Reconceiving African jurisprudence in a post-imperial society: the role of *ubuntu* in constitutional adjudication

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Abstract

As pace-setters, Western anthropologists conceptualised and defined philosophy in the image of the dominant Euro-American thought systems, which they considered benchmarks for measuring the propriety of all philosophical thought. Consequently, late comers to mainstream philosophical reasoning such as African philosophy had already been excluded as 'other' thought systems, when they entered the scene, as an indication of their 'unphilosophical' nature. These 'other' philosophies were so regarded because Euro-American philosophy had already taken centre-stage as the norm when the former systems started being considered as thought systems in their own right.

It took centuries of relentless struggles for the 'other' philosophies to deconstruct the huge edifice of accumulated axioms about their alleged unphilosophical nature, based on the absence of the essential elements of Euro-American philosophy, which had become *the* philosophy. Hence new philosophies such as the African jurisprudence's concept of *ubuntu* get contested before they get off the ground by legal scholars and constitutional interpreters trained in Western philosophy. Whilst some contestants resent what they regard as the excavation of obsolete values that are no longer of service to humanity, others hail the contribution of these novel ways and are excited to learn about new knowledge systems.

INTRODUCTION

The task of reconceiving African jurisprudence by re-imagining its operation under the South African Constitution involves an examination of the vastly unequal ground between the relentless domination of the overpowering

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Western legal order and the indomitable resilience of African culture. This analysis is possible because of the transformative space provided by the Constitution which allows us to continue rediscovering ourselves. The time when the researcher would accept that the existence of African philosophy had to be justified and proved, unlike its Western counterpart, is behind us. The seriousness of the dissimilarities between these two thought systems, which convinced early Western anthropologists that African thought was 'unphilosophic',[1] was viewed as sufficient basis for this differentiation. The reason was that Western philosophy was deemed synonymous with philosophy. This disqualified African philosophy from being called philosophy because it was not founded on the essential features underpinning Western thought.

This paper discusses this centuries-old degrading phenomenon and shows how later generations of philosophers gradually accepted the reality of African philosophy, and, therefore, African jurisprudence.[2] In order to locate African jurisprudence within the discipline of jurisprudence, one must demonstrate how contemporary scholars have deviated from their earlier counterparts who did not even include it among the topics featured in their works.[3]

The most prominent feature of African jurisprudence – *ubuntu* – is chosen in this paper to represent the system's conceptual foundations. Consequently, the various functions of *ubuntu,* which include acting as a bench mark for good governance, are analysed in order to show its potential to contribute to the redefinition of the new dispensation envisioned by the Constitution.

Part of the problem is that many academics refer to 'African', 'Chinese' or 'Islamic' philosophy – condemning these to an 'otherness'[4] and the status of

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1 Kaphagawani 'What is African philosophy' in Coetzee & Roux (eds) *Philosophy from Africa – A text with readings* (1998) 86.

2 Roederer & Moellendorf (eds) *Jurisprudence* (2004).

3 Van Blerk *Jurisprudence – an introduction* (1996).

4 Irele 'Introduction' in Hountodji *African philosophy – myth & reality* (2ed 1996) 7–30 traces the negative perceptions about the nature of African philosophy. He asks the question whether the various cosmologies and thought systems that were generated within the framework of pre-colonial African societies and cultures, as reconstituted by anthropology, constitute a philosophical tradition. He wonders if these systems are not a mere confirmation of the once-denied capacity of African people for reflection upon the world and upon experience. To demonstrate how African world-views were

sub-cultures or the 'poor-relations' of the unqualified 'Philosophy' by which they clearly have in mind traditional Western philosophy. The current intellectual renewal recognises that in fact all philosophic thought systems constitute the discipline of philosophy, irrespective of their origin, and represents a way of re-conceiving the concept. In this context the qualifiers 'African', 'Chinese', or 'Islamic' point rather to their distinctive features than their 'otherness'.

The original scepticism about philosophies from 'other' parts of the world stems from early European anthropological constructs of the cultural paradigms of the 'other'. These researchers limited the status of 'civilisation' – typified by the art of writing and the phonetic alphabet – to Euro-American standards.[5] Without consultation, the African was labelled as savage or barbaric while the European was civilised on the basis of Morgan's evolutionary theory of lower savagery, middle savagery, upper savagery, lower barbarism, middle barbarism, upper barbarism, and civilisation.[6] These seven stages of evolution were substantiated with

