclopaedia Britannica*, or *Dictionary of Arts and Sciences*,⁴⁴ the *amende honorable* was described as "an infamous kind of punishment inflicted in France upon traitors, parricides, or sacrilegious persons in the following manner: the offender being delivered into the hands of the hangman, his shirt is stripped off, and a rope put about his neck, and a taper in his hand; then he is led into court, where he must beg pardon of God, the King, the Court, and his County. Sometimes the punishment ends here".

36 Zimmermann (n 33) at 25; cf, C von Wallenrodt "Die Injurienklage auf Abbitte, Widerruf und Ehrenerklärung in ihrer Entstehung, Fortbildung und ihrem Verfall" (1864) 3 *Zeitschrift für Rechtsgeschichte* 238-300 at 243ff.

37 Johannes Voet points out in his *Commentarius ad pandectas* vol 2 (Geneve, 1769) 47 10 17 that the actio palinodia was not known in Roman law.

38 For a historical survey of apologies in South African law, see, generally, Melius De Villiers *The Roman and Roman-Dutch Law of Injuries* (Cape Town, 1899) (hereafter De Villiers *Injuries*) at 177-179, which is today still regarded as a seminal work on defamation; see, also, his article "Apologies" (1921) 38 *SALJ* 129-132 (hereafter De Villiers "Apologies") at 130, and the references there to apologies in Plautus' *Amphitruo* and Terence's *Adelphi*; see, also, B Ranchod *Foundations of the South African Law of Defamation* (Leiden, 1972) at 65-66; Zimmermann (n 34) at 1072-1074.

39 See Zimmermann (n 34) at 824 n 283 for an exposition of the origins of the principle of restitution in the teachings of the Church.

40 De Villiers "Apologies" (n 38) at 130 notes that in terms of a resolution of the Council of Carthage a cleric who had defamed another had to beg for forgiveness: "Clericus maledicus cogitur ad veniam postulandam."

41 (n 34) at 1073-1074 and cf, generally, Zimmermann (n 33) at 24-27.

42 A view held by the courts of Holland too, that allowed the *amende honorable* and *profitable* (or actio iniuriarum aestimatoria) to be instituted concurrently. Cf, also, De Villiers *Injuries* (n 38) at 179.

43 Jeremy Bentham *Theory of Legislation* (tr from the French of Etienne Dumont by R Hildreth, London, 1876) at 341-342. In JM Lely *Wharton's Law-lexicon forming an epitome of the law of England, and containing full explanations of technical terms and phrases, both ancient ...* (London, 1902) sv "amende honorable" at 53, the remedy is described as "an adequate reparation, an apology. In French law a species of punishment to which offenders against public decency or morality were anciently condemned".

44 Vol 1 (Edinburgh, 1771) sv "Amende honorable" at 134.

The different forms it assumed in reformation France reveal the humiliating and degrading effect the *deprecatio Christiana* (prayer for forgiveness) had on the perpetrator. Generally, the spoken words of the *deprecatio* were accompanied by physical acts to enhance their effect.⁴⁵ Even secular cases retained a distinctly religious character and the perpetrator had to plead God's forgiveness.⁴⁶

The following are some examples: A seventeenth-century work on ecclesiastical history recounted the fate of one Natalis Bedda, a "Doctor of the Faculty of Divines at Paris", who had spoken publicly against the divorce of Henry VIII. In 1536 he "was condemned to make an Amende honorable ... before the Church of Nôtre Dame at Paris, declaring that he had spoken against truth, and against the King". The *amende honorable* is explained as "a publick begging Pardon for Offences: Sometimes the Person who is thus to beg Pardon, goes to the Place where he is to acknowledge fault, with a rope about his Neck and a Torch in his Hand".⁴⁷ In 1552, during the reign of Henry II (1547-1559) in France, heretics were sentenced to make an *amende honorable* "in their Shirts, bare-footed, a Rope about their Necks, holding each of them a link burning of a pound weight ... [one of them with] Faggot^[48] upon his back."⁴⁹ And, during the reign of Charles IX (son of Henry), in 1560, "the Parliament [of Paris⁵⁰] sentenced [a perpetrator] to an Amende honorable before the Courts assembled, bare-headed and bare-footed, with burning Taper in his hand, to confess his Crime aloud, and to beg pardon of God, the King, and Justice".⁵¹

