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THE ROLE OF THE UBUNTU PHILOSOPHY IN THE SOUTH AFRICAN TRANSITIONAL JUSTICE PROCESS AND IN SELECTED AREAS OF SOUTH AFRICAN LAW*

I. INTRODUCTION

Political transformation – a paradigmatic example of which is the collapse of authoritarian rule and the birth of a new democracy – is not only a time of radical political, economic and social change, but also a period of major transformations at the very foundations of the legal system. This is because fundamental shifts in the axiology of the body politic result in new norms being introduced into the legal system. Some of those – such as the principle of the democratic rule of law in the states of the former Eastern bloc – become the primary norms of the system. This leads to a thoroughgoing reconstruction, as norms-consequences are derived by means of rules of inference from the new primary norm of the legal system. As Marzena Kordela observes, 'without evaluative, frequently enthymematic premises, often formulated based on a set of extra-textual values, at least a part of which is traditionally attributed to the natural law position, none of these inferences would lead to an acceptable conclusion in the form of a particular rule.'[1] However, this quest for an underpinning for positive law in the domain of *ius* not only serves to fill the axionormative space through legal inference, but also to ensure the cohesion of the legal system, as during the transitional period normative acts supported by the new value system exist alongside acts relying on the previous axiology.[2] In such circumstances, invoking the new system of values that has not yet become fully positivized enables the construction of the latter acts in line with the new directives of functional interpretation, which during the period acquire particular significance.[3] It is therefore no wonder that, as

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[1] Kordela (2002): 218.

[2] Ziembiński (1991): 4.

[3] On the interpretation of law during political transformation see Smolak (1998); Krotoszyński (2016).

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Jerzy Zajadło notes, the period of transition typically witnesses 'a remarkable permeation of the philosophy of law into legal science and practice, especially in the form of broadly understood natural-law theories.'[4]

An illustrative example of the impact of philosophical and ethical concepts on lawmaking and the application of law is the influence of the *ubuntu* philosophy on the political transformation and the legal system in the Republic of South Africa. The concept, originating with the indigenous communities of the Sub-Saharan Africa, provides a foundation of the customary law in the region. Moreover, in South Africa, *ubuntu* was officially recognized by the legislator as one of the axiological bases of the legal system. The postamble (epilogue) to the 1993 interim Constitution of the Republic of South Africa[5] emphasized the necessity of national reconciliation and asserted that in order to overcome the legacy of apartheid there is a need for 'understanding but not for vengeance', 'reparation but not for retaliation', and 'ubuntu but not for victimisation'. Although no direct references are made to *ubuntu* in the Constitution of the Republic of South Africa now in force,[6] the aforementioned postamble and the provisions of the current Constitution, which acknowledge customary law to be a source of law,[7] gave rise to a case law in which the philosophy is regarded as a repository of values underlying the entire South African legal system. Thus the influence of *ubuntu* goes well beyond the issues usually associated with political transformation.

This paper sets out to discuss the role which the *ubuntu* philosophy played in the process of political transformations in South Africa, as well as to demonstrate its impact in selected areas of South African law. For this purpose, the paper begins with an overview of the essential philosophical and ethical premises which make up the concept. Subsequently, the author outlines the role which *ubuntu* played in the legislation and case law relating to the apartheid period and in the proceedings of the Truth and Reconciliation Commission. The next section presents judicial decisions which draw on the philosophy in three distinct legal areas: penal law, evictions, and defamation. The analysis then enables the author to formulate conclusions and remarks of a more general nature.[8]

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[4] Zajadło (2003): 183.

[5] Constitution of the Republic of South Africa, Act 200 of 1993.

[6] Constitution of the Republic of South Africa, Act 108 of 1996.

[7] Article 39(2) of the Constitution of the RSA of 1996 sets forth as follows: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Section 3 of the Article indicates that 'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'. Finally, according to Article 211(3) of the Constitution: 'The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

[8] The scope and extent of this paper do not permit one to discuss studies into *ubuntu* from the standpoint of anthropology and sociology (including sociology of law), therefore it focuses on the dogmatic and theoretical issues.

II. *UBUNTU*. AN OUTLINE OF THE PHILOSOPHY

The word *ubuntu* derives from the languages in the Nguni family, whose chief languages are Zulu, Xhosa, Suazi and Ndebele. Equivalents of the word – such as *botho* in the Sotho languages – are nevertheless found in most dialects of Sub-Saharan Africa.[9] Although it tends to be translated as 'humaneness',[10] its deep cultural roots do not allow it to be conveyed through a simple definition. A former judge of the Constitutional Court of the RSA, Yvonne Mokgoro, observes that abstract rendering of the African notion in a foreign language 'def[ies] the very essence of the African world-view', and is simply not workable: after all *ubuntu* is apparently 'one of those things that you know when you see it.'[11] Although providing a precise definition of such a vague notion is indeed difficult – and perhaps unfeasible – a closer analysis of *ubuntu* in an extra-legal context makes it possible to distinguish the two major planes on which it operates. Hence, *ubuntu* may be understood as a philosophy on human beings and their place in a society and the world, and as an ethical conception associated with that philosophy, which presents the rules that human beings thus perceived should observe in their conduct.