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denigrated by Western anthropologists Irele singles out Hegel (*Philosophy of history* (1881)) who placed African philosophical thoughts as the antithesis of Western philosophy by placing Europeans at the apex of humanity. This became the basis for later anthropologists like Levy-Bruhl *How natives think* (1910 repr 1985) to justify their characterisation of the 'inferior' African thought systems as 'primitive' philosophy. It then became the duty of the generation of missionaries like Tempels *Bantu philosophy* (1945) who were motivated by the desire to integrate Christian principles within African philosophy, to acknowledge the existence of an independent African thought. This opportunistic recognition provoked Africans like Senghor *On African socialism* (1964) who later became the first President of the independent state of Senegal to respond by formulating a philosophy of negritude which, though unwittingly, confirmed some of the accusations of the inferiority of mental reflection in African traditional thought. This discredited formulation of negritude was eventually refuted by Diop *The African origins of civilization: myth or reality* (1974), who attempted a historical foundation as opposed to Senghor's metaphysical approach. By characterising ancient Egyptians as black Africans who contributed immensely to world civilisation, Diop managed to come up with a credible formulation of a distinctive African philosophy which originated from the cosmologies of the various African societies. This approach was in turn refuted by Towa *Essai sur le problematique dans l'Afrique actuelle* (1971), who discounted cultural nationalism as a disabling factor in understanding post-colonial African philosophy. His explicit social and political function for philosophy is in turn reflected by Hountondji n 1 above, whose primary objective is to hold the African philosopher to a more rigorous conception of this discipline than previous writers. However, Hountondji's rejection of the notion of collective philosophy derived from a reconstruction of the world views and systems of thought of traditional cultures, cost him the accusation of elitism by his critics for making Western philosophy the model for African philosophy.

5 Biakolo 'Categories of cross-cultutal cognition and the African condition' in Coetzee & Roux n 1 above.

6 Morgan *Systems of consanguinity and affinity of the human family* (1870).

reference to nameable societies. As a result the image of the African in eighteenth century Europe was brutal, ignorant, idle, crafty, treacherous, bloody, thieving, mistrustful and superstitious.[7]

Whilst mounting his own negative characterisation of 'underdeveloped peoples', Levy-Bruhl departed from this stages-theory, preferring rather to call African ideologies a 'pre-logical mentality' which was synthetic and concrete in its intellectual participation. Africans, however, remained incapable of abstract and analytical reasoning.[8] This in turn was gainsaid by Levi-Strauss who vigorously imputed logical categorical abilities on the 'primitive' mind.[9] In his 'bricolage' mode of inquiry, the 'bricoleur' African mind was perceptual as opposed to the conceptual and scientific Western mind which always opened up new possibilities of knowledge by extension and renewal. Western thought was scientific, innovative and inventive of new technological forms. On the other hand, the African mind conserved knowledge by re-organising what was already known. It was mythical, conservative and recreated existing structures, without creating anything new.

This dichotomy between the African and the Western mind has since been pursued relentlessly, notwithstanding the advent of independent African societies, on the basis of the superiority of the written nature of Western ideas as opposed to the inferior oral African tradition.[10] The contrast fell between 'the Western abstract, analytic, syllogistic and definitional tendencies which resulted in Western privatist contexts, and the traditionalist, conservative and concrete participatory practices which resulted in communalist contexts in African thought systems'.[11]

To justify the development of Europe as opposed to the underdevelopment of Africa, the Western approach has been described as scientific and rational, whilst the African approach was seen as religious, mystical and magical. These stereotypes proceeded to associate the West with progress and Africa with stagnation. As part of African philosophy, African jurisprudence is also the product of the denigration of African law by the

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7 Harris *The rise of anthropological theory* (1969).
8 Levy-Bruhl n 4 above.
9 Levi-Srauss *The savage mind* (1962).
10 Havelocke 'The oral-literate equasion: a formula for the modern mind' in Olson & Torrance (eds) *Literacy and orality* (1991) 11.
11 Biakolo n 5 above at 9–12.

colonial authorities who administered this system from the perspective of Western jurisprudence. Hence today's discerning researchers, practitioners and judges have to resort to integrating progressive indigenous jurisprudential concepts like *ubuntu* in their quest to reconceive African law in its indigenous perspective.

AFRICAN JURISPRUDENCE DEFINED

As part of African philosophy, African jurisprudence of necessity suffers from most, if not all, the Afro-pessimist stereotypes that have afflicted the main discipline. As the law of the barbaric 'other' African law, like the rest of the African knowledge structures, was dismissed as evidence of primitive ignorance because the Western anthropologists did not see what they expected to see, namely, judges, lawyers, courts, police and the prisons through which law was administered in the West. Any legal knowledge system which did not have these basic legal structures and institutions could not be called jurisprudence, notwithstanding that it was a similar thought system which produced similar results through different social structures.

In order to vindicate the position of African jurisprudence as the system of thought through which African law was understood and administered, the starting point must be to define jurisprudence as it is done in Western legal thought. According to Posner

> [j]urisprudence addresses the questions about law that an intelligent lay person of speculative bent – not a lawyer – might think particularly interesting. What is law? Where does it come from? Is law an autonomous discipline? What is the purpose of law? Is law a science, a humanity, or neither? A practising lawyer or judge is apt to think questions of this sort at best irrelevant to what he does, at worst naïve, impractical, even childlike (how high is up?).[12]

On the other hand Harris defines jurisprudence as a ragbag into which are cast all forms of general speculation about the law.[13]

From these definitions one finds that jurisprudence debates all the questions that the discourses about the nature of law generate. This includes all mental and intellectual exercises regarding what law is or does. In contemporary

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[12] Posner *The problems of jurisprudence* (1990) 1.
[13] Harris *Legal philosophies* (1980) 1.