- 45 See Von Wallenrodt (n 36) at 296; De Villiers *Injuries* (n 38) at 178; Zimmermann (n 33) at 26-27.
- 46 Eg. in a description of the French legal profession in the late seventeenth century, William Forsyth gave an account of the case before the Parlement of Paris (1673) against the Marchioness de Brinvilliers, "the great poisoner", who was found guilty of the murder of close relatives. She was condemned "to make the *amende honorable* ... placed on a cart with her feet naked, and a cord round her neck, holding in her hands a burning torch of the weight of two pounds; and there being on her knees she shall say and declare [her crimes] ... after which she repents and craves pardon of God, the king and justice": *Hortensius, or, The Advocate An Historical Essay* (London, 1849) at 202-303.
- 47 Louis Ellies Du Pin *A New Ecclesiastical History containing an Account of the Controversies in Religion; the lives and writings of ecclesiastical authors ...* vol 13 (containing the history of the fifteenth century) (London, 1699) at 425; see, also, the accounts in the London magazine, (Jan 1699) 10 *The Present State of Europe or the Historical and Political Monthly Mercury* at 301, 308.
- 48 "Faggot" here referring to a bundle of sticks or twigs tied together used to burn on a fire: *Concise Oxford Dictionary*.
- 49 *A Compendious History of the Reformation in France ...* vol 1 bk 1 (1714) at 149.
- 50 The French *curia regis* established in the thirteenth century.
- 51 *A Compendious History of the Reformation in France* (n 49) bk 3 at 593. The story of the church bell of La Rochelle evidences the ludicrous lengths to which the *amende honorable* was taken in the persecution of heretics. This bell was condemned in 1685 for assisting heretics. It was whipped and buried. Then it was disinterred as a symbol of its rebirth into the service of Catholics. "They compelled it to speak ... made it promise that it would never again return to the conventicle. It made *amende honorable*. Finally it was reconciled, baptised, and bestowed upon the church which bears the name of St Bartholomew": George Ives *A History of Penal Methods Criminals, Witches, Lunatics* (London, 1914) at 525.

Although the *amende honorable* was considerably watered down in Victorian England,⁵² in the sphere of defamation it retained an element of humiliation and was still accompanied by physical acts that brought shame on the perpetrator and could be regarded as a punishment for injuring another's feelings. Thus an English common-law court ordered a woman to call herself a liar while holding her nose between thumb and fore finger, and in another case a knight was ordered to ride his horse facing its tail.⁵³ Remedies for offences against honour included chastisement that was analogous to the offence and could "operate at the same time as a means of satisfaction to the party injured".⁵⁴ Among others, the offender could be required to kneel before the injured party, or wear "emblematic dresses" or "emblematic masks"; or "the persons whose good opinion is most important to the offender [were] called to be present at the execution of the sentence"; and, "[f]or an insult to a woman, the man [had] to be dressed in women's clothes, and the retort to be inflicted by the hand of a woman".⁵⁵

As indicated, the roots of the *amende honorable* in South African law may be traced to Roman-Dutch law,⁵⁶ but not all the Roman-Dutch institutional writers emphasised the punitive features of the remedy. Unlike the descriptions by Van Alphen⁵⁷ and Leeuwen,⁵⁸

52 In England the ecclesiastical courts had jurisdiction to hear defamation cases until about two decades into Victoria's reign when this jurisdiction was usurped by the secular courts: see De Villiers "Apologies" (n 38) at 131.

53 *Ibid.*

54 Bentham (n 43) at 305-306.

55 *Idem* at 305.

56 Ranchod (n 38) at 90; RW Lee *An Introduction to Roman-Dutch Law* (Oxford, 1931) at 331. M Bliss *Belediging in die Suid-Afrikaanse Reg* (Utrecht, 1933) at 39-43 demonstrates that the old authorities did not always distinguish completely between the principles of defamation in civil and criminal law, and that the *amende honorable* and *profitable* remained penal in nature; *cf.* also, 91-93.

