

ULPIAN'S *PRAECEPTA IURIS* AND THEIR ROLE IN SOUTH AFRICAN LAW PART 2: MODERN-DAY SOUTH AFRICAN PRACTICE

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1. Introduction

The South African legal system is multilayered. It is an uncodified, hybrid legal system, relying, apart from the Constitution, the supreme law of the land, on different sources of law such as legislation and precedent but also on common law and on African customary law. The South-African common law mainly consists of Roman-Dutch law, influenced by English common law and adapted over the centuries by local legislation and precedent. Furthermore, legal pluralism prevails: within a paradigm of state-law pluralism, the Roman-Dutch common law and constitutionally recognised African customary law¹ are applied as independent (theoretically parallel) systems of law.²

In South Africa the civilian tradition is dominant and is generally regarded as the essential axis of South African law. South African courts still frequently use both Roman-Dutch and Roman law as primary sources of law and academics rely on Roman law as an original source and not only as part of Roman-Dutch law. Its foundational precepts – which largely coincide with the core values of the Constitution – play an important role in legal development and law reform.³

Considering the importance of Roman-Dutch law as the foundation of South-Africa's legal system, an analysis of Ulpian's *praecepta iuris* is still relevant. However, given the reality of legal pluralism, no such analysis can be useful and pertinent, without considering African customary law. Thus it is also necessary to establish what the foundational principles of African customary law are, and specifically how *ubuntu* fits in with that notion.

1 See s 211(3) of the Constitution of the Republic of South Africa, 1996.

2 In the context of deep legal pluralism one also finds unofficial legal systems not recognised by the state, such as religious laws (eg, Hindu, Muslim and Jewish law) and living African customary law.

3 For a more detailed exposition see GJ van Niekerk "The endurance of the Roman tradition in South African law" (2011) 4 *Studia Iurisprudentia (Universitatis Babes-Bolyai)* available at <http://studia.law.ubbcluj.ro/articole.php?an=2011> (accessed 15 Nov 2013).

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The High Court's *dictum* in *Bophuthatswana Broadcasting Corporation v Ramosa*⁴ linked the South African Constitution, *ubuntu* and the *praecepta iuris*.⁵ This is but one of numerous decisions in which *ubuntu* has featured, in various contexts and with varying content. The courts appear to be increasingly inclined to regard *ubuntu* as the perceived foundation of African customary law – its all-encompassing *praeceptum iuris* as it were.

Against the backdrop of their historical context explored in Part 1 of this contribution, we shall first briefly sketch the role of Ulpian's *praecepta iuris* in South African judicial decisions, and then explore to what extent they intersect with *ubuntu*,⁶ and whether *ubuntu* encapsulates the underlying principles of African customary law.

2. Ulpian's *praecepta iuris* in the courts

In *Law Society, Transvaal v Matthews*⁷ the South African Supreme Court remarked:

'The precepts of the law are these' says Justinian at the beginning of the *Institutes*, 'to live honourably, to injure no one and to give everyone his due'. It is obviously impossible for anyone, who is not himself prepared at least to try to order his life in accordance with these precepts, to make even a pretence of practising the law.

DH van Zyl, Romanist and retired judge of the South African High Court in his book on *Justice and Equity in Cicero*⁸ observed that the *suum cuique tribuere* principle encompasses the prohibition of wrongful conduct, which in turn "paves the way for delictual ... criminal ... [and] contractual liability". There is, however, a direct reference to Ulpian's *praecepta iuris* in only a few South African cases, and these principles had never been invoked with reference to African customary law or in any way linked to it until the decision in *Bophuthatswana Broadcasting Corporation v Ramosa*.⁹

Importantly, in recent judicial decisions the courts have referred to the *praecepta* within the framework of justice.¹⁰ In *FTCK Consultants CC v Shoprite Checkers Ltd*¹¹ the Court remarked that the concept that everyone is entitled to claim what is rightfully his is reflected in "Cicero's concept of justice: *quae animi affectio suum cuique tribuens atque hanc quam dico societatem coniunctionis humanae munifice et aequae tuens iustitia dicitur*."¹²

4 [1997] JOL 283 (B) at 283.