jurisprudence the starting point for these speculations is often whether the law consists of rules which the state must enforce, or whether there is a higher law with which state law must conform. This is the famous (or infamous?) contest which runs perennially between the oldest and greatest schools of jurisprudence, namely positivism and natural law.[14]

This competition as to what the law is or its nature boils down to the relationship between law and justice. Textbook authors generally accept this positivist versus naturalist contest as their starting point before proceeding to discuss other schools, which generally either take issue with or support these major schools. Van Blerk discusses these two schools and then proceeds to explain Austin's imperative theory of law[15] which depicts law as a matter of command issued by the sovereign and backed by sanctions directed to those who disobey the rules.[16] Hart is then brought in to refute this theory for exempting the sovereign from the ambit of the rules by formulating his theory of rules which apply to everyone, including the Austinian sovereign who issued the rules.[17]

In other words, if the rules are to be valid,[18] the sovereign must also observe the rules for rule-making provided that such rules are consistent with the master-rule, the rule of recognition. Van Blerk deals next with Kelsen's pure theory of law in which sociological and psychological influences are excluded from the idea of law. Denuded of all moral appeal, law becomes a hierarchy of legal norms which owe their existence and authority to higher norms which themselves derive their power from the *grundnorm* which gives them validity.[19]

The American realists reject the formalism of the positivist school as portraying the judicial process as passive and evolutionary while concealing its deep political nature.[20] Likewise, Dworkin's theory of constructive interpretation is a rejection of Hart's rules' theory which suggests judicial

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14 See Le Roux 'Natural law theories' in Roederer & Moellendorf (eds) n 2 above at 25–29, and Kroeze 'Legal positivism' in Roederer & Moellendorf n 2 above at 62–80.

15 Van Blerk n 3 above at 28–34.

16 Austin 'The province of jurisprudence determined' in Arthur & Shaw (eds) *Readings in the philosophy of law* (2001) 117 at 118.

17 Hart 'Positivism and the separation of law and morals' in Arthur & Shaw n 16 above 148.

18 Van Blerk n 3 above at 35–45.

19 *Id* at 45–50.

20 *Id* at 55–77.

discretion in the event of lack of rules. In his constructive interpretation, Dworkin rejects the possibility of judicial discretion and portrays law as integrity, in terms of which judges are enjoined to interrogate the political morality of their society and extract the principles and standards that direct judicial decision-making in difficult cases.[21]

Having done this, Van Blerk proceeds to discuss welfare liberalism through Rawls's principles of justice;[22] libertarianism through Nozick's entitlement theory;[23] the socialist theories of Marx;[24] the Critical Legal School;[25] legal feminism;[26] communitarianism;[27] and legal hermeneutics.[28] This covers Van Blerk's sphere of jurisprudence.

These topics address questions about law, its nature, meaning and purpose in terms of Posner's definition, as well as endorse Harris's description of jurisprudence as a ragbag. In the final analysis jurisprudence means all serious deliberations by legal experts, scholars or professionals about the meaning, nature, content and purpose of law.

In its own way African jurisprudence raises similar issues and addresses the same concerns insofar as they touch on the African cosmic order. To accommodate this, more recent jurisprudential scholars raise even more topics in discussing this concept. In addition to the traditional questions raised by Van Blerk, these scholars include such topical issues as gay and lesbian legal theory,[29] African jurisprudence,[30] Islamic jurisprudence,[31] Chinese jurisprudence,[32] law in the context of globalisation, and transitional/transformative jurisprudence.[33] In other words, jurisprudence

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21 *Id* at 83–103.
22 *Id* at 128–133.
23 *Id* at 135–141.
24 *Id* at 142–144.
25 *Id* at 147–168.
26 *Id* at 171–189.
27 *Id* at 193–196.
28 *Id* at 217–224.
29 De Vos 'Gay and lesbian legal theory' in Roederer & Moellendorf n 2 above at 328–352.
30 Pieterse 'Traditional African jurisprudence' in Roederer & Moellendorf n 2 above at 438–462.
31 Moosa & Goolam 'Islamic Jurisprudence' in Roederer & Moellendorf n 2 above at 463–498.
32 Roederer 'Traditional Chinese jurisprudence and its relevance to South African legal thought' in Roederer & Moellendorf n 2 above at 499–531.
33 Moellendorf 'Law in the context of globalisation: the demands of justice in Roederer & Moellendorf n 2 above at 588–620.

includes the latter topics which scholars such as Van Blerk did not regard as falling within this discipline. This is indeed a manifestation of the renaissance that occupies the space opened by the new South African dispensation in order to reconceive the idea of law in the wake of the inclusion of previously excluded thought systems.