As a point of departure for its deliberations, the philosophical tradition of the Western world adopts the perspective of the individual who consciously engages in interactions with other people. Thus here social groups are no more than a mental construct, while the individual person, a subject of rights and obligations, is the only entity that actually exists. In contrast, the backbone of *ubuntu* as a philosophical concept is the conviction of the communal nature of human existence, just as a Xhosa maxim suggests: 'a person is a person through other people' (*umuntu ngumuntu ngabantu*). As a biological entity, *Homo sapiens* is always born in a community: a family, a nation, an ethnic or language group. It is only in the course of socialization and contacts with other people that they become a human being in the full sense of the word. Thus, from the standpoint of *ubuntu*, the community is primary to the individual person. However, this does not entail extreme communitarianism and the annihilation of individuality; the concept places emphasis on the self-actualization of the individual, yet it presumes that only thanks to participation in a community and its support can one's potential unfold to the fullest. Given that relationships between the members of a community have first and foremost an ethical dimension, it is through interaction with others and contribution to the common good that an individual can strive to come closer to the ideal of humaneness. The individual is thus still present in the *ubuntu* philosophy, but they should be viewed from the perspective of a dense

[9] Comaroff, Comaroff (2009): 44; Bennett (2018): 10.

[10] Concurring opinion of Y. Mokgoro to the judgment of the Constitutional Court of the RSA of 6 June 1995, *S v Makwanyane and Another*, (3) SA 391 (CC), par. 307.

[11] Both quotations: Mokgoro (1998): 15. To the contrary, arguing that *ubuntu* may only become a foundation of social transformation and reconciliation when it is expressed in the languages of groups for whom the philosophy has so far been alien: Himonga, Taylor, Pope (2013): 375.

network of relations with other people.[12] In the sphere of the sacred, such relations do not occur solely between the current members of the community, as they connect one with the spirits of the ancestors, with the yet unborn members of the community, and even with nature as a whole.[13]

Self-actualization of the individual is possible insofar as the individual is guided by particular values and discharges their duties to the community. In the ethical dimension, *ubuntu* involves such values as communalism, solidarity, co-operation, respect towards others, compassion, and respect for human dignity.[14] Such a set of values translates into specific moral intuitions. Thaddeus Metz notes that even though African societies are no different from the Western ones in their condemnation of the killing of the innocents, violation of sexual integrity, deception, breaking of promises, theft other than under duress of circumstances, and racial discrimination, they are more willing than the latter to give preference to reaching a consensus among all members of the community at the expense of majority decisions, to opt for co-operation rather than competition in the production of goods, to distribute goods based on need rather than merit, and to repay evil with reconciliation and reparation of the severed ties rather than with retribution.[15] The last of these moral intuitions unequivocally aligns *ubuntu* with the concept of restorative justice, since the fundamental characteristic of *ubuntu* is seeking to reintegrate wrongdoers and restore social harmony, 'based on the pervasive philosophy that something capable of improvement can be found in every human being.'[16] Although the communitarian trait of the philosophy causes various authors to express concerns regarding its approach to respecting the rights of minorities,[17] it seems that the obligation to renounce violence and to unconditionally respect human dignity, which both arise from *ubuntu*, make it necessary to accept otherness in fellow human beings and to maintain close social relations that transcend the existing divides.[18]

Another element of *ubuntu* is a particular perception of law and its social role. Apart from the emphasis on solidarity within a group and the 'conciliatory character of the adjudication process', which is to 'restore peace and harmony between members', instead of a complete triumph of one, Mokgoro emphasizes that *ubuntu* is associated with the duties of the individual towards a community rather than with the notion of individual rights.[19] Western

[12] Cornell, Muvangua (2012): 2–5; Bennett (2018): 31–36, including literature cited therein. On the relationship between *ubuntu* and the Western philosophical tradition, including the concept of social contract, see Cornell (2004); Bohler-Müller (2007), esp. 591–593.

[13] Radebe, Phooko (2017): 244; Bennett (2018): 43–45, and sources cited therein.

[14] Mokgoro (1998): 17.

[15] Among moral obligations proper to *ubuntu*, Metz (2007) also mentions respect for tradition, participation in the community and establishing a family. Critically on the association of *ubuntu* with the obligation to procreate: Radebe, Phooko (2017): 245.

[16] Sachs (2012): 310.

[17] See especially: Keevy (2009).

[18] Criticizing the draft of a Ugandan bill which criminalized homosexual acts, Archbishop Desmond Tutu (2012) compared it to apartheid legislation and, stressing respect for the autonomy of the individual, observed for instance that '[…] the freedom of one depends upon the freedom of all. We call it the spirit of ubuntu: the idea that I cannot be free if you are not also free.'

