

CHAPTER 5

BREAKING THE CHAINS OF DISCRIMINATION AND FORGING NEW BONDS: THE EXTRAORDINARY JOURNEY OF JUSTICE YVONNE MOKGORO

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Source: <http://www.constitutionalcourt.org.za/site/judges/justiceyvonnemokgoro/index1.html>

1 Introduction

In this chapter we make an attempt to highlight the main contributions of Justice Yvonne Mokgoro to South African constitutional jurisprudence. As the first black African woman appointed to the Bench in 1994, she brought with her fresh scars of the oppressive system of *apartheid* that alienated and marginalised her as a black person and as a woman. Her childhood and youth were marked by the struggle; her first encounter with Robert Sobukwe put her firmly on a path of resistance to injustice. As a member of the Constitutional Court Justice Mokgoro was active and engaged, with her most lasting contribution being her efforts to Africanise human rights through the dignification of the law and the operationalisation of *ubuntu* as a constitutional value.

The three cases discussed in this chapter are chosen to illustrate the powerful and unique impact of her judgments and philosophies. In

Makwanyane (the constitutionalism of the death penalty), *Khosa* (the right of foreign nationals to social grants) and *Dikoko* (determining the quantum of damages in defamation cases) Mokgoro brought to bear her life views and expressed them in ways that continue to shape the *ubuntu* jurisprudence of the Court. Even post-Bench she has continued to live out her convictions that the Constitution should reflect values that South Africans can accept as their own in order to ensure its legitimacy.

The first part of the chapter briefly looks at Justice Mokgoro's journey through childhood and young adulthood, with an emphasis on her activism, the effects that *apartheid* had on her life and her thinking, and her strong sense of gender justice. The second part outlines her unfolding story of *ubuntu* and how she expertly crafted this African philosophy to influence constitutional interpretation and adjudication in such a way as to recognise the humanity of 'others' and our duty to care for 'them'. In the last part we follow her journey post-Bench and discover that she continues to influence public discourse around justice, care and social cohesion.

2 Yvonne Mokgoro's background and context: From childhood to judge

I don't see my position as a judge, as a woman wielding power. I see my role as having great responsibility to my people, to justice in this country, to assist in providing people with what is necessary to improve the quality of their lives. Why I see it this way, when many see the position of a judge at the Constitutional Court as powerful, can be attributed to my mother's influence. We were so many kids, not wealthy, but my parents did the best they could. My father was very ambitious. Although he and my mother only went up to primary school ... they put into our education as much as they could, because they wanted us to have a quality of life better than theirs. They instilled in us the values that the only way to a better life was for us to get an education and escape the rut of *apartheid* and poverty.⁴⁵⁷

Appointed in 1994 as a judge of the Constitutional Court of the Republic of South Africa, Justice Yvonne Mokgoro was not only the first black woman to be appointed to the Constitutional Court Bench, but also one of only two women to be appointed, the other being Justice Kate O'Regan.⁴⁵⁸ Mokgoro served for fifteen years as judge until the end of her term in 2009.⁴⁵⁹ She has ascribed her valued contribution as Constitutional Court

457 Judge Mokgoro, on how her parents influenced her views on her role as judge in the Constitutional Court. In M Orford (ed) *Life and soul: Portraits of women who move South Africa* (2006) 58.

458 *Duke Law* 'The Honorable Yvonne Mokgoro, Justice of the South African Constitutional Court' 15 April 2009 <https://law.duke.edu/news/honorable-yvonne-mokgoro-justice-south-african-constitutional-court/> (accessed 1 November 2017).

459 South African History Online 'Yvonne Mokgoro' <http://www.sahistory.org.za/people/yvonne-mokgoro> (accessed 1 November 2017).

judge to her 'special background', which is a claim worth exploring further.⁴⁶⁰

Mokgoro, the second child of working class parents, was born in Galeshewe, a township on the outskirts of Kimberley in the Northern Cape. After matriculating in 1970 at St Boniface High School, a local Catholic Mission School, she enrolled for an education degree to become a teacher, as she had 'always known' that she would like 'to work with people'.⁴⁶¹ However, during that time she met Robert Sobukwe, founder of the Pan Africanist Congress (PAC), who instilled in her a passion for law. Having served time on Robben Island, Sobukwe was one of the few African lawyers in Kimberley at the time. After her arrest for protesting against the ill-treatment of a man by the police her family secured the services of Sobukwe to represent her in court. Mokgoro recounts that she expressed her frustration to Sobukwe about the small number of African lawyers and specifically about the lack of African male law students to represent black South Africans. Sobukwe, however, noted that although the legal profession was male dominated, it was not 'exclusively male' and that 'there [was] no law that preclude[d] women from studying law and becoming lawyers'. Mokgoro subsequently enrolled for a law degree and used the legal profession to live out her dream of working with people.⁴⁶²

Justice Mokgoro studied mostly part time from 1982 to 1987 at the erstwhile University of Bophuthatswana, where she obtained the B.Luris, LLB and LLM degrees, and subsequently received a second LLM degree from the University of Pennsylvania in 1990.⁴⁶³ She specialised in the field of human rights, customary law and the effect of the law on society, particularly on women and children.⁴⁶⁴

Entering the job market, Mokgoro worked as a nursing assistant and a salesperson before being appointed as clerk in the Department of Justice of Bophuthatswana. Upon obtaining her LLB degree she was employed as maintenance officer and public prosecutor in the former Mmabatho Magistrate's Court.⁴⁶⁵ During the period 1984 to 1991 she worked at the University of Bophuthatswana's Department of Jurisprudence, first as lecturer and later as Associate Professor, whereafter she was appointed as

460 Orford (n 457 above) 58.

461 University of the Witwatersrand 'Constitutional Court Trust Oral History Project: Interview with Justice Yvonne Mokgoro 24 November 2011' http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AG3368/AG3368-M60-001-jpeg.pdf (accessed 1 November 2017) 1-2.

462 As above, 2.

463 Democracy & Governance Research Programme, HSRC *Women marching into the 21st century: Wathint'Abafazi, Wathint'Imbokodo* (2000) 260.

464 University of the Witwatersrand 'Citation: Yvonne Mokgoro' <https://www.wits.ac.za/media/wits-university/alumni/documents/Justice%20Yvonne%20Mokgoro.pdf> (accessed 2 November 2017).

465 Penn Law University of Pennsylvania Law School 'Yvonne Mokgoro, LLM'90' <https://www.law.upenn.edu/live/profiles/1124-yvonne-mokgoro/profiles/international-alumni-spotlight.php> (accessed 3 November 2017).