Writing from this transformed orientation, Pieterse insists that 'a uniquely African perspective of law and society does indeed exist'.[34] He stresses that this is a view that challenges the dominant Western/liberal philosophies and is particularly useful to legal scholars because of its potential to offer unique solutions to distinctly African problems. Pieterse does not wish to choose between Western liberal individualism and African traditional thinking, nor does he seek to argue that either of these thoughts is preferable in contemporary South Africa. His aim is to conscientise lawyers to the importance of African legal thinking for legal academics in South Africa. While customary law, colonial regulation, and post-independence legislation comprise Africa's legal heritage, its oral tradition makes it difficult to find credible jurisprudential sources and materials which remain uncorrupted.[35]

Pieterse selects the current academic and judicial engagement with the notion of *ubuntu,* African customary law, and the African Charter of Human and Peoples' Rights as the sources of African jurisprudence from which to extract common principles that represent uniquely African views of law and society.[36] *Ubuntu* embraces all the notions of universal human interdependence, solidarity, and communalism which bolster collective survival. Because certain of the values encapsulated in the notion of *ubuntu* are also known in other systems of jurisprudence – although by different names – legal academics and judges use the concept to lend legitimacy to the South African Constitution by merging our fundamental values with traditional African thinking.

In this way the norms underlying the Constitution and the Bill of Rights,

> reverberate with values integral to both Western and traditional African jurisprudence, others correspond more with one than with the other, and both Western and African legal rules and concepts will sometimes fall short

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34 Pieterse n 30 above at 438.
35 *Id* at 440.
36 *Id* at 441.

> of the standards set by the Bill of Rights.[37]

In other words, the possibilities for conceiving the emergence of the post-1994 law of South Africa abound because of the intellectual energies created by the space opened by the simultaneous demise of apartheid and the birth of democracy.

Ubuntu 'represents the crux of African jurisprudence' and contains 'authentically African jurisprudential values',[38] However, Pieterse regrets the fact that recent noble academic and judicial efforts have failed in incorporating African jurisprudence into the mainstream jurisprudence of South Africa. He believes that the reason for this is that South African scholars tend 'to treat *ubuntu* as a uni-dimensional concept rather than as a philosophical doctrine'.[39]

In support of Pieterse one can also point out the problem of treating *ubuntu* as an invention of the interim Constitution, which was the first authoritative document to publicly proclaim the concept, at a time of intense national anxiety in the transition towards majority rule and national reconciliation. As he suggests, *ubuntu* must be studied in the context of its jurisprudencial strengths, namely, its theoretical values.[40] All legal and political interpreters should bear this context in mind to avoid the temptation to trivialise *ubuntu* as a mere opposite of despair or a synonym for hope.

They must also refrain from viewing *ubuntu* in isolation from the traditional worldview held by African people, and must understand it as a concept used by people every day as a measure of moral propriety. This involves understanding the African cosmic order in which the living and the dead live together in a unified 'field of force' in a universe of interacting and interdependent beings who are striving to maintain an harmonious equilibrium.[41]

This recognition of the celestial cosmos in whose civilisation this philosophy developed would help legal interpreters to understand the Constitution as a

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37 *Id* at 439.

38 *Id* at 442. See also Ramose 'The philosophy of ubuntu and ubuntu as a philosophy' in *Philosophy from Africa* by Coetzee & Roux (eds) (2002) 230.

39 Pieterse n 30 above at 442.

40 *Id* at 444.

41 *Ibid*.

product of diverse deliberations. The African worldview in which the individual's role is inseparably intertwined with that of other individuals with whom he or she shares a greater communal field of force regulated by the *ubuntu* doctrine, is a unique social orientation whose strength for South Africa's transformation lies in its distinctiveness from, not similarity to, the Western world. In this sense *ubuntu* embodies all the forces that advance the human condition and is the root from which good governance and correct decisions can derive.[42]

Pieterse describes *ubuntu* as African humanism in the following terms:

> [U]buntu is simultaneously individual and universal. It requires tolerance, understanding and respect towards all individuals in interpersonal relationships, in relations between the individual and the groups of which she forms part, between different groups, between such groups and larger communities of which they in turn are component forces, between different communities and so forth, to eventually encompass all tiers of humanity. The universal and the individual are difficult to distinguish as actions of component forces impact (in almost karmic fashion) on larger component forces and ultimately on the entire universe. Ubuntuism may thus be observed on its most basic level in individual interactions and in the operation of small groups (such as families), but such interactions reflect a view of humanity generally.[43]

This graphic presentation of the concept of *ubuntu* which reveals its uniqueness as the repository for all African philosophy in its individual, family, community, and universal manifestations is confirmed by Ramose who likens *ubuntu* to a tree of knowledge with indivisible connections to African ontology and epistemology.[44]

According to Ramose these basic foundations of *ubuntu* establish it as the origin of African philosophy rooted in the 'family atmosphere' which is the philosophical affinity and kinship among and between the indigenous people of African.[45] These intricate relations from individual to group and to society will no doubt have serious variations as the web expands in the

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42 Ramose n 38 above at 231.

43 Pieterse n 30 above at 445. See also Ramose n 38 above at 231 where he presents this concept as *ubuntuness* which he says captures it more appropriately than Pieterse's *ubuntuism*.

44 Ramose n 38 above at 230–231.

45 *Id* at 230.

family atmosphere, but the blood that circulates through the veins of the family members remains the same in its basics.[46] It is thus the basis of African philosophy.

