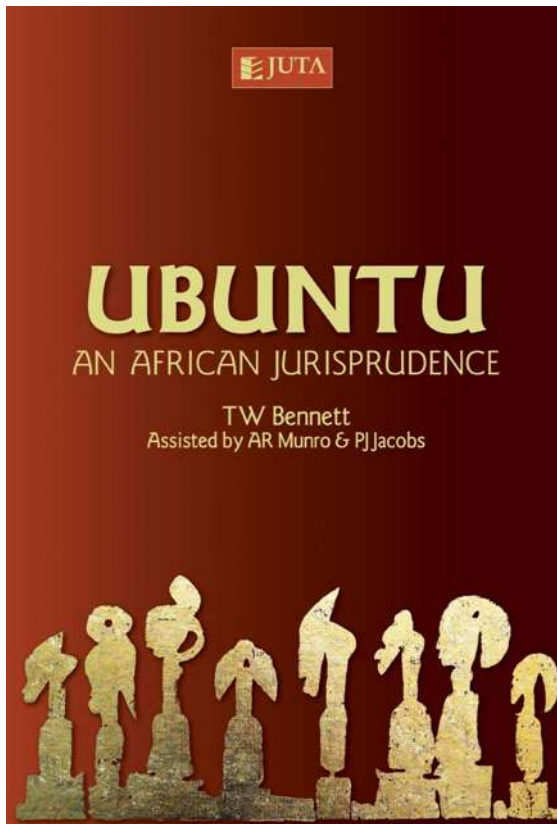


## Book Review



## **UBUNTU** **An African Jurisprudence**

by T W Bennett  
assisted by AR Munro & P J Jacobs

(223 pages)

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***"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."***

– South Africa's Interim Constitution, Act 200 of 1993

The evolution of law involves far more than new or amended legislation, rules and regulations, crafted to deal with our ever-changing human condition. The very notion of law is founded on its purpose – to bring order and justice to society, to promote and protect the well-being of our planet and its people, and to advance the values that underpin that purpose. Inevitably, to achieve that

purpose, throughout the ages various structures and institutions, processes and procedures have been introduced so as to give effect to legal systems. These include courts of law, prosecuting authorities, law enforcement agencies, various tribunals and quasi-judicial bodies, legislators, regulators, and much else.

In South Africa, with our complex cross-pollinated history and diverse society, both our laws and our legal institutions are an amalgam of Roman-Dutch civil law, English common law, international commercial law, home-grown legislation and judicial precedent, all tumbled through the clattering spin-dryer of colonialism and apartheid. With the advent of our constitutional democracy, far more sources of law from jurisdictions around the world can now be called upon and incorporated into our legal order in the constant endeavour to achieve the justice which the law pursues.

This transformation has again raised awareness that we have available to us our very own indigenous resources of traditional law still deeply espoused and ingrained in large portions of our society, urban and rural.

The challenge of weaving our traditional legal regimes into a constitutional order is no easy task, but if law is to reflect and seek to order society, and society is to submit to and uphold the law, then it is imperative that the law has its finger on the pulse of society.

An example of this process in the field of health and medicine was the enactment of the *Traditional Health Practitioners Act 22 of 2007*, which can be considered a formal recognition and acceptance of the role, value and importance of traditional health practices in South Africa.

A truly remarkable and significant step as far as the law is concerned has been the emergence of ubuntu as part of South African jurisprudence.

But what is ubuntu? What does it mean? What does it offer? How does it work? These and many other common questions have now been truly grasped, dissected and unravelled in a fascinating and stimulating book by Tom Bennett BA LLB PhD, Professor in the Department of Public Law at the University of Cape Town, ably assisted by A R Munro and P J Jacobs.