Associate Professor at the University of the Western Cape for the period 1992 to 1993. Mokgoro also worked at the Human Sciences Research Council (HSRC), specialising in human rights, and lectured part time at the University of Pretoria before being appointed as a judge of the Constitutional Court.⁴⁶⁶ Hers was indeed a meteoric rise.

Justice Mokgoro spent most of her career as an academic prior to her appointment to the Constitutional Court. In fact, her limited practical experience in litigation was questioned during her interview with the Judicial Service Commission (JSC) for the position of Constitutional Court judge. She argued eloquently that her analytical skills as an academic would be greatly beneficial to the Court as it dealt with the analysis of both law and fact.⁴⁶⁷

In her life prior to the court Mokgoro was an anti-*apartheid* and gender activist, as illustrated briefly below.

2.1 Activism

Apart from teaching law to university students, Justice Mokgoro also utilised her knowledge of the law as an activist during the *apartheid* years. She was, for example, involved in the establishment of the Mafikeng Anti-Repression Forum (MAREF),⁴⁶⁸ she was a member of the Northern Cape Executive Committee of the ANC (which included Mafikeng at that stage) and headed the Justice for Women portfolio⁴⁶⁹ and she was also involved in Lawyers for Human Rights (LHR) in Mafikeng.⁴⁷⁰ Through her involvement in these activist organisations Mokgoro used her legal knowledge to 'try to improve people's lives, try to improve the way communities see oppression and repression' while simultaneously endeavouring to protect the oppressed.⁴⁷¹ On being an activist Mokgoro noted that although people might have perceived her as a troublemaker, her aim was to 'try to change the system and ... to create awareness of what is right and what is wrong'.⁴⁷²

466 Democracy & Governance Research Programme (n 463 above) 260.

467 Constitutional Court 'Judicial Service Commission interview with Prof Yvonne Mokgoro 5 October 1994' http://www.constitutionalcourt.org.za/site/judges/justice_yvonnemokgoro/index1.htm (accessed 3 November 2017).

468 MAREF, founded in 1990 in the erstwhile Bophuthatswana, was an organization working in the field of human rights and had, amongst other things, monitored human rights abuses in the former homeland and assisted victims of political repression to secure legal representation. See A Manson "'Punching above its weight": The Mafikeng Anti-Repression Forum (Maref) and the fall of Bophuthatswana' (2011) 43(2) *African Historical Review* 55.

469 Personal communication with Justice Mokgoro.

470 F Haffajee (ed) *The book of South African women* (nd) 135.

471 University of the Witwatersrand (n 461 above) 3.

472 As above, 4.

2.2 Impact of *apartheid* on Justice Mokgoro's life

When reminiscing on her experiences of Constitutional Court deliberations, Mokgoro highlighted the 'total equality and respect' for each other's diverse views as judges, despite any disagreement that may have existed about a particular issue. For a black woman who had spent a substantial part of her life under an *apartheid* dispensation it was 'the most wonderful experience'. Describing her background, she noted that:

you lived in a system which told you every day and reminded you that you are nothing. That you don't belong. That you don't have a brain. Because you have to do what the system wants you to do. That you can't think. That you have no right to think.⁴⁷³

She experienced her time with the Court as antithetical to her experiences under the oppressive system of *apartheid*. Perhaps her negative experiences and activism during *apartheid* contributed in some way to her support for the concept of *ubuntu* within the legal system, *ubuntu* being an inclusive worldview and not a divisive one as *apartheid* had been.⁴⁷⁴ During an interview in 2011 for the Constitutional Court Trust Oral History Project she commented as follows on the meaning of *ubuntu*.⁴⁷⁵

[i]t can mean so many different things, values ... It's just the basic value of life where human beings share a space and show respect for each other based on the fact that they are human ... you don't have to earn to be treated with *ubuntu*. You're treated with *ubuntu* because you are a human being. It's just respect that we have for human beings. All the other socio-economic issues come after that.⁴⁷⁶

Her background influenced her in dealing with socio-economic rights cases. Mokgoro has noted that thoughts about her upbringing and experiences during the *apartheid* years involuntarily came to mind, as did the related importance of these rights for the transformation of society and making a difference in peoples' lives as required by the Preamble of the Constitution.⁴⁷⁷

473 As above, 8.

474 For Mokgoro's views on *ubuntu* and the law, see JY Mokgoro 'Ubuntu and the law in South Africa' Paper delivered at the first Colloquium, Constitution and the Law, Potchefstroom (1997) www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/.../98v1mokg.pdf (accessed 6 November 2017).

475 Her influential thinking on *ubuntu* and the law in a number of Constitutional Court cases is addressed in more detail below.

476 University of the Witwatersrand (n 461 above) 21.

477 As above, 20.

2.3 Customary law and gender

At the time of Justice Mokgoro's appointment to the Constitutional Court she specialised in customary law and legal philosophy. As a result she was asked during her interview with the Judicial Service Commission (JSC) about possible tensions between customary law, the Constitution and common law. Mokgoro argued⁴⁷⁸ that prior to the adoption of the new Constitution, customary law had enjoyed 'ordinary legislative status', but since it had been formally recognised in Chapter 11 of the Constitution it had attained constitutional status. This implied that future legislative reform of customary law must comply with the Constitution, making future reform more challenging. However, customary law 'ha[d] not developed ... sufficiently', since 'traditional social practice' was much more flexible than written laws.

To illustrate this, Justice Mokgoro discussed the situation of rural women who, in the absence of the men who migrated to cities to work, managed families and communities and had, for example, been greatly involved in the purchasing of property. But when ownership of such property was questioned, customary law was applied. Fortunately, the constitutional recognition of customary law is subjected to the Bill of Rights and in the case of women Section 8, the equality clause in the interim Constitution, 'seems to trump customary law.' Mokgoro concluded by stating that the equality clause should 'take precedence as opposed to the preservation of culture, because if culture for its sustenance depends on the unequal treatment of some members of the cultural group who descend particularly from the prevailing culture, then that aspect of culture has no place in our legal system.'⁴⁷⁹

3 *Ubuntu* on the Bench

The collective unity, group solidarity and conformity tendencies of *Ubuntu* can surely be harnessed to promote a *new patriotism* and *personal stewardship* so crucial (for a number of reasons) to the development of a young democracy.⁴⁸⁰

Yvonne Mokgoro was an active judge who contributed substantially to the formative jurisprudence of the Constitutional Court over a period of fifteen years. Although much is written about her and Justice Sachs sharing a strong belief in *ubuntu's* potential as an interpretational value along with dignity, equality and freedom, she was more likely to agree with Justices

478 Constitutional Court (n 467 above).

479 As above.

480 Mokgoro (n 474 above) emphasis added. The paper was published by the Konrad Adenauer-Stiftung in its Seminar Report of the Colloquium (1998). Paper in possession of the lead author of this chapter.