5 See the discussion in Part 1 of this contribution: Duard Kleyn & Gardiol van Niekerk "Ulpian's *praecepta iuris* and their role in South African law Part 1: Historical context".

6 Space constraints do not allow an analysis of the intersection of either with constitutional principles.

7 [1989] 2 All SA 195 (T) at 202, quoting the seminal work of J Herbstein & L de V van Winsen *The Civil Practice of the Superior Courts in South Africa*.

8 (Pretoria, 1991) at 146.

9 (n 4) at 283.

10 *FTCK Consultants CC v Shoprite Checkers Ltd* [2003] JOL 11356 (T); *Fitch v SABC 1* [2009] JOL 22981 (BCCSA) in par [8].

11 (n 10) at 19-20.

12 The Court referred to Cicero *De finibus* 5 23 65-66 and noted at 19: "I have found references to the view of Cicero in 15 judgments as from 1927 to 1995, which illustrates that his views remain of importance for modern legal thinking"; for older cases see *Murdock v Bullough* 1923 TPD 495 at 508; *Isaacman v Miller* 1922 TPD 56 at 60.

In general, *suum cuique tribuere* has been invoked in cases regarding the language of instruction at school level,¹³ the interpretation of statutes¹⁴ and enrichment.¹⁵ And in *Silberman v Hodkinson*,¹⁶ breach of an agreement to hand over prize money to a school was held to be morally deplorable behaviour that is in conflict with Justinian's *praecepta iuris* in Inst 1 1 3.

In cases of delictual liability, both the courts and counsel have had recourse to *alterum non laedere*.¹⁷ This principle still obtains in present-day case law, although Ulpian's precept is seldom mentioned. The courts frequently raise the imperative of *sic utere tuo ut alienum non laedas* in cases of nuisance,¹⁸ if only in its English "give and take" version.¹⁹ As recently as 2013, the High Court remarked in *Roseveare v Katmer; Katmer v Roseveare*²⁰ that "in the case of adjoining owners the relevant principles are ... expressed in the legal maxims: (i) *qui jure suo utitur neminem laedit* (ii) *sic utere tuo ut alienum non laedas*", adding that it "has also been referred to as the 'neighbourly principle of toleration' interpreted as 'give and take' and 'live and let live'."

In other judicial decisions the courts, without referring directly to the *praecepta iuris*, relied on the equitable principles of Roman-Dutch law that reflect the ethos of the *praecepta*, as postulates of justice.²¹ In a number of these cases, *ubuntu* has been linked to the equitable principles of the civilian tradition.²²

13 *Swart and Nicol v De Kock Garner* 1951 (3) SA 589 (A) at 623.

14 *Patullo v Colonial Government* 1876 NLR 22 at 27.

15 *Le Roux v Van Biljon* [1956] 2 All SA 175 (T) at 179.

16 1927 TPD 562 at 573.

17 See *Blore v Standard General Insurance Co Ltd* 1972 (2) SA 89 (O) at 94; *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974 (2) SA 101 (A) at 105; *Knight v Findlay* 1934 NPD 185 at 191.

18 *Van Eck v Clyde Brickfields (Pty) Ltd* [2006] JOL 17208 (T) in par [10]; see, also, *Laskey v Showzone CC* [2007] 4 All SA 1162 (C) in par [21]; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) at 365; *Colonial Development (Pty) Ltd v Outer West Local Council; Bailes v Town & Regional Planning Commission* [2006] JOL 17815 (N) at 34; *Sun International of Lesotho (Pty) Ltd v Zakhura* [1990] LSCA 71 in par [6]. In *Waterhouse Properties CC v Hyperception Properties* 572 CC [2008] JOL 21071 (O) at 6, the Court remarked that this maxim forms the "essence of common-law nuisance".