[19] Mokgoro (1998): 20–21. Both quotations: 21.

thinking, which typically casts issues in terms of individual obligations and related rights, thus yields to obligations to the community, which an individual should strive to fulfil to the furthest extent possible.[20]

III. *UBUNTU* AND POST-APARTHEID TRANSITIONAL JUSTICE

Due to the negotiated nature of the political transformation which took place in South Africa in the early 1990s, despite decades of racial segregation the legacy of the apartheid was not severely reckoned with. After all, the consent of the white minority to democratization was not unconditional. It became a sine qua non condition that the postamble to the interim Constitution of the RSA include an amnesty clause pertaining to political crimes; the exact extent and mechanism of amnesty would be specified in a separate law. A 1995 act[21] provided for the establishment of the Truth and Reconciliation Commission (TRC), which was tasked with compiling a report on the legacy of human rights violations and awarding compensation to the victims, as well as with conducting amnesty proceedings. Amnesty was granted to applicants on either side of the political barricade, provided that they disclosed all the relevant information on the circumstances of the crime, including accomplices, as long as the act itself had been committed between 1 March 1960 and 10 May 1994, and solely for political reasons, that is, not out of malice, ill-will or spite, or for personal gain. Once granted, amnesty waived the criminal and civil liability of the individual, as well as the liability of the State and other bodies in respect of the act subject to amnesty. In view of its conditional nature, contingent on the readiness of an individual to participate in the process of documenting the crimes of apartheid, the adopted solution may be classified as belonging to the historical clarification model.[22] In spite of being praised by the international community, the actual work of the Amnesty Committee was only partially successful. Although it examined over 7,000 applications, according to Antje du Bois-Pedain only 1,700 of those, covering 4,000 events, were submitted by persons who took part in political activities; 88% of such persons were granted amnesty. Regrettably, most applications were filed by the representatives of the former opposition, members of the African National Congress in particular.[23]

The amnesty bill became the object of constitutional review. In the judgment of 25 July 1996,[24] the Constitutional Court of the Republic of South Africa (CC RSA) found it to be in conformity with the constitution in force, at the same time affirming the normative nature of the postamble and the status

[20] Bennett (2018): 47–48.

[21] Promotion of National Unity and Reconciliation Act, Act 34 of 1995.

[22] Krotoszyński (2017): 118–131, 136–139.

[23] du Bois-Pedain (2007): 60–96. More broadly on the activities of the Truth and Reconciliation Commission and South African transitional justice: Dyzenhaus (1998); van Zyl (1999); Smolak (2002); Sitze (2013).

[24] Judgment of the CC RSA of 25 July 1996, *Azanian People's Organization (AZAPO) and Others v President of the Republic of South Africa and Others*, (4) SA 672 (CC) (hereinafter as *AZAPO*).

of *ubuntu* as a legal term.[25] The postamble states that the interim Constitution of the RSA creates a 'historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans'; however, achieving national unity and the wellbeing of the community would require the reconciliation and reconstruction of society.[26] In its judgment, the South African Constitutional Court noted that without relinquishing sanction, the 'historic bridge' linking the past and the future would never have been built, and even so, it 'would have remained wobbly and insecure, threatened by fear from some and anger from others.'[27] In the Constitutional Court's opinion, amnesty also made it possible to reveal the truth about the past, which, due to shortage of evidence, could never be authoritatively established in the course of criminal trials.[28] Simultaneously, learning the truth was an instrument of constructing a new order. The Court expressed the view that were it to remain undisclosed, the victims and the perpetrators would have to 'hobble more than walk to the future with heavy and dragged steps delaying and impeding a rapid and enthusiastic transition to the new society'.[29] Thus, the Court approved of the amnesty as a means to accomplish the overriding goal of forging a reconciled community who would work towards shared aspirations. Discharging the State itself from civil liability was also determined to be constitutional, as the Court found that given limited financial resources, the lawmaker was entitled to give priority to outlays which were in the interest of the entire nation (i.e. in respect of education, housing or health care) over the right to full indemnification, to which relatively few victims of direct violence were entitled.[30] Consequently, individual rights had to yield to collective needs, which appears to be in line with the *ubuntu* philosophy.

The proceedings of the Truth and Reconciliation Commission resulted in a seven-volume report, published in 1998–2003. In nearly 4,500 pages it described the history of the South African conflict, the crimes committed by the authorities in and outside the country, human rights violations perpetrated by the opposition groups, the role of the so-called Bantustans, as well as the conduct of the media, the business sector and the legal community. The report also enumerated the victims, detailing the harms each of them had suffered, and recapitulated the work of the amnesty and reparation committees.[31] Justifying the decision to introduce conditional amnesty, the Commission not only cited the particular political circumstances of the transition which ruled out the Nuremberg option,[32] but also invoked the *ubuntu* philosophy and the concept of restorative justice. The truth which

[25] Thus also: Bennett (2018): 92.
[26] Constitution of the RSA of 1993, postamble.
[27] *AZAPO*, par. 19.
[28] *AZAPO*, par. 17.
[29] *AZAPO*, par. 18.
[30] *AZAPO*, par. 42–47.
[31] The report is accessible at: <http://www.justice.gov.za/trc/report/>.
[32] TRC (1998): 5–6, 118, 122.

emerged in the course of the amnesty procedure, its official recognition and the compensations awarded were intended not only to restore dignity to the victims, but also to enable the culprits who accepted moral responsibility for their deeds to rejoin the community in a dignified manner.[33] Furthermore, the report conveyed an appeal in the spirit of *ubuntu*, which called upon those who thus far had been beneficiaries of the racist system – and still occupied privileged positions – to assume particular responsibility for the reconstruction of the community.[34]

The appraisal of the Commission's achievements among the citizens of South Africa depended largely on their ethnicity. In a 1998 survey, most black respondents evaluated the activities of the Commission positively (72%), found it to have been impartial (61%), and believed that it had contributed to promoting peace and reconciliation (56%). In contrast, only 15% of the white population surveyed expressed positive opinions about the Commission, with 13% considering it impartial, while more than half believed it had failed to foster reconciliation (54%). At the same time, the respondents showed greater approval for amnesty insofar as it dispensed with criminal proceedings, than they did for the fact that it precluded indemnification under civil law.[35] This may confirm that for most South Africans justice has more to do with redressing the harm caused than with retribution. Unfortunately, this also means that until the socio-economic legacy of apartheid is overcome – the tremendous inequality in such areas as employment, income, housing and education, along with the consequent crime and corruption – the fate of South African democracy can hardly be considered certain.[36]

Regardless of the above, it needs to be stressed that the transitional justice paradigm adopted in South Africa, which consisted neither in retribution based on penal sanctions nor in unconditional amnesty and social amnesia, represented an original approach which has often been cited as a model example in the relevant literature. In a difficult political situation, South Africans managed to arrive at a novel solution which, enabling democratization, did not rely on blanket amnesty but at the very least required the perpetrators to openly admit their guilt. Despite the passage of time, where international criminal law does not demand prosecution, the solution still appears attractive to a divided society in a period of political transformation. However, the success of such solutions seems only possible if the mechanisms are grounded in social axiology; in the case of South Africa, its source was none other than the *ubuntu* philosophy.

[33] TRC (1998): 125–131.

[34] TRC (1998): 134.

[35] A summary of the research: Theissen (1999). See also: Smolak (2002): 70.

[36] According to the 2015 Afrobarometer survey, the support for democracy in the RSA decreased from 72% in 2011 to 64% in 2015. As much as 61% of the respondents expressed willingness to forgo free elections if non-democratic authority would ensure that basic needs of the people, such as security, rule of law, work, and place to live are met (Lekalake 2016).

IV. *UBUNTU* IN SELECTED JUDICIAL DECISIONS OF SOUTH AFRICAN COURTS

The influence of the *ubuntu* philosophy on the South African legal system is by no means limited to issues associated with political transformation. In the light of contemporary jurisprudence in South Africa, there can be no doubt that the concept provides an axiological underpinning of the entire legal system. The Constitutional Court of the RSA observed that '[t]he spirit of ubuntu […] suffuses the whole constitutional order' and, by combining 'individual rights with a communitarian philosophy', it constitutes 'a unifying motif of the Bill of Rights'.[37] Consequently, *ubuntu* now exerts its effect on almost all branches of South Africa's legal system.[38] Since a comprehensive characterization of the jurisprudence which draws on *ubuntu* is beyond the scope of this paper,[39] the instances discussed below illustrate the impact of this philosophy on criminal law, proceedings regarding eviction from unlawfully occupied land, and lawsuits relating to delictual liability for defamation.

The first verdict in which the Constitutional Court of the RSA invoked *ubuntu* was the judgment in *S v Makwanyane,* of 6 June 1995.[40] In the judgment – the second ever to be delivered by that tribunal – the Court found the death penalty to be in contravention of the Constitution. Pronouncing it unconstitutional, the Court deemed it a 'cruel, inhuman and degrading punishment' which is prohibited under Article 11(2) of the Constitution of the RSA of 1993. The CC RSA also argued that the death penalty annihilates life and human dignity, which are protected under Articles 9 and 10 of the Constitution,[41] while its use is inevitably arbitrary.[42] These arguments, along with the alternative of life imprisonment, were taken into account by the Court as it conducted a proportionality test of limitations on subjective rights, weighing them with respect to the declared goals of the death penalty: individual and general prevention as well as just retribution.[43] In the opinion of the Court, there was no evidence to prove that the death penalty contributed to both kinds of prevention to a greater degree than a life sentence.[44] The court also rejected retributive arguments in their entirety, drawing on the concept of *ubuntu* directly in that respect. The judgment stated as follows: 'To be consistent with the value of *ubuntu* ours should be a society that "wishes to

[37] Judgment of the CC RSA of 1 October 2004, *Port Elizabeth Municipality v Various Occupiers*, (1) SA 217 (CC), par. 37.

[38] According to Tom W. Bennett, tax law and companies law represent the two exceptions. Bennett (2018): 93.

[39] The jurisprudence is discussed by, e.g., Himonga, Taylor, Pope (2013); Bennett (2018): 60–100.

[40] On the judgment see e.g. Cornell, Muvangua (2012): 7–13; Himonga, Taylor, Pope (2013): 374–382; Roux (2013): 238–248; Bennett (2018): 69–71. A critical view, alleging that the reasoning of the Court sought to force *ubuntu* into the conceptual framework of liberal constitutionalism, is expressed in: Kroeze (2002).

[41] *S v Makwanyane*, par. 95.

[42] *S v Makwanyane*, par. 48–54 and 94.

[43] *S v Makwanyane*, par. 145.