The learned author observes:

*"Whatever is said about ubuntu, it is undeniably of great moral and, latterly, of legal value. Although borne of pre-colonial society when it was applicable to small social units – families, clans and neighbours – its basic precepts of caring, compassion and seeking social harmony give it an inherently inclusive scope. Ubuntu is therefore quite capable of embracing the much larger groups that make up the large, heterogeneous populations of modern day South Africa."*

Tom Bennett is perhaps uniquely qualified to tackle this subject. His decades of research and publications on customary law have been widely recognized, perhaps most recently by Judge MS Jolwana in the Eastern Cape High Court in Mthatha in the case of *Lurhani and another v Premier of the Eastern Cape Provincial Government and others* [2018] 2 ALL SA 836 (ECM), who cited with approval Bennet's *Customary Law in South Africa* (2004 – Juta & Co Ltd)

The book deals with the concept of ubuntu and its value, the difficulty of its definition, and whether any precise definition is even possible or desirable. Ubuntu is associated with fairness, non-discrimination, dignity, respect and civility. The author explores ubuntu as way a person behaves, or ought to behave, as a human towards other humans. This encompasses caring, unity, tolerance, closeness, generosity, genuineness, empathy, consultation, compromise and hospitality. It could include the notions of fullness of human life, truthfulness, self-respect and integrity. Ubuntu implies a collective personhood, which invokes images of group support, acceptance, co-operation, sharing and solidarity.

Objections to ubuntu as being too generalised and vague, not a legal concept, unsuited to modern conditions, promoting the interests of insiders and majorities, and susceptible to manipulation to achieve political and ideological ends, are all addressed.

How the courts have applied ubuntu is an eye-opener and convincingly establishes its value in a legal setting. The author writes that "*...the courts have made full use of the many connotations of ubuntu, such as civility, respect, dignity, harmony and compassion when interpreting the concept in keeping with the Bill of Rights.*"

The term ubuntu first appeared in the 1993 Interim Constitution. It has since been linked by our courts to at least ten constitutional rights including equality, privacy, freedom of expression, and most often dignity. It has been associated with other general principles of common law, such as reasonableness, good faith, fairness, justice and equity. It is closely aligned to the important concept of restorative justice. In the Constitutional Court case of *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), Justice Albie Sachs observed:

*"The key elements of restorative justice have been identified as encounter, reparation, reintegration and participation. Encounter [dialogue] enables the victims and offenders to talk about the hurt caused and how the parties are to get on in future. Reparation focuses on repairing the harm that has been done rather than doling out punishment. Reintegration into the community depends upon the achievement of mutual respect for and mutual commitment to one another. And participation presupposes a less formal encounter between the parties that allows other people close to them to participate. These concepts harmonise well with processes well known to traditional forms of dispute resolution in our country, processes that have long been, and continue to be, underpinned by the philosophy of ubuntu – botho."*

Two other important concepts are also discussed and analysed in detail, namely imbizo and indaba. The former is a traditional method for engaging members of a community in decisions affecting their welfare. Public participation is a constitutional requirement that brings an added sense of legitimacy to rule-making processes. Indaba is the decision making deliberation to reach a solution.

*"The functions of both imbizo and indaba complement the overarching normative goal of ubuntu, which is to achieve the common good of a community. Thus imbizo is a gathering of all members of the community to participate in a decision-making indaba, a process that is open and relatively informal."*

The author makes a persuasive and compelling case for the enormous potential ubuntu has to contribute to imbuing our legal system with an African set of values, and thereby giving expression to South Africa's unique cultural and historical circumstances.

As our courts become increasingly congested and the search for alternative dispute resolutions, means, methods and forums increases, the deep wells of ubuntu, endorsed by our highest courts, provide a rich and ready-made resource and remedy that should be embraced by legal practitioners, judicial officers, mediators, litigants and, before the law even steps into the arena, all who seek to break deadlocks, calm troubled waters, build bridges, and find common ground.

The acclaimed satirist and astute social observer, Pieter-Dirk Uys, makes this comment:

*"It should be a human right to laugh at fear, but maybe the only human right we are left with is the right to be human. That humanity includes the compassion, dignity and respect we show one another, the ubuntu that is the essence of our democracy – or should be."*

*Review by Louis Rood BA LLB (UCT), Consultant at Fairbridges Wertheim Becker Attorneys.*