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**AN EVALUATION OF THE NEXUS BETWEEN UBUNTU AND THE AFRICAN  
CHARTER ON HUMAN AND PEOPLES' RIGHTS**

by

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## DECLARATION BY CANDIDATE

I hereby declare that the dissertation “An evaluation of the nexus between *ubuntu* and the African charter on human and peoples’ rights” submitted for the Master of Law degree in Law and Political Justice is my own original work and has not previously been submitted to any other tertiary institution and all the sources I have used or quoted are acknowledged by means of a comprehensive list of references.

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T. O Oluwaranti

## DEDICATION

This study is dedicated to God Almighty who remains my inspiration and strength at all times.

To my parents Mr and Mrs EO Kuponiyi for being the best parents in the world. Your love, prayers, support and encouragement have seen me through all the different stages of my life.

## ACKNOWLEDGEMENTS

My gratitude goes to my husband, Ademola, my daughters, Temidayo and Temitayo and my son, Oluwademilade for all their love and support.

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## ABSTRACT

This study is based on the moral philosophy and theory of African humanness termed *ubuntu*. A qualitative methodology has been adopted to interpret *ubuntu* in the light of, and in contrast to the Eurocentrism of human rights law, particularly as contained in the African Charter on Human and Peoples' Rights. The study identifies the inconsistencies in the African Charter and the weaknesses in the jurisprudence of the African Commission on Human and Peoples' Rights.

The researcher argues that inconsistencies and weaknesses arise due to the absence of an interpretive framework in the African Charter. *Ubuntu* is proposed as an interpretive framework at the hand of which the provisions of the Charter can be read and interpreted. Research shows that *ubuntu* aligns itself with the historical experiences and human rights values of the African continent. It is in line with the aspirations and intents of the drafters of the African Charter and more importantly, *ubuntu* has proved to be capable of promoting and protecting the rights and interests of a society without jeopardizing the rights and interests of the individual. It also has the potential of an harmonious balance between an individual's duties and his rights or needs.

In conclusion, the researcher contends that with the adoption of *ubuntu* as an interpretive framework of the African Charter, those humanist aspirations of the African Charter which have so far been ignored, can be achieved.

## CONTENTS

Declaration.....	ii
Dedication.....	iii
Acknowledgement.....	iv
Abstract.....	v
Chapter 1.....	1
Introduction.....	1
1.1 Background.....	2
<u>1.1.1 Human rights in Africa, the West and The African Charter.....</u>	3
1.2 Theoretical approaches.....	5
1.3 Motivation for the study.....	5
1.4 Research objectives.....	<b>Error! Bookmark not defined.</b>
1.5 Research problem.....	6
1.6 Significance of the study.....	7
1.7 Literature review.....	7
1.8 Limitations of the study.....	9
1.9 Outline of the study.....	9
Chapter Two: The framework and critique of the African Charter on Human and Peoples' Rights .....	11
2.1 Introduction.....	11
2.2 Structure of the African Charter.....	12
2.3 Drafting the African Charter.....	12
<u>2.3.1 International human rights and African norms.....</u>	14
2.4 Group or peoples' rights in the African Charter.....	15

2.4.1 Definition of people.....	15
2.4.2 Group rights .....	16
2.4.3 Enforceability of group rights.....	17
2.5 Individual duties in the African Charter.....	19
2.6 Weaknesses of the African Charter .....	20
2.6.1 Inconsistencies in the African Charter.....	21
2.6.2 Claw-back clauses in the African Charter .....	22
2.6.3 Derogation clauses and the African Charter.....	24
2.7 Weaknesses of the African Commission.....	25
2.7.1 Enforcement mechanism of the African Commission.....	26
2.7.2. The African Commission and its decisions .....	26
2.8 Conclusion.....	28
Chapter Three: Meaning, criticisms and justiciability of <i>ubuntu</i> .....	30
3.1 Introduction .....	30
3.2 Meaning of <i>ubuntu</i> .....	31
3.3 Is <i>ubuntu</i> : vague and anachronistic? .....	35
3.4 Can <i>ubuntu</i> be made justiciable?.....	38
3.5 Conclusion.....	40
Chapter Four: Grounding <i>ubuntu</i> in the provisions of the African Charter.....	42
4.1 Introduction .....	42
4.2 Legislation and interpretive frameworks.....	43
4.3 African Charter and the lack of an interpretive framework .....	43
4.4 Interpreting the African Charter through <i>ubuntu</i> .....	47
4.5 Ubuntu as a framework in adjudication.....	50

4.6 Ubuntu demonstrated.....	54
4.6.1 <i>Maphango v Aengus Lifestyle Properties (Pty) Ltd</i> .....	55
4.6.2 <i>Jaftha v Schoeman &amp; Others; Van Rooyen v Stoltz and Others</i> .....	58
4.7 Conclusion.....	60
5. Chapter Five: Conclusion .....	62
Bibliography .....	67
Books.....	68
Journals.....	68
Case Law .....	70
South African.....	70
Foreign.....	71
Legislation.....	71
Conferences Papers .....	72
Internet Sources.....	72
Other Sources.....	73





# Chapter 1

## Introduction

African humanness, known as *ubuntu* in South Africa is a moral theory and philosophy. It is an ethical worldview of the Bantu people according to which human beings are completely connected to one another and puts forward “the belief in a universal bond of sharing that connects all humanity.”<sup>1</sup> The *isiZulu* maxim *umuntu ngumuntu ngabantu* which means “a person is a person through (other) persons” reinforces its ideological stand.

An often quoted definition of *ubuntu* is that of Archbishop Desmond Tutu:

A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.<sup>2</sup>

In an interview, Cornell (2013) argues that an apt legal illustration of *ubuntu* is how in African customary law, a person has a duty to rescue another person in distress while in Anglo-American law, and Roman-Dutch law, there is no duty to rescue another person in distress unless he is an immediate family member<sup>3</sup>

Since *ubuntu* is a philosophy of the Bantu people, of whom there are over 140 million throughout Southeast Africa,<sup>4</sup> this study does not propose to have it imposed on all African people. Instead, this study proposes it as a possible interpretive framework for the African

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<sup>1</sup> ‘About the Name.’ Official Ubuntu Documentation. Available online at < <https://help.ubuntu.com/10.04/about-ubuntu/C/about-ubuntu-name.html> > accessed on 2 March 2015.

<sup>2</sup> Tutu, D.M., *No Future Without Forgiveness* (Doubleday New York, 1999) 294.

<sup>3</sup> Coletti, H., ‘Interview: Drucilla Cornell,’ Rutgers University, Expositions 7.2 (2013) 41–51.

<sup>4</sup> Philip, M. P. and Yankah, K., ‘African Folklore: An Encyclopedia.’ (Taylor & Francis, (2004), 699.

Charter since *ubuntu* is a philosophy and theory which shares a common ground with the African socio-cultural values of collectivism and group solidarity.

## 1.1 Background

The African Charter on Human and Peoples' Rights (hereafter called "the African Charter") was adopted in Nairobi, Kenya in June 1981 by the Organization of African Unity.<sup>5</sup> It came into effect in 1986, following the deposit of Eritrea's instrument of ratification.<sup>6</sup> Ever since, it has become the leading instrument governing the protection of human rights on the entire African continent. All fifty-three African Union (AU) States are now bound by it. The adoption of the African Charter opened a new chapter in African human rights discourse. Under the Charter, the African Commission on Human and Peoples' Rights (hereafter called "the African Commission") was established as the supervisory organ of the Charter.<sup>7</sup> The African Commission has a broad mandate to:

...promote human and peoples' rights...Ensure the protection of human and peoples' rights under the conditions laid down by this present Charter. Interpret all provisions of the present Charter at the request of a State Party, an institution of the organization of African Unity or an African organization recognized by the OAU. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.<sup>8</sup>

This study suggests that although the African Charter contains innovative provisions on peoples' rights and individual duties which seek to reflect human rights in the light of the African values

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<sup>5</sup> African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 Rev. 5. The Organization of African Unity (OAU) was created in 1963 as a political institution to unite and consolidate the independence of African states. As a result of the Constitutive Act adopted in 2000, the OAU has been replaced by the African Union (AU).

<sup>6</sup> Thirteenth Activity Report AHG/222 (XXXVI) Annexes 1-V & Addendum (July 2000).

<sup>7</sup> The African Charter, Art. 30.

<sup>8</sup> *Id.*, Art. 45.

of humanness and communal solidarity, the African Charter's quest for humanness is nonetheless frustrated by its inherent inconsistencies and the weaknesses in the jurisprudence of the African Commission. The study argues that the African Charter's failure to achieve its desired African humanness concept is due to the absence of an interpretive framework. This study identifies and proposes *ubuntu* as a philosophy and legal theory which can be used to explain the provisions of the African Charter to fill the void created by the absence of an interpretive framework. *Ubuntu* is generally a concept of the Bantu people which embodies African values of humanness, collectivism and communal solidarity. These values, which contrast sharply with the Western individualistic conception of human rights, have long shaped the conception and practice of human rights in Africa.

### 1.1.1 Human rights in Africa, the West and The African Charter

Several African writers, among others, Wai (1979) Legesse (1980) and Mojekwu (1980) argue that there is a uniquely African concept of human rights.<sup>9</sup> This is the communitarian ideal of human rights.<sup>10</sup> Although the elevation of Africa's communitarian social structure to a unique ideal of human rights has been criticized, the notion of community is still central to the African way of life.<sup>11</sup> An individual is not regarded as an exclusive and isolated entity, but as an integral

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<sup>9</sup> See for instance, Wai, D. M., 'Human Rights in Sub-Saharan Africa,' in Pollis, A. and Schwab, P. (eds.), *Human Rights: Cultural and Ideological Perspectives* (Praeger New York, 1979), 116-118; Legesse, A. 'Human Rights in African Political Culture,' in Thompson, K. W. (ed.), *The Moral Imperatives of Human Rights: A World Survey* (University Press of America Washington, D.C., 1980), 125-128; and Mojekwu, C. C. 'International Human Rights: The African Perspective,' in Nelson, J. L. and Green, V. M. (eds.), *International Human Rights: Contemporary Issues* (Human Rights Publishing Group Stanfordville, N.Y., 1980), 85-87.