19 Cf, also, *Allaclas Investments (Pty) Ltd v Milnerton Golf Club* 2008 (3) SA 134 (SCA) in par [21]; *PGB Boerdery Beleggings Edms Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA) in par [9].

20 [2013] JOL 30141 (GSJ) in par [20].

21 See, eg, *Le Roux v Dey* 2011 (3) SA 274 (CC) in pars [198]-[199]. In *Edouard v Administrator, Natal* 1989 (2) SA 368 (D), in an action for damages for breach of contract, the notion of *honeste vivere* came to the fore in the following remark: "That sound morality and civic honesty are cornerstones of the social edifice is a truism which needs no reinforcement by argument" (at 378). Cf, also, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) in par [75] where the Court noted that the maxim *lex non cogit ad impossibilia* (D 50 17 185) "derives from the principles of justice and equity which underlie the common law"; see, also, pars [82] and [83]; cf, further, *Brisley v Drotzky* 2002 (4) SA 1 (SCA) in par [69].

22 See, eg, *Le Roux v Dey* (n 21) in par [197]; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) in par [16].

The courts often emphasise the enduring value of the fundamental principles of the law.²³ In *Willis Faber Enthoven (Edms) Bpk v Receiver of Revenue*²⁴ Hefer JA acknowledged that these principles should play a role in legal development: “Roman-Dutch law is ‘a virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society’.”

3. *Ubuntu*

Academic discussions on the concept of fundamental principles underlying the law are not limited to the *praecepta iuris* in Roman law and in the civilian legal systems. A similar discourse is to be found in the socio-legal writings of academics who study the interaction of legal systems in multicultural societies where legal pluralism prevails.²⁵ In that discourse, two ideal types of foundational principles or jural postulates may be distinguished, namely diffuse and specific postulates.²⁶ The latter are principles that relate to specific legal rules, while the former coincide with Ulpian’s concept of *praecepta iuris* as these have evolved over the years in the writings of Roman-law scholars.²⁷ Like the *praecepta iuris*, they are seen as a starting point for legal reasoning.²⁸ The diffuse postulates are considered as pre-legal axioms that have crystallised as self-evident truths

- 23 Eg, in *S v Zuma* 1995 (2) SA 642 (CC) in par [18] the Court stressed that in the new constitutional dispensation “the principles of law which have hitherto governed our courts” should not be ignored as they “obviously contain much of lasting value”.
- 24 [1992] 4 All SA 62 (AD) at 72, quoting Lord Tomlin in the seminal case of *Pearl Assurance Company Limited v Government of the Union of South Africa* 1934 AC 570. In the Namibian case of *S v Tcoeb* 1 SACR 274 (NM) at 286, the Court regarded the precept of *alterum non laedere* as important enough to be included in a bill of rights. There is a strong link between the legal history of South Africa and that of Namibia, which also has a civilian tradition.
- 25 See, eg, EA Hoebel *The Law of Primitive Man. A Study in Comparative Legal Dynamics* (Cambridge, 1954); Roscoe Pound *Social Control through Law* (Hamden, Conn, 1968) Masaji Chiba *Legal Pluralism Toward a General Theory through Japanese Legal Culture* (Tokyo, 1989) (hereafter Chiba *Legal Pluralism*); Masaji Chiba “Legal pluralism in Sri Lankan society: Toward a general theory of non-western law” (1993) 33 *J of Legal Pluralism and Unofficial Law* 197-212; Elise Nalbandian “Sociological jurisprudence: Roscoe Pound’s discussion on legal interests and jural postulates” (2011) 5(1) *Mizan LR* 141-149.
- 26 Chiba *Legal Pluralism* (n 25) at 94-95.
- 27 Laurens Winkel “The role of general principles in Roman law” (1996) 2(1) *Fundamina* 103-120 at 104 regards them as “definitions of justice”. See, further, the various translations of D 1 1 10 1 (“*Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*”) and Inst 1 1 3: In his *The Digest of Justinian* vol 1 (Philadelphia, Penn, 1985), Alan Watson translates *praecepta iuris* as “basic principles”; JAC Thomas *The Institutes of Justinian. Text Translation and Commentary* (Cape Town, 1975) as “precepts of law”; JE Spruit *et al Corpus iuris civilis. Tekst en vertaling* vol 2 (’s-Gravenhage, 1994) as “grondbeginselen van het recht”; AC Oltmans *De instituten van Justinianus. Vertaling, tabellen en register* (Haarlem, 1967) as “grondregels van het recht”; TC Sandars *The Institutes of Justinian* (London, 1934) as “maxims of the law”: see Part 1 of this contribution (n 5) par 2.
- 28 Pound (n 25) at 112; cf, also, Nalbandian (n 25) at 145 ff. Chiba *Legal Pluralism* (n 25) at 87, 138-140, 178 describes these foundational postulates of law as a separate tier of law, with official and unofficial law as the other two in his three-tier paradigm of law.

based on societal views on what is desirable and what is not. These societal values are encapsulated in the concept of *ubuntu*, which is in turn linked to the idea of natural law.²⁹ In this article, we concentrate on the diffuse postulates or fundamental principles of African customary law. They are “harmony of the collectivity”, “superhuman³⁰ forces are superior to man”, and the “identity postulate”.³¹

The first question is whether *ubuntu* should be added to this model of fundamental principles. In order to answer this we have to establish what exactly *ubuntu* means. Of course, one runs the risk of imposing typically “European” or “Western” ideas on an essentially African concept when trying to describe *ubuntu* by analogy with a characteristically “western” concept, and thereby stripping it of its “Africanness”. Thus it is necessary to postulate *ubuntu* in the context of the world view³² of the indigenous African people, according to which the world is an integrated harmonious whole of nature, life on earth and the after-life. The traditional African world view focuses on the notion that the interests of the individual and of society are inextricably linked and are connected to a harmonious relationship with the ancestors and with nature.³³

Ubuntu has featured in a plethora of academic materials and in many judicial decisions³⁴ and has crystallized as either a human attribute or an abstract idea, encompassing a philosophy or ethos.³⁵ It is the latter connotation that has distinguished it as the source of African values and the bedrock of the underlying principles of African

29 Cf Part 1 of this contribution (n 5) par 4 for Grotius’s perception of natural law.

30 It is preferable to refer to ancestral spirits, witches, nature spirits, the Supreme Being, and so forth as “superhuman” rather than “supernatural” (which is generally in Western thought linked to superstition) as these all form part of the African cosmology. These beings are directly linked to living humans, usually through the ancestors; cf, JS Mbiti *African Religions and Philosophy* (London, 1990) at 83; Kenneth Kaunda *A Humanist in Africa* (London, 1966) at 29. Cf, also, Ilze Keevy “Ubuntu: Ethnophilosophy and core constitutional value(s)” in Frank Diederich (ed) *Ubuntu, Good Faith and Equity Flexible Legal Principles in Developing a Contemporary Jurisprudence* (Claremont, 2011) 24-49 at 39-40; Dion A Forster “A generous ontology: Identity as a process of intersubjective discovery. An African theological contribution” (2010) 66(1) *HTS Teologiese Studies/Theological Studies* available at <http://www.hts.org.za/index.php/HTS/article/view/731/1132> (accessed 14 Nov 2013).

31 These postulates intersect not only with the core values in Japanese law but also with those of Confucianism (although some key differences may be discerned); see the discussion by Daniel Bell & Thaddeus Metz “Confucianism and ubuntu: Reflections on a dialogue between Chinese and African traditions” (2011) 38 *J of Chinese Philosophy* 78-95 at 81 ff.

32 WD Hammond-Tooke *Rituals and Medicines. Indigenous Healing in South Africa* (Johannesburg, 1989) at 33 explains that “world view” may be defined as “a (cognitive) attempt to make sense of the world, and impose meaning on it”. Besides intellectual statements to explain the world and life, a world view comprises concepts and beliefs, with a strong emotional content, about the sense of being and thus comprises subjective value systems.

33 Cf, also, Keevy (n 30) at 33-36.

34 This is confirmed by the seminal constitutional cases that have “revived *ubuntu* as an active and central constitutional principle”: see Part 1 of Drucilla Cornell & Nyoko Muvangua (eds) *Ubuntu and the Law African Ideals and Postapartheid Jurisprudence* (New York, 2012) at 2.

35 See GJ van Niekerk “*Amende honorable* and *ubuntu*: An intersection of *ars boni et aequi* in African and Roman-Dutch jurisprudence?” (2013) 19(2) *Fundamina* 397-412 at 399-402.

customary law.³⁶ *Ubuntu* should thus not be regarded as a fundamental principle, but rather as the ethical foundation of the fundamental principles. *Ubuntu* may therefore be linked to the African natural-law doctrine (which resembles the Stoic notion of natural law³⁷) as the foundation of the *praecepta iuris*. Sanders³⁸ equates the African natural-law doctrine, or “ideal aspect of law”, with the “ethic of African social solidarity”, a concept that has come to the fore in many of the varied judicial interpretations of *ubuntu*.

This is not unlike Grotius's idea of the *appetitus societatis* in his *De iure belli ac pacis*.³⁹ According to Winkel, the concept of *appetitus societatis* contributed to modern views of social solidarity that influenced political thinking even before the French Revolution.⁴⁰ However, he takes this idea a step further and links the *appetitus societatis* with the social contract theory expounded in the writings of Locke.⁴¹ It is tempting to use the concept of the social contract, flowing from brotherly love, as an analytical tool to explain *ubuntu*. Yet, if perceived in the Hobbesian paradigm as a defence against eternal strife, there is an undeniable tension between the social contract theory and *ubuntu*.⁴² Cornell & Muvangua⁴³ reject any attempt to posit *ubuntu* in the paradigm of either of the social contract theories: “*uBuntu* ... does not conceive of a social bond as one that precedes through an imagined social contract”, denying the separateness of individuals in the African context: “The *ubuntu* human beings are intertwined in a world of ethical relations and obligations from the time they are born ... the social bond, then, is not imagined as one of separate individuals.”

36 Mokgoro J describes it as encompassing “key values” of African customary law: *Makwanyane* 1995 (3) SA 391 (CC) in par [308]; see, also Y Mokgoro “Ubuntu as a legal principle in an ever-changing world” in Diederich (n 30) 1-2 at 1; *cf*, further, Drucilla Cornell “A call for a nuanced constitutional jurisprudence: South Africa, *ubuntu*, dignity and reconciliation” in Cornell & Muvangua (n 34) 324-332 at 326-328.

37 See Costas Douzinas *The End of Human Rights Critical Legal Thought at the Turn of the Century* (Oxford, 2000) at 31; *cf*, also, Christopher Roeder & Darrel Moellendorf *Jurisprudence* (Lansdowne, 2004) at 34-35: see the discussion in Part 1 of this contribution (n 5) par 3 at n 26. In D 12 6 14, *eg*, Pomponius states that “it is only in accordance with natural equity that no one should profit financially by the injury of another.” This illustrates the link between the *praeceptum* of *non laedere* and natural law.

38 As AJGM Sanders “On African socialism and natural law thinking” (1978) 11 *Comparative and International LJ of Southern Africa* 68-75 at 68 refers to natural law; and see 72-73.

39 (Amsterdam, 1712); see the discussion in Part 1 of this contribution (n 5) par 4. In his *Inleiding tot de hollandsche rechtsgeleerdheid* (Middelburg, 1767), Grotius distinguishes between natural and positive law, stating that natural law is inherent in humankind and enables a person to differentiate between what is honourable and dishonourable (1 2 4-5).

40 Laurens Winkel “Les origines antiques de l’*appetitus societatis* de Grotius” (2000) 68 *Tijdschrift voor rechtsgeschiedenis* 393-403 at 402-403; see, also, Hans Blom & Laurens Winkel “Introduction” in Hans W Blom & Laurens C Winkel (eds) *Grotius and the Stoa* (Assen, 2004) at 7 ff.

41 Winkel (n 40) at 400; *cf*, also, Laurence Dickey “*Doux-commerce* and humanitarian values” in Blom & Winkel (n 40) at 279-281; see Part 1 of this contribution (n 5) par 4.

42 *Cf*, Cornell (n 36) at 328.

43 (n 34) at 3.

Ubuntu nevertheless entails more than social solidarity or even communitarianism.⁴⁴ The most quoted African proverb relating to *ubuntu* is “a person is a person through other persons”.⁴⁵ This proverb captures the essence of *ubuntu*: individuals are not islands unto themselves but interdependent,⁴⁶ and there is a symbiotic relationship between the individual and the community.⁴⁷ Justice Mokgoro’s explanation of *ubuntu* encapsulates the “key values” of African customary law as “group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity”⁴⁸ and, importantly, “respect for the basic norms of human and social inter-dependence”.⁴⁹ The connection with restorative justice⁵⁰ and societal harmony is only natural.⁵¹

It is necessary to bear in mind, though, that the courts do not distinguish between *ubuntu* and the underlying postulates of African customary law, and that they use *ubuntu* as a generic term for the postulates.

4. An intersection of Ulpian’s *praecepta iuris* and the jural postulates of African customary law

Winkel⁵² contends that Ulpian’s *praecepta iuris* are “so abstract that they come close to formal criteria”,⁵³ and that they are universally valid and may be regarded as natural law. Gaius, who was himself influenced by Cicero, likewise stated that there are certain legal rules (*ius gentium*) that are accessible and understandable to all.⁵⁴ However, Winkel is alive to the cultural relativity of perceptions of the underlying principles of law, and

44 Cf. *idem* at 3-7.

45 “umuntu ngumuntu ngabantu”; see, also, *S v Makwanyane* (n 36) in par [308]; *MEC for Education KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) in par [53]; cf. further, Cornell & Muvangua (n 34) at 3.

46 *MEC for Education KwaZulu-Natal v Pillay* (n 45) in par [53].

47 This may be likened to the Japanese idea that “I” and “we” are not regarded as in conflict with each other but that “[t]here can be no ‘I’ without a ‘we’, nor conversely, a ‘we’ without a set of ‘I’s’”: see JC Smith “Ajase and Oedipus: Ideas of the self in Japanese and Western legal consciousness” (1986) *University of British Columbia LR* 341-377 at 354.

48 *S v Makwanyane* (n 36) in par [308].

49 *Dikoko v Mokhatla* (n 22) in par [69]. These aspects have also come to the fore in *Makwanyane* (n 36) in pars [237], [263] and [308]. In par [227], Justice Langa described it as “something to be desired, a commendable attribute which the nation should strive for”.

50 See, eg. *Le Roux v Dey* (n 21) in par [197]; *Dikoko v Mokhatla* (n 22) in pars [69], [86], [105], [114]-[116].

51 See, eg. *Dikoko v Mokhatla* (n 22) in pars [68], [69].

52 Marc A Loth & Laurens Winkel “Reasonableness in a divided society” (2009) 2 *De Jure* 302-315 at 311.

53 He notes that in his *Metaphysik der Sitten* Kant views the *praecepta* as the *lex iuridica*: *idem* at 311-312.

54 Inst 1 1: “the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind”; he has been influenced by Cicero’s seminal text on natural law in his *De re publica* 3 22: I Kant *Die Metaphysik der Sitten; Erster Theil Metaphysische Anfangsgründe der Rechtslehre* vol 6 *Gesammelte Schriften* (Berlin, 1914) at 310-311.

confirms this through an example from colonial history that illustrates how differently the Dutch East India Company and the indigenous people of Indonesia interpreted Grotius' *promissorum implendorum obligatio (pacta sunt servanda)*.⁵⁵ It is not surprising that the South African courts also acknowledge: "[c]ommunity values and concepts of morality differ from period to period and from one country to another".⁵⁶ Of importance here is the oft-quoted *dictum* of Davis J in *Mort NO v Henry Shields-Chiat*:⁵⁷ "While Roman-Dutch law may well supply the conceptual apparatus for our law, the *content with which concepts are filled* depends on an examination of the legal conviction of the community – a far more difficult task" (our emphasis).

This does not mean that these *praecepta* have lost their relevance to modern legal theory. It is possible that the individual precepts of *honeste vivere*, *alterum non laedere* and *suum cuique tribuere* may overlap in different societies and different periods. This is illustrated below by some practical examples from South African law.

The first fundamental postulate of African law referred to above is harmony of the collectivity. The idea that equilibrium in the community should be maintained filters through all aspects of African culture, including law. Disputes upset relationships and threaten the coherence of the community and impact on the relationship with the ancestors.⁵⁸ Harmony and solidarity are regarded as crucial virtues that should be pursued above all else.⁵⁹ That the precepts of living honestly, not causing harm to another and giving everyone his due, fit into the larger aim of maintaining equilibrium, is not implausible, bringing the African postulates within the fold of Ulpian's three *praecepta* – or vice versa.

Nevertheless, one has to bear in mind that perceptions of justice and concomitantly the interpretation of the *praecepta iuris* are in principle culturally bound. The content of the *praecepta* may accordingly differ in different cultures, but may also differ in a single homogeneous culture over time.

Roscoe Pound's postulate that "[i]n civilized society men must be able to assume that others will commit no intentional aggressions upon them"⁶⁰ coincides with Ulpian's *alterum non laedere* and is *prima facie* consonant with *ubuntu* and as such compatible with the jural postulates of African customary law. However, there are some differences

55 Winkel (n 52) at 312; he mentions, further, the differing interpretations of the concept of *damni culpa dati reparatio* and unjustified enrichment.

56 *Edouard v Administrator, Natal* (n 21) at 376.

57 2001 (1) SA 464 (C) at 474J-475F; cf *Brisley v Drotzky* (n 21) in par [69]; *Barkhuizen v Napier* (n 21) in par [40].

58 Forster (n 30); Keevy (n 30) at 39-40; EAR Omi & KC Anyanwu *African Philosophy. An Introduction to the Main Philosophical Trends in Contemporary Africa* (Rome, 1981) 141-143; cf, also, MN Darboe *The Interaction of Western and African Traditional Systems of Justice The Problem of Integration. (A Case Study of the Gambia)* (PhD, University of Pennsylvania, 1982) at 105-106.

59 There is a *prima facie* resemblance between the ethic of African solidarity and the Stoic notion of kinship (on the latter see Douzinas (n 37) at 31: cf Part 1 of this contribution (n 5) at n 26) as echoed in the emphasis on solidarity in Cicero's philosophy of justice in his *De finibus* 5 23 65-66.

60 Pound (n 25) at 113. He does not distinguish between jural postulates as underlying principles of law (as in Ulpian's *praecepta iuris*) and the rules deduced from law in practice as in the *regulae iuris* of D 50 17.

between conceptions of this postulate in the living African customary law and those in Western societies. In the living African customary law intentional aggression, in the form of self-help, to attain private satisfaction for a delict or public satisfaction for a crime is acceptable and has no legal consequences.⁶¹ Such actions are regarded as a means of restoring equilibrium in the group and with the ancestors.⁶²

However, this occurs in Roman law too. Three examples will suffice: The *regulum iuris* of D 50 17 55 (no one is considered to commit a fraud who does what he has a right to do) is not compatible with the *praeceptum* of *alterum non laedere*.⁶³ Thus, according to D 39 3 1 1, a person would not have an action against his neighbour who had redirected water from his land, and so deprived him of its use.⁶⁴ Likewise, according to D 39 2 24 12 there is no action against a person who intercepts his neighbour's water by digging a well on his own property.⁶⁵ *Alterum non laedere* is further not compatible with D 4 4 16 4: "Pomponius also states with reference to the price in a case of purchase and sale, that the contracting parties are permitted to take advantage of one another in accordance with natural law."

Nevertheless, in Roman law this *praeceptum* is, for example, compatible with the *regula*: "It is but just, and in accordance with the Law of Nations that no one, by the commission of an injury, can be enriched at the expense of another."⁶⁶ In addition, *honeste vivere* corresponds with the *regula*: "In matrimonial unions, not only what is lawful but also what is honorable should be considered."⁶⁷ Besides, while in practice African customary law is sometimes inconsistent with the concept of *alterum non laedere*, this concept nevertheless forms the foundation of other rules or specific postulates of African customary law.⁶⁸

61 See Max Gluckman *African Traditional Law in Historical Perspective* Radcliffe-Brown Lecture in Social Anthropology (London, 1974) at 29-40; AC Myburgh *Papers on Indigenous Law* (Pretoria, 1985) at 14, 18-23, 113-116 and the examples discussed at 31-49.

62 For example, an adulterer or thief caught red-handed may be thrashed. (Of course, this principle also obtained in ancient Roman law, where the thief who had been caught red-handed could be killed: see XII Tables 8 12 and 8 13.) Nor did any sanction attach to those who killed witches or sorcerers. The practice of sorcery and witchcraft (and the associated witch killings) is common throughout South Africa and the belief in magic is still strong: see, generally, the Human Sciences Research Council's report on witch killings published as A Minnaar, D Offringa & C Payze *To Live in Fear Witch Burning and Medicine Murder in Venda* (Pretoria, 1992).

63 Cf Ernst Levy "Natural law in Roman thought" in Wolfgang Kunkel & Max Kaser (eds) *Ernst Levy Gesammelte Schriften* vol 1 (Köln, 1963) at 17.

64 Cf, also, *Pappalardo v Hau* 2010 (2) SA 451 (SCA) for a practical example of the tension between the principle of *alterum non laedere* and D 39 3.

65 "For there was no reason to believe that ... [he] caused ... damage through any defect of [his] work, where ... [he] was only making use of a right to which ... [he] was entitled."

66 D 50 17 206.

67 D 50 17 197.

68 See the text above at n 58.

5. Conclusion

The continued relevance of Ulpian's *praecepta iuris* in present-day South African law confirms the endurance of the scientific system of Roman law. Despite the fact that these principles in essence originate in "Western" legal theory, they can play a valuable role as an analytical tool in African jurisprudence. However, this can only happen if they are considered within the African world view, since their interpretation is culturally bound. The *praecepta* may also be relevant when we seek common ground for a convergence of the predominant civilian common law and African customary law.

Abstract

This article investigates the role of Ulpian's *praecepta iuris* in modern-day South African law against the background of their historical development, as expounded in Part 1 of this contribution. The South African High Court has perceived a link between the African notion of *ubuntu* and the *praecepta iuris*. In view of the prevailing legal pluralism, the relevance of these *praecepta* for African customary law is explored as well as their intersection with the fundamental postulates of African customary law and *ubuntu*.