THE PHILOSOPHICAL FOUNDATIONS OF THE CONCEPT OF *UBUNTU*

One often gets introduced to the ontological depiction of *ubuntu* in its most basic form where it places the human being at the centre of African philosophical thought. Almost all works on African philosophy resonate monotonously with the phrase – *umuntu ngumuntu ngabantu* (Nguni) or *motho ke motho ka batho (se Sotho*). It means that to be a human being is to affirm one's humanity by recognising the humanity of others.[47]

In this way one establishes humane social relations with others. This definition immediately recognises the human being as the speaking animal that negotiates relations which advance its interests by promoting the interests of others. In this way the epistemological analysis of *ubuntu* is directed towards this ontological structure to which this concept relevates.[48]

Ubuntu divulges its basic features as demands from human beings to human beings for integrity, respect, courtesy, passion, solidarity, sharing and all forms of good attitude. That is why *ubuntu* operates in the individual, communal and universal spheres in an ever inclusive manner that continues to embrace the selves and collectives of selves into a seamless communal whole that emphasises a universal oneness of indivisible selves.[49]

At a general level the affirmation or negation of *ubuntu* is a metaphor for ethical, social and legal judgment of human worth and conduct.[50] If the conduct of a human being is found to lack *ubuntu* ethical, social or legal worth is negated it. Conversely if such conduct reflects good ethical social behaviour or legal judgment, *ubuntu* is affirmed.

One therefore often hears a person being affirmed or negated as a human being in these terms: *ke motho* or *gase motho* (she or he is a human being

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46 *Ibid*.
47 *Id* at 231.
48 *Ibid.*
49 *Ibid.*
50 *Id* at 232 .

or she or he is not a human being).[51] This is a metaphor because these judgments do not detract from his or her biological condition as a human being, but impact only on the worth of his or her conduct as that of a human being or its quality.

This brings us to the close relationship between *ubuntu* and *umuntu.*[52] If *ubuntu* is a general condition in which good human conduct is reflected, *umuntu* is the specific agent for the realisation of that conduct. *Umuntu* is the human being whose activities get affirmed or negated depending on the extent to which they advance good ethical, social or legal aspirations of the community. *Umuntu,* therefore, is the human being, the *homo sapiens,* who takes the decisions which may get affirmed (for being in accordance with the philosophy of *ubuntu*) or negated (for not being so).[53]

She or he is also a *homo loquens* who does not only act but also vocalises his or her thoughts, intentions, and decisions in a way that reflects his or her ethical, social or legal worth or lack of it. *Ubuntu* is therefore both the ontological and the epistemological category of African philosophical thought. It consists of the abstract condition of ideal goodness which should generally drive human conduct, and the specific and concrete process of operationalising such conduct.[54]

In this sense *ubuntu* is a barometer for measuring ethical, social, political, economic or legal propriety. Official or professional conduct is proper when it earns the approval underlying the philosophy *of ubuntu*. Individual conduct and activities must advance the interests of other individuals. This is based on the *batho pele*[55] principle of *ubuntu* which prioritises people's interest in the agenda governing service delivery or the agendas of all community or state officials. Approval is negated in all official activities which project selfish or corrupt interests of the perpetrators ahead of their social responsibilities.

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51 *Ibid.*

52 *Id* at 231.

53 *Id* at 232.

54 *Ibid*.

55 *Batho Pele* (People First) is the *ubuntu* aphorism that is used by the South African government to remind its officials and to assure the public that the focus of state institutions is to deliver efficient services to the people.

In the same vain *ubuntu* serves to control government power through its maxim: *Kgosi ke kgosi ka batho.*[56] This is to say, the source and justification of royal power is the people.[57] In this sense government authority can only be exercised for the advancement of individual, community, national, and international interests. If the leader is cruel or corrupt the *ubuntu* philosophy denies him the right to his title by saying *gase kgosi* – he or she is not a leader. In other word, his or her actions are inimical to those expected of a leader of his or her status.

By analogy we can expect people to denounce an official, minister, or president who corruptly or otherwise acts cruelly against the interests of his or her clients, community, or nation by denying them the right to their title. Therefore people would denounce these officials as *gase official*, *gase minister* or *gase president* as the case may be, metaphorically denying them the right to their positions. In other words, the people deny him or her the right to his or her title because she or he has acted contrary to the values associated with her or his office. This is the African way of saying the functionary has acted improperly, inappropriately, unlawfully, or unconstitutionally.

THE JURISPRUDENCE OF *UBUNTU* IN A CONSTITUTIONAL DEMOCRACY

In line with the history of the South African Constitution as a product of the diverse multi-party negotiations in which the African faction played a significant role, African jurisprudence has been used to legitimise judicial decisions through the application of the *ubuntu* doctrine.[58] As Tully explains, while modernist approaches of constitutionalism in terms of which groups claimed territories over which to exercise their national sovereignties, the post-imperial strategy is to retain all national groups in one territory where their respective sovereignties are respected and recognised in the Constitution. He says:

> Popular sovereignty in culturally diverse societies appears to require that the people reach agreement on a constitution by means of intercultural dialogue in which their culturally distinct ways of speaking and acting are

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[56] Ramose n 38 above at 232. The maxim means that the ruler rules by the mandate of the people.