<sup>10</sup> Howard, R. 'Is There an African Concept of Human Rights?' Working Paper no. A:8, Development Studies Programme, (University of Toronto 1986).

<sup>11</sup> Menkiti, I. A., 'Person and Community in African Traditional Thought,' in Wright, R. A. (ed.), *African Philosophy: An Introduction*, 2d. ed. (University Press of America Washington, D.C., 1979), 157-168.

member of a community.<sup>12</sup> In Africa, as Bello (1985) rightfully points out “man is part and parcel of society.”<sup>13</sup>

While the Western human rights concept stresses individual over group rights, the African human rights concept is not individualist.<sup>14</sup> Africans, as Howard (1984) argues, are more community-oriented than Westerners.<sup>15</sup> This African human rights stance is now embodied in the 1981 African Charter.<sup>16</sup> The addition of “peoples’ rights,” in the title of the Charter itself sets it apart from all other regional and international human rights instruments.<sup>17</sup> In this context, it can be argued that the African Charter enshrines the African philosophy that rights are not only individualistic, but also collective in nature. This view is justified in the light of the historical experiences of past and present social organizations of African people.<sup>18</sup>

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<sup>12</sup> Kiwanuka, R., *The Meaning of “People” in the African Charter of Human and Peoples’ Rights*, 82 AM. J. INT’L L. 80, 82 (1988).

<sup>13</sup> Bello, E., ‘The African Charter on Human and Peoples’ Rights’, in *194 Hague Recueil*, 13-268, at 24 (1985-86); Mutua, M. W., ‘The Banjul Charter and African Cultural Fingerprint: An Evaluation of the Language of Duties’ in *Revue Africaine des Droits de l’Homme* 6 1996-7, 16 – 48; D’Sa, R. M. ‘*The African Charter on Human and Peoples’ Rights: Problems and Prospects for Regional Actions*,’ 10 Aus. Y.B. INT’L L. 101-30 (1987).

<sup>14</sup> Howard, R., ‘Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons’ in *6 Human Rights Quarterly* 160 1984 (The Johns Hopkins University Press, 1984), 5.

<sup>15</sup> *Ibid.*, Howard, R., 6.

<sup>16</sup> Okere, B. ‘The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems,’ in *6 Human Rights Quarterly*, 1984, 141-159.

<sup>17</sup> Gittleman, R., ‘The Banjul Charter on Human and Peoples’ Rights: A Legal Analysis,’ in Welch, Jr. C. E. and Meltzer, R. I. (eds.), *Human Rights and Development in Africa* (State University of New York Press Albany, N.Y., 1984).

<sup>18</sup> *Ibid.*, Howard, R., 8.

## 1.2 Theoretical approaches

In this study the critical legal theory methodology is used to explore the nexus between the concept of *ubuntu* in South African jurisprudence and the provisions of the African Charter on group rights and individual duties.

Critical legal theory has assisted the researcher in the exploration of how the African Charter enriches modern international human rights thought and advances the African socio-legal values of humanness and collective prosperity. This theoretical foundation is used in this study to argue that *ubuntu* is one philosophy that can be used as a framework to read and interpret the African Charter.

## 1.3 Motivation for the study

The motivation to undertake this study arises from the fact that when the United Nations Charter and the Universal Declaration of Human Rights (UDHR) were drawn up in 1945 and 1948 respectively, Africans were not represented. This means that the contents of those international human rights instruments largely leave out the African concept of human rights.

The African Charter, which came into effect in 1986 and was ratified by South Africa on 9 July, 1996 pursuant to the provisions of section 231(2) of the RSA Constitution, contains landmark provisions on group rights and individual duties which reflect African human rights values. However, the inconsistencies in the Charter and the weaknesses in the jurisprudence of the

African Commission, frustrate the African Charter's quest for humanism. This study proposes that *ubuntu* is one philosophy and theory that can fill this void in the African Charter.

#### **1.4 Research objectives**

The study seeks to achieve the following objectives:

- to examine critically whether the inclusion of provisions on individual duties and group rights are an African humanist innovation of the African Charter;
- to identify the inconsistencies in the provisions of the African Charter;
- to evaluate the philosophy and legal significance of *ubuntu* in South African jurisprudence; and
- to argue that *ubuntu* can be grounded in the provisions of the African Charter, which would mean that there is an interpretive framework for the African Charter.

#### **1.5 Research problem**

The study identifies and evaluates the inconsistencies in the African Charter and argues that the reason for this is the absence of an interpretive framework. The researcher attempts to unravel how the inconsistencies have weakened the jurisprudence of the African Commission and failed to achieve the objective of the African Charter which is to reflect the African values of human rights. It then concludes by proposing the use of *ubuntu*, which is a theory and philosophy of the Bantu people, to substantiate the provisions of the African Charter.

## 1.6 Significance of the study

There are numerous studies on the innovative contributions of the African Charter and the philosophy of *ubuntu*. However, the researcher is not aware of any study that has attempted to use *ubuntu* to fill the gap created by the absence of an interpretive framework in the African Charter.

## 1.7 Literature Review

The reality of the African Charter has provoked a discussion on how group rights and individual duties can be as important as individual rights. Oba (*undated*) evaluates the contributions of the African Charter to modern thinking on human rights.<sup>19</sup> Keetharuth who writes extensively on the historical background and drafting of the African Charter, argues that the provisions of the African Charter on individual duties and group rights are deliberate innovations and not an accident of drafting.<sup>20</sup> D'Sa (1985) describes how the provisions of the African Charter on group rights could be abused by governments to limit individual liberty.<sup>21</sup> Taking the attack further, Howard argues that the Charter's provisions on individual duties conflict with its provisions on individual rights could ultimately be used by governments as a clout to oppress political opponents.<sup>22</sup> When perusing the criticism which the African Charter has attracted for departing from the narrow formulations of rights adopted by earlier regional and international human rights

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<sup>19</sup> Oba, A. A., 'The Contributions of the African Charter to Modern Human Rights Thought' in *The Jurist* 4 (*undated*), 123–131

<sup>20</sup> Keetharuth, S. B., 'Major African legal instruments' in Bösl, A. and Diescho, J., *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (Macmillan Education Namibia, 2009).

<sup>21</sup> D'Sa, R. M., 'Human and Peoples' Rights: Distinctive Features of the African Charter' in *29 Journal of African Law* 72 1985

<sup>22</sup> *Ibid.*, Howard, R.



instruments, Mutua (1996) argues that the innovations of the African Charter are justified within the context of Africa's colonial history and current socio-legal challenges.<sup>23</sup>

Ramose (1998) takes the view that *ubuntu* is at the root of African philosophy and being an African is to be anchored in *ubuntu*.<sup>24</sup> He also expresses the opinion that *ubuntu* exists across the entire African legal and cultural universe. Malan (2014) who has examined the definition and the field of application of *ubuntu* as viewed by the courts, argues that *ubuntu* has lately come to play an increasingly important role in South African constitutional jurisprudence.<sup>25</sup> Metz (2011) attempts to provide a philosophical explanation of *ubuntu* free from the charges of vagueness, anachronism and collectivism.<sup>26</sup> Oyowe (2013) responds by pointing out that Metz's project fails to convince, as *ubuntu* is essentially based on collective harmony and not on individual rights.<sup>27</sup> After having consulted the body of existing literature on the African Charter and *ubuntu*, the researcher is unaware of any study which has linked *ubuntu* to the African Charter or, more specifically, proposed *ubuntu* as the framework or lens through which the African Charter should be read and interpreted. This angle is the focus of this study.

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<sup>23</sup> Mutua, M. W., 'The Banjul Charter and African Cultural Fingerprint: An Evaluation of the Language of Duties' in *Revue Africaine des Droits de l'Homme* 6 1996-7, 16 – 48.

<sup>24</sup> Ramose, M.B., 'Ubuntu Philosophy' in Coetzee, P. H. & Roux, A. P. J. (eds), *The African Philosophy Reader* (Routledge London, 1998)

<sup>25</sup> Malan, K., 'The Suitability and Unsuitability of Ubuntu in Constitutional Law – Inter-Communal Relations Versus Public Office-Bearing': De Jure, 2014

<sup>26</sup> Metz, T. 'Ubuntu as a Moral Theory and Human Rights in South Africa' in *African Human Rights Law Journal*, vol. 11, 532-559 (2011)

<sup>27</sup> Oyowe, A. O., 'Strange Bedfellows: Rethinking Ubuntu and Human Rights in South Africa' in *African Human Rights Law Journal*, vol. 13, 103-124 (2013)

## 1.8 Limitations of the study

The researcher explored and reviewed primary and secondary sources on human rights, the African Charter and *ubuntu*. The researcher after having consulted books, journal articles, human rights instruments and case laws on African human rights could find no direct link between the provisions of the African Charter and *ubuntu*.

However, in trying to fill this gap and conceptualize *ubuntu* within the provisions of the African Charter on group rights and balancing of rights with duties, no field research was done. The researcher depended on content analysis<sup>28</sup> (Babbie 2011). The scope and extent of the study was constrained by insufficient time and a lack of financial resources.

## 1.9 Outline of the study

In chapter one a brief history of the progression of the African Charter to Modern Human Rights is given with much emphasis being placed on how the use of *ubuntu* as an interpretive framework can remedy the inconsistencies in the documents. The chapter also spells out the objectives of the study, the research problem and the justification for the research. A discussion of the research design and the methodology follows. The last part of the chapter highlights some of the difficulties encountered and limitations of the study and how these were dealt with.

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<sup>28</sup> Defined as the study of recorded human communications, such as books, websites and laws. Babbie, E. *Introduction to Social Research*. International Edition. Wadsworth (Cengage learning 2011)

In chapter two the issue of whether the recognition of group rights and the balancing of rights with duties can be regarded as an African humanist innovation of the African Charter is discussed. To do this, the researcher delves into the history of the drafting and reasons for the provisions of the African Charter. The inconsistencies in the African Charter and the weaknesses in the jurisprudence of the African Commission are exposed and the researcher argues that these problems have arisen due to the absence of an interpretive framework for the African Charter.

In chapter three the meaning of *ubuntu* as a moral theory and as an African legal philosophy is explained. The charges of vagueness and anachronism aimed at *ubuntu* are examined and arguments are advanced in its defence.

