Can African juridical principles redeem and legitimise contemporary human rights jurisprudence?

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Abstract

The question of bringing justice closer to citizens is often regarded either from an equidistant perspective, or from the angle of affordability. The epistemological question of whether notions of justice practised by constitutional institutions resonate with the value systems and cosmological perspectives of the citizens, is shrouded iin the mists of the jurisprudential discourse of most post-colonial jurisdictions. This article contends that the dominant human rights jurisprudence in post-colonial Africa remains only tangentially relevant because it is moulded by the inherently exclusionary constitutive rules associated with Western enlightenment. African juridical principles provide more appropriate social justice for the vast majority of the African citizenry as they speak to a social organisation underpinned by the values of belonging, sharing, and restoration of social equilibrium.

INTRODUCTION

In theory, the current global era of human existence is the best of times from a human-rights perspective. It is a period during which a universalised human rights discourse ought to have reached every corner of the globe and every sinew of human endeavour. There is little doubt that this is an era in which artificial persons – the 'corporates' – may have not only leveraged the human rights bonanza, but may have appropriated this bonanza better than natural humans. It is not difficult to discern that contemporary human rights discourse is informed by neo-liberal socio-political imperatives. A direct link appears to exist between this development and the later 1970s during which the newest permutation of modernity, the ideology of neo-liberalism,

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acquired political and economic clout across the globe[1]. While theoretically there is much to celebrate in access to rights for the global citizenry, it is at the substantive level that the paucity of the celebrated rights is deeply experienced by many on the planet. Presumably this may be ascribed to fact that the global citizenry has been cast into two camps: those who have made the best of the situation on the one hand; and those whose circumstances have taken a turn for the worse, on the other. The purported economic growth resulting from neo-liberalism 'has been bought at a high social price, which includes poverty, increased unemployment and income inequality',[2] thus straining social cohesion within states to breaking point. As humans struggle to assert control over their environments and resources in the face of the insecurities engendered, the fault lines of nationalist populism and xenophobia against the perceived 'other', have been thrown wide open. In some parts of the world perceived marginalisation has given birth to the rise in religious fundamentalism, terrorism, and the phenomenon of failed states.[3]

It is, therefore, imperative that scholars and jurists go 'back to basics' and problematise human rights jurisprudence. As Onazi has contended '[t]he search for an alternative framework for human rights has become imminent given the limitations of the state or the exclusions of markets[…]'.[4] At the heart of this argument is the social-justice question which, as will become apparent in this article, is crucial in that the currently dominant human rights paradigm appears to be failing.

A further argument is that of legitimacy. Underlying this argument is the perspective that the values underpinning the dominant rights paradigm are, by and large, removed from notions of justice as understood and lived by the vast majority of people previously colonised in places such as Africa. Thus, mainstreaming indigenous juridical principles in the legal system holds the promise of going some distance towards legitimising the system. Inherently, however, this entails an epistemological shift in world outlook. Arguably,

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1 Howard 'Evaluating human rights in Africa: some problems of implicit comparisons' (May, 1984) 6/2 *Human Rights Quarterly* 160. Human rights became the Jimmy Carter administration's major policy in the 1970s in its endeavour to re-assert US global hegemony and it has since been adopted by other Western nations and international organisations.

2 Inter-American Development Bank quoted by Saul *The collapse of globalism and the reinvention of the world* (2005) 157.

3 *Id* at 139–214.

4 Onazi 'Good governance and the marketization of human rights: a critique of neoliberal normative approach' (2009) 2 *Law, Social Justice & Global Development* 8.

this is what Mignolo advocates when he speaks of 'engaging in epistemic disobedience and delinking […] to open up […] a vision of life and society that requires decolonial subjects, decolonial knowledges, and decolonial institutions'.[5]

It is, therefore, contended that African legal rights values, expressed and adumbrated by the ubuntu/botho[6] philosophy, differ from the rights and values hewn from the Western tradition. The underlying contention expressed in this article is that, generated by a different social organisation and world outlook, African legal rights values can be harnessed as a critical bridge for the kind of society most of humanity yearns for – a more inclusive and just society.

This article is divided into three sections. The first deals with the constraints of the received Western concepts of rights within the cultural milieu and world outlook in which they evolved. The second section presents an overview of the African ontological framework. The objective here is to highlight the difference between the salient intellectual Western concept of rights, and the world outlook underpinning the ubuntu philosophy in which pristine, albeit evolving, African legal rights values are anchored. The final section captures and discusses some of the peculiar African legal principles. The central message is that within these principles, and others not discussed in this article, lies the possibility of bringing justice closer to the people.

THE LIMITS OF THE RECEIVED-RIGHTS JURISPRUDENCE

Commenting broadly on contemporary social science, Alvares correctly observes that:

> Much of present day social science in non-European universities is nothing more than the endless study and re-study of the dead corpus (corpse) of sociological knowledge generated in response to ethnocentric or peculiarly European perceptions of situations often decades or centuries old. Even where such academic work may nowadays sometimes reflect local issues

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5 Mignolo *The darker side of Western modernity: global futures, decolonial options* (2011) 9.

6 *Ubuntu* in the Nguni group of languages (Zulu, Xhosa, Ndebele, Swazi, *etc*) and *Botho* in the Sotho group of languages (Sesotho, Setswana, Sepedi, *etc*) mean the same thing. In this article, we use *ubuntu* simply because it has become better recognised in most writings. As will become apparent in this article some writers either use *ubuntu* or *Ubuntu* or *uBuntu* as written stylistic variants of the term.

> due to the efforts of individual researchers who wish to do meaningful, independent work, the methodologies applied and theoretical frameworks still remain firmly Euro-American in character.[7]

Alvres's views are shared by Mamdani who argues that the intellectual paradigms taught in post-colonial African universities, de-historicise, de-contextualise and universalise European experiences from which they evolved. When these theories are exported to non-European environments, elaborates Mamdani, 'they do so by submerging particular origins and specific concerns through describing these in the universal terms of scientific objectivity and neutrality'.[8] In Mamdani's view, because research is forced to apply theories and methodologies formulated outside of the African continent and social milieu, it is devalued and reduced to 'no more than a demonstration that societies around the world either conform or deviate from the European model'.[9] For Mamdani, because of their geographic and historical origins, it must be understood that the humanities and social sciences theorise or critique the European enlightenment tradition. '[T]he problem is this: if the Enlightenment is said to be an exclusively European phenomenon', he contends, 'then the story of the Enlightenment is one that excludes Africa as it does most of the world'.[10] Mamdani makes it clear that he is not advocating that enlightenment not be studied and taught, but rather that it be contextualised within its historical and social background.

It is axiomatic that the legal system imposed on Africa – as was the case in other regions of the world where European powers extended their colonial dominance – was European in every respect.[11] Founded on European life experience and culture, the legal system was rationalised into a systematic body of rules formulated with the purpose of finding answers to a specific social context and to specific social issues. Its basic social purpose, structure, and institutions that inexorably moulded its evolution, have their intellectual umbilical cord firmly attached to the traditions of enlightenment.

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7 Alvares 'A critique of Eurocentric social science' in Ghajar & Mirhosseini (eds*) Confronting academic knowledge* (2011) 33–34.

8 Mamdani 'The importance of research in a university' http://pambazuka.org/en/category/features/72782 (last accessed 20 January 2017).

9 *Ibid*.

10 *Ibid*.

11 Hoppers & Richards *Rethinking thinking: modernity's 'other' and the transformation of the university* (2012) 45.

It is trite that the legal system later exported to Africa and other parts of the globe, originated from Rome where it was packaged as the *jus gentium* and extended to the rest of Europe by way of the Roman Empire's territorial conquests. Hoppers and Richards underscore the fact that in a fundamental sense this legal system rests on four principles: *honour; live and let live* (do no harm to others); *tamper not with what is already in existence* (preserve property in those in whom it already reposes); and finally, *contract*.[12] For these authors, the defining principles of the legal system were critical in shaping a capitalist society, otherwise called modernity, imported to Africa and elsewhere. While all four principles are the essential lifeblood of modernity, it is contract that, in a decisive way, structures the social stations of individuals. A society structured by the ethos of buying and selling or bargaining, is therefore, the very essence of modernity – in other words, with contract at its centre, the legal system is constitutive of the essential features of modernity.

The constitutive norms undergirding modernity are by their very nature exclusionary. Richards elaborates on this issue and suggests that '[e]xclusive rules, typified by the modern contract or bargaining society, where livelihoods depend on sales and those who do not have anything to sell for which there is a willing buyer in the marketplace are left out, excluded.'[13] Therefore, the socially marginalised will find themselves outside the concentric of a bargaining society. Those affected or disaffected in this manner are condemned to a brutish life experience in perpetuity, and then to the grave. For them, as Mutua notes, 'marginalization is largely seen as an individual moral failing'.[14]

In this way, the received rights jurisprudence is intensely schizophrenic, inexorably paradoxical, and intrinsically contradictory. For while it propagates that everyone is born with rights and that those rights are inalienable, it is palpably and in a fundamental way unable, as Mutua observes incisively, 'to respond to powerlessness, human indignity, and the challenges of markets and globalisation'.[15] Alternatively, Mutua contends,

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12 *Id* at 51–52.

13 Richards 'Humanizing methodologies in transformation' (20 July, 2010) available at http://howardrichards.org/peace4us/humanizing-methodologies-in-transformation/ (last accessed 21 January 2017).

14 Mutua 'Human rights in Africa: the limited promise of liberalism' (2008) 51/1 *African Studies Review* 24.

15 *Id* at 25.

the received rights doctrine appears to be more concerned with certain kinds of human powerlessness and less with others.[16] As a matter of record, this is not a function of lack of concern as such, but an *ab initio* inability etched in the constitutive rules of a bargaining society. For, while the received rights doctrine speaks in aggregating universal references, it is ill-designed to address 'human powerlessness in all its dimensions.'[17]

Significantly, the received human rights jurisprudence, predicated as it is on individualism, is strained to accommodate the collective. This inability to embrace the collective is not accidental; it springs from the fact that, in terms of this ethic, humans must enter the market place as individuals without the succour or the fraternity of the collective. And yet humans are not naturally individualistic. Recall the refrain of the French revolution: 'liberty!, fraternity!, equality!'. While liberty remains the hallmark of the rights doctrine, it is no accident that the solidarity enjoined by fraternity has been left by the wayside. So, too, is equality – save when it is formal rather than substantive. Therefore, it is the essence of the received rights doctrine that the formal conception of the rule of law obscures, rather than reflects, substantive inequalities in society.[18] Humans may well be equal in the abstract provided that it is a form of equality that does not disturb the socially-structured inequalities deemed natural.

Mutua is therefore correct when he contends that 'to be useful to Africa's reconstruction, human rights cannot simply be advocated as an unreformed Eurocentric doctrine that must be gifted to native peoples.'[19] Therein lies the challenge of transformation – a transformation that transcends colour but must create a value system that has to anchor a new society of hope for all. We now turn to exploring an alternative ontology.

THE AFRICAN ONTOLOGICAL FRAME

African legal principles are rooted in the ubuntu philosophy and world outlook. Outside of this context, their intrinsic value and logic necessarily atrophies particularly when an attempt is made to subject them to the rationale and logic of modernity and the enlightenment tradition. The ubuntu philosophy, not as a sub-system of other world views, but as a self-contained

16 *Id* at 30.
17 *Id* at 33.
18 Mahao 'O se re ho morwa "morwa towe!" African jurisprudence exhumed' (2010) 43/3 *CILSA* 329.
19 Mutua n 14 above at 35.

intellectual tradition moulded by peculiar socio-ecological and spiritual conditions, is the starting point for African social justice. The College of Law of the University of South Africa defines ubuntu in these broad terms:

> As a universal philosophy Ubuntu is captured by the credo *motho ke motho ka batho* ("man" becomes a social being with the help of other social beings). It also captures the ethical and moral basis underlying an interdependent relationship between humans and nature. Similarly it grounds an insoluble interdependency between rights and responsibilities.[20]

Construed in their ordinary meaning, the words in the principle 'motho ke motho ka batho' would, on face value, seem to portend and highlight the social solidarity and interconnectedness between and among all humans. And yet in normal discourse, when it is said 'ha a na botho!' (He has no humanity!), not only is reference being made to one's conduct, attitude, or general disposition towards other humans, living or dead, but also to the same negative attributes in relation to conduct towards animals, the physical world, and everything in it. Thus, in ordinary discourse, the same sentiment expressing judgment for displaying less than 'human' attributes may refer to one's treatment of fauna and flora. In other words, the normative humanistic ethic is extended to these other phenomena which are elevated to the genre of 'human' to underlie the fundamental recognition of man's insoluble belonging to and affinity with it.[21]

Moodie very ably expounds on this expansive notion of ubuntu thus:

> Belonging to the community is complemented by belonging to the world – the social solidarity of one level of being is matched at another level by the interconnectedness of the world, and humanity with the world. Thus social interconnectedness is more a particular expression of a universal connectedness of being, which sets African thought sharply in opposition to the atomistic ontology of 'Enlightenment' modernism [...][22]

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20 College of Law of the University of South Africa (2011) unpublished document titled 'Statement of Curriculum and Institutional Transformation'.

21 In many African cultures the kindred relations are underlined by animal totems that clans name themselves after. Thus, Bakoena (people of the crocodile), Bafokeng (people of the hare), Bataung (people of the lion), *etc.* Special social, spiritual and religious relations are deemed to exist between the animal symbolising the totem and persons subscribing the totem.

22 Moodie 'Re-evaluating the idea of indigenous knowledge: implications of anti-dualism in African philosophy and theology' in *Proceedings of the African Studies Association of Australia and the Pacific Annual Conference on 'African Renewal, African*

In his world view, while acknowledging the autonomy which gives him the attribute of agency, the African does not see him- or herself as a total abstraction – a separate entity from his or her socio-ecological surroundings. On the contrary, he or she sees him- or herself as one element interacting with those surroundings – which, through his or her agency, he or she shapes in as much as, dialectically, they constantly shape him or her. 'To separate one's self from the phenomenal world is to objectify that world[...]. It [the African world view] perceives human beings and the phenomenal world as extensions of each other', writes Ntuli.[23]

It can never be easy to isolate in clearly demarcated forms the social and moral principles that underlie as complex a philosophy as ubuntu in that ubuntu addresses all aspects of the human condition holistically. Be that as it may, an attempt is made below to distil fundamental moral and social principles that, when interwoven, define its basic characteristic. Its human-centred ontology appears to hinge on three moral and social imperatives.
First, is the moral and social imperative that everyone has to belong and that no one should not belong. This is expressed in the Sesotho saying that 'motho ha a lahloe' (a human being cannot merely be discarded). In terms of this tenet, belonging, is both a right and an obligation. Nabudere captures the principle succinctly when he argues that, '[t]he solitary individual is a contradiction in terms, (as) you seek to work for the common good because your humanity comes into its own community, in belonging.'[24] This principle is the basis of social inclusion. It is customary for the Teso people of Uganda to welcome a stranger in their midst by shouting the refrain: 'Umoria kuria!' ('Let the ties that bind us together grow!'). As they shout this refrain they tie knotted kikuyu grass around the wrist of the stranger being welcomed as a symbol that he is now one with them. Each knot in the grass is symbolic of the infinity of the growing human chain. Nothing can better dispel the notion of an insular ethic than this custom.

The second principle is sharing. In African metaphysics, nature is deemed to have bequeathed an abundance of resources to the human species. There is a strong belief that no one must be destitute amid abundance. But even

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Renaissance': New Perspectives on Africa's Past and Africa's Present (University of Western Australia, November 2004) 4.

23 Ntuli quoted by Moodie *id* at 8.

24 Nabudere 'Ubuntu philosophy: memory and reconciliation' at: http://www.grandslacs.net/doc/3621.pdf (20 January 2017).

during scarcity, the imperative of sharing remains an inviolable ethic. Hence a saying that 'sejo senyane ha se fete molomo' (even if food is scarce every mouth must still have a bite). Alternatively it is said 'bana ba monna ba arolelana hlohoana ea tsie' (those who belong together must share even the smallest thing such as a head of a locust). Therefore, sharing is a creed underlying the individual's humanity. To deny those in unfortunate circumstances a share is deemed not only to affirm their dehumanisation, but also to dehumanise those who deny them a share.

Sharing is thus a moral and social principle that predicates social cohesion and harmony through empathy, reciprocity, cooperation, interdependence, and solidarity. It is the very quintessential foundation of a shared humanity and underpins social bonds, community and belonging. This is better articulated by Bishop Tutu's apt words: 'I am human because I belong, I participate, I share'.[25] Along with the inclusive imperative of belonging, sharing squares the circle that concretises substantive equality and social justice. 'Rather than the survival of the fittest and control over nature', argues Cobbah, 'African worldview is tempered with the general guiding principle of survival of the entire community and a sense of cooperation, interdependence, and collective responsibility'.[26] In pre-colonial African societies several institutions and common practices existed to give practical expression to this ethos.

Ubuntu philosophy also recognises that in the lived world breaches of the ideal happen all the time as part of the social and physical dynamics of existence itself. From this recognition, a third moral principle of maintaining or restoring the equilibrium emerges. And so, ubuntu places a high premium on the restorative norms of forgiveness, restitution, rehabilitation, and reconciliation. These norms are invoked to mediate broken social relations; to reintegrate those who may have strayed into the community; and to make whole those who may have been despoiled in one way or the other. The restoration of harmony – the very essence of social equilibrium – is the end game undergirding the norms. This is the backdrop against which, for example, Nabudere asserts that '[t]o achieve[...] togetherness, reconciliation with those "others" becomes a continuous necessity of being'.[27]

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25 Bishop Desmond Tutu quoted by Richards n 11 above at 12.

26 Cobbah 'African values and the human rights debate: an African perspective' (August 1987) 9 (3) *Human Rights Quarterly* 320.

27 Nabudere n 24 above at 3.

Of course, ubuntu has not been spared criticism from academics – albeit a small minority, as the majority have welcomed its potential to free the law from the bondage of legal positivism and the imperatives of modernity. Criticism ranges from the legitimate to the banal. In the first category one encounters the apt remark by Mokgoro and Woolman that '[i]f *uBuntu* is connected – however unreflectively – with practices such as male primogeniture, male ascension to leadership positions, male circumcision rites or compensation for teacher-student, male-on-female sexual violence, then such practices must be rooted out before uBuntu can lay a claim to the mantle of revolutionary constitutional doctrine.'[28] It is not clear how any of the things mentioned by these authors are of themselves associated with ubuntu. It can only be surmised that they intended to distance the philosophy from practices deemed in some quarters to be pernicious to human dignity.

Racial stereotyping and profiling of the philosophy by linking it to misconduct, including certain forms of crime, are, however, only thinly disguised in some of the criticism levelled at ubuntu. For example, Keevy explains that his article sets out to:

> [D]econstruct Ubuntu in terms of the following: Ubuntu as the basis of African law; Ubuntu as ethnophilosophy; ubuntu's stereotyping of women, children, homosexuals, lesbians, witches, strangers and outsiders;[…] This article concludes that Ubuntu is not in consonance with the values of the Constitution in general and the Bill of Rights in particular.[29]

Such a deliberate conflation of a philosophy with the stereotyping of a race can only be regarded as old-fashioned racism. Mokgoro and Woolman could have been referring to this when they suggest that 'this lassitude takes the form of a rather thin and potted post-structuralist or post-modernist account of other cultures – as in 'it's a black thing, we couldn't possibly understand'.[30] For, if anything, homophobia, xenophobia, the rape of children and the elderly, treatment of women as minors, *etc*, are, or have been, around in all cultures and indeed even today are no less common in the Global North than in Africa.

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28 Mokgoro & Woolman 'Where dignity ends and uBuntu begins: an amplification of, as well as an identification of tension in Drucilla Cornell's thoughts' (2010) 25 *South African Public Law* 407.

29 Keevy 'Ubuntu versus the core values of the South African Constitution' (2009) 34/2 *Journal of Juridical Science* 22.

30 Mokgoro & Woolman n 28 above at 405.

Moreover, anti-social criminal behaviour can be seen as a direct consequence of the collapse of the community courtesy of the sweeping changes wrought, often brutally, by modernity, and possibly exacerbated by its contemporary neo-liberal form. Nor would any right-thinking person glibly dismiss the doctrine of the rule of law and ascribe to it the vices of slavery, colonialism, and imperialism on the logic that European powers practised these on other sections of the human race. Elsewhere I have shown with historical evidence, how the humane values of ubuntu were harnessed by King Moshoeshoe, the founder of the Basotho nation, during 'Difaqane' (nineteenth century internecine wars) – one of the most vexed historical epochs in Southern Africa – as an antidote to the seeds of inhumanity that had been sown. As argued there, some of the constitutional devices King Moshoeshoe put in place, such as the abolition of the death penalty,[31] the recognition of the right to one's culture and language,[32] laws protecting the weak and vulnerable,[33] *etc*, many a Western nation is still struggling to firmly institutionalise in their constitutional systems two hundred years later.[34] The vote by the majority of British citizens to quit the European Union, so-called 'Brexit' and the vote for Donald Trump as President of the United States of America, are typical examples of how some Western nations are still wrestling with the fear of the alien 'other' now accentuated by the impact of globalisation.

And so if we were to sum up the constitutive norms of the African ontology, they would revolve around three principles: social inclusion, sharing, and a constant focus on maintaining the social equilibrium. A world outlook structured around these principles presupposes *sui generis* legal principles which fit comfortably with the societial model they must serve.

AFRICAN JURIDICAL PRINCIPLES

Of necessity and logically there exist particular juridical principles that mediate social conduct resonating with the life framework of the ubuntu ontology. Central to all of these principles is the over-riding idea that the maintenance of the fabric of society and its underlying ethos are enforceable

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31 Mahao n 18 above at 332–333.

32 *Id* at 333–334.

33 *Id* at 334–335

34 In several leading Western European countries the attack on the right of immigrants to hold onto their individual cultures and languages is on a steady rise influencing the behaviour of whole political and constitutional systems.

through the institution of law. Below I discuss some of the key juridical principles peculiar to ubuntu.

Ubuntu as an expansive system of equity

One cannot but agree with Bennett who likens ubuntu to the English doctrine of equity. Inherent in the doctrine of equity is the idea that justice is more than the notion of law conceived solely as a system of technical legal rules. 'Like equity', Bennett argues, 'ubuntu is functioning as a metanorm to correct injustices resulting from the application of abstract rules of the common law, or even, on occasion, the Bill of Rights'.[35] Because of its inherent homocentric nature ubuntu locates justice not only within the rules, but also beyond them. It is also not difficult to understand why. With the restoration of social equilibrium at its heart, ubuntu searches for answers beyond the letter of the law, and balances the interests of the wronged against those of the wrongdoer, or those of the powerful against those of the weak. Furthermore, the doctrine acknowledges that in real life power relations tend to skew issues of fairness and agency, and it responds in a way that mitigates resulting injustices.

In post-colonial Africa, certain of the post-apartheid South African courts have made an effort to extract critical lessons as to the limits of the letter of the law, or the narrow technical conception of the rule of law, by broadening the legal system to accommodate victims of on-going social and historical injustice. Why, of all post-colonial jurisdictions, the South African has made these conscious – if still nascent – efforts, is not difficult to fathom. As a relatively better developed and integrated social formation within the modernity paradigm, and historically underpinned by brazen social and racial exclusion and its adverse impact on the marginalisation of millions of people, South Africa's case is compelling when it comes to the development of an enlightened jurisprudence. The courts have, therefore, incorporated and mainstreamed elements of ubuntu as a normative palliative for extreme unfairness and as a bridge to mediate technical law and justice defined as social and historical fairness.[36]

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35 Bennett 'Ubuntu: an African equity' (2011) 14/4 *Potchestroom Electronic Law Journal* 351.

36 *Ibid*. Bennett discusses scores of cases invoking ubuntu in criminal, delict, administrative, contract, property and family law matters are extensively discussed.

Perhaps the best example of elements of ubuntu as a doctrine that functions fairly in judicial practice, is in the judgment of the South African Constitutional Court in the case of *Port Elizabeth Municipality v Various Occupiers*.[37] Responding to a petition from a group of landowners, the Port Elizabeth Municipality applied for an eviction order against a group of landless people who had occupied plots of land where they had lived for various periods without title deeds. In petitioning for the occupiers' eviction the Municipality did not consider itself obliged to provide alternative land, but concentrated solely on the fact that the occupation was unlawful. Drawing from a similar earlier case, *Government of the Republic of South Africa and Others V Grootboom and Others,* the Constitutional Court observed that the judge had ruled that the court 'would be obliged to break away from a purely legalistic approach and have regard to extraneous factors such as morality, fairness, social values and implications and circumstances which would necessitate bringing out an equitably principled judgment'.[38] Similarly, in delivering the Constitutional Court's decision in the *Port Elizabeth* case, Sachs J contended that the criteria the court had to apply were not purely technical. He stated that the legislation called upon the court 'to infuse the elements of grace and compassion into the formal structures of the law'.[39] The court, he argued, was 'called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern'.[40] 'The spirit of ubuntu, part of the deep cultural heritage of the majority of the population', Sachs J elaborated, 'suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'.[41] Applying these principles, the court ruled against the eviction of the occupiers.

But not all South African courts invoke ubuntu to resolve matters that carry potentially unjust social consequences. In *Emfuleni Local Municipality v Builders Advancement Services CC and Others,*[42] Willis J of the South

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37 *Port Elizabeth Municipality v Various Occupiers*, CCT 53/03; 2005 1 SA 217 (CC).
38 *Id* at 236.
39 *Id* at 237.
40 *Ibid*.
41 *Id* at237–38.
42 *Emfuleni Local Municipality v Builders Advancement Services CC and Others* 2010 (4) SA 133

Gauteng High Court mounted an attack on the judgment in *Port Elizabeth Municipality v Various Occupiers* and other similarly inclined judgments. Firmly embedded in the worldview of modernity or what he terms 'economic freedom', Willis J argued that the only way prosperity can reach those in the poverty trap, is when the law protects those who create wealth. He stated: 'Ironically, if anyone doubts the transformative power of this economic model, he or she should read (or re-read) The Communist Manifesto, written by Karl Marx and Friedrich Engels'.[43] Expressing his rejection of what he dubbed 'judicial intervention in socio-economic rights', he stated that 'unless the courts are well attuned to economic realities and are firm, clear, and consistent in applying the principles that provide the foundation for economic prosperity for all, we shall all rue our acquiescence in what may perhaps be a misplaced moral superiority being paraded in high places'.[44] Intriguingly, what emerges unequivocally from Willis J's views, is not that he is opposed to derogation from or tampering with black-letter law represented by unbending rules, which ubuntu-equity advocates. His discourse is essentially that if courts have to do so, it must be in defence of the economic model of modernity.

By the look of things, the jurisprudence expressed in *Emfuleni Local Municipality v Builders Advancement Services CC and Others,* is ever more likely to become an aberration as South African courts grapple with immense socio-economic challenges posed by modernity, especially in the age of a neo-liberal political economy with its acute capacity to consign a large percentage of the human species to the periphery. Even as the pronouncements in cases such the *Port Elizabeth Municipality v Various Occupiers* naturally drew heavily from the interpretation of the constitutional schema, there is no gainsaying that they mark a major jurisprudential milestone and a shift in the exposition of ubuntu as an applicable legal doctrine. Cases such as these have not only propelled ubuntu to the centre of judicial practice in South Africa, but they bear testimony to two realities. First, a subtle acknowledgement that unless somewhat tempered, the hard legal principles anchored in the imperatives of modernity, may de-legitimise the whole constitutional scheme in the eyes of victims of a system which is historically and socially exclusive. Secondly, they acknowledge that another set of juridical values hewn from a different

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43 *Id* at 141.
44 *Id* at 143–144.

intellectual tradition and worldview, is necessary to overcome the homocentricity and limitations of the former system.

Restoration as the essence of African justice

In practice there is a significant overlap between what are sometimes termed 'transitional justice' and 'restorative justice'. In its contemporary usage transitional justice is perceived as a temporary mechanism to enable the making of new rules which is often invoked in situations where social bridges between communities have collapsed. The mechanism is invoked as merely transitional and a necessary evil if only to restore assumed normality, which, for the time being has been suspended by an unanticipated rupture. As a practical tool, therefore, transitional justice tends to play a role where states or large communities have experienced a crisis to enable them to regain an assumed ideal end-state. 'It is simply a convenient way of describing the search for a just society in the wake of undemocratic, often oppressive, even violent, systems',[45] says Boraine.

From the perspective of African jurisprudence, the concept of transitional justice is almost alien and awkward because of its ephemeral nature – African justice is conceptually and by practice inherently restorative. 'Traditional law and culture', asserts Mokgoro J in *Dikoko v Mokhatla*, 'have long considered one of the principal objectives of law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms'.[46] Thus restorative justice, and not only transitional justice, is what the adjudicative process is expected to attain in fulfilling its rehabilitative role, not as a once in a lifetime occurrence, but as a focal point of routine vocation. Critically important to restorative justice is the fact that its focus necessarily includes the underlying causes of the breach and strives to provide a broader remedy to the damaged social fabric. 'In the African philosophical understanding of justice' contend Nabudere and Velthuizen, 'a person who commits a crime does so because there is something wrong that has occurred within the society'.[47] Dr Makgoba, Anglican Archbishop of Cape Town, concurs:

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45 Boraine 'Defining transitional justice: tolerance in the search for justice and peace' in Boraine & Valentine (eds) *Transitional justice and human security* (2006) 24.

46 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) at 260**.**

47 Nabudere & Velthuizen *Restorative justice in Africa: from trans-dimensional knowledge to a vulture of harmony* (2013) 12.

> The aim of restorative justice is to bring about solutions that go far beyond addressing wrong-doing, and instead aims to bring healing and wholeness – first to the victims of injustice, but also to the entire underlying situation. It recognises that sometimes wrong-doing is only a symptom of something greater that is not as it should be, and needs to be addressed too.[48]

It is for this reason that the African concept of justice, better illustrated and amplified by restorative justice, is not amenable to reduction solely to technical pre-occupations, and necessarily adopts a transdisciplinary process in its search for cause and remedy. Nabudere and Velthuizen put it appositely:

> Restoration of social relations enables people in the communities to regain control over their lives on the basis of acceptance. Perpetrators take responsibility for their wrongful actions ('crimes'), reparation and reconciliation. It means restoring a sense of security, dignity, harmony and a feeling of justice that enables society to set rules for social relations that everybody is comfortable with.[49]

In practice what a formally constituted tribunal does, both procedurally and substantively, is not materially different from what any basic unit of the community seized with polarised claims warranting affirmation or repudiation does. What then are the basic requirements for restorative justice? In a most comprehensive re-statement of restorative justice requirements, Opak[50] outlines its six stages.

Stage One: Voluntary telling of the truth

Both parties to the matter in dispute must honestly divulge the full facts of the cause of the fall-out. By itself disclosure portends well for possibilities of finding a solution and it is a good indicator that the parties are willing to finding such a solution.

Stage Two: Acknowledgement of the wrong committed

The party who knows that he is in the wrong, or who is exposed by the facts to be in the wrong, must acknowledge the wrong.

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48 Makgoba quoted by Faris 'Mediatory intervention in the context of ubuntu', unpublished paper delivered at the University of Johannesburg, 6 July 2011, 8.

49 Nabudere & Velthuizen n 47 above at 12.

50 Opak *The road map to peace in East and Central Africa* (2010) 32–42.

Stage Three: Asking for forgiveness
This requirement also falls to the party in the wrong, and it flows logically from having acknowledged the wrong.

Stage Four: Undertaking not to repeat the offence
It is acknowledged that it helps little to renounce the past wrong without a clear commitment not to repeat the offence in the future.

Stage Five: Payment of compensation to the offended
If payment of compensation has a slight tinge of retribution, this is only in a very tangential and unintended sense. Otherwise, its primary purpose is restorative of the *status ante* by making good the loss suffered by the wronged party.

Stage Six: Reconciliation
A party restored his loss has very little reason to harbour a grudge and indeed is expected not to begrudge the wrongdoer any longer. Through reconciliation he reaches out to the wrongdoer and restores harmony between them.

In practice these principles can apply in a complex way and without following a pre-determined order. What is important is that they define a broader notion of justice with social rehabilitation of both the perpetrator and the victim at its core.

Land belongs to the dead, the living, and the unborn
Across sub-Saharan Africa, the African philosophy on land is yet another point of departure of the enlightenment tradition.[51] Land, culture and language are the interwoven matrix through which shared identity with past and future is mediated. Land occupies a special place in the African's worldview because the interconnection between humans, natural resources, and the animal world is perceived as a seamless whole. As such, land is sacred: first, because it is the giver of life; secondly, it is in land that the bones of ancestors are interred and the community's spirituality which moulds its consciousness and conscience is transmitted; and thirdly, the land where bones of the dead are interred establishes a title of sorts which affirms the community's spiritual connection with that land mass in perpetuity.

[51] This assertion is made by, among many others, Cobbah n 26 above at 323.

Gutto and Teffo recount the evidence of a Nigerian chief deposing before a British colonial land commission in 1912 as stating: 'I conceive that land belongs to a vast family of which many are dead, few are living and countless yet unborn'.[52] In this simple statement the chief captured the African juridical doctrine the *land belongs to the dead, the living, and the unborn.* This doctrine contains a set of values and principles that enshrine this complex cultural and spiritual relationship between African communities and the physical landmass on which they live.

First, the doctrine underscores the limited nature of rights anyone can have to land. Apart from land being an inherited collective patrimony of the living, the latter can only hold it in trust for future generations. Implicit here is the idea that the living have no more than usufruct rights in the land, as indeed did previous generations. It is against this backdrop that Gutto and Teffo contend that from the perspective of the African knowledge system, land cannot be conceived of as a mere 'thing' or an ordinary 'commodity'.[53] Thus, the doctrine of alienability of land – so much a part of Western jurisprudence and stemming from a conception of land as a commodity – is alien to African jurisprudence. This is also because it holds the inherent potential of dispossessing the dead and the unborn, who logically cannot contract their rights away. 'While private ownership of land is considered an inalienable right within Western society', asserts Cobbah, 'land in African society is communally held'.[54]

The second implicit doctrine is founded on the responsibility imposed on the living to use, maintain, and pass to posterity the land in qualitatively the same condition as they inherited it from the dead. From this perspective the doctrine speaks to the imperative of maintaining ecological balance. It is understood that to destroy land is to undermine the very fountain of life. The significance of this requirement cannot be overemphasised. It imposes a duty of care on users of land and restrains the liberty to use (or abuse) land in ways that individualistic ownership of land is inherently unable to enforce.

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52 Gutto & Teffo 'Deconstructing the land question' in *Sunday Independent* 6 November 2011.

53 *Ibid*.

54 Cobbah n 26 above at 323.

Seriti as an unbounded doctrine of human dignity

Unsurprisingly, ubuntu conceptualises and approaches human dignity in ways far broader and more fully resonating with human sanctity than the Western enlightenment tradition. A term akin to dignity in the Sotho group of languages is 'seriti' (translated as dignity in a broad sense). In an interesting article Cornell writes:

> Legally, ubuntu is important, as would be expected, in the arena of socio-economic rights – but not just there. Both uBuntu and dignity have been deployed in the battle to maintain an 'outside' to capitalisation of all human relationships. I will argue that ubuntu, rather than dignity, may well serve as the more adequate opposition to turn all human relationships into commodities and cash them out for their value in the marketplace.[55]

In a rejoinder supportive of Cornell's thesis, Mokgoro and Woolman acknowledge that there is indeed a difference between dignity as espoused by Western philosophers, and ubuntu. They argue for the need to suffuse the dignity jurisprudence with ubuntu.[56] It is suggested that Cornell is quite correct in implicitly locating the Western concept of dignity within the logic of modernity and the latter's commodification of every facet of human interaction. Cornell is also correct, as would have been implicit in this article, to distance ubuntu from that ethic. And yet it must be said that it is the concept of seriti within the ubuntu worldview that in a specific way both parallels and distinguishes itself from the highly circumscribed Western concept of dignity.

Jurisprudence on dignity has indeed developed significantly, especially since World War II.[57] This notwithstanding, global rights jurisprudence remains in fetters associated with modernity's inherent inability to fully embrace all rights. In the age of neo-liberalism, as Onazi observes, the hegemony of civil and political rights is reinforced over socio-economic and cultural rights.[58] Little wonder that in practice the concept of dignity is associated largely with three values only: respect, non-discrimination, and formal equality.

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55 Cornell 'Is there a difference that makes a difference between ubuntu and dignity' in Woolman & Bilchitz (eds) in *Is this seat taken: conversations at Bar, the Bench and Academy* (2012) 221.

56 Mokgoro & Woolman n 28 above at 403.

57 Cornell n 55 above at 383.

58 Onazi n 4 above at 5.

Richards uses the notion of 'unbounded organisation' to ground the search for possibilities beyond the conventional paradigm.[59] This is what the concept of seriti achieves as it liberates dignity from the limited conceptualisation imposed by modernity. Firstly, in addressing, as it does, socio-economic and cultural well-being, seriti imports a critical element to human dignity. Thus seriti posits an indivisible concept of human dignity. Elsewhere I have contended that human dignity the African way 'encapsulates physical, spiritual, cultural and material wellness. From this perspective, political and civil rights are inseparable from socio-economic and collective rights – together they make up the totality and indivisibility of human dignity.'[60]

But seriti also expresses the doctrine of indivisibility in another sense: rights and responsibilities are an inseparable whole inherent in every human being physically and socially able to discharge both.[61] It is for this reason that it is said 'ha a na seriti' (he has no seriti) if one fails to honour his or her responsibilities towards others, notwithstanding his or her potential ability to do so. And so, if we reflect back to the one aspect of ubuntu, of the inter-dependence between rights and responsibilities, captured in the definition proffered by the University of South Africa's College of Law noted earlier, we understand that mediating this interdependence is the concept of seriti.

CONCLUSION

Cramton speaks the truth when he says that legal rules are not truths revealed from on high, but normative declarations made by individuals (perhaps also communities) conditioned by their own peculiar cultural milieus.[62] As shown in the first section of this article, the human rights jurisprudence practised in the courts of law and taught at learning institutions in South Africa, as elsewhere in the formerly colonised world, remains conditioned by the Western cultural milieu where it originated and from where it was exported. While its positive usefulness in advancing the development of broad humanity must be acknowledged; it would be grossly remiss to ignore its palpable limitations as a leitmotif of optimal social inclusion, justice, and cohesion. And so the necessity for an alternative

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59 See for example, Richards 'Unbounded organisation and the future of socialism' (July 2013)17/2 *Education as Change* 229–242.

60 Mahao n 18 above at 326.

61 Cobbah n 26 above at 322.

62 Cramton 'The ordinary religion of the law school classroom' (1978) 29/3 *Journal of Legal Education* 249.

human rights jurisprudential paradigm is not only of academic interest. In an age where neo-liberal globalisation has exacerbated social exclusion and engendered the vices of polarisation and anomie, even in historically rich countries, and has visited untold destruction on the biosphere, the very basis of human existence, the search for an inclusionary, responsible and caring rights value system has never been more urgent.

In this article, the ubuntu ontology has been advanced as providing an anchor for a panoply of juridical principles – only a few of which have been discussed here – that mediate the desired alternative ideal. Ubuntu, understood as a broader principle of equity and justice inherently associated with restoring social equilibrium and harmony, a land doctrine that secures the future for posterity and preserve the biosphere, and a concept of dignity that is inherently substantive and reconciles rights with duties, are the principles we have traversed above. All of these juridical principles import into the space of jurisprudence what the imported Western legal system is strained to furnish to mankind. Jurists and scholars have a duty to add value to jurisprudence by constantly pushing its frontiers. African juridical principles, advancing a kind of society which differs from that to which we have been socialised, a kinder and more caring society, provides ample opportunities to explore this further.

Finally, we cannot afford the luxury of removing the legitimising value of endogenously evolved juridical values from the equation. A legal system that relies on wholly imported values remains alien and alienated, no matter how long it may have been enforced and who administers it. True legitimacy is better leveraged when the majority can relate to the normative system because it resonates with values etched in the DNA of their cultural milieu. After all, what is justice if not a subjective experience? In this regard I must conclude by deferring the last word to Justice Krishna Iyer, former Chief Justice of India, who put it eloquently thus:

> Jurisprudence must match jurisdiction and jurisdiction must broaden to meet the challenges of the masses hungry for justice after a long night of feudal-colonial injustice[…] The rule of law must run close to the rule of life and the court, to be authentic, must use native jural genius, people-oriented legal theory and radical remedial methodology regardless of Oxbridge orthodoxy, elitist petulance and feudal hubris.[63]

[63] Chief Justice K Iyer, quoted by W Mutunga, Chief Justice of Kenya, in his Keynote Speech for the Africa and International Law Conference (April, 2012) Albany Law School 6.