57 *Nieuw verbeterde en vermeerderde Papegay ofte formulier-boeck* vol 1 (s'Graven-Hage, 1658) c 8.

58 Simon van Leeuwen *Het Rooms-Hollands regt* (Amsterdam, 1708) 4 37 1 (in which he refers to Van Alphen's *Papegay*) and 5 19 18. In his *Censura forensis* (Leiden, 1741) 5 25 8, he equated the *amende honorable* and *profitable* with "wederevening": "De Wederevening, vulgo, honorable ende profitable amende" and added that in cases of verbal injury the *amende honorable* and *profitable* might not be sued for criminally: "adeoque propter injuriam verbalem criminaliter agi non solet". Hugo de Groot *Inleidinge tot de Hollandsche rechts-geleerdheid* (met aantekeninge van Fockema Andreae, Arnhem, 1926) 3 32 7 stated that two obligations flowed from a crime: the one for punishment, the other restitution (wederevening der onevenheid); *cf.* also, Nic Olivier "Moraalfilosofiese grondslae vir die aksie vir pyn en lyding" (1990) 55(4) *Koers* 535-564 at 559, 561-562. In *Gray v Poutsma* (n 34) at 218 the Appellate Division, too, linked the *amende honorable* and *profitable* to the concept of "weder-evening": "*Injuria* was punished criminally if it were at all serious (*atrox*). Van Leeuwen (*Cen. For.* 5, 25, 8), says that the gravity of the injury depended on the person, place and time or other circumstances, so if a public person such as a magistrate were insulted in respect of his office the punishment is discretionary (*arbitraria*), in addition to reparation of the loss. Then he adds that nowadays it is usual to, condemn the offender to recantation or *palinodia* and to a fine to be applied to the benefit of the poor and sometimes also to the benefit of the injured party, if he asks it, in order to indemnify him for the injury done him by the defamation. The 'weder evening', commonly called *honorable en profitable amende*, is not usually sued for criminally on account of verbal injury and it is hardly conceivable that the fiscus would have an action."

those by Grotius⁵⁹ and Van der Linden,⁶⁰ for example, do not refer to any additional physical acts that would add to the shame of the defendant.

Van der Linden wrote that the *amende honorable* entailed that “den injuriant voor den Regter te doen verzoeken om vergiffenis, met verklaring, dat hem het geurde van harten leed is, en dat hij den geinjuriëerden houdt voor een man van eer, op wiens gedrag hij nietz te zeggen weet”.⁶¹ Interestingly, this definition was taken up in article 7 of Van der Linden’s 1807/1808 Draft Civil Code and was also included in article 1322 of the 1809 Code. In article 1326 of the latter Code, van der Linden’s definition was expanded and the judge was given a discretion on the form of the apology, depending on how malicious the actual defamation was. This gave the judge the opportunity to prescribe an apology that would be humiliating enough to satisfy the plaintiff’s need for retribution; in other words, the goal was to impair the defendant’s honour to the same extent that the plaintiff’s honour had been damaged, thus satisfying the plaintiff’s need for revenge. This illustrates the French influence on Dutch legal practice.⁶²

Van Alphen,⁶³ in his discussion of *injuriën* in the mid-seventeenth century Netherlands, recounted a humiliating practice: “ende Gedaeghde ghecondemneert deselve injuriën te beteren, eerlyck ende profytelyck. Eerlyck, mids comparerende in de audientie van desen Hove, bloots hooft, op syn knyen, biddende de Justirie, end Impetrant ... om vergiffenis”. In similar words Leeuwen described in his *Het Roomsche Hollands recht*,

59 *Inleidinge* 3 32 17, 3 35 2 and 3 36 3; *De jure belli ac pacis* 2 17 22 (tr William Whewell Grotius on the Rights of War and Peace – an abridged translation London, 1853): in the latter work he indicated that the *amende honorable* was the compensation and the *amende profitabile* the punishment. He further explained the form the compensation took: confession of fault; manifestation of respect; testimony of the innocence of the person who had suffered the injury; DG van der Keessel *Praelectiones iuris hodierni ad Hugo Grotii introductionem ad iurisprudentiam Hollandicam* (tr HL Gonin & D Pont Voorlesinge oor die Hedendaagse Reg ... vol 5 Amsterdam, 1967) ad Grotius 3 32 17; Ranchod (n 38) at 64-66.