In chapter four, the researcher proposes *ubuntu* as an interpretive framework for the African Charter and an explanation is given of how that can address the inconsistencies in the African Charter.

Chapter five concludes the study with a brief summary of the research objectives with recommendations.

## Chapter Two: The framework and critique of the African Charter on Human and Peoples' Rights

### 2.1 Introduction

This Chapter investigates the contention of whether the recognition of group rights and balancing of rights with duties can be regarded as an African humanist innovation of the African Charter. The chapter delves into the history of the drafting and reasons for the provisions of the African Charter. The chapter also examines the inconsistencies in the African Charter and exposes the weaknesses in the jurisprudence of the African Commission on Human and Peoples' Rights and argues that these problems have arisen due to the absence of an interpretive framework within the African Charter.

The African Charter is the basic instrument for the protection and promotion of human rights in Africa. It established an African human rights system which combines some rights that feature prominently in the European and Inter-American human rights systems with peoples' rights and even individual duties.<sup>29</sup> The African Charter has been applauded for enshrining civil, political, economic, social and cultural rights as well as "peoples' rights" which is an innovation as this chapter reveals. Such an approach demonstrates the indivisibility and interdependence of all human rights.

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<sup>29</sup> For a general and more detailed study on the African human rights system, see Evans M.D. and Murray, R., *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge, 2002); Nmehielle, V.O., 'The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?' in *Singapore Journal of International & Comparative Law* (2003) 7 pp 412–446; Murray, R., *The African Commission on Human and Peoples' Rights and International Law* (Hart Oxford, 2000); Ankumah E., *The African Commission on Human and Peoples' Rights: Practice and Procedures* (Martinus Nijhoff Publishers The Hague, 1996); Rembe, N.S., *The System of Protection of Human Rights Under the African Charter on Human and Peoples' Rights* (National University of Lesotho, Lesotho, 1991).

## 2.2 Structure of the African Charter

The African Charter has three parts. Part I contains two chapters that deal with rights and duties. Chapter one sets out the human and peoples' rights that are protected by the Charter, while Chapter II sets out an individual's duties towards his family and society, the State and the international community. Part II of the Charter, comprising four chapters, sets out the measures that can be taken to maintain the rights contained in part I. Chapter one establishes the African Commission and provides its structure. Chapter two details its functions while chapter three focuses on its procedure. Chapter four of Part II provides the applicable principles which the African Commission will call on to protect human rights in Africa. Finally, Part III gives an explanation of the commencement of the African Commission.

## 2.3 Drafting the African Charter

Keetharuth (2009)<sup>30</sup> has written extensively on the historical background and drafting of the African Charter. Discussions concerning the adoption of an African human rights document first came up at Congress of African jurists in Lagos, Nigeria, in 1961. Such a document was needed because of the massive violations of human rights being witnessed across the continent. During the Organization of African Unity's (hereinafter called "OAU") 16th Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979, the then Secretary General of the OAU, Edem Kodjo, was instructed to organize a meeting at which a preliminary draft of the envisaged document had to be done.

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<sup>30</sup> Keetharuth, S. B., 'Major African legal instruments' in Bösl, A. and Diescho, J., *Human Rights in Africa Legal Perspectives on their Protection and Promotion* (Macmillan Education Namibia, 2009).

The drafters of the Charter had a mandate to prepare an African treaty on human rights which “reflects the African conception of human rights” and “take as a pattern the African philosophy of law and meet the needs of Africa”.<sup>31</sup> Africa’s unique problems justified a departure from other regional human rights models and a response different from that found in the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>32</sup> and the American Convention of Human Rights.<sup>33</sup>

The draft of the African Charter on Human Rights and Rights of Peoples’ was presented at a Ministerial Conference convened by the OAU Assembly which met in Dakar, Senegal in November 1979. The Assembly was attended by African ministers of justice and other legal experts. Further meetings were held in Banjul, The Gambia, in June 1980 and January 1981, respectively. The draft Charter was then passed on to the 37th Ordinary Session of the Council of Ministers of the OAU in June 1981 for its consideration. After much deliberation, it was approved by the OAU Assembly without amendment on 17 June 1981.<sup>34</sup>

This descriptive history shows that the provisions for peoples’ rights and individual duties enshrined in the African Charter are not accidental innovations of the African Charter. These are products of deliberate efforts by the drafters to reflect African humanness and communalism.

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<sup>31</sup> OAU Doc. CAB/LEG/67/3, Rev. 1 at 1.

<sup>32</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, (1953) 213 U.N.T.S. 22; Gr. Brit. T.S. No. 71 (Cmnd. 8969).

<sup>33</sup> American Convention on Human Rights, November 22, 1969, O.A.S. T.S. No. 36 at p. 1, O.A.S. Doc. OEA/Scr.L/V/II. 23 doc. 21 rev. 6.

<sup>34</sup> D’Sa, R. M., ‘Human and Peoples’ Rights: Distinctive Features of the African Charter’ in *29 Journal of African Law* 72 1985.

### 2.3.1 International human rights and African norms

Although Article 60 of the Charter reaffirms its adherence to general international laws on human and peoples' rights, Article 61 cites legally enforceable African customs and practice as a subsidiary means of determining the applicable legal principles. As argued in the preceding section, the provisions of the African Charter boldly reflected the African values of human rights because the African leaders shared the same vision which they explicitly communicated to the drafters of the African Charter. In effect, the African Charter reflects a conscious vision of the African leaders to produce a Charter that blended the African concept and values of human rights with the existing norms of international human rights laws. Hence, the drafters of the Charter combined important aspects of international human rights ideals with the African legal and cultural ideal and humanism. The civil and political rights of the individual in the African Charter have much in common with the European Convention and American Convention.<sup>35</sup>

Articles 2 to 14 of the European Convention and Articles 3 to 25 of the American Convention contain important civil and political rights such as the right to life, right to freedom from forced labour, right to liberty, right to fair trial, right to freedom of expression, right to freedom of association and right to freedom of religion. In similar to them, the African Charter contains provisions on these civil and political rights in Articles 2 to 14.

These rights in the African Charter were innovatively linked to provisions on group rights and individual duties to reflect the African cultural and social value of communalism and humanism.

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<sup>35</sup> *Ibid*, Okere, B.

Prior to the Charter, these group rights were not enshrined in other human rights instruments.<sup>36</sup> A major part of the motivation for the recognition of “peoples’ rights” lies in the fact that African countries basically share the same history. They have been colonized, taken as slaves and discriminated against under the repressive apartheid (in the case of South Africa) and have had to engage in prolonged struggles to secure their human rights.

## **2.4 Group or peoples’ rights in the African Charter**

### **2.4.1 Definition of people**

The African Charter does not provide a definition of “people”. In fact, Bello (1985) argues that the drafters had no intention of providing one.<sup>37</sup> From available evidence, “people” could be interpreted as referring to the residents or nationals of a State, or to smaller groups within the State, irrespective of their ethnic, religious or linguistic background.

According to the Commission people could mean the population of a State as a whole with a view to protecting, as in, the “people of Rwanda” against the consequences of war.<sup>38</sup> It has been used in relation to the “people of South Africa” in their fight against apartheid. The Commission

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<sup>36</sup> *Ibid.*, Keetharuth, S. B.

<sup>37</sup> *Ibid.*, Bello, E.

<sup>38</sup> ‘Press Release,’ in Seventh Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1993-1994, ACHPR/RPT/7th, Annex XIII.



has also shown its readiness to interpret “people” as discrete groups within the State.<sup>39</sup> In the Katangese People’s case, the Commission recognized the Katangese as a “people” in Zaire.<sup>40</sup>

These examples show that in as much as the African Charter has failed to provide a definition of ‘people’, the African Commission has also failed to advance a consistent and definitive delineation of the concept as frequently used in the African Charter. First, the absence of a definition of “people” in the African Charter is a huge void, granted that “peoples’ rights” is arguably the most ambitious contribution to the international human rights laws. Secondly, this inconsistency has led to a weakness in the jurisprudence of the African Commission as is clearly shown in its contradictory positions.

#### **2.4.2 Group rights**

The Charter contains numerous provisions for substantive protection of human rights in all areas. However, it does not recognize the traditional divide between civil and political rights on the one hand,<sup>41</sup> and economic, social and cultural rights on the other hand.<sup>42</sup> It also innovatively provides for “peoples’ rights” which were hitherto unknown in the international human rights system. Articles 19 to 24 deal with group rights. These include the right to equality among people, the right to development, the right to national and international peace and security, and the right to a decent environment.

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<sup>39</sup> ‘Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples’ Rights,’ 6-12 Sept. 1995, Cape Town South Africa, Report, OAU/LEG/EXP/AFC/HPR (I), reprinted in *8 African Journal of International & Comparative Law*, 493-500, 7 (1986).

<sup>40</sup> *Katangese Peoples’ Congress v. Zaire*, 75/92, in *Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights*, 1 994-1995, ACHPR/RPT/8th, Annex VI.

<sup>41</sup> The African Charter, Arts. 2–14.

<sup>42</sup> The African Charter, Arts. 15–18.

In these provisions, the African Charter makes it clear that as the rights of an individual are inextricably linked to a group, these are only achievable within the context of the community. In principle, these rights are not restricted, but rather protected.<sup>43</sup> It “places individual human rights in the contextual setting of people’s rights, with due respect for the human person as the central subject of development”.<sup>44</sup>

It is important to note that collective rights in the African Charter have been alleged to be “vague and impractical claims which inflate the currency of rights”.<sup>45</sup> This study argues that this is not a genuine accusation because all rights contain some degree of imprecision. Otherwise, there would be no need to negotiate international agreements on them or even contest and litigate on the interpretations of rights in national and international courts. Far from the allegation of impracticability, the imprecision of rights is an attribute that should make it possible for succeeding generations to adapt the language and contents of rights when framing solutions to their human rights challenges.<sup>46</sup>

### **2.4.3 Enforceability of group rights**

There is no indication in the Charter that the rights enumerated in Articles 19 to 24 are not legally binding. As such, there is no evidence to suggest that they should not be treated on a par with the other rights in the Charter. Although some writers argue that the peoples’ rights in the

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<sup>43</sup> Balanda, M. L. ‘The African Charter on Human and Peoples’ Rights,’ in Ginther, K. and Benedek, W. (eds.), *6 New Perspectives and Conceptions of International Law: An Afro-European Dialogue* 139 (1984), 134-46.