Yacoob and Chaskalson, as illustrated in Figure 1 below. In addition, she did not always agree with O'Regan, her fellow female judge, and had less disagreement than might have been expected with Justice Ackermann, an Afrikaner judge who tended to avoid debate on the Africanisation of the law.

The table below provides an overview of the judgment statistics of Justice Mokgoro's tenure on the Bench over the period 1994-2009. She participated in 305 judgments, which averaged just more than 20 cases per year. Justice Mokgoro wrote 19 leading (L) judgments, which comprised 6.2 per cent of the total judgments she participated in. Of note are the nine dissenting judgments, which comprised 3 per cent of the total number of judgments. Of these dissenting judgments *one third* were delivered from 2006 to 2009, her last three years on the Bench.

Table 1: Judgments in which Justice Mokgoro participated

Judge	Leading Judgments (L)	Concurring Judgments (C)	Concurring Votes (c)	Dissenting Judgments (D)	Dissenting Votes (d)	Total
Mokgoro	19 (6.2%)	16 (5.3%)	256 (83.9%)	9 (3%)	5 (1.6%)	305



Figure 1: Extent of agreement of Yvonne Mokgoro with other judges, 1994-2006

Key: Ya = Yacoob; Ch = Chaskalson; La = Langa; Ms = Moseneke; Ng = Ngcobo; Sk = Skweyiya; Ac = Ackermann; Md = Madala; Sa = Sachs; Mh = Mahomed; VdW = Van der Westhuizen; OR = O'Regan; Kr = Kriegler; Nk = Nkabinde; Di = Didcott

Source: Bishop *et al*, 2008⁴⁸¹

481 M Bishop *et al* 'Twelve-year review of the work of the Constitutional Court: A statistical analysis: Current developments' (2008) 24(2) *South African Journal on Human Rights* 370.

An analysis of voting alignment of Justice Mokgoro with other judges for the period 1994-2006 is provided in Figure 1. Justice Mokgoro's highest voting alignment was with Yacoob (Ya) (93.8%) and Chaskalson (Ch) (92.6%) for this period. Of note is the relatively low alignment with Nkabinde (Nk) (81%) and Justice Didcott (Di) (71.9%). Possible reasons for this low alignment are the retirement of a number of judges during the period 2002 to 2004. In particular the retirement of the two Chief Justices, Chaskalson and Langa, is reported as the most likely explanation for this increasing trend of dissent.⁴⁸² During his relatively short tenure on the bench, Justice Didcott had some of the lowest levels of agreement of any judge, which highlights his independent voice.⁴⁸³ The relatively short overlap of tenures of Justices Nkabinde and Mokgoro was marked for its high level of disagreement in comparison with other years and may explain the low alignment with them.

While Justice Mokgoro was an engaged member of the Bench and contributed to many areas of constitutional jurisprudence, she is best known for her remarkable contribution towards utilising and developing *ubuntu* as a constitutional value and interpretative tool that stemmed from her wish for the 'dignification' of South African post-apartheid law and jurisprudence and that led to far-reaching decisions and outcomes. The discussion of her judgments below is limited to the three cases in which she articulated most ardently her views in a way that influenced subsequent African-focused jurisprudence. Nor is this an extensive treatise on the advantages and disadvantages of linking *ubuntu* and the law. The contents of this chapter are limited to those aspects of her work, and some commentary on it, that is sure to receive continued attention by South African courts and scholars, especially within the context of restorative justice.

3.1 *Makwanyane*: Not in my name

In the second substantive case on human rights heard by the Constitutional Court, *S v Makwanyane*,⁴⁸⁴ the Court in 1995 unanimously declared the death penalty unconstitutional. Justice Mokgoro brought to bear on this judgment her understanding of the African philosophy of *ubuntu* within the new South African constitutional context. As reflected in this seminal case, Mokgoro was convinced that *ubuntu* could serve as a basis from which interpretation of the Bill of Rights proceeds. She endorsed, along with Justices Madala and Sachs, the idea of *ubuntu* as an over-arching and basic constitutional value that could drive and assist the Court's future jurisprudence. The judges made it clear that the relevance of *ubuntu* for

482 As above, 361.

483 As above, 365.

484 1995 (3) SA 191 (CC).

South Africa's new order extended well beyond a narrow reading of the Post-amble of the interim Constitution:⁴⁸⁵

National Unity and Reconciliation

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

According to Mokgoro, Madala and Sachs this African value, based on a philosophy of life, is foundational and permeates the Constitution as a whole, not only within the context of the fear of vengeance but in the context of the restoration of dignity to the law and to the peoples of South Africa. *Makwanyane*, decided prior to 27 April 1996, marked the beginning of an *ubuntu* jurisprudence that has endured despite some scepticism.⁴⁸⁶

In her separate judgment in *Makwanyane* Mokgoro explained that although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is *ubuntu*:

Generally, *ubuntu* translates as humanness. In its most fundamental sense it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.⁴⁸⁷

In her scholarly writing Yvonne Mokgoro placed her nuanced understanding of *ubuntu* alongside the concept of humanity. She was (and is) of the view that in order to transform South African law and along with it the lives of those who live under the law, constitutional jurisprudence should embrace *ubuntu* in all its Africanness along with the key values of human dignity, respect, inclusivity, compassion, concern for others, and honesty.⁴⁸⁸ In her work, she mentions the following as examples of ways

485 Act 103 of 1994. It should be noted that *ubuntu* is not mentioned at all in the 1996 Constitution.

486 See C Himonga *et al* 'Reflections on judicial views of *ubuntu*' (2013) 16(5) *Potchefstroom Electronic Law Journal* 67 for an extensive analysis of the scope and content of *ubuntu* and the law.

487 *Makwanyane* (n 484 above) para 308.

488 Mokgoro refers to *ubuntu* as the 'one shared value that runs like a golden thread across cultural lines' (*Makwanyane*, paras 307-308) and equates this African concept with the English word 'humanity' and the Afrikaans word *menswaardigheid* (*Makwanyane*, para 308).

in which South African jurisprudence could be transformed in order to align itself with these values:⁴⁸⁹

- Law should be transformed to the extent that it is no longer conceived as a tool for personal defence
- Communalism should place more emphasis on group solidarity and interests
- The conciliatory character of the judicial process should be developed in order to restore peace and harmony between members, rather than placing overdue reliance on the adversarial approach, which emphasises retribution and seems repressive
- The importance of public ritual and ceremony should be given due recognition
- The idea that law, experienced by an individual within the group, is bound to individual duty as opposed to only individual rights or entitlement should be advanced; and
- The importance of sacrifice for every advantage or benefit which has significant implications for reciprocity and caring within the communal entity should also be advanced.

In radically re-thinking the law Mokgoro states:

Quite obviously, the complete dignification of South African law and jurisprudence would require considerable re-alignment of the present state of our value systems. We will thus have to be ingenious in finding or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to such unprecedented change.⁴⁹⁰

In *Makwanyane* and her subsequent scholarship it is clear that Mokgoro does not want to limit *ubuntu* to a vague spirit, but wishes to use *ubuntu* as a concrete value made explicit in legal decisions. It is therefore surprising that she does not explicitly refer to *ubuntu* in the *Khosa* case.⁴⁹¹ Nowhere in this judgment does she give voice to her express wish to operationalise *ubuntu* as a constitutional value, although it does seem that her understanding of *ubuntu* implicitly informed her legal opinion in this case, which led to the extension of payment of social grants to permanent residents. However, in an interview conducted with the HSRC for the Constitutional Justice Project,⁴⁹² Mokgoro explained that:

And in *Khosa*, although I didn't particularly mention even once *ubuntu* ... but the inter-connectedness that is a central aspect of *ubuntu* I used when I said when people come into the country, foreign nationals come into the country,

489 Mokgoro (n 474 above).

490 As above, 6.

491 *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC).

492 G Pienaar 'HSRC Constitutional Justice Project: Interview with Justice Yvonne Mokgoro' (2014) 22.

they are accepted as permanent residents They've integrated with communities, they work here, they pay taxes, they contribute to the social welfare system, and when they are down and out [we] want to reject them and say they have no right to benefit from the social welfare system, when they're already so inter-connected with South Africans. There's just no way we can treat them like that. So I didn't mention *ubuntu* ... but I used the principles of *ubuntu* [– that] was a deliberate choice.

3.2 Beyond Makwanyane: A narrative about reconciling care and justice

3.2.1 Khosa: Radically re-interpreting citizenship

In *Khosa* the Constitutional Court was faced with a challenge to the Social Assistance Act.⁴⁹³ The applicants were Mozambiquan citizens who were permanent residents in South Africa. The first applicant, a mother of two children, applied for a child support grant and a care dependency grant for a child suffering from diabetes. The second applicant applied for an old age grant. Both applicants had been denied their grants as they were not citizens of South Africa. The applicants argued that sections 26, 27 and 28 of the final Constitution use the word 'everyone' in the first two sections and 'every child' in the third, and that it would be unconstitutional to limit access to social grants to citizens alone. In the Constitutional Court, Mokgoro upheld a decision of the High Court that it was the Court's responsibility to read the words 'permanent resident' into the challenged provisions of the Social Assistance Act.

Drucilla Cornell and Karin van Marle critically analyse this case and the underlying assumptions in Mokgoro's judgment. They argue that Mokgoro's reasoning reveals politics and ethics at play.⁴⁹⁴ There is a deep sense that the humanity and dignity of these applicants should not be denied as the purposive nature of the South African Constitution is rooted in the promotion of a just community.⁴⁹⁵ Although Mokgoro does not use the word *ubuntu* anywhere in this case, her insistence that everyone is responsible for ensuring the well-being of persons within their community reflects the essence of *ubuntu* in the way that she understands it. She is not only promoting a fair community but a *caring* one. In her view, there is a connection between a just and caring community:

493 Act 59 of 1992.

494 D Cornell & K van Marle 'Exploring *ubuntu*: Tentative reflections' (2005) 5(2) *African Human Rights Law Journal* 195. This politics and ethics seems to be telling us that no one – including the state – is allowed to say 'you do not interest me'.

495 During *apartheid*, legislation was interpreted in terms of what was considered to have been the intention of the legislators as Parliament was supreme in its law-making powers. After 1994 the Constitution became the supreme law and the interpretation of any law had to be purposive and reflect the underlying values of the Constitution. See also section 39 of the Constitution (1996).

Through careful immigration policies it can ensure that those admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent residents become a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who have homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times.⁴⁹⁶

In *Khosa*, Mokgoro further develops her vision as expressed in *Makwanyane*, namely that of caring within a communal context. In attempting to find a new constitutionalism along these lines, Kenneth Karst suggests that women's concern for a 'web of connection' might result in a more *inclusive* reading and interpretation of constitutional and human rights law.⁴⁹⁷ He suggests that constitutions traditionally derive from a 'male' conception of freedom that is expressed in terms of (negative) freedom from the interference of others and separation from government. The emphasis is thus on individual liberties rather than on collective or group rights. Karst suggests that the voice of care and connection may lead to doctrinal changes in the state's duty to assist all members to fully participate in the community.⁴⁹⁸

In the *Khosa* case Mokgoro's reasoning is a concrete example of an attempt to protect the applicants from manifestations of technical, juristic violence and negative freedom. She encourages us to consider the stories of the applicants and the plight of children and the aged who would be left to suffer even more if not assisted. Our response to these stories defines who we are and our visions of the type of community and society we wish to live in. Our courts, now more than ever as institutions operating in a constitutional and transitional democracy, have an opportunity to open up spaces in which the vulnerable can be heard. Justice Mokgoro has drawn our attention to the responsibility of creating, within constitutional imperatives, a community both just and caring and a morality of social concern. She challenges us to view the imperatives of the Constitution as demanding of us to be responsible and caring towards all members of our community, including permanent residents.

Justice Mokgoro argues for a more conciliatory and communal *approach* to law and justice. A common thread is found in her insistence on more attention being paid to caring within the community. She argues convincingly that *ubuntu* is a philosophy of life which, in its most fundamental sense, represents personhood, humanity, humaneness, and morality. The fundamental belief is that *motho ke ba batho ba bangwe/ ubuntu*

496 *Khosa* (n 491 above) para 65.

497 K Karst "'Women's' Constitution' (1984) *Duke Law Journal* 477.

498 As above, 487, 488.

ngumuntu ngabantu, which, literally translated, means that a person can only be a person through others.

As such our freedom and well-being is dependent upon our communal interactions and our attitudes towards, and relations with, others. This is a recognition of the constitutional importance of care, connectivity and the protection of vulnerable members of our society.