[57] *Ibid*.

[58] Pieterse n 30 above at 445–446.

mutually recognised.[59]

In our experience the defunct tri-cameral Republic of South Africa in which the whites enjoyed sovereign power, the defunct Republics of Transkei, Bopthuthatswana, Ciskei and Venda in which the blacks were supposed to enjoy theirs, were premised on the modernist idea of constitutionalism in which sovereignty was associated with some physical territory. This approach has since been abandoned through the adoption of a post-imperial strategy which demands mutual acceptance and requires the negotiation of one national Constitution in which the various national groups that form the diverse South African nation could respect and recognise one another's cultures. In testimony hereof the Constitution enacts in its Preamble: 'We the people of South Africa…Believe that South Africa belongs to all who live in it, united in our diversity.'

This is to say that we all now belong to one republic as one nation, but our diverse cultures are alive, accepted, respected and recognised. Section 30 of the Constitution entrenches the right of all to use the language and to participate in the cultural life of their choice. It then hastens to proscribe the use of these rights in a manner contrary to the Bill of Rights (that is, the inter-cultural agreement). Section 31 preserves the rights of persons belonging to cultural, religious or linguistic communities to enjoy and practise their cultures, religions and languages. This includes the right to form, join and maintain social associations to advance their rights in a manner not inconsistent with the Bill of Rights.

In line with this collective agreement, Chapter 12 of the Constitution – Traditional Leaders – provides for the recognition of African traditional institutions. Section 211 reads:

> (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
> (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

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[59] Tully *Strange multiplicity – constitutionalism in an age of diversity* (1995) 29.

African law is therefore the most important source of African jurisprudence, which derives from the philosophy of *ubuntu.* Section 211(3) requires the courts in imperative terms to apply African law where appropriate. The courts recognise that *ubuntu* contains all the normative foundations for ethical, social or legal decision-making, and have since the advent of the interim Constitution endeavoured to push it towards the mainstream of South African jurisprudence.

In the *Makwanyane* case, the judges sought counsel in African philosophical thought on the possible compatibility of the death penalty with the protected rights.[60] They found themselves analysing *ubuntu's* emphasis on the values of communal living, interdependence, recognition of a person's status as a human being who is entitled to unconditional respect, dignity and acceptance.

The emphasis on the demand for reciprocity in the observance of these values, and the centrality of the sharing spirit in the enjoyment of rights generated by these positive attitudes, led to the conclusion that life and human dignity were sanctified by *ubuntu's* dominant theme that another person's life is as valuable as one's own. This was considered proof that the death penalty is incompatible with the right to life and the right to human dignity in the Constitution.[61]

Equally prominent in the *Makwanyane* judgment was *ubuntu's* synonymity with the Western notions of humaneness, personhood and morality which are embraced in the central metaphor *umuntu ngumuntu ngabantu/motho ke motho ka batho* (a person owes his or her personhood to other people), to emphasise the significance of group solidarity and communal living.[62] In the context of transitional politics the *ubuntu* concept appeared in the interim Constitution to mark the shift from the era of strife and confrontation.

On this basis *ubuntu's* capacity to embrace notions of solidarity, compassion, respect, human dignity and conformity to basic norms leads to the conclusion that it allows a transformative space for our constitutional democracy. Its constant application is therefore a further proof that legal,

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60 *S v Makwanyane* 1995 3 SA 391 (CC).
61 *Per* Langa J (as he then was) in *Makwanyane* pars 224–225.
62 *Per* Mokgoro J also in *Makwanyane* par 308.

professional and judicial officials can use this space to apply African jurisprudence in the resolution of the most difficult problems in our law.[63]

By expressing the ethos of an instinctive capacity for the enjoyment of love towards our fellow men and women in order to fulfil their recognition of innate humanity, *ubuntu* pushes the elements of passion and compassion that remind us as decision-makers that our actions impact on real human beings. This is emphasised by the elements of reciprocity generated by the *ubuntu* doctrine in engendering creative emotions and moral energies that bring individuals and groups together to transact and interact in the advancement of communal objectives.[64]

More recently *ubuntu* has also been invoked to assist the Constitutional Court to reconceive the available remedies so as to focus more on the human dimension than on the patrimonial one in assessing damages for defamation.[65] To achieve the goal of reconciliation through repairing the broken relations rather than punishing the perpetrator, greater allowance should be made to acknowledge the values of *ubuntu* in constitutional adjudication.

These values are intrinsic to and constitutive of South Africa's constitutional culture that 'was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past.'[66] Sachs J's contribution characterises *ubuntu* as having an enduring and creative quality that represents the element of human solidarity.[67] It thus binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values of equality, human dignity and fundamental human rights.