<sup>44</sup> Boven, T. V. ‘The Relations Between Peoples’ Rights and Human Rights in the African Charter,’ in *7 Human Rights Law Journal*, 183, 194 (1986).

<sup>45</sup> Juviler, P., ‘Are Collective Rights Anti-Human? Theories on Self-Determination and Practice in Soviet Successor States,’ *11 NETH. Q. HUM. RTS.* 267 (1993), 269.

<sup>46</sup> Odinkalu, C. A., ‘Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples’ Rights’ in *23 Human Rights Quarterly* 327 2001 (The Johns Hopkins University Press, 2001), 23.

Charter are merely “aspirational and exhortatory,”<sup>47</sup> therefore, peoples’ rights should not be the subject of claims before the Commission<sup>48</sup>, this has not been the view of the Commission. Instead, the Commission has been willing to consider complaints regarding alleged violations of the rights of people contained in the Charter.<sup>49</sup>

In a case against Nigeria, the Commission was called upon to consider the impact of oil exploitation on the people of Ogoniland.<sup>50</sup> The Commission used both the economic and social rights provisions of the Charter, as well as those on peoples’ rights, and found a violation of Article 24 that cites the right of a people to a general satisfactory environment. The Commission linked this to an individual’s right to health under Article 16. Furthermore, the Commission maintained that Article 21 had been violated as the government had failed to monitor the operations of the oil companies and had not involved the Ogoni people in any decision-making on oil exploitation. The Commission stated that Article 21 serves the purpose of reminding “African governments of the continent’s painful legacy and to restore cooperative economic development to its traditional place at the heart of African Society.”<sup>51</sup>

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<sup>47</sup> Bondzie-Simpson, E., ‘A Critique of the African Charter on Human and Peoples’ Rights,’ in 31 *Howard Law Journal*, 643, 654 (1988).

<sup>48</sup> Neff, S. C. ‘Human Rights in Africa: Thoughts on the African Charter on Human and Peoples’ Rights in the Light of Case Law from Botswana, Lesotho and Swaziland,’ in 33 *International Comparative Law Quarterly*, 331 (1984).

<sup>49</sup> See for instance, *Katangese Peoples’ Congress v. Zaire, 75/92*, in *Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1994-1995*, ACHPR/RPT/8th, Annex VI.

<sup>50</sup> *Supra*, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*

<sup>51</sup> *Supra*, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, 56.

## 2.5 Individual duties in the African Charter

The African Charter contains provisions on both rights and duties of the individual.<sup>52</sup> This is an important, albeit non unique, feature of the Charter.<sup>53</sup> However, it gives the concept of individual duty more attention than all preceding human rights instruments. In fact, Mutua (1987) argues that the enshrinement of provisions on individual duties is the Charter's "most radical contribution to human rights law."<sup>54</sup>

The sixth clause of the preamble shows that the Charter spells out the concept of duty. It provides that "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone". By virtue of Article 27(1), obligations are imposed on individuals to "his family and society, the State and other legally recognized communities and the international community". This is a noticeable difference from other regional human rights instruments which emphasize rights and utterly neglect duties. In those other regional human rights instruments, duty is usually applicable to a State towards its citizens, or foreigners towards a State.<sup>55</sup> Occasionally, other regional human rights instruments make vague references to the individual's responsibility to the community.<sup>56</sup>

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<sup>52</sup> The African Charter, Arts. 27-29.

<sup>53</sup> The American Declaration on the Rights and Duties of Man of 1945, and American Convention on Human Rights of 1969 both contain individual duties.

<sup>54</sup> Ibid., Mutua, M. W., 'The Banjul Charter and African Cultural Fingerprint: An Evaluation of the Language of Duties.'

<sup>55</sup> Gittleman, R., 'The Banjul Charter on Human and Peoples' Rights: A Legal Analysis,' 676.

<sup>56</sup> The American Convention in Art. 32 mentions the individual's duty to his family, community and mankind. The Universal Declaration of Human Rights also in Art. 29(1) provides that "everyone has duties to the community in which alone the free and full development of his personality is possible."

Article 29 enshrines duties such as respect for the family and care of parents, the preservation of social and natural solidarity, as well as a contribution to the achievement of African unity, defence of the State, payment of taxes and the strengthening of African cultural values. Although some of these duties can be viewed as moral obligations, some of them are argued to be enforceable.<sup>57</sup> It would appear that the duty to pay taxes can indeed be legally enforced.

This notion of individual duties is consistent with the historical traditions and values of African civilization upon which the Charter has been built.

## 2.6 Weaknesses of the African Charter

Despite its shining contributions to modern human rights thought, some of the African Charter's provisions are weak and contradictory. Indeed, the subsequent adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereafter called 'The African Court') is an attempt to mitigate the inadequacies of the African Charter.<sup>58</sup>

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<sup>57</sup> Mumba, D. K. C. 'Prospects for Regional Protection of Human Rights in Africa,' in *Holdsworth Law Review*, 101-120 (1982), 105, 114.

<sup>58</sup> Since the adoption of the Charter, African States have entered into agreements for the protection of human rights in Africa, including the African Charter on the Rights and Welfare of the Child, adopted by the Assembly of Heads of State and Government of the OAU, Kampala, Uganda, 1990, and came into force on 29 November 1999, OAU Doc. CAB/LEG/24.9/49; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU, Ouagadougou, Burkina Faso, on 9 June 1998, OAU/LEG/ AFCHPR/PROT (III), reprinted in 6 *International Human Rights Reports* 891; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union, Maputo, Mozambique, July 2003 Assembly/AU/Dec. 14(II), July 2003.

### 2.6.1 Inconsistencies in the African Charter

First, the African Charter enshrines both individual rights and group rights. This in itself creates conflict. The individual has inalienable rights which the State is bound to protect. The imposition of duties on the individual has been argued to be a powerful tool of the State to limit guaranteed human rights.<sup>59</sup> It is important to point out that the articulation of an African concept of group rights has the potential danger to be abused by limiting individual rights and legitimizing those rules aligned to the interests of the ruling classes. Hence, governments could refuse to allow the formation of political opposition parties and justify this stance on the ground that the activities of such parties would be at variance with the notion of consensual decision-making in customary African communities.<sup>60</sup> This idea could ultimately be used as a weapon to oppress political opponents.<sup>61</sup>

Mutua disagrees with this view, dismissing it as too “simplistic”<sup>62</sup>. He adds that a valid objection would be to question the “precise boundaries, content and conditions of compliance contemplated by the Charter”.<sup>63</sup> He proceeds by calling on the African Commission to clarify, in its jurisprudence, which – if any – of these duties are moral or legal obligations, and what the scope of their application ought to be. It is important to note that this vital clarification has to date not been made by the African Commission. At best, what we can cite is the view of Pityana, a former Commissioner of the African Commission, that “...far from duties creating an

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<sup>59</sup> *Ibid.*, Keetharuth, S. B.

<sup>60</sup> *Ibid.*, D’Sa, R. M., ‘Human and Peoples’ Rights: Distinctive Features of the African Charter.’

<sup>61</sup> *Ibid.*, Howard, R., ‘Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons.’

<sup>62</sup> *Ibid.*, Mutua, M. W., ‘The Banjul Charter and African Cultural Fingerprint: An Evaluation of the Language of Duties.’

<sup>63</sup> *Ibid.*, Mutua, M. W.

environment for a gratuitous invasion of rights, duties should be understood as reinforcing rights”<sup>64</sup>.

### 2.6.2 Claw-back clauses in the African Charter

Another weakness in the African Charter is the number of ‘claw-back’ clauses<sup>65</sup>. These clauses could limit a specific right in normal circumstances for specific reasons. Such a clause “permits, in normal circumstance, breach of an obligation for a specified number of reasons”<sup>66</sup>. These are different from derogation clauses which “allow suspension or breach of certain obligations in circumstances of war or public emergency”<sup>67</sup>. A number of civil and political rights are limited by terms such as “except for reasons and conditions previously laid down by law”<sup>68</sup> “subject to law and order”<sup>69</sup> or “within the law”<sup>70</sup>.

These limitations weaken the content and scope of the Charter by the subjection of guaranteed rights to domestic law. While Article 10(2) of the European Convention on Human Rights limits the right to freedom of expression by providing that it “may be subject to such formalities, conditions, restrictions or penalties as are prescribed by the law and are necessary in a democratic society,” it specifies the limits as well. Sadly, the claw-backs in the African Charter have been left open. The African Commission has attempted to alleviate the adverse effects of

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<sup>64</sup> Pityana, N. B., ‘The Challenge of Culture for Human Rights in Africa,’ in Evans, M and Murray, R., (eds.), *The African Charter on Human and Peoples’ Rights: The System in Practice 1986–2000* (Cambridge University Press Cambridge, 2002), 230.

<sup>65</sup> Term coined by Professor Rosalyn Higgins, quoted in Udombana, N. J., ‘Can the Leopard Change Its Spots? The African Union Treaty and Human Rights’ in *American University International Law Review* 17, no. 6 (2002): 1177-1261.

<sup>66</sup> Higgins, R., ‘Derogations under Human Rights Treaties,’ 48 BRIT. Y.B. INT’L L. 281 (1978).

<sup>67</sup> *Ibid.*, Higgins, R.

<sup>68</sup> The African Charter, Article 6.

<sup>69</sup> The African Charter, Article 8.

<sup>70</sup> The African Charter, Article 9.

these claw-backs by rejecting the subjection of protected rights to domestic law.<sup>71</sup> In *Civil Liberties Organization (in respect of the Nigerian Bar Association) v Nigeria*,<sup>72</sup> which deals with freedom of association, the African Commission states that:

... in regulating the use of this right, the competent authorities should not enact provisions which should limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.