60 *Koopmans Handboek* (Amsterdam, 1806) 1 16 4 and 2 5 16.

61 *Idem* 1 16 4. In 2 5 16 he wrote: “De misdaden tegen de eer van onze mede-menschen, anders injuriën genaamd, hebben doorgaans alleenlijk een civiele actie, tot amende honorabel en profitabel.” This description by Van der Linden is based on Grotius *Inleidinge* 3 35 3 and 3 36 2. In *Norton v Spooner* (1854) 9 Moo 103, 14 ER 237 (PC) at 106-107, 238, a case before the Privy Council from the Colony of British Guiana (a territory where Roman-Dutch law had been received), the Court commented: “In Van der Linden’s ‘Manier van Procedeeren,’ 1st vol., p. 197, (which was also supported by Merula’s Practice, vol. i., p. 467,) they found, under the head of ‘Reparation for injuries,’ the form of conclusion in the claim and demand, thus stated: ‘And making claim, concludes that the Defendant shall be declared to have atrociously injured the Plaintiff (Impetrant), and moreover be condemned to make amends for such injuries, honourably and profitably. *Ilonou’rably*, by appearing at the sitting of the Roll of this Court (or before Counsellor Commissaries of this Court), and there, with head uncovered, and within the hearing of every one, to ask the Plaintiff (should he wish to be present) pardon, declaring that he sincerely regrets having spoken and uttered the injurious words and language, as more fully set forth in the Plaintiff’s claim (mandament); and that he considers the Plaintiff to be a man of honour, against whose character and conduct he is not aware any thing can be said.”

62 See, also, Ranchod (n 38) at 95-96.

63 1 8 at 94, *cf.* also, 47.

how the defendant had to perform a physical act in addition to the spoken words to confirm his sincerity or to add to his humiliation.⁶⁴

But, even where the form of the remedy had become completely diluted, it was still regarded as mortifying for the plaintiff and had the resulting punitive effect. Invoking Seneca's dictum in his *ad Ira*,⁶⁵ Voet held that "[s]uch a recantation carries with it a great enough penalty, since ... no one 'is more seriously touched than he who is handed over to the tortures of penitence'".⁶⁶

Of course, the defendant's shame also enhances the plaintiff's satisfaction, as does the reluctance to apologise; it is only natural that a defendant would rather apologise, even very reluctantly, than pay damages.⁶⁷ Visser⁶⁸ notes that the judgement in *Le Roux v Dey* clearly confirms that "a court-ordered apology can operate with punitive effect". He continues:

[I]n addition to the severe disciplinary measures taken by the school and the criminal sanction imposed on the applicants in a related criminal case, the applicants are additionally forced by the decision to express internalised shame as determined by the court imposing its own moral standard instead of just paying damages.⁶⁹

As to be expected, today one of the arguments against forced apologies is that they are cruel and inhumane and should therefore rather be characterised as a form of punishment. That brings to the fore the debate on whether punitive damages are appropriate in private law.⁷⁰ I shall not discuss this aspect here.

64 *Inleidinge* 5 19 18: "[b]loots-hoof op zijn Knyen te bidden de Justitsie en den Impetrant ... om vergiffenis".

65 Voet referred to *Ad Ira* 3 26 2: "Quid ergo?" inquis 'inpune illi erit?' Puta velle te, tamen non erit; maxima est enim factae iniuriae poena fecisse, nec quisquam gravius adficitur quam qui ad supplicium poenitentiae traditur" available at <http://www.thelatinlibrary.com/sen/sen.ira3.shtml> (accessed 10 May 2013).

66 *Commentarius ad pandectas* 47 10 17 (tr Percival Gane *The Selective Voet being the Commentary on the Pandects by Johannes Voet* vol 7 (Durban, 1957)). The Latin text of the *Commentarius* reading: "qualis recantatio sat magnum in se poenam habet, dum nullus gravius afficitur quam qui ad supplicium poenitentiae traditur ..."; he nevertheless stressed that even though the action causes infamy, it lies in civil law and must not be "reckoned ... among criminal judicial proceedings" (Gane at 235-236). Cf. also, De Villiers "Apologies" (n 38) at 132.

67 De Villiers "Apologies" (n 38) at 129; cf. also, Wolfgang Schild "History of crime and punishment" in Christoph Hinkeldey (ed) *Criminal Justice through the Ages. From Divine Judgement to Modern German Legislation* vol 4 (tr John Fosberry, Rothenburg, 1981) 99-173 at 149. Schild classified the recantation and apology as a degrading punishment because the perpetrator had to stand or kneel in a public place and in a loud voice retract what he had said and "strike his mouth with his flat hand".

68 (n 7) at 350.

69 At 344, Visser *idem* draws a comparison between the punitive element in American law and that in the historical cases highlighted by Melius de Villiers "Apologies" (n 38); see, also, Neethling (n 33) at 700; Neethling & Potgieter (n 33) at 332; cf Midgley (n 10) at 290, 293.

70 In the decision in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) in par [62], the Constitutional Court noted that "in the Aquilian action and in the action for pain and suffering an award of punitive damages has no place" but noted that "the Appellate Division has, however, recognised that in the case of defamation punitive damages may in appropriate cases be awarded"; cf. further, Midgley (n 10) at 293; Mukheibir "*Ubuntu* and the *amende honorable*" (n 10) at 583.

Against this background of ridicule, shame, insincerity and retribution it is difficult to reconcile the remedy with the concept of restorative justice that will now be explained.

2 3 Restorative justice

The goal of restorative justice is to reconcile the parties, to “make the victim whole”, and to reintegrate the defendant into society.

Historically, conciliation has not been a feature of the Western system of justice, but since the advent of our constitutional democracy, it has been playing an increasingly important role in South African jurisprudence. Restorative justice is an embodiment of the values enshrined in the Constitution⁷¹ and has developed in response to the constitutional dictates of fairness, conciliation and equality.⁷²

It appears that a distinction is not always drawn between spontaneous apologies in the sphere of restorative justice, which does indeed intersect with the principles of *ubuntu*, and the forced apology in the private-law remedy of *amende honorable*, with its punitive elements. In the context of communities in transition, the function of apology has crystallised as symbolic reparation following mass atrocities: in these instances the apology is made freely, with a view to reconciliation and the restoration of social relationships between individuals and in society as a whole. As such it gives expression to restorative justice, a concept that is being increasingly utilised in the field of criminal law.⁷³

Nevertheless, it has been argued that forced apologies could play a role in healing the community “by morally condemning the conduct of the offender” and satisfying the plaintiff’s “retributive thirst” by communicating and enforcing normative as opposed to legal standards”.⁷⁴ However, given the general disingenuousness of a forced apology, the

71 The Constitution of the Republic of South Africa, 1996.

72 See, eg, pars [197]-[202] in *Le Roux v Dey* (n 2).

73 See Mia Swart “Sorry seems to be the hardest word: Apology as a form of symbolic reparation” (2008) 24 *SAJHR* 50-70 at 70; cf, also, Cornell & Muvangua (n 24) at 14-16, 31-64. In *Dikoko v Mokhatla* (n 3) in par [115] Sachs J remarked: “Like the principles of restorative justice, the philosophy of *ubuntu-botho* has usually been invoked in relation to criminal law, and especially with reference to child justice.” Further, it is important to distinguish between *amende honorable* (apology ordered by the court) and an apology which is freely made during or before the court proceedings. Unlike the forced apology, such an apology may influence the amount of damages awarded. See Midgley (n 10) at 292-293; Neethling (n 33) at 701. In Roman law, D 47 10 17 6, the willing apology was a defence against the *actio iniuriarum*; cf, also, Voet 47 10 23 1; De Villiers *Injuries* (n 38) at 244-246.

74 Visser (n 7) at 343; Zimmermann (n 34) at 1072 holds that the *amende honorable* is founded on the concept of distributive justice, its significance being the distribution of respect. Distributive justice is concerned with the fair distribution of benefits and burdens and involves the relationship between society and individuals. In a discussion of the influence of different perceptions of justice on remedies granted by the courts, Mbazira (C Mbazira *Litigating Socio-economic Rights in South Africa* (Pretoria, 2009) at 103ff) juxtaposes distributive and corrective justice. The former is regarded as multilateral, while the latter is bilateral. According to Mbazira, distributive justice (see the discussion at 111ff) is therefore concerned not only with the relationship between individuals and individual interests, but also with the impact of the disturbed relationship on society and societal interests. If the *amende honorable* were founded on distributive justice it would indeed be reconcilable with the underlying values of *ubuntu*. On corrective justice, see Mbazira at 105-111.

degree of humiliation it usually engenders and people's natural reluctance to make such an apology, it is doubtful whether it would restore any relationship, supposing there had been one in the first place.

The pre-existence of a social relationship between plaintiff and defendant is problematic in modern-day societies. Obviously such a relationship is lacking in disputes between a defendant from the media and a plaintiff, and it has therefore been argued that in media defamation cases the *amende honorable* cannot restore interpersonal relations and achieve social harmony.⁷⁵ This also applies to many, if not most other defamation cases. Individualism is one of the invariable characteristics of the European legal culture.⁷⁶ Hostility between opposing parties in a private-law dispute makes no difference to society at large. It does not fall into the same category as reconciliation following on mass atrocities such as apartheid or genocide, which are by nature structural or systemic violations⁷⁷ that go to the heart of society as a whole.

Communal relationships in an African context are different, as is the context of restorative justice. Neither *ubuntu* nor restorative justice sets out to *create* relationships. In both cases the goal is the *restoration* of ruined relationships. African legal culture is characterised by communitarianism, and social solidarity permeates all spheres of life, forming the foundation of African legality and justice. *Ubuntu*, according to Kenneth Kaunda, in his book *A Humanist in Africa*,⁷⁸ originated in small-scale societies that were by nature mutual, accepting, inclusive, and participatory and in which the only perception of life was life-in-community: preservation of relationships was a fundamental communal value. This is the foundation of reconciliation in African customary law.

The goals of apology in Western and African legal cultures seldom coincide.

3 Conclusion

The question may be asked whether the assumed link between the *amende honorable* and *ubuntu* is not forced. Is it not true that *ubuntu* is dragged into decisions as “a gracious and affirmative gloss to a legal finding already arrived at”?⁷⁹

Generally, it appears that the principles of justice and equity guide the courts when they have to determine whether the *amende honorable* would be an appropriate remedy in a dispute, with reference to the circumstances of the specific case under consideration. In *Mineworkers Investment Co (Pty) Ltd v Modibane*,⁸⁰ the Constitutional Court called

75 See Visser (n 7) at 339 and *cf*, generally, 334-339.

76 F Wieacker “Foundations of European legal culture” (tr by E Bodenheimer) (1990) 38 *American J of Comparative Law* 1-29 at 20-29. At 20 he describes individualism as “the primacy of the individual as subject, end, and intellectual point of reference in the idea of law”.

77 These are sustained organisational violations that stem from institutional rather than individual behaviour: see the discussion by Mbazira (n 74) at 110-111.

78 (London, 1966) at 22-28.

79 Sachs *Dikoko v Mokhatla* (n 3) in par [113]. English (n 13) at 641 remarks that one of the purposes of *ubuntu* is that of a “marketing device” which is used “to put an African imprimatur on a set of civil liberties and freedoms forged largely out of Western instruments”.

80 (n 10) in pars [25]-[27]; *cf* Roederer & Grant (n 33) at 461-463.

for a revival of the *amende honorable* in the interests of justice and in line with the imperatives of our times,⁸¹ and in the decisions in both *Dikoko v Mokhatla*⁸² and *Le Roux v Dey*⁸³ the court called for the development of a remedy in the shape of an apology, along the lines of the equitable principles of Roman-Dutch law. That it would be fair and just to order an apology in lieu of damages under certain circumstances, or in addition to the damages, may be true.⁸⁴ As indicated, restorative justice has a place in cases of mass atrocities, for example. In addition, it may play a role in private law if there is a pre-existing relationship between the plaintiff and defendant, for instance in family disputes or where both parties are members of a defined community such as a school.⁸⁵ However a decision to order an apology should not be based on the constitutional imperative of conciliation and restorative justice or *ubuntu*. And its primary goal should not be to heal interpersonal or societal relationships through the apology. It should be borne in mind that even the African model of justice in cases of defamation, described above, was attained through reconciliation but also through correction. There was inter-dependence, as it were, of restorative, corrective and retributive justice;⁸⁶ but the retribution was never such as to negate the reconciliation.

Finally, in *Dikoko v Mokhatla*⁸⁷ Sachs J posited *ubuntu* as the more recent legal concept: “A good beginning for achieving greater remedial suppleness might well be to seek out the points of overlap between *ubuntu* – *botho* and the *amende honorable*, the first providing a new spirit, the second a time-honoured legal format.”⁸⁸ Although the notion of *ubuntu* is indeed new to Western jurisprudence, it is, of course, not a new concept in African customary law, the original law that applied in Southern Africa. This *dictum* only emphasises how difficult it is to transcend the existing paradigm of state-law pluralism in South Africa. However good the intentions of our judiciary, the Roman-Dutch common law is still regarded as the primary legal system and African customary law as a secondary system. Ultimately, African customary law – and culture for that matter – still has a long way to go to attain an equal footing with the Western component of our law and its rightful, constitutionally protected⁸⁹ position as a source of South African law.

- 81 In par [29]; the Court further stated: “In the circumstances of this particular case, I am satisfied that it would be just and equitable that the defendant be given a choice between making a public apology or paying damages. I shall make an order to this effect”; see, generally, pars [29], [33].
- 82 (n 3) in par [105], [69].
- 83 (n 2) in par [199].
- 84 See, eg, *Young v Shaikh* (n 33) at 57 where Nel J found: “I do not believe that a published apology in this matter would serve the interests of justice. Freedom of expression does not include the right to falsely attack the integrity of a fellow citizen for selfish reasons or for reasons which have nothing to do with ‘public benefit’”; see, also, Neethling (n 33) at 699.
- 85 As in the case of *Le Roux v Dey* (n 2).
- 86 Cf. W Lambourne “Transitional justice and peacebuilding after mass violence” (2009) 3 *The International J of Transitional Justice* 28-48 available at <http://ijj.oxfordjournals.org> (accessed 19 Apr 2013).
- 87 (n 3).
- 88 In par [121] (my emphasis).
- 89 See s 211 of the Constitution of the Republic of South Africa, 1996.

But then, the fact that our courts have shown that they are willing to internalise concepts of African customary law and to utilise them at a practical level, confirms same movement towards a functional convergence of our (essentially Roman-Dutch) common law and African customary law.⁹⁰

Abstract

Amende honorable is a defunct delictual remedy for defamation that originated in medieval canon law and became part of South African law through Roman-Dutch law. This remedy is aimed at restoring the dignity of the plaintiff by an apology from the defendant. It has fallen into disuse in South Africa, but recently, within the framework of restorative justice, South Africa's highest courts have reassessed the suitability of this remedy in restoring the dignity of the plaintiff by an apology from the defendant. Importantly, on various occasions they commented on its interrelation with the African principle of *ubuntu* which is regarded as a fundamental postulate of African customary law and in effect the foundation of restorative justice in African jurisprudence. In this article I address the suitability of any comparison of the equitable principles of Roman-Dutch law as expressed in the remedy of *amende honorable* and the equitable principles of African jurisprudence rooted in *ubuntu*.

90 See GJ van Niekerk "Reflections on the interplay of African customary law and state law in South Africa" (2012) 4 *Studia Iurisprudentia (Universitatis Babes-Bolyai)* available at <http://studia.law.ubbcluj.ro/articole.php?an=2012> (accessed 14 May 2013) at n 34.