These features align *ubuntu* with the notions of restorative justice, a concept that is currently evolving internationally. *Ubuntu* therefore, rooted as it is in South African society, constitutes our contribution to the world-wide effort towards the development of restorative systems of justice which emphasise reparatory measures as opposed to punitive sanctions. Sachs J

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63 *Ibid.*
64 *Per* Mahomed J (as he then was) in *Makwanyane* par 263.
65 *Dikoko v Mokhatla* 2006 6 SA 235 (CC).
66 *Id* at par 113 *per* Sachs J.
67 *Ibid*.

proceeded to identify the four concepts underpinned by the philosophy of *ubuntu* and which represent traditional forms of dispute resolution in South Africa, as dialogue (encounter), reparation, reintegration, and participation.[68]

With these qualities *ubuntu* affirms values that seek to both restore a person's public honour and at the same time assuage inter-personal trauma. In this regard *ubuntu* can be likened to what the court referred to as the traditional Roman-Dutch law concept of *amende honorable* which shares the underlying philosophy 'directed towards promoting face-to-face encounter between the parties' in resolving their differences, and also restoring harmony in the community. Both traditions succeed by creating conditions to facilitate an apology that would be honestly offered and generously accepted.[69]

Mokgoro J agrees that in South Africa's constitutional democracy the basic value of human dignity relates closely to *ubuntu* which is 'an idea based on deep respect for the humanity of another'.[70] According to Justice Mokgoro, *ubuntu* is a principle of traditional law and culture whose principal objective is the restoration of harmonious human and social relationships which have been ruptured by an infraction of community norms. She agreed with the sentiments expressed by Sachs J that the trajectory of judicial intervention in cases of compensation for defamation should be the re-establishment of harmony in the relationship between the parties, rather than mulcting the defendant with heavy damages.[71]

The judge goes on to hold that an apology serves to recognise the human dignity of the plaintiff and acknowledges his or her inner humanity in the true sense of *ubuntu.*[72] The resultant harmony that the restoration of the relations between the parties would bring about serves the interests of the parties and the community better than hurting the defendant by causing a bigger hole in his or her pocket.

In *Port Elizabeth Municipality v Various Occupiers*, the spirit of *ubuntu* was described as part of the deep cultural heritage of the majority of the

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68 *Id* at par 114.
69 *Id* at par 116.
70 *Id* at par 68.
71 *Ibid*.
72 *Id* at par 69.

population which suffuses the whole of the constitutional order. In this sense *ubuntu* was presented as the unifying motif of the Bill of Rights which combines individual rights with communitarian philosophy in a structured and institutionalised way which encourages human interdependence, respect and concern.[73] Similarly in *Fosi v Road Accident Fund and Others*, Somyalo J describes a child who refuses to maintain her or his indigent parents whilst he or she is working and able to do so, as having no *ubuntu (gase motho*). Hence, in this case the spirit of *ubuntu* compelled the child to maintain his or her indigent parents and in so doing created liability for the Road Accident Fund to compensate the child's parent(s) where such a child was a sole breadwinner and was negligently killed in a motor accident.[74]

CONCLUSION

African jurisprudence is a uniquely African way of understanding law through indigenous cognitive processes. The possibility of applying it today arises from the space for the renewal of the post-1994 approaches towards African law opened up by the Constitution. This means that opportunities now exist to give legal effect to the indigenous African world-view which characterised African thought systems before they were adulterated by alien influences.

African jurisprudence is therefore the legal thought system rooted in African philosophy whose resilience has managed to withstand successive colonial and apartheid strategies. This resilience has ensured the survival and thus the acceptance of the reality of the existence of African thought systems. Consequently, contemporary Western and other philosophers concede that what they initially presented as evidence of a barbaric, primitive and savage mentality, was in fact nothing other than a feature of the distinct nature of African philosophy. This conversion is a function of the renewal of intellectual attitudes in the twenty-first century determined to reconceive reality in a multi-cultural context.

This represents remarkable progress since the abandonment of the stages-basis of Western evolutionary theory of human development that constrained European philosophers to attribute the various 'exotic' thought systems to inferior stages in the evolutionary process simply because they

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[73] 2005 1 SA 217 (CC) par 37.

[74] *Fosi v Road Accident Fund* [2007] JOL19399(CC).

were different. This led Westerners to believe that Africans had a cultural deficit in terms of stages of development which still needed to be traversed by indigenous thinkers before their thought system could qualify as philosophical.

On this basis Western philosophers placed themselves at the apex of human evolution because they had the art of writing, their reasoning process was abstract, their approach towards knowledge production was scientific and innovative, and they monopolised the attribute of rationality.

This appropriation of the attributes of knowledge made the Western world-view dominant by exaggerating the value of literacy as compared to oracy. Western scholars, as products of this mythical approach, became stunted in their observations and failed to see that the difference between their system and the African, was not qualitative but lay mainly in the difference in areas of emphasis. Today it is accepted that African thought is as capable of abstract, scientific and rational reasoning as Western thought, although in doing so, it emphasises the concrete, mystical and magical aspects of knowledge, all of which are also acknowledged, but not equally emphasised, by the latter.

This is why it is unacceptable for present-day legal and political actors to continue to exclude African approaches in processing their decisions. Without this essential shift in mindset distortion will persist in reflecting the Western frame of reference as the benchmark for the validity and rationality for all thought systems. That would, in turn, deny indigenous African concepts and their jural underpinnings the opportunity to be judged on their own merits.