The African Commission has taken a stand that limitations are to be in accordance with state parties' obligations as spelt out in the Charter.<sup>73</sup> In *Communications 105/93, Media Rights Agenda & Constitutional Rights Project v. Nigeria*, in its *Twelfth Annual Activity Report*, the Commission states that any limitation of the rights contained in the Charter needs to comply with international law, adding that "to allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter." Hence, the Commission relies on its duty to interpret the Charter in light of international human rights jurisprudence,<sup>74</sup> to "neutralize the claw-back clauses"<sup>75</sup>.

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<sup>71</sup> *Ibid.*, Keetharuth, S. B., 9.

<sup>72</sup> Communication 101/93, *Civil Liberties Organization (in respect of the Nigerian Bar Association) v. Nigeria*, in Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights 1994-95, issued at the Eighteenth Ordinary Session, 2-11 Oct. 1995, ACHPR/AHG/201 (XXXI) 22 (1995).

<sup>73</sup> 147/95 and 149/96 *Sir Dawda K Jawara v The Gambia*, 13th Annual Activity Report [in *Compilation 1994-2001*, IHRDA, Banjul 2002, pp. 108-121]; 212/98 *Amnesty International v Zambia*, 12th Annual Activity Report [in *Compilation 1994-2001*, IHRDA, Banjul 2002, pp.371-382].

<sup>74</sup> The African Charter, Articles 60 and 61.

<sup>75</sup> Heyns, C. 'Civil and Political Rights in the African Charter,' in Evans, M. and Murray, R., (eds.). *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2000*. Cambridge: Cambridge University Press, (2008)



### 2.6.3 Derogation clauses and the African Charter

In contrast to the above, the African Charter does not contain a derogation clause. When referring to this obvious omission, the African Commission states that “limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances”<sup>76</sup>. In *Amnesty International & 3 Others v. Sudan*,<sup>77</sup> the African Commission adds that “the Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic state governed by the rule of law”.

This, in my view, is one of the most commendable milestones the African Charter has achieved. Against the backdrop of frequent wars, displacement of people and other forms of violence, the African people have historically suffered, it is cardinal that, as the African Charter states clearly, there should be no basis for the derogation or abandonment of the enforcement of the rights on grounds of or under the pretext of emergencies or special circumstances.

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<sup>76</sup> See Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v. Chad* (Merits), in *Ninth Annual Activity Report of the African Commission on Human and Peoples' Rights 1995-96*, ACHPR/RPT/9th/XX, AHG/207 (XXXII) Annex VIII1,2 , 15 (1996).

<sup>77</sup> See Communications 48/90, 50/91, 52/91 & 89/93, *Amnesty International & 3 Others v. Sudan*, in *Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights 1999-2000*, July 2000, Annex V., Add. 122,135 T 79 (2000).

## 2.7 Weaknesses of the African Commission

The African Commission established under Article 30, is the body responsible for monitoring the implementation of the African Charter.<sup>78</sup> Until the adoption of the Protocol establishing the African Court in January 2004,<sup>79</sup> the African Commission has been the only mechanism for the implementation of the African Charter. Even now, the African Court exists only “to complement the protective mandate of the African Commission”<sup>80</sup>. In other words, the African Court does not replace the African Commission, but rather supplements its mandate.

The efficacy of the African Commission since its first session in 1987 in Addis Ababa in protecting human rights in Africa has received extensive scholarly commentary.<sup>81</sup> Concerns have been raised on the weak start of the African Commission, its lack of adequate resources, non-cooperation of Member States of the OAU and the weaknesses of its enforcement mechanism.<sup>82</sup>

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<sup>78</sup> See First Activity Report of the African Commission on Human and Peoples’ Rights 1987-88, ACHPR/RPT/1st, para. 4.

<sup>79</sup> *Ibid.*, OAU/LEG/ AFCHPR/PROT (III), reprinted in 6 *International Human Rights Reports* 891

<sup>80</sup> See Udombana, N. J., *Towards the African Court on Human and Peoples’ Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000); Naldi, G. J., and Magliveras, K., *Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples’ Rights*, 16 NETH. Q. HUM. RTS. 431 (1998); Stimmet, A., ‘A Future African Court on Human and Peoples’ Rights and Domestic Human Rights Norms,’ in 23 *S. AFR. Y.B. INT’L L.* 233 (1998); Mubangizi, J., and O’Shea, A., ‘An African Court on Human and Peoples’ Rights,’ in 24 *S. AFR. Y.B. INT’L L.* 256 (1999); Mutua, M. W., ‘The African Human Rights Court: A Two-legged Stool?’ in 21 *HUM RTS. Q.* 342 (1999).

<sup>81</sup> See Welch, C. E. ‘The African Commission on Human and Peoples’ Rights: A Five Year Assessment’ in *Hum. Rts. Q.* (1992) 43; Benedeck, W., ‘The African Commission on Human and Peoples’ Rights: How to Make it More Effective’ in *Netherlands. Q. Hum. Rts.* (1993) 25; Amoa, P., ‘The African Charter on Human and Peoples’ Rights: An Effective Weapon for Human Rights?’ in 4 *Afr. J. Int’l & Comp. L.* (1992) 226; Mutua, M. W., ‘The African Human Rights System in a Comparative Perspective: The Need for Urgent Reformulation’ in 5 *Legal F.* (1993) 31; Anthony, A. E. ‘Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa’ in 3 *Tex. Int’l L. J.* (1997) 511; El-Sheik, I. A. B., ‘The African Commission on Human and Peoples’ Rights: Prospects and Problems’ in 7 *Netherlands. Q. Hum. Rts.* (1989) 272.

<sup>82</sup> Nmehielle, V. O., ‘The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?’ in *Singapore Journal of International & Comparative Law* (2003) 7, 434.

### 2.7.1 Enforcement mechanism of the African Commission

Unlike the European and Inter-American human rights courts, the African Commission is a quasi-judicial body.<sup>83</sup> It functions more in a reportorial than an adjudicative fashion. Its decisions do not carry the binding force of decisions emanating from a court of law, “but have a persuasive authority similar to the opinions of the United Nations Human Rights Committee”<sup>84</sup>. When it makes a finding or declaration regarding a State’s compliance with or violations of the African Charter, all the African Commission can do is to make recommendations to the concerned State Party to remedy those violations.<sup>85</sup> This is a weak enforcement mechanism because it gives the concerned State Party the choice of accepting and or implementing the decision against itself – or ignoring it. Evidence exists that Member States of the OAU, with very few exceptions, have not cooperated with the Commission in an effort to promote and protect human rights on the continent.<sup>86</sup>

### 2.7.2. The African Commission and its decisions

Another weakness of the African Commission is that it may not publish its decisions or Annual Activity Report, unless and until it has submitted the decisions or reports to the African Union

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<sup>83</sup> Naldi, G. J. ‘Future Trends in Human Rights in Africa: The Increased Role of the OAU’, in Evans, M. and Murray, R. (eds.), *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2000*, (2002) 1, 10.

<sup>84</sup> The UN Human Rights Committee is responsible for monitoring the compliance of State Parties to the International Covenant on Civil and Political Rights (ICCPR). See ICCPR, 16 Dec. 1966, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), Part IV.

<sup>85</sup> *Ibid.*, Ankumah E.

<sup>86</sup> During the twenty-second session of the Commission, the chairman stated “that none of the decisions on individual communications taken by the Commission and adopted by the Assembly had ever been implemented.” See Murray, R., ‘Report on the 1997 Sessions of the African Commission on Human and Peoples’ Rights, 21st and 22nd Sessions: 15-25 April and 2-11 November 1997,’ in *19 HUM. RTS. L.J.* (1998) 169, 170.

(hereafter referred to as “AU”) Assembly, which is a political body, for authorization.<sup>87</sup> The Assembly may or not authorize the publication of the report or decisions. In the OAU era, the Assembly routinely approved the Commission’s Activity Reports without much debate. Since the commencement of the AU era in 2002, however, many Member States have become more sensitive to criticism by the African Commission, leading to more rigorous and politicized debates on the African Commission’s reports and decisions. Unfortunately, in 2006, the Executive Council, to which the AU Assembly delegated its authority to consider the Commission’s reports and decisions, decided to veto the publication of a decision against Zimbabwe.<sup>88</sup>

Further evidence of weaknesses in the jurisprudence of the African Commission can be seen in how it has on many occasions shown reluctance to deal with issues it declared as political issues. In this line, it failed to determine that genocide had occurred in Rwanda<sup>89</sup> and the fact that Black Mauritians had been discriminated against, was acknowledged many years after the initial complaint,<sup>90</sup> at which time the issues were no longer current. This selective approach to jurisdiction by the African Commission is regrettable, especially considering the fact that all issues brought before it are political.

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<sup>87</sup> The African Charter, Article 59.

<sup>88</sup> The African Commission, Twentieth Activity Report, EX.CL/Dec. 310(IX), adopted in June 2006.

<sup>89</sup> Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, Commission Internationale des Juristes (CIJ), *Union Interafricaine des Droits de l’Homme v. Rwanda*, Communications 27/89, 46/91, 49/91, 99/93, in Tenth Annual Activity Report of the African Commission on Human and Peoples’ Rights 1996-97, ACHPR/RPT/10th, Annex X.

<sup>90</sup> Murray, R., and Wheatley, S., ‘Groups and the African Charter on Human and Peoples’ Rights’ in *25 Human Rights Quarterly* 213 (The Johns Hopkins University Press, 2003), 217.

In respect of the genocide which was perpetrated against the Tutsi population of Rwanda in 1994,<sup>91</sup> the African Commission received several complaints before the genocide in the late 1980s and early 1990s.<sup>92</sup> Rather than proactively sending a mission to the country, the African Commission passed a series of ineffective resolutions,<sup>93</sup> merely referring to “the alarming human rights situation in Rwanda characterized by serious and massive human rights violations” and “the wanton killing of civilians and heinous acts perpetrated in this country”<sup>94</sup> were a violation of the rights contained in the African Charter.