[44] *S v Makwanyane*, par. 116–128, 146.

prevent crime...[not] to kill criminals simply to get even with them.'"[45] It was also argued in the concurring opinions that given the emphasis that *ubuntu* places on human dignity and the value of human life, all punishments that are cruel, inhuman or degrading – including the death penalty – should be considered contradictory to this philosophy.[46] Furthermore, the death penalty represents an antithesis to the corrective function of punishment and, as such, it cannot be reconciled with *ubuntu*, which presumes a potential for rehabilitation in every human being.[47]

In later criminal jurisprudence, *ubuntu* served to justify more clement sentences, the abstention from imposing punishment other than symbolic ones, the conditional suspension of sentences, and was also invoked as an argument in favour of release on parole. In *S v Matiwane*, the High Court – replacing three years' imprisonment with a caution – asserted that *ubuntu* obliges one to take the personal circumstances of the criminal (unemployment, illness, dependents of minor age) into consideration, instead of attaching excessive significance to previous convictions; the punishment should not only fit the crime, but also the culprit.[48] In *S v Sibiya*,[49] it was determined that sentencing the sole breadwinner to short-term unconditional imprisonment, despite his young age and lack of previous convictions, contravened the corrective function of punishment. Such a punishment failed to facilitate rehabilitation, while imposing it resulted in loss of employment, which was likely to contribute to the further demoralization of the felon; the Court therefore held that it would be legitimate either to suspend the sentence conditionally or adjudicate in accordance with the spirit of *ubuntu* to foster reconciliation between the perpetrator and the victim. No previous criminal record, a low risk of returning to crime, difficult family circumstances, visible remorse, and a readiness to offer apologies as the local custom required, provided grounds for the court to desist from the unconditional sentence of imprisonment in *S v Maluleke*, a murder case.[50] In the *Van Vuren* case, CC RSA found that release on parole is supported by the concept of restorative justice (strictly linked to *ubuntu*), even though the interest of the convicted offender should be weighed against social interest in terms of preventing crime.[51] In *Derby-Lewis* the Court held that all statutory provisions, including those pertaining to release on parole, should be

[45] *S v Makwanyane*, par. 131. The quote comes from the concurring opinion of Justice Brennan's to the holding of the US Supreme Court of 29 June 1972, *Furman v Georgia*, 408 U.S. 238, par. 305.

[46] Concurring opinion of P. Langa and Y. Mokgoro: *S v Makwanyane*, par. 223–227 and 306–313, esp. par. 225.

[47] Concurring opinion of T. Madala: *S v Makwanyane*, par. 235–251, 260.

[48] Judgment of the HC RSA (*Western Cape*) of 13 August 2012, *S v Matiwane*, JOL 35378 (WCC). Interestingly enough, the Court found that the case concerned a 'serious crime', even though it involved a theft of 40 packets of yeast valued at a total of ca. ZAR 110 (ca. PLN 30 at the current exchange rate).

[49] Judgment of the HC RSA (*North Gauteng*) of 11 August 2009, *S v Sibiya*, (1) SACR 284 (GNP).

[50] Judgment of the HC RSA (*Transvaal*) of 13 June 2006, *S v Maluleke*, (1) SACR 49 (T).

[51] Judgment of the CC RSA of 30 September 2010, *Van Vuren v Minister of Correctional Services and Others*, (1) SACR 103 (CC), par. 51.

interpreted in a manner which pursues the fundamental tenets of the legal system, including the *ubuntu* philosophy as well.[52]

The earlier verdict in the eviction case *Port Elizabeth Municipality v Various Occupiers* also relied on the concept of restorative justice. In the judgment, the Constitutional Court of the RSA refused leave to appeal against the decision of the Supreme Court of Appeal, which dismissed the eviction action of the Port Elizabeth municipality against 68 persons (including 23 children), who had illegally occupied its land and had been living on it in an informal settlement they had built. The situation of the respondents was not exceptional given the realities in South Africa: the racist legislation which had radically constrained Africans in terms of access to inhabitable land caused a substantial proportion of the population to live in harsh conditions, which is still the case today.[53] For this reason, pursuant to the act governing evictions,[54] the court is entitled to order eviction only when it is just and equitable and upon having considered all the circumstances of the case, which in the event of eviction on behalf of a public authority incudes the context of the seizure of land, the duration of its occupation and the availability of suitable alternative accommodation or land. The Court found that the act requires courts to weigh the right to property against the rights to which the homeless are entitled as well, namely the right to a place of habitation and freedom from unlawful evictions, both of which are supported by Article 26 of the 1996 South African Constitution. What is more, constitutional values, such as *ubuntu*, should inform the assessment of whether eviction would be just and equitable. According to the judgment, the aforesaid act 'expressly requires the court to infuse elements of grace and compassion into the formal structures of the law' and thereby promotes 'the constitutional vision of a caring society based on good neighbourliness and shared concern.'[55] In this particular case, the Court found that the respondents had occupied the land for several years, that there was no direct need to designate the property for other purposes, and that the municipal authorities had not undertaken mediation nor given sufficient attention to the needs of the respondents with regard to replacement housing. Thus, the grounds for ordering eviction had not been satisfied, which was why the Court refused leave to appeal.

The judgment initiated *ubuntu*-based case law regarding evictions,[56] as exemplified by the judgment of CC RSA in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*.[57] In this case the court upheld the eviction of 86 persons inhabiting the property purchased by Blue Moonlight Properties. Yet, the Court also determined the housing policy of the

[52] Judgment of the HC RSA (*Gauteng*) of 29 May2015, *Derby-Lewis v Minister of Justice and Correctional Services*, (2) SACR 412 (GP), par. 55.