Echoing Mokgoro's concerns with the development of a caring society, Albie Sachs makes explicit reference to *ubuntu* in *Port Elizabeth Municipality v Various Occupiers*, an eviction case,⁴⁹⁹ expanded upon in Chapter 7 in this volume. In justifying his refusal to uphold an eviction order which would result in the homelessness of a large number of squatters, he highlights the constitutional requirement that everyone must be treated with 'care and concern' within a society based on the values of human dignity, equality and freedom. He also reminds us that the Constitution places a demand upon us to decide cases not on generalities but in the light of their own particular circumstances.⁵⁰⁰

The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.⁵⁰¹

Justices Mokgoro and Sachs thus argue strongly that *ubuntu* should become central to a new constitutional jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance or re-birth.⁵⁰² They do so again in a case dealing with the civil law.

3.2.2 *Dikoko and the interrelationship between ubuntu and restorative justice*

Justices Mokgoro and Sachs were instrumental in bringing the restorative dimensions of *ubuntu* to bear in the case of *Dikoko v Mokhatla*,⁵⁰³ which dealt with defamation and the assessment of a quantum of damages.

Without going into the detail of the facts, Mokgoro and Sachs invoked *ubuntu* in deciding that the order of damages imposed by the High Court

499 2005 (1) SA 217 (CC).

500 As above, para 31.

501 As above, para 37.

502 T Mbeki 'The African renaissance, South Africa and the world' Speech delivered at the United Nations University on 9 April 1998. For the full speech see <http://archive.unu.edu/unupress/mbeki.html> (accessed 15 November 2017).

503 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

was too harsh and unreasonable. But their conclusions were different. Mokgoro argued that the amount in damages should be reduced from R110 000 with costs to R50 000 without costs, while Sachs preferred to have the payment of damages replaced with an order requiring an apology, arguing that 'the reparative value of retraction and apology' should be given a more prominent role:⁵⁰⁴

There is a further and deeper problem with damages awards in defamation cases. They measure something so intrinsic to human dignity as a person's reputation and honour as if these were market-place commodities. Unlike businesses, honour is not quoted on the Stock Exchange. The true and lasting solace for the person wrongly injured is the vindication by the Court of his or her reputation in the community. The greatest prize is to walk away with head high, knowing that even the traducer has acknowledged the injustice of the slur.

Mokgoro emphasised that the basic constitutional value of dignity has an interrelationship with *ubuntu*. Her focus was on the restoration and/or attainment of harmony as understood in indigenous law. Thus, when one considered cases of compensation for defamation the goal should not be to 'enlarge the hole in the defendant's pocket'.⁵⁰⁵ She explained that compensatory damages were intended to restore the insulted dignity of the plaintiff rather than to punish the defendant. She further argued that this was better achieved through restorative than through retributive justice:⁵⁰⁶

The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognize the human dignity of the plaintiff, thus acknowledging, in the true sense of *ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant.

In this case Mokgoro clearly articulates the interrelationship between dignity and *ubuntu*. This is addressed in an interesting way in an article entitled 'Where dignity ends and *uBuntu* begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts',⁵⁰⁷ which she co-authored with Stu Woolman. Responding to Drucilla Cornell's '*Ubuntu* Project',⁵⁰⁸ Mokgoro and Woolman acknowledge her attempts at defining *ubuntu* within the context of western notions of dignity

504 As above, para 109.

505 As above, para 68.

506 As above, para 69.

507 Y Mokgoro & S Woolman 'Where dignity ends and *uBuntu* begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *South African Public Law* 402.

508 For details of Cornell's *Ubuntu* Project see <http://www.up.ac.za/en/jurisprudence/article/17597/ubuntu-project> (accessed 14 November 2017).

or communitarianism, but submit that ‘it provides a distinctly Southern African lens through which judges, advocates, attorneys and academics ought to determine the extension of the actual provisions of the basic law.’⁵⁰⁹ Mokgoro and Woolman argue strongly that ‘[t]he presence of “*uBuntu*” as a guiding norm in the interpretation of our basic law is essential, in the minds of ordinary people, for the legitimization of our legal system. We ignore “*uBuntu*” at our own peril.’⁵¹⁰ This position is the same taken by Mokgoro in her 1997 paper (above), where she argues that the value of *ubuntu* could provide the Constitution with the necessary ‘*indigenous impetus*’⁵¹¹ to prevent scepticism about its legitimacy as an African-focussed supreme law. Although Mokgoro linked *ubuntu* and dignity in her judgments, she also recognised, in 2010, that:

... a growing sense of disjunction between the ideals of the Constitution and the lived experience of most South Africans warrants a reappraisal of the place of *uBuntu* in South African law. It is this difference between dignity – as espoused by Kant and other Western philosophers – and *uBuntu* as practiced by the majority of South Africans The legitimization of the South African legal order depends upon our ability to synchronise these two closely related, but distinct terms.⁵¹²

They conclude, simply, that ‘*uBuntu* and dignity do not map directly on to one another’ as Drucilla Cornell has tried to establish, ‘but they do rhyme’.⁵¹³

3.3 Some critical and cautionary notes

Of course critical scholars have warned that it would be dangerous to merely embrace *ubuntu* as a universal value without reflection. Postmodern critics of essentialism, foundationalism and metanarratives have submitted that rendering concepts stable and static only leads to further oppression and exclusion as those who do not ‘fit in’ are once again silenced and excluded. In his critique of *ubuntu*, Patrick Lenta points out that the recognition of *ubuntu* as a constitutional value has been heralded in South Africa as an indication that we now share a substantive, inclusivist vision of the law and justice.⁵¹⁴ However, he cautions us against declaring this a victory as ‘... there is a danger that indulging in nostalgia about African colonial cultures will reinforce the myth that there is a single African culture and that the continent lacks diversity....’⁵¹⁵

509 Mokgoro & Woolman (n 507 above) 402.

510 As above, 403.

511 Emphasis in the original.

512 Mokgoro & Woolman (n 507 above).

513 As above, 407.

514 P Lenta ‘Just gaming? The case for postmodernism in South African legal theory’ (2001) 17 *SAJHR* 189.

515 As above.

Adopting an even more critical stance towards the attempts by the Constitutional Court in *Makwanyane* to 'legalise' the value of *ubuntu*, Rosalind English expresses concern over the contradictory nature, meaning and implications of adopting *ubuntu* as a specific conception of human rights.⁵¹⁶ She states that: 'If *ubuntu* is a serious proposal ... it is a pity that the implications of the idea have not been explored more fully in cases where the interests of the individual conflict with those of society.'⁵¹⁷

It is no doubt true that critical perspectives should be taken seriously; but we do not share the same concern about the collapse of the rights of individuals within community and the impression created that *ubuntu* thinking would *always* place societal interests over and above those of the individual. In fact, the opposite result was reached in *Makwanyane*, where every opinion poll in South Africa showed overwhelming support for the death penalty at the cost of individual lives. The Court decided differently, upholding the human rights of even the most heinous of criminals.