## 2.8 Conclusion

The adoption of the African Charter has been a giant leap in the direction of greater promotion of the unique African values and culture in the application of human rights. It ushered in the recognition of peoples’ rights, individual duties and the interdependence of rights, and harmoniously merged these with civil and political rights as well as social, economic and cultural rights. The African Charter boldly attempts to represent an African conception of human rights and incorporates a number of distinctive features which reflect the traditional African cultural values of humanism and group solidarity. It modifies, but does not supplant, the international human rights ideals. The innovative provisions of the Charter are not accidents of history, but a deliberate and courageous attempt of the drafters to document the African cultural and social leanings in the application of human rights. While the enshrinement of provisions on duties is not

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<sup>91</sup> See Organization of African Unity, Report of the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events (7 July 2000); United Nations, United Nations Independent Inquiry: Carlsson Report, U.N. SCOR, U.N. Doc. 5/1999/1257(1999).

<sup>92</sup> *Ibid.*, Communications 27/89, 46/91, 49/91, 99/93, in Tenth Annual Activity Report of the African Commission on Human and Peoples’ Rights 1996-97, ACHPR/RPT/10th, Annex X.

<sup>93</sup> The African Commission later appointed a Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions to look into deaths in Rwanda, as well as other countries. *Ibid.*, Murray, R., and Wheatley, S.

<sup>94</sup> *Resolutions of the 16th Session: Resolution on Rwanda, adopted 3/11/94 Rev. 1*, in Eighth Annual Activity Report of the African Commission on Human and Peoples’ Rights 1994-1995, ACHPR/RPT/8th, Annex VII.

entirely an innovation on the Charter, the Charter elevates individual duties to a level hitherto unknown to regional and international human rights regimes. The Charter, unlike other regional and international human rights instruments, goes further and innovatively enshrines provisions on peoples' rights. It is because of these conspicuous features that the Charter has been described as "the most distinctive and the most controversial of the regional human rights regimes"<sup>95</sup>.

Laudable as the adoption of the African Charter is, it has been severely criticized. Its documentation of individual rights and collective rights on the same scale is arguably an avoidable inconsistency, but this clash is intensified by the absence of an interpretative framework in the African Charter. Again, the considerable degree of autonomy the African Charter grants African governments in respect of human and peoples' rights by its inclusion of draw-back clauses is not acceptable. The African Commission, which should have proactively developed a consistent jurisprudence on the provisions of the African Charter has been beset by problems of funding, inadequacy of personnel, undue control by the AU Assembly and non-cooperation of Member States. The cumulative effect of the inconsistency in the African Charter and the weaknesses of the African Commission is the frustration of the quest for African humanism embarked on by the Charter. In Chapter 4 of this study, the researcher proposes *ubuntu* as a theory and philosophy capable of serving as an interpretative framework for the African Charter.

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<sup>95</sup> Steiner, H. and Alston, P. (eds.), *International Human Rights in Context: Law, Politics and Morals* (second edition). (Oxford University Press Oxford, 2000).

## Chapter Three: Meaning, criticisms and justiciability of *ubuntu*

### 3.1 Introduction

This Chapter examines the meaning of *ubuntu* and comments on some of the definitions offered by other writers. The chapter shows how some misinterpretations of the meaning and working of *ubuntu* have led to charges of vagueness and anachronism against the concept of *ubuntu*. The study argues that these charges against it arise from a misinterpretation of the theory of *ubuntu* and not from a defect in *ubuntu* itself. Finally, the researcher argues that *ubuntu* can be made justiciable.

While *ubuntu* is hard to define, it is easier to describe it. In parts of South Africa, it is a moral theory and philosophy. It is an African worldview from which some aspects of South Africa's value system and socio-cultural thinking have been derived. But its values have relevance that transcend the borders of South Africa. Indeed, it has been described as an African phenomenon that provides an accurate reflection of Africa's historical, cultural, legislative and social systems which feature on the agenda of several well-known African initiatives such as the African Renaissance and the Millennium Action Plan.<sup>96</sup>

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<sup>96</sup> Olinger, H. N., *Western privacy and/or Ubuntu? Some critical comments on the influences in the forthcoming data privacy bill in South Africa (Volume 39, Issue 1, March 2007)* 31–43.

### 3.2 Meaning of *ubuntu*

*Ubuntu* is an African philosophy and theory which presupposes human beings to be inextricably connected to one another and promotes “the belief in a universal bond of sharing that connects all humanity”<sup>97</sup>. It implies sincere commitment of individuals to the good of the community in which their identities have been formed, so that they may experience their lives as bound up with that of their community.<sup>98</sup>

Reviewed literature on *ubuntu* exposes difficulties in writers’ attempts to offer a workable definition.<sup>99</sup> In my opinion, some attempts to define *ubuntu* fail to communicate anything of value of *ubuntu*. At best, it appears that the writers making such attempts are themselves confused about the exact meaning and boundaries of *ubuntu*. One such attempt that appears not to have succeeded at conveying the meaning of *ubuntu* is that of Cornell (2010) which reads:

For now we may define *ubuntu* as the African principle of transcendence through which an individual is pulled out of himself or herself back towards the ancestors, forward towards the community, and towards the potential each one of us has.<sup>100</sup>

A classical definition of *ubuntu* is that of Archbishop Desmond Tutu:

A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-

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<sup>97</sup> ‘About the Name.’ Official Ubuntu Documentation. Available online at < <https://help.ubuntu.com/10.04/about-ubuntu/C/about-ubuntu-name.html> > accessed on 6 April 2015.

<sup>98</sup> Nkondo, G. M., ‘*Ubuntu as a public policy in South Africa*’ (Volume 2, International Journal of African Renaissance Studies, 2007) 90.

<sup>99</sup> Mokgoro ‘*Ubuntu and the law in South Africa*’ 1998 *Potchefstroomse Elektroniese Regsblad (PER/PELJ)* 15-26;

<sup>100</sup> Cornell, “A call for a nuanced constitutional jurisprudence: *Ubuntu*, dignity and reconciliation” 2004 SAPR/PL 666-675; Bilchitz “Citizenship and community: explaining the right to receive basic municipal services in Joseph” 2010 *Constitutional Court Review* 45-78.



assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.<sup>101</sup>

This definition shows that *ubuntu* embodies that metaphysical element that defines our ‘humanness’ and our roles and places us in the entire body of our communal existences. Indeed, we are humans, because we are interlinked. It implies respect and compassion for others and establishes the virtues of patience, hospitality, loyalty, respect, sociability and sharing among its adherents. These are traits which it shares with many other philosophies.<sup>102</sup> It is an important African worldview based on the values of caring, respect and compassion, thereby fostering a happy and qualitative human community life in the spirit of family.<sup>103</sup> The isiZulu maxim *umuntu ngumuntu ngabantu* which means a person is a person through (other) persons deepens its ideological stand. As a philosophy of life, *ubuntu* represents personhood, humanity, humaneness and morality because the fundamental belief that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which means a person can be a person only through others.<sup>104</sup>

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<sup>101</sup> Tutu, D. M., *No Future Without Forgiveness* (Doubleday New York, 1999) 294.

<sup>102</sup> Olinger, H. N., *Western privacy and/or Ubuntu? Some critical comments on the influences in the forthcoming data privacy bill in South Africa (Volume 39, Issue 1, March 2007) 31–43.*

<sup>103</sup> Olinger, H. N., *Western privacy and/or Ubuntu? Some critical comments on the influences in the forthcoming data privacy bill in South Africa (Volume 39, Issue 1, March 2007) 31–43.*

<sup>104</sup> Mbigi, L. and Maree J *Ubuntu: the Spirit of African Transformation Management* (Sigma Press Johannesburg 1995) 1-7.

In the words of Metz (2011):

The assertion that ‘a person is a person’ is a call to develop one’s (moral) personhood, a prescription to acquire *ubuntu* or *botho*, to exhibit humaneness.<sup>105</sup>

Also, in an interview, Cornell (2013) defines *ubuntu* as “an ethical worldview which understands human beings to be completely connected to one another.”<sup>106</sup> Illustrating further, she said:

...in living customary law, there’s a very hefty duty to rescue another person. In Anglo-American law, and Roman-Dutch law, there is no duty to rescue, unless it’s an immediate family member. But to walk by somebody who’s drowning and not save them would be to condemn yourself to complete marginalization in the community under *uBuntu*. So the idea of individualism is completely rejected by *uBuntu*, but not individuation. And individuation is always a relational project. There’s no individual who becomes him or herself without community support...

Ramose (1998) wrote a long treatise on the linguistic and philosophical meaning of *ubuntu*. In his words:

*Ubuntu* is the root of African philosophy. The be-ing of an African in the universe is inseparably anchored upon *ubuntu*... Apart from a linguistic analysis of *ubuntu*, a persuasive philosophical argument can be made that there is a ‘family atmosphere’, that is, a kind of philosophical affinity and kinship among and between the indigenous people of Africa. No doubt there will be variations within this broad philosophical ‘family atmosphere’. But the blood circulating through the ‘family’ members is the same in its basics.1 in this sense, *ubuntu* is the basis of African philosophy.<sup>107</sup>

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<sup>105</sup> Metz, T. ‘*Ubuntu* as a Moral Theory and Human Rights in South Africa’ in *African Human Rights Law Journal*, vol. 11, 532-559 (2011)

<sup>106</sup> Coletti, H., ‘Interview: Drucilla Cornell,’ Rutgers University, Expositions 7.2 (2013) 41–51.

<sup>107</sup> Ramose, M.B., ‘*Ubuntu* Philosophy’ in Coetzee, P. H. & Roux, A. P. J. (eds), *The African Philosophy Reader* (Routledge London, 1998), 270-271.

Ramose further contends that *ubuntu* is best understood as two words in one, *ubu-* and *-ntu*. The first word, *ubu-*, means be-ing in general. It is enfolded being which is always oriented towards unfoldment. This means it is always oriented towards the stem, *-ntu*. At the ontological level, there is no strict and literal separation and division between *ubu-* and *-ntu*. He argues that both words are mutually bound rather than fundamentally irreconcilable. In essence, they are two aspects of be-ing. *Ubu-ntu* is the radical ontological and epistemological aspect in the African thought of the *Bantu*-speaking people. Individuals are commanded to prove themselves to be the embodiment of *ubu-ntu* (*botho*) because essentially, the important legal, ethical and social criteria of human-worth are based upon *ubu-ntu*.