[53] On the historical context, see e.g. *Port Elizabeth Municipality v Various Occupiers*, par. 8–10.

[54] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998.

[55] *Port Elizabeth Municipality v Various Occupiers*, par. 37.

[56] Thus also: Himonga, Taylor, Pope (2013): 395.

[57] Judgment of the CC RSA of 1 December 2011, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*, (2) SA 104 (CC).

Johannesburg municipality to be unconstitutional, where it differentiated between persons removed from public and private land in terms of their right to alternative housing, and ordered the city to provide the unlawful residents with temporary accommodation within four months after delivering the judgment. Consequently, the Constitutional Court stayed the eviction for a period of four and a half months from the judgment. The Court also noted that while the entrepreneur who purchased property for commercial purposes is under no obligation to provide the homeless with shelter for an indefinite period of time, they must be ready to be temporarily deprived of the possibility of having the use of the property if this is dictated by reasons of equity.[58]

Furthermore, in the judgment in *City of Johannesburg v Rand Properties*,[59] the court found that the restrictions pertinent to eviction also apply to facilities which represent structural, health or fire hazards. In such instances local authorities are also obliged to ensure alternative housing, including the implementation of a comprehensive housing programme. Until that time, eviction cannot be carried out, as the respondents would thus be made homeless and deprived of their dignity. On that account, the court observed that *ubuntu* requires that one 'must not allow urbanization and the accumulation of wealth and material possessions to rob us of our warmth, hospitality and genuine interests in each other as human beings.'[60]

Although in the often cited case *Dikoko v Mokhatla*[61], concerned with delictual liability for defamation, CC RSA ultimately upheld the judgment awarding damages in the amount of ZAR 110,000 (approx. PLN30,000),[62] two dissenting opinions to the verdict explicitly called for a reform of that area of law in the spirit of *ubuntu*. Justice Mokgoro, proposing a substantial reduction of the damages, argued that in such cases the goal of the law should be 'the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hole in the defendant's pocket', which only adds to mutual rancour and pushes the parties even further apart. After all the function of compensation is to restore the plaintiff's dignity as opposed to punishing the defendant.[63] In his dissenting opinion, Justice Albie Sachs also stated that gearing defamation cases towards monetary compensation does not contribute to rebuilding harmony between the parties. Voicing his doubt as to whether human dignity can even be expressed in quantum, Sachs suggested that courts should rather focus on the reconciliation of parties, through for example an 'apology genuinely offered and generously received.'[64]

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[58] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*, par. 40.

[59] Judgment of the HC RSA (*Witwatersrand*) of 3 March 2006, *City of Johannesburg v Rand Properties (Pty) Limited and Others*, (1) SA 78 (W).

[60] *City of Johannesburg v Rand Properties (Pty) Limited and Others*, par. 63. Although higher courts did not endorse all the assertions of the judgment, they upheld its conclusion in its essence. Himonga, Taylor, Pope (2013): 405–406.

[61] Judgment of the CC RSA of 3 August 2006, *Dikoko v Mokhatla*, (6) SA 235 (CC).

[62] *Dikoko v Mokhatla*, par. 104.

[63] *Dikoko v Mokhatla*, par. 68.

[64] *Dikoko v Mokhatla*, par. 105–121. Quote: 119. On the judgment see also: Bohler-Müller (2007): 595–598.

Apology was found to be a mechanism of compensation for defamation in *Le Roux and Others v Dey*.[65] Even though CC RSA did not base its judgment on *ubuntu* directly, leaving the question of the latter's relationship to the institutions of the Roman-Dutch law, such as *amende honorable*, to later verdicts,[66] it drew in the ruling on the concept of restorative justice and 'the shared values of fairness that underlie both our common law and customary law.'[67] Thus, the Court found that while law cannot enforce reconciliation, it may still create conditions which are conducive to it. An apology, being a manifestation of respect towards the dignity of the injured party, is a tool which may indeed lead to such reconciliations between the litigants.[68] Hence, even if the discussed ruling did not invoke *ubuntu* specifically, there can be no doubt that the Court – ordering an apology to be tendered alongside compensation – relied in its rationale on an identical understanding of the aims of law and the values it protects.

V. CONCLUSIONS

It is often argued in the literature that – alongside the Western liberal tradition – the adoption of *ubuntu* as one of the two axiological foundations of the legal system in South Africa legitimized that system in the eyes of the citizens. As the law of the apartheid era was an emanation of the political domination of one ethnicity, the legal system had to be based on a philosophy which would mirror the cultural and demographic diversity of the country.[69] Still, the role of *ubuntu* transcends that function to a considerable degree. As demonstrated, *ubuntu* has a particularly powerful effect on South African criminal law and – because of the historical context relating to access to habitable land – on the regulations governing eviction from unlawfully occupied property. The influence can also be seen in other areas of law, such as the law of delict. Even if – as some authors assert – *ubuntu* ceased to be a significant value for a proportion of South Africans due to social transformation and acute poverty,[70] its impact on the legal system remains very substantial.