A possible answer to English's concern about individual rights may also be found in the sentiments expressed by Justice Edwin Cameron (a sitting judge) when deliberating on the equal right to sexual orientation.⁵¹⁸ Cameron supports an approach to substantive equality which is informed by *ubuntu*. In doing so he relies on former Chief Justice Langa's description of *ubuntu* as the recognition of another's status as a human being worthy of respect. This recognition has a converse in that '... the person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community.'⁵¹⁹ Rather than attacking or dismissing *ubuntu* as a patriarchal, exclusionary and conservative force, Cameron praises this African concept as one inclusive of humanity that encourages the extension of human rights protection to the socially vulnerable, including gays and lesbians. He states that *ubuntu* finds *practical value* by providing constitutional protection to those we deem to be different from ourselves and by allowing us to build our future on respect and tolerance and 'delight in our diversity'.⁵²⁰ From the above, it is clear that Cameron, an HIV/AIDS activist and current Constitutional Court judge, is *not* of the view that adopting *ubuntu* as a constitutional value

516 R English 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal of Human Rights* 641.

517 As above, 643. English states that the Court seems to be 'resurrecting indigenous values that have fallen into desuetude' (648). She submits that constitutional adjudication is about conflict and not harmony and that 'if *ubuntu* is to be a useful addition to constitutional discourse, we have to get rid of the idea that it is in some way a balm for the conflict at the heart of society' (648). She also warns that 'if you are delving in the archives for the fragmentary accounts of a legal system which has largely gone unrecorded, in search of practices that support your particular argument (whatever it is) you are bound to find exactly what you are looking for' (644).

518 In a speech delivered in Windhoek, Namibia during Human Rights Awareness Week 2001. See E Cameron 'Sexual orientation and "Ubuntu"' (2010) 10 *Sister Namibia*.

519 As above.

520 As above, 3. Cameron thus holds that the value of *ubuntu* encourages the unconditional acceptance of the gay and lesbian community.

would lead to the oppression and marginalisation of the gay and lesbian community. In fact, he expresses the opposite view: that *ubuntu* thinking encourages inclusivity, even of those deemed to be 'different'.⁵²¹

In *Justice: A Personal Account*,⁵²² Justice Cameron tells the story of a random act of kindness by a stranger which allowed him and his sister to buy a cake for his sister Jeanie's birthday.⁵²³ In recounting this poverty-riddled childhood story he recounts the generosity and 'charity' that led to his appointment as a judge. He writes about the '[d]istributive interventions' that changed his life and concludes that 'we all need the caring and generosity of others',⁵²⁴ and he maintains that the Constitution gives us this by obliging our government to care for us.

Marius Pieterse also encourages the use of *ubuntu* on condition that it is utilised as a multi-dimensional value within the sphere of legal interpretation.⁵²⁵ Pieterse argues that it is precisely the treatment of *ubuntu* as a unidimensional concept that renders the ideal problematic.⁵²⁶ He argues that the fact that *ubuntu* thinking does not fit comfortably into legal discourse does not mean that it has nothing to offer.⁵²⁷ On the contrary, it is a rich philosophy that holds much promise in assisting us in developing a constitutional jurisprudence that is not merely a mirror of western law – thereby reflecting the views of Mokgoro. *Ubuntu* could be seen as a form of 'groupcentered individualism' in that it acknowledges the importance of individual interests, but always contextualises these interests by emphasising the effects of these interests on the group.⁵²⁸

Thus, when applauding *ubuntu* as a constitutional value, we need to keep in mind that it remains a 'problematic concept' as Lenta warns us, while simultaneously heeding the call of Mokgoro to reimagine *ubuntu* as a constitutional value that resonates with African ways of being. In paying close attention to Yvonne Mokgoro's vision of a just and caring community, we could be adopting a radical position that serves in its own way to decolonise the law and contribute to the African renaissance. Consequently, in displacing and destabilising dominant conceptions of western liberalism and individualism, and by introducing new ways of

521 As above.

522 E Cameron *Justice: A Personal Account* (2014).

523 As above, 232-235.

524 As above, 236.

525 M Pieterse "'Traditional' African jurisprudence' in CJ Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 438.

526 As above, 442.

527 As above, 448.

528 As above, 460. He comes to this conclusion after analysing the provisions of the African Charter on Human and Peoples Rights which place emphasis on social justice and development. These 'communitarian' values are reflected in the African Charter articles 27-29, where reciprocal duties are stressed.

solving disputes, we would be empowered to move beyond the exclusionary tendencies of western discourses of law.⁵²⁹

However, despite all the value to be had, *ubuntu* is an open and malleable concept that could be used to justify a certain form of conservatism, which could be glimpsed in the AfriForum case against Julius Malema in the Equality Court. This case is interesting in that there was a need to balance two rights, that of freedom of expression versus the feelings of dignity of a minority Afrikaner community in South Africa.

3.4 A legacy in the making: Mind the gap

Mokgoro's *ubuntu* legacy was outlined in a very vivid and complex way by Justice Lamont in the Equality Court case of *Afri-Forum and Another v Julius Sello Malema and Others*,⁵³⁰ wherein the singing of the song 'shoot the boer' was found to construe hate speech and thus serve as a limitation of the right to freedom of speech as encompassed in section 16 of the Constitution. In his judgment Lamont held that *ubuntu* was recognised as being an important source of law within the context of strained or broken relationships amongst individuals or communities and as an aid for providing remedies that contributed towards more mutually acceptable remedies for the parties in such cases.⁵³¹ He described *ubuntu* broadly as a concept which:⁵³²

1. Is to be contrasted with vengeance
2. Dictates that a high value be placed on the life of a human being
3. Is inextricably linked to the values of, and which places a high premium on, dignity, compassion, humaneness and respect for the humanity of another
4. Dictates a shift from confrontation to mediation and conciliation
5. Dictates good attitudes and shared concern
6. Favours the re-establishment of harmony in the relationship between parties and that such harmony should restore the dignity of the plaintiff without ruining the defendant
7. Favours restorative rather than retributive justice

529 N Bohler-Muller 'Developing a new jurisprudence of gender equality in South Africa' unpublished LLD thesis, University of Pretoria, 2006.

530 2011 (6) SA 240 (EqC).

531 As above.

532 As above. Lamont references the following cases for informing his summary understanding, many of which were influenced by Mokgoro's thinking: *S v Makwanyane and Another* 1995 (3) SA 191 (CC) (paras 131, 225, 250, 307); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517 (CC) para 37; *Dikoko v Mokgatla* 2006 (6) SA 235 (CC) paras 68-69, 112, 115-116; *Masethla v President of RSA* 2008 (1) SA 566 (CC) para 238. See also *Union of Refugee Women v Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) para 38; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 50; *Bhe and Others v Magistrate Khayelitsha and Others* 2005 (1) SA 580 (CC) paras 45, 163.

8. Operates in a direction favouring reconciliation rather than estrangement of disputants
9. Works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant
10. Promotes mutual understanding rather than punishment
11. Favours face-to-face encounters of disputants with a view to facilitating differences being resolved rather than conflict and victory for the most powerful; and
12. Favours civility and civilised dialogue premised on mutual tolerance.

This use of *ubuntu* to ban the *apartheid* struggle song combines the sentiments in the Post-amble of the interim Constitution with elements of the jurisprudence of the Constitutional Court and provides a very broad understanding of the value and its use. The emphasis on reconciliation and the facilitation of differences are honourable, but freedom of expression activists may argue that this is indeed *not* a reconciliation of differences and recognition of diversity, as one party is held to a higher standard of 'civility' than the other. In a firm critique of this judgment, Pierre de Vos mentions three problematic aspects, one of which is of relevance here.⁵³³ Judge Lamont invoked the notion of *ubuntu* '... to help justify the drastic limitation on the freedom of expression of all South Africans. For judge Lamont ... the protection of dignity and adherence to the values of *ubuntu* requires a radical limitation on the right to freedom of expression.'

It is a drastic limitation because Judge Lamont ordered that both Julius Malema and the ANC be interdicted and restrained from singing the song known as *Dubula Ibhunu* 'at any public or private meeting held by or conducted by them'. His 'essentialistic and simplistic division of South Africans' into different race groups could also be viewed as problematic as the Court relied on racial assumptions and stereotypes to justify its finding. This could be considered the antithesis of *ubuntu* as understood by Mokgoro.

4 Life after the Bench

Since her departure from the Bench Justice Mokgoro has continued to be active in the legal space by occupying several influential positions. She has taught a number of legal courses, which include Constitutional Law, Human Rights Law Jurisprudence, Criminal Law, History of Law, Customary Law, Comparative Law, and Private Law, at universities in the

533 P de Vos 'Malema judgment: A re-think on hate speech needed' 12 September 2011 <https://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/> (accessed 15 November 2016).

United States, Netherlands, the United Kingdom and South Africa.⁵³⁴ As a skilled writer and speaker, she has written and presented papers and participated in a number of conferences, seminars and workshops both nationally and internationally, where she has focused mainly on themes pertaining to sociological jurisprudence, human rights, customary law, the impact of law on society in general, and on women and children in particular.⁵³⁵ In recognition of her contributions to the judiciary and law the South African universities of North West, Western Cape, KwaZulu-Natal, Pretoria and Wits as well as the University of Toledo (Ohio) and the University of Pennsylvania have awarded her with the Doctor of Laws (*Honoris Causa*).⁵³⁶

Justice Mokgoro served as Chairperson of the South African Law (Reform) Commission for a period of 16 years until the end of her third term on the Bench in 2011. From 2011 until 2013, she served in the Office of the Chief Justice (OCJ). Work in this office required of her to exercise oversight over the administration of the OCJ. Her responsibilities also entailed the implementation of the mandate of the OCJ, which promotes the independence of the South African Judiciary as per Section 165 of the South African Constitution as well as other supporting laws.

Of note is the fact that Justice Mokgoro has made significant contributions as a resource person both in South Africa and internationally for non-governmental and community-based organisations.⁵³⁷ She holds a number of memberships of prestigious institutions such as the International Women's Association (Washington DC), the International Federation of Women Lawyers, the International Association of Women Judges, and the South African Women Lawyers Association.

Justice Mokgoro was appointed as a Special Ambassador by the University of Venda in 2009, and in January 2012 she was appointed as Chairperson of the Independent Panel of Experts, with the brief to investigate the circumstances surrounding an incident at the University of Johannesburg (UJ) in which a stampede occurred during a student registration process, resulting in the death of a parent. In 2013 she was appointed to chair a tribunal to investigate the ethical conduct of the President of the Lesotho Court of Appeal. In her role as Chairperson of the Social Cohesion Reference group, Yvonne Mokgoro supported a forum that managed to diffuse tension around the 'Fees must fall' student protest in 2016. It is not widely publicised that this forum entered into highly sensitive talks with student leaders, university managements and government and played a vital role in dissolving the violence and tensions

534 South African History Online 'Yvonne Mokgoro' 16 August <http://www.sahistory.org.za/people/yvonne-mokgoro> (accessed 3 November 2017).

535 Penn Law (n 465 above).

536 Constitutional Court 'Judges: Yvonne Mokgoro' <http://www.constitutionalcourt.org.za/site/judges/justiceyvonnemokgoro/index1.htm> (accessed 3 November 2017).

537 As above.

on campuses across the country.⁵³⁸ The Premier of Gauteng, David Makhura, called upon an Eminent Group of Social Cohesion Champions on Human Right's day in 2016 to deal with racism and xenophobia among various sections of the population in Gauteng. The group is chaired by Justice Mokgoro and has been tasked to work with both government and civil society to unravel and address the institutional, spatial, structural, psychosocial and socio-economic nature of racism and xenophobia in the province.

Currently, Justice Mokgoro serves on a number of boards and trusts. These include the Nelson Mandela Children's Fund, the Mandela-Rhodes Trust, the International Institute of Judicial Education, the South African Police Services (children's) Education Trust (of which she is Deputy Chairperson), and the African Centre for Justice Innovation (ACJI).⁵³⁹

4.1 A public voice in defence of the Constitution and its values

Justice Mokgoro has been vocal on a number of matters in the media and public spaces since leaving the Constitutional Court. A golden thread of upholding the Constitution as the basis for a South African ethos on human rights, ethics, and the rule of law is notable whenever she speaks in civic forums. Speaking in Midrand, the former Constitutional Court Justice commented, when opening a two-day ethics conference, that the ethical situation in South Africa was dire. She also lamented the new ethos of corruption that was eroding the fabric of society and added that the Constitution must serve as the basic ethos of all South Africans and a guide for all their actions.⁵⁴⁰

During a women's networking and empowerment session in Kimberly recently, she encouraged women not to always wait for the judicial system to resolve all their problems but clarified that society had the power to resolve many psychological and social problems. She mentioned that everyone in society, including schools and youth organisations, had a mandate right from the beginning to deal with society and its well-being.⁵⁴¹

Justice Mokgoro spoke about the Constitution during a media briefing in February 2015 on the funding of a joint 'Constitutionalism Fund',

538 'When reason leaves the building' *News24* 20 March 2017 <http://www.news24.com/Columnists/AletJvRensburg/when-reason-leaves-the-building-20170320> (accessed 3 November 2017).

539 South African History Online (n 534 above).

540 'Justice Yvonne Mokgoro: Ethical issues in SA have become dire' *EWN Eyewitness News* 2016 <http://Ewn.Co.Za/2016/09/15/Justice-Yvonne-Mokgoro-Ethical-Issues-In-Sa-Have-Become-Dire-1> (accessed 3 November 2017).

541 'Judge instils hope' 9 September 2015 <http://www.news24.com/SouthAfrica/Local/Express-News/Judge-instils-hope-20150908> (accessed 6 November 2017).

insisting on the substantiveness of the protection of human rights. She said that:

some people like to call it delivery of the mandate to those who have been tasked with making real the promise of the constitution. I think those people who like to call it – in relation to socio-economic rights, health care, education, access to food – they like to term those service delivery by government. Maybe we have got to bring it back to the constitution and base it on the substantiveness of the constitution.⁵⁴²

She added that the long-term stability of the country and the progressive realisation of the rights and values of the Constitution were dependent on the maintenance of key institutions and the promotion of the rule of law.⁵⁴³

In a speech delivered in 2015 entitled ‘The rule of law, judicial authority, and constitutional democracy in South Africa’⁵⁴⁴ Mokgoro ended with a powerful statement about politics, the Constitution, the courts and integrity in South Africa:

The long and short of it is that whether state or the public at large, we all have an interest in the independence, integrity and legitimacy of our courts and must therefore protect them and desist from creating circumstances which weaken them and place their authority in jeopardy. If there is a point of social cohesion which has the greatest potential for institution-building with a view to nation-building, it is the respect we must show for our Constitution as the foundation of our constitutional democracy, where the role of our courts is central.

5 Concluding observations about the dignity of *ubuntu*

Yvonne Mokgoro has been an ardent supporter of *ubuntu*, which was reflected in her judgments in the *Makwanyane*, *Khosa* and *Dikoko* cases touched upon above. In her separate judgment in *S v Makwanyane*, she secured a place for *ubuntu* in South Africa’s jurisprudence, spearheading an Africanist approach to constitutional interpretation. In the *Khosa* case she insisted that everyone was responsible for ensuring that the well-being of persons within their community and society reflected such thinking. She

542 ‘Massive boost for SA civil society as \$25 million long-term fund to advance Constitution announced’ *Daily Maverick* 5 February 2015 <https://www.dailymaverick.co.za/article/2015-02-05-massive-boost-for-sa-civil-society-as-25-million-long-term-fund-to-advance-constitution-announced/#.WfsGj4-Cw2w> (accessed 6 November 2017).

543 As above.

544 Mokgoro’s tribute to Professor Asmal. See P de Vos ‘Justice Yvonne Mokgoro on rule of law, judicial authority and democracy’ 21 July 2015 <https://constitutionallyspeaking.co.za/justice-yvonne-mokgoro-on-rule-of-law-judicial-authority-and-democracy/> (accessed 14 November 2017).

has therefore shown herself to be in support not only of a fair community but also of a 'caring' one.⁵⁴⁵ In her view, a just community and a caring community are one. During her career Justice Mokgoro has dedicated her scholarship to unpacking *ubuntu*,⁵⁴⁶ including taking forward her thoughts on *ubuntu* and dignity, as expressed in the civil case of *Dikoko*.

The concept of *ubuntu* has been widely debated, with some authors arguing that it cannot be given expression satisfactorily using non-African vocabulary. In *Makwanyane*, Justice Mokgoro explained that: 'Although South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of *uBuntu*.'⁵⁴⁷ She also relies upon her own understanding of the African philosophy within the constitutional context by claiming that constitutional law reform can harness the spirit of *ubuntu*(ism), with its key values of human dignity, respect, inclusivity, compassion, concern for others, and honesty.⁵⁴⁸ She maintains also that: '[q]uite obviously, the complete dignification of South African law and jurisprudence would require considerable re-alignment of the present state of our value systems. We will thus have to be ingenious in finding or creating law reform programmes'⁵⁴⁹ within the context of the African renaissance. In the words of Mokgoro and Woolman:

We can ask of the *uBuntu* project, as Hillel did of his brethren over two millennia ago, 'If not now, when?'⁵⁵⁰

545 Bohler-Muller (n 529 above) 81.

546 Mokgoro (n 474 above).

547 *Makwanyane* (n 484 above).

548 Bohler-Muller (n 529 above).

549 Mokgoro (n 474 above) 10-11.

550 Mokgoro & Woolman (n 507 above) 407.

Bibliography

- Bishop, M; Chamberlain, L & Kazee, S 'Twelve-year review of the work of the Constitutional Court: A statistical analysis: Current developments' (2008) 24(2) *South African Journal on Human Rights* 354.
- Cameron, E *Justice: A personal account* (Tafelberg Press: Cape Town 2014).
- Cornell, D & Van Marle, K 'Exploring *ubuntu*: Tentative reflections' (2005) 5(2) *African Human Rights Law Journal* 195.
- Democracy & Governance Research Programme, HSRC (Human Sciences Research Council) *Women marching into the 21st century: Wathint' Abafazi, Wathint' Imbokodo* (HSRC Press: Pretoria 2000).
- English, R 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal of Human Rights* 641.
- Haffajee, F (ed) *The book of South African women* (M&G Media Ltd: Johannesburg nd).
- Himonga, C; Taylor, M & Pope, A 'Reflections on judicial views of *ubuntu*' (2013) 16(5) *Potchefstroom Electronic Law Journal* 67.
- Karst, K "'Women's' constitution' (1984) 3 *Duke Law Journal* 477.
- Lenta, P 'Just gaming? The case for postmodernism in South African legal theory' (2001) 17 *South African Journal of Human Rights* 173.
- Manson, A "'Punching above its weight". The Mafikeng Anti-Repression Forum (Maref) and the fall of Bophuthatswana' (2011) 43(2) *African Historical Review* 55.
- Mokgoro, Y & Woolman, S 'Where dignity ends and *uBuntu* begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *South African Public Law* 400.
- Mokgoro, Y 'Ubuntu and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 1.
- Orford, M (ed) *Life and soul: Portraits of women who move South Africa* (Juta and Company Ltd: Cape Town 2006).
- Pieterse, M "'Traditional" African jurisprudence' in Roederer, CJ & Moellendorf, D (eds) *Jurisprudence* (Juta and Co Ltd: Lansdowne 2004).