In the words of Ramose (1998), the terms, *ke motho* or *gase motho*, mean approval or disapproval, respectively. However, he warns that these expressions should not be interpreted literally because such approval or disapproval cannot change the biological nature of a human being. The approval or disapproval of *ubu-ntu* is a metaphor for legal, ethical and social weighing of human worth.<sup>108</sup> These considerations show that *ubuntu* is the philosophical foundation of African philosophy of the *Bantu*-speaking people.

In view of all these descriptions, it can be seen that it is not easy to attach a precise meaning to *ubuntu*. Even the *Nguni* native speakers from whom the statement emanates do not appear to have formulated a single generally acceptable definition for it.<sup>109</sup> This is much less so in the

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<sup>108</sup> Ibid Ramose, M.B.

<sup>109</sup> Olinger, H. N., *Western privacy and/or Ubuntu? Some critical comments on the influences in the forthcoming data privacy bill in South Africa (Volume 39, Issue 1, March 2007) 31–43.*

neighbouring communities who have similar ideas but couch them in different terms.<sup>110</sup> To my mind, *ubuntu* can best be described as a community-based mindset in which the welfare of the group is worth more than the welfare of a single individual in the group.<sup>111</sup> It embodies a value system of an African, that is diametrically opposed to current Western values which base most of human relations on fundamental individual rights.

### 3.3 Is *Ubuntu* vague and anachronistic?

*Ubuntu* is often slated as being too vague, anachronistic and collectivist. Keevy (2009) maintains that *ubuntu* is fundamentally at odds with the values of equality and tolerance as endorsed by the South African Constitution (1996).<sup>112</sup> Oyowe (2013) also argues that individual freedom and rights cannot be successfully based on *ubuntu* which is a moral theory that regards an extrinsic value (that is, communal harmony) as the fundamental moral value.<sup>113</sup> It is also argued that since respect for basic human rights is a very important feature of the modern world, a (moral) theory that fails to capture adequately the importance attached to basic human rights is inadequate to stand up to discourse on human rights.<sup>114</sup> Gorodnichenko and Roland (2015) assert that *ubuntu* discourages individuals from dissenting and standing out.<sup>115</sup>

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<sup>110</sup> Olinger, H. N., *Western privacy and/or Ubuntu? Some critical comments on the influences in the forthcoming data privacy bill in South Africa (Volume 39, Issue 1, March 2007) 31–43.*

<sup>111</sup> Mokgoro, J. Y. *Ubuntu and the Law in South Africa* (Paper delivered at the first Colloquium Constitution and Law held at Potchefstroom on 31 October 1997) 2.

<sup>112</sup> Keevy, I., “*Ubuntu* versus the core values of the South African Constitution” 2009 *Journal for Juridical Science* 34(2) 19-58

<sup>113</sup> Oyowe, A. O., *Strange bedfellows: rethinking Ubuntu and human rights in South Africa* (Volume 13, African Human Rights Law Journal, 2013) 103-124.

<sup>114</sup> Oyowe, A. O., *Strange bedfellows: rethinking ubuntu and human rights in South Africa*, African Human Rights Law Journal, (2013) 13 AHRLJ 103-124.

<sup>115</sup> Gorodnichenko, Y. and Roland, G. *Understanding the individualism-collectivism cleavage and its effect: lessons from cultural psychological*, Available from <<http://eml.berkeley.edu/~groland/pubs/IEA%20papervf.pdf>> Accessed on 09 April 2015.

In view of this, these criticisms are doomed to fail because they rest on an essential misunderstanding of *ubuntu* and not on any inherent defects in *ubuntu* itself. However, special attention is in fact paid to individual rights and needs in the implementation of the *ubuntu* principle.<sup>116</sup> *Ubuntu* is not synonymous with demoting individual rights or even limiting them. In reality, it is concerned with promoting the communal good so that individual good is improved and individuals are loved, with their rights being respected and protected. Communalism demonstrates that once the good of the group has been ensured, benefits will flow through to each individual member.<sup>117</sup> According to Schutte (2001):

Our deepest moral obligation is to become more fully human. And this means entering more and more deeply into community with others. So although the goal is personal fulfilment, selfishness is excluded.<sup>118</sup>

As Langa, J said in *S v Makwanyane* *ubuntu* calls for the balancing of the interests of society against those of the individual, for the maintenance of law and order, but not for dehumanizing and degrading the individual.<sup>119</sup> Also, in *Port Elizabeth Municipality v Various Occupiers*, the court expressed a strong preference for the communication, mediation and settlement of disputes. According to Sachs (2005) who read the PIE Act in the light of *ubuntu*:

Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The

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<sup>116</sup> Sigger, D. S. et al., '*Ubuntu*' or '*humanness*' as a management concept (No. 29, CDS Research Report, July 2010) 36.

<sup>117</sup> Elza, V. *The notion of ubuntu and communitarianism in African educational discourse* (ed.) *Studies in Philosophy and Education* (Volume 23, Issue 2-3, 2004) 150.

<sup>118</sup> Schutte, A. *Ubuntu: an ethic for the new South Africa* (2001) 30.

<sup>119</sup> 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 250.

Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>120</sup>

It should be noted that some of the negative comments on *ubuntu* are ethnocentric. It is claimed that *ubuntu* is unsuitable for the modern world because it is at variance with the Western concept of human rights and the promotion of individual rights to the utter neglect of who has the responsibility to provide the rights. In reality, the African continent has a unique history and cultural leanings that have shaped its conception and practice of human rights. The African continent's experiences of the violence of colonization, apartheid and trans-Atlantic slavery justify its practice of human rights in the light of collective good and group solidarity as an attempt to restore the dignity and humanness of a people who were under oppression for so long. Indeed, this is the reason for the African Charter having taken a radical departure in intent and content away from other regional human rights instruments. Understanding *ubuntu* in the light of the history and cultural values of the African people – rather than viewing it through the ethnocentric lenses of the Western conception of human rights – will reveal that *ubuntu* is neither anachronistic nor opposed to individual liberty. As Mazrui (1995) observes:

... Africa can never go back completely to its pre-colonial starting point but there may be a case for re-establishing contacts with familiar landmarks of modernization under indigenous impetus.<sup>121</sup>

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<sup>120</sup> 2005 (1) SA 5 17; 2004 (12) BCLR 1258 (CC) par 37 237E-238A.

<sup>121</sup> Mbigi, L. and Maree, J., *Ubuntu: the spirit of African transformation management* (Sigma Press Johannesburg 1995) 5.

### 3.4 Can *ubuntu* be made justiciable?

It is a subject of fierce debate whether *ubuntu* can be legally enforceable in a modern legal system. This is due to the popularity of the positivist view that what is justiciable must be supreme and derived from the sovereign. However, this restrictive notion of justiciability has been challenged and expanded to accommodate ethical values which cannot be separated from law. By this expansion, what constitutes a justiciable legal principle or rule need not be separated from an ethical or moral principle. It can be argued that law should be completely integrated into the wide ethical boundary of humanness that *ubuntu* implies.

Although *ubuntu* is very difficult to express in a Western language, it addresses the essence of being human.<sup>122</sup> Judging by the South African Constitutional Court, which states that the spirit of *ubuntu* is part of the deep cultural heritage of the majority of the South African population, *ubuntu* might be far more important than one might generally tend to assume.<sup>123</sup> Although the word ‘*ubuntu*’ does not feature explicitly in the 1996 Constitution that was ultimately adopted by South Africa, the 1993 Transitional Constitution spells out that “there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization” to heal the wounds of the apartheid era.<sup>124</sup> In the words of Malan (2014):

The value of *ubuntu*, among other things encapsulating the notions of humaneness, human dignity, reconciliation, group solidarity, compassion, the establishment and the maintenance of warm relations and restorative justice is autochthonous to South African law, more in particular, South African

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<sup>122</sup> Tutu, D., *Ubuntu: a primer: no future without forgiveness* (Doubleday, University of Michigan) 1999.

<sup>123</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC) par. 37.

<sup>124</sup> *Constitution of the Republic of South Africa* (the interim constitution), Act 200 of 1993: Epilogue after Section 251.

constitutional law. Lately it has come to play an increasingly important part in South African constitutional jurisprudence.<sup>125</sup>

This study argues that *ubuntu* is relevant and even of crucial importance in airing inter-communal peace, which is an essential condition for the very existence and survival of the State and a core issue of importance in human rights protection. It is no surprise therefore that *ubuntu* has generated considerable discourse and garnered judicial recognition in South African cases such as *S v Makwanyane*,<sup>126</sup> *Port Elizabeth Municipality v Various Occupiers*,<sup>127</sup> *Dikoko v Mokhatla*,<sup>128</sup> *Masethla v President of the RSA*<sup>129</sup> and *Union of Refugee Women v Private Security Industry Regulatory Authority*.<sup>130</sup>

In *S v Makwanyane*, several justices of the Constitutional Court deemed capital punishment as unconstitutional based on *ubuntu*. In his judgment in *Makwanyane*, Langa, J, explained some of the main characteristics of *ubuntu* and specifically the high regard of *ubuntu* for human life and dignity. He stated:

An outstanding feature of ubuntu in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and times when violent crime is rife, distraught members of society decry the loss of ubuntu.

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<sup>125</sup> Malan, K., 'The Suitability and Unsuitability of Ubuntu in Constitutional Law – Inter-Communal Relations Versus Public Office-Bearing' (De Jure, 2014), 231-232.

<sup>126</sup> 1995 (3) SA 391; 1995 (6) BCLR 665 (CC).

<sup>127</sup> 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC).

<sup>128</sup> 2006 (6) SA 235; 2007(1) BCLR 1 (CC).

<sup>129</sup> 2008 (1) SA 566; 2008(1) BCLR 1 (CC).

<sup>130</sup> 2007 (4) SA 395; 2007 (4) BCLR 339 (CC).



Thus, heinous crimes are the antithesis of ubuntu. Treatment that is cruel, inhuman or degrading is bereft of ubuntu.<sup>131</sup>

In view of this, it is clear that *ubuntu* has relevance in the African human rights discourse and it can be made justiciable. It is not simply a value or ideal to be applied in interpersonal relations or even the customary courts. It has assumed a justiciable principle at the level of Constitutional Law in South Africa. It can thus be made justiciable in the human rights law for the African continent. The issue is how the boundaries of its applicability can be delineated. This is discussed in Chapter 4 of this study.