Yet African jurisprudence, like African philosophy in general, is predicated on the *ubuntu* concept which is an indigenous benchmark for validity and propriety. This could contribute to the constitutional demand for a progressive development from the unjust ethos of apartheid legalism towards a democratic society founded on human dignity, equality and freedom. These values emphasise humanhood in private, public, communal, national and international interaction in the true spirit of *ubuntu*.

Consequently, when diagnosing the propriety of the conduct complained of judges, academics and politicians are tempted to investigate its compatibility with the concept of *ubuntu* in contemporary South Africa. As

a result the death penalty, corporal punishment, excessive sanctions in assessing defamation damages, ill-treatment of illegal land occupiers, as well as the neglect of indigent parents by working children have been found to be forms of conduct that lack *ubuntu* and are therefore inconsistent with the spirit of the Bill of Rights and the ethos of Constitution.

Pieterse traces the problem underlying *ubuntu's* continued peripheral treatment in South African jurisprudence as the persisting unidimensional application of the concept by the majority of the participants which disregards its own philosophical foundations. It is therefore recommended that all theorists learn to appreciate the centrality of humans, humaneness, humanity, and humanhood in the African cultural discourse so as to understand the demands of *ubuntu* in enforcing its homocentricity.

Human activities at all levels of human endeavour must justify their acceptability by the extent to which they advance the interests of humans and the condition of humanity. Human, state, or corporate conduct which fails this test exposes the actor to the label of *gase motho* (he or she is not a human being) because he or she is *gase botho* (lacks *ubuntu*.)

It is therefore suggested that the courts should insist that counsel address them on this benchmark whenever they are called upon to pronounce on the moral compass of human, state or corporate conduct. Indeed, academics, administrators and politicians would also do well to insist on the *ubuntu(ness)*[75] of their processes and decisions, before going all the way to foreign jurisdictions to seek ways of discrediting corrupt justifications for coercive conduct.

While this approach could go a long way to assuage the concerns of the likes of Pieterse regarding the marginalisation of African jurisprudence, it would also persuade sceptics like English[76] to first of all realise that *ubuntu* is an African concept that can contribute an indigenous dimension in the resolution of South African legal and other problems. It is therefore not

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[75] Ramose n 38 above at 231 insists that *ubuntu* always expresses oneness and wholeness at the same time. It therefore expresses the indivisibility that can only appear as both a gerund and gerundive. This wholeness can only be expressed as *ubuntuness* and not *ubuntuism* which does not embrace the essence of this wholeness. This latter term presents *ubuntu* as an ideology of being as opposed to the former which refers to the essence of being.

[76] English 'Ubuntu: the quest for an indigenous jurisprudence' (1996) 12 *SAJHR* 641.

enough to discredit a widely accepted concept on the basis that it does not make Western sense.

English berates Sachs J's conduct in *Makwanyane* as 'delving in the archives for the fragmentary accounts of a legal system that 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'.[77] He takes issue with the Constitutional Court's tendency to rely on *ubuntu* as a form of community consensus as an appearance of 'reaching out for some sort of external order of values, and, at the same time, to be resurrecting indigenous values that have been allowed to fall into desuetude'.[78]

This exposes the fallacy of English's absurd claim that because *ubuntu* has remained interred under colonial rubble for a long time, it must forever remain outside the jurisprudential mainstream. This attitude has serious implications for the regeneration of African law and its traditions which were relegated to the periphery by colonial and apartheid legalism. It is disheartening to learn that a value so central to a major South African tradition can be dismissed as some 'sort of external order of values'[79] in its country of birth.

While *ubuntu* is widely used as a harmonising value by millions of contemporary South Africans, English sees it as 'fragmentary accounts' which Sachss J dug out of some archive. Because English understands constitutional adjudication as something which 'is about conflict', he fails to comprehend the value in learning that this is not the experience of everyone in South Africa. In fact, to some the Constitution has brought life to an indigenous tradition that contributes an harmonious dimension to social life in order to reduce possibilities for conflict.

Instead of being curious to know how this 'balm for the conflict at the heart of society' managed to bring harmony to people who historically had no police force, court system, or prison service, English is worried about what he sees as the promotion of a flawed 'ethnic South African jurisprudence

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77 *Id* at 644.
78 *Ibid*.
79 *Ibid*.

(which) is bound to fail'.[80] What needs to be noted is that *ubuntu* is the principle that gives direction to the millions of people who live on the periphery of South Africa's justice system and is not an 'invention' of the interim Constitution where English and the protagonists of his views, in all likelihood encountered it for the first time.

The reality is that *ubuntu* appeared in the prologue to the interim Constitution because the resolution of the poisoned relations among the negotiating political stakeholders demanded the re-emergence of this harmonious resource which South Africa needed and happened to have. As such a resource, *ubuntu* embraced the basis for a more harmonious granting of amnesty for criminal activities which qualified for it. It was therefore more than a mere instrument for the judicial resolution of political offences.

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[80] *Ibid*.