In case law, *ubuntu* serves various functions. In *AZAPO* and in *S v Makwanyane* it was used in the process of weighting values against one another and provided an instrument for determining their reciprocal importance. This is because from the standpoint of *ubuntu* certain values appear to be particularly significant – such as peaceful coexistence and the needs of the entire community with respect to education, health care, or housing (*AZAPO*) – whereas others, such as retribution, lose their importance (*S v Makwanyane*). Second, in *Derby-Lewis* the court affirmed the necessity of drawing on *ubuntu* for the purposes of the interpretation of law. *Ubuntu* plays

[65] Judgment of the CC RSA of 8 March 2011, *Le Roux and Others v Dey*, (3) SA 274 (CC).
[66] *Le Roux and Others v Dey*, par. 199–200.
[67] *Le Roux and Others v Dey*, par. 197.
[68] *Le Roux and Others v Dey*, par. 202.
[69] Thus e.g. Keep, Midgley (2007): 48; Himonga, Taylor, Pope (2013): 389; Bennett (2018): 1.
[70] Matolino, Kwindingwi (2013), esp. 204. A critical approach to such views may be found in: Bennett (2018): 39–40.

that very role in eviction cases, where the appraisal made in line with its spirit to ascertain whether eviction would be 'just and equitable' within the meaning of the relevant enactment, requires the state of facts to be subsumed under the substance of a norm established in the light of values characteristic of *ubuntu*. In the event of a negative assessment, this will temporarily prevent the owner of the property from exercising their subjective right. Third, *ubuntu* was invoked at the stage of sentencing, in order to determine which sanction within the discretion of the court would be just (*S v Matiwane*, *S v Sibiya*, *S v Maluleke*). Fourth, reasoning in line with *ubuntu* philosophy – though not the philosophy itself – provided grounds to formulate a new delictual claim relating to defamation in *Le Roux and Others v De*y, namely the right to demand an adequate apology from the defendant.

It may be worthwhile to ask whether there exists a Polish equivalent that performs the role the *ubuntu* philosophy plays in the South African legal system. The scope of this paper does not permit a detailed analysis in this respect, but nevertheless a similarity can be noticed between *ubuntu* and a fundamental general clause in Polish civil law: the principles of social coexistence (*zasady współżycia społecznego*). These principles are informed by values which are both universally acknowledged in the community and constitute a part of European culture; hence, they include norms of conduct which are axiologically justified.[71] Consequently, they are associated with such notions as 'equity', 'integrity' or 'good faith'. Despite the above similarities, one cannot fail to notice a number of substantial differences between the function of *ubuntu* and the principles of social coexistence. Unlike *ubuntu*, the principles of social coexistence apply solely in the domain of civil law;[72] they may serve as a measure safeguarding one against abuse of a subjective right, but not as an autonomous ground for its acquisition.[73] Thus, while it would be conceivable for the principles of social coexistence to inform a ruling analogous to *Port Elizabeth Municipality v Various Occupiers*,[74] it seems unlikely that the said principles – as currently construed – would contribute to the emergence of a new mechanism of compensation for defamation, as in *Le Roux and Others v De*y.

Adam Czarnota notes that a period of political transformation is a time in which societies attempt to find a 'new normativity'.[75] The case of the Republic of South Africa demonstrates that the sources of that normativity can (and even should) be sought outside the legal system. The verdicts discussed in this paper conspicuously reflect the impact of moral norms on the legal system in a period of political transformation and validate the claim that during a transition, the system becomes particularly imbued with extra-legal

[71] See e.g. Kordela (2012): 194–195; Gutowski (2018), and literature cited therein.

[72] See e.g. Judgment of the Polish Supreme Court of 14 December 2005, III UK 120/05, OSNP 2006, No. 21–22, pos. 338.

[73] See e.g. Judgment of the Polish Supreme Court of 5 March 2002, I CKN 934/00, Lex No. 54371.

[74] See e.g. Judgment of the Polish Supreme Court of 10 December 1993, I CRN 200/93, Lex No. 1671643.

[75] Czarnota (2015): 14.

elements. Simultaneously, the relationship between *ubuntu* and South African law offers a unique example of a legal system which has been consistently shaped in accordance with the adopted philosophical and ethical concepts. The choice should come as no surprise: in the circumstances where law was exploited as an instrument of state-mandated violence, recourse to something that is external to the law itself may be requisite if the legal system is to regain its legitimacy.

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Bennett, T.W. (Munro, A.R., Jacobs, P.J.) (2018). Ubuntu: An African Jurisprudence. Claremont (Cape Town).

Bohler-Müller, N. (2007). Some thoughts on the *ubuntu* jurisprudence of the Constitutional Court. Obiter 3(28): 590–599.

Bois-Pedain, A. du (2007). Transitional Amnesty in South Africa. Cambridge.

Comaroff, J.L., Comaroff, J. (2009). Ethnicity, Inc. Chicago–London.

Cornell, D. (2004). A call for a nuanced constitutional jurisprudence: ubuntu, dignity, and reconciliation. SA Publiekreg/SA Public Law 3(19): 666–675.

Cornell, D., Muvangua, N. (2012). Introduction, [in:] D. Cornell, N. Muvangua (eds.), Ubuntu and the Law African Ideals and Postapartheid Jurisprudence. New York: 1–27.

Czarnota, A. (2015). Między polityką a prawem, czyli o sprawiedliwości okresu przejściowego. Acta Universitatis Lodziensis. Folia Philosophica. Ethica – Aesthetica – Practica 27: 13–35.

Dyzenhaus, D. (1998). Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order. Oxford.

Gutowski, M. (2018). Artykuł 5 k.c., [in:] M. Gutowski (ed.), Kodeks cywilny. Volume 1: Komentarz do art. 1–352 [Online]. Legalis/el.

Himonga, C., Taylor, M., Pope, A. (2013). Reflections on judicial views of Ubuntu. Potchefstroom Electronic Law Journal 5(16): 370–427.

Keep, H., Midgley, R. (2007). The emerging role of ubuntu-botho in developing a consensual South African legal culture, [in:] F. Bruinsma, D. Nelken (eds.), Explorations in Legal Cultures. Den Haag: 29–56.

Keevy, I. (2009). *Ubuntu* versus the core values of the South African Constitution. Journal for Juridical Science 34(2): 19–58.

Kordela, M. (2002). „Lex" i „ius" w orzecznictwie Trybunału Konstytucyjnego. Ius et Lex 1: 213–223.

Kordela, M. (2012). Zasady prawa. Studium teoretycznoprawne. Poznań.

Kroeze, I.J. (2002). Doing things with values II: the case of ubuntu. Stellenbosch Law Review 13(2): 252–264.

Krotoszyński, M. (2016). Wykładnia prawa w okresie transformacji ustrojowej, [in:] M. Hermann, S. Sykuna (eds.), Wykładnia prawa. Tradycja i perspektywy. Warsaw: 19–37.

Krotoszyński, M. (2017). Modele sprawiedliwości tranzycyjnej. Poznań.

Lekalake, R. (2016). Support for democracy in South Africa declines amid rising discontent with implementation. Afrobarometer. <http://bit.do/afrobar> [accessed 19 July 2019].

Matolino, B., Kwindingwi, W. (2013). The end of ubuntu. South African Journal of Philosophy 32(2): 197–205.

Metz, T. (2007). Toward an African Moral Theory. The Journal of Political Philosophy 15(2): 321–341.

Mogkoro, Y. (1998). Ubuntu and the law in South Africa. Buffalo Human Rights Law Review 4: 15–23.

Roux, T. (2013). The Politics of Principle: The First South African Constitutional Court, 1995–2005. Cambridge.

Sachs, A. (2012). Towards the liberation and revitalization of customary law, [in:] D. Cornell, N. Muvangua (eds.), Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence. New York: 303–316.

Sitze, A. (2013). The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission. Ann Arbor.

Smolak, M. (1998). Zmiana paradygmatu interpretacyjnego w okresie transformacji ustrojowej w Polsce. Ruch Prawniczy, Ekonomiczny i Socjologiczny 60(3/4): 21–33.

Smolak, M. (2002). Sprawiedliwość transformacyjna na przykładzie Komisji Prawdy i Pojednania Republiki Południowej Afryki. Państwo i Prawo 57(11): 66–73.

Theissen, G. (1999). Common past, divided truth: the truth and Reconciliation Commission in South African public opinion. Paper presented at the IISL Workshop on "Legal Institutions and Collective Memories". <http://userpage.fu-berlin.de/~theissen/pdf/IISL-Paper.PDF> [accessed 19 July 2019].

TRC (1998). Truth and Reconciliation Commission of South Africa Report. Volume 1. <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf> [accessed 19 July 2019].

Tutu, D. (2012). To Ugandan MPs: God does not discriminate among our family. Daily Monitor, 12.12.2012, <http://bit.do/monitor-co-ug-tutu> [accessed 19.07.2019].

Zajadło, J. (2003). Filozofia prawa a prawo karne. Studium tzw. *Mauerschützen*. Ius et Lex 1: 175–202.

Ziembiński, Z. (1991). „Lex" a „ius" w okresie przemian. Państwo i Prawo 46(6): 3–14.

Zyl, P. van (1999). Dilemmas of transitional justice: the case of South Africa's Truth and Reconciliation Commission. Journal of International Affairs 52(2): 647–667.

THE ROLE OF THE UBUNTU PHILOSOPHY IN THE SOUTH AFRICAN TRANSITIONAL JUSTICE PROCESS AND IN SELECTED AREAS OF SOUTH AFRICAN LAW

Summary

The inauguration of Nelson Mandela as South Africa's first democratic president on 10 May 1994 became a symbol of the end of apartheid and the beginning of a new chapter in the country's history. As South African society was deeply divided, the 1993 Interim Constitution expressed the need for reconciliation between the people of South Africa and the reconstruction of its society. The legacy of apartheid was to be addressed based on 'a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization'. Due to its introduction into the Constitution, *ubuntu* – a philosophy of unity, cooperation, compassion and respect for human dignity, which originated in small African communities – became a source of values for the whole legal system. The goal of the text is to present the *ubuntu* philosophy and to describe its role in the South African transitional justice process and in selected areas of South African law (criminal law, evictions and defamation). On the whole, South Africa presents a unique case in which both the political transformation and the

legal system were strongly shaped by the said philosophical and ethical concepts, which bear close resemblance to the idea of restorative justice.

Keywords: ubuntu; Republic of South Africa; transitional justice; restorative justice; Truth and Reconciliation Commission (South Africa); amnesty; truth; reconciliation; death penalty; criminal law; eviction; defamation