### 3.5 Conclusion

Though the word *ubuntu* has not been defined definitively, it can be described as a community-based mindset in which the welfare of the group is of greater importance than the welfare of an individual in the community. The study contends that *ubuntu* is best understood as a combination of African humanism and group solidarity. The study has shown that the charges of vagueness and anachronism against *ubuntu* are due to ethnocentric bias and misinterpretation of its meaning. *Ubuntu* can be made justiciable, because it has been accorded legal enforcement by the South African Constitutional Courts. Since *ubuntu* is a philosophy of the Bantu people, who number over 140 million throughout Southeast Africa, this researcher does not propose that it should be imposed on all African people.<sup>132</sup> In the next Chapter, the study proposes *ubuntu* as a possible interpretive framework for the African Charter. This is because *ubuntu* is a philosophy

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<sup>131</sup> 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 225.

<sup>132</sup> Philip M. P. and Yankah, K., 'African Folklore: An Encyclopedia.' (Taylor & Francis, (2004), 699.

and theory which shares common ground with the African socio-cultural human rights values of collectivism and group solidarity. The next chapter is a proposition of *ubuntu* as a possible interpretive framework through which the provisions of the African Charter can be read and interpreted

## Chapter Four: Grounding *Ubuntu* in the provisions of the African Charter

### 4.1 Introduction

This chapter proposes *ubuntu* as a possible interpretive framework through which the provisions of the African Charter can be read and interpreted. This stance can be used to address inconsistencies in the Charter and help it to achieve its African humanist objectives.

Earlier, the researcher investigated the issue of whether or not the provisions of the African Charter that recognizes group rights and individual duties can be regarded as an African humanist interpretation of the African Charter. The investigation revealed how historical sources prove that such provisions are innovative and deliberate, and not accidental. While these innovative provisions are aligned with the African human rights values of communal solidarity, the research showed that the absence of an interpretative framework for the Charter frustrated many of these innovative humanist provisions and weakened the jurisprudence of the African Commission. *Ubuntu* as a philosophy could be made justiciable. Further, the study suggested that the charges of anachronism and vagueness levelled against *ubuntu* are not due to an inherent weakness in *ubuntu* but due to ethnocentric bias and misinterpretation of the philosophy of *ubuntu*.

## 4.2 Legislation and interpretive frameworks

Written laws often accompanied by an interpretation guide to aid the body empowered to interpret the written law. This is evident in many international law instruments.<sup>133</sup> It is also commonly found in state legislation and within the general jurisprudence of the state.<sup>134</sup> An interpretive framework can come in form of a definition for some concepts or terms within a section, or as a separate interpretation section within the written law, or even as a reference to an external, independent interpretive aid. In the United States, the Federal Dictionary Act which codifies several rules for interpreting statutes demands that singular words include their plural counterparts, and that “he” can mean “she.”<sup>135</sup> The importance of this is that the body charged with the responsibility of interpreting the law is well informed as to the intent of the law makers or drafters.

## 4.3 African Charter and the lack of an interpretive framework

Interpretive guides act as the compass that directs the interpretation of specific statutes. The African Charter does not have an interpretive framework. Although the African Charter contains landmark provisions for group rights and individual duties which reflect African human rights values, one does not find in it, explicit, practical provision for, or reference to, an interpretive framework. At best, only the preamble gives some insights into how and why the African Charter was conceived and the values and objectives the drafters attempted to achieve when formulating it. In Clause 4 of the preamble to the African Charter this is stated:

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<sup>133</sup> Vienna Convention on the Law of Treaties arts. 31-33, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980).

<sup>134</sup> Jacob Scott, “Codified Canons and the Common Law of Interpretation”, 98 GEO. L.J. 341, 350 & n.35 (2010).

<sup>135</sup> Dictionary Act, (2006) 1 U.S.C., Section 1.

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights.

While this might be of help to the African Commission when interpreting the provisions for the African Charter, it is not explicit enough. The African Commission is at best left to imagine or guess what exactly is intended by the drafters in their reference to “the virtues of their historical tradition” and “the values of African civilization.” However, Clause 6 of the preamble to the African Charter sheds more light on what is meant by “the values of African civilization”:

considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone; convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights;

This Clause appears to spell out three aspects of what was earlier termed “the values of African civilization”. The first is the interdependence of rights and duties, “considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone”. The second is the importance of group solidarity, since giving “particular attention to the right to development” is essentially about the progress of the society as a whole rather than an egocentric focus on a single individual’s progress. The third is the interdependence of rights, since “civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality.”

These pointers provide guidance to the African Commission on the intents of the drafters, and the contents of the African Charter. However, I think they are not adequate or comprehensive. They fail to address the inconsistencies in the provisions of the African Charter. There are no specific guidelines on how the conflicting provisions in the African Charter should be reconciled or which provisions should take precedence. There are no interpretive guides on how the duties can be harmoniously enforced vis-à-vis the rights so that the duties are not employed to limit individual liberties.<sup>136</sup> There are no interpretive guides delineating the nexus between, and boundaries of, group rights vis-à-vis individual rights. As shown in Chapter 2, no definition is provided for a term such as “people” which appears often and is central to the intent and content of the African Charter. Other important terms such as “duty,” “family,” “community,” “rights,” and “human” are not defined in the Charter and the Charter does not refer to an external interpretive aid.

This lack of an interpretive framework for the African Charter has led the African Commission uttering conflicting opinions on some of the provisions of the Charter. The opinion of the African Commission is the concept of “people” implies the population of a State as a whole with a view to protecting for instance, the “people of Rwanda” from the consequences of the war.<sup>137</sup> It also applied this term to the “people of South Africa” in their fight against apartheid.<sup>138</sup> In direct conflict to this stance, the African Commission has also stated that “people” can mean distinct

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<sup>136</sup> *Ibid.*, Keetharuth, S. B.

<sup>137</sup> ‘Press Release,’ in Seventh Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1993-1994, ACHPR/RPT/7th, Annex XIII.

<sup>138</sup> ‘Government Legal Experts Meeting on the Establishment of an African Court on Human and Peoples’ Rights,’ 6-12 Sept. 1995, Cape Town South Africa, Report, OAU/LEG/EXP/AFC/HPR (I), reprinted in *8 African Journal of International & Comparative Law*, 493-500, 7 (1986).

groups within the State. In the Katangese peoples' case, the Commission referred to the Katangese as a "people" in Zaire.<sup>139</sup> The words of the African Commission were as follows:

All peoples have a right to self-determination. There may however be controversy as to the definition of peoples and the content of this right. The issue in the case is not self-determination for all Zairians as a people, but specifically for the Katangese. Whether the Katangese consist of one or more ethnic groups is, for this purpose immaterial and no evidence has been adduced to that effect. The Commission believes that self-determination may be exercised in any of the following-independence, self-government, local government, federalism, confederalism, unitarism or any other form of relations that accords with the wishes of the people but fully cognizant of other recognized principles such as sovereignty and territorial integrity.

Also stemming from the absence of an interpretive framework for the African Charter is the risk that the provisions in the African Charter for group rights could be abused by governments to limit individual liberty.<sup>140</sup> Again, the provisions for individual duties could be used by governments as a means to oppress political opponents.<sup>141</sup> In the end, although the African Charter contains innovative provisions for peoples' rights and individual duties which seek to reflect human rights in the light of the African values of humanism and communal solidarity, the African Charter's quest for humanism is nonetheless thwarted by its lack of an interpretive framework. To fill this huge void in the African Charter, this study proposes *ubuntu* as an interpretive framework which can serve as the lens through which the provisions in the African Charter can be read and interpreted.

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<sup>139</sup> Katangese Peoples' Congress v. Zaire, 75/92, in *Eighth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 1 994-1995, ACHPR/RPT/8th, Annex VI.

<sup>140</sup> D'Sa, R. M., 'Human and Peoples' Rights: Distinctive Features of the African Charter' in *29 Journal of African Law* 72 1985

<sup>141</sup> *Ibid.*, Howard, R.

#### 4.4 Interpreting the African Charter through ubuntu

*Ubuntu* is at the root of African philosophy and being an African is anchored in *ubuntu*.<sup>142</sup> Lately it has played an increasingly important role in South African constitutional jurisprudence.<sup>143</sup> As was shown in the previous chapter, *ubuntu* can be made justiciable therefore, it is possible that it can function as an interpretive framework or a lens through which the African Charter can be read and interpreted.

*Ubuntu* aligns perfectly with the African human rights ideals which are embodied in the 1981 African Charter.<sup>144</sup> The addition of “peoples’ rights,” even in the title of the African Charter, sets the tone for the communal approach to human rights with the emphasis on group solidarity rather than on individualistic prosperity in Africa.<sup>145</sup> *Ubuntu* as a philosophy and theory encompasses the notion that rights and solidarity should be communal without undue disservice to individual interests and aspirations. This notion of *ubuntu* is aligned with the historical experiences of the African people. Hence, there is justification to use *ubuntu* to form the foundation for the provisions of the African Charter in the light of the African continent’s history.

Another reason that *ubuntu* can be viewed as a suitable interpretive framework for the African Charter is that *ubuntu* conforms to the aspirations of the drafters of the African Charter. These aspirations, as shown in Chapter 2, are to “reflect the African conception of human rights” and

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<sup>142</sup> Ramose, M.B., ‘Ubuntu Philosophy’ in Coetzee, P. H. & Roux, A. P. J. (eds) *The African Philosophy Reader* (Routledge London, 1998)

<sup>143</sup> Malan, K., ‘The Suitability and Unsuitability of Ubuntu in Constitutional Law – Inter-Communal Relations v Public Office-Bearing’ (De Jure, 2014)

<sup>144</sup> Okere, B. ‘The Protection of Human Rights in Africa and the African Charter on Human and Peoples’ Rights: A Comparative Analysis with the European and American Systems,’ in *6 Human Rights Quarterly*, 1984, 141-159.

<sup>145</sup> Gittleman, R., ‘The Banjul Charter on Human and Peoples’ Rights: A Legal Analysis,’ in Welch, Jr. C. E. and Meltzer, R. I. (eds.), *Human Rights and Development in Africa* (State University of New York Press Albany, N.Y., 1984).



“take as a pattern the African philosophy of law and meet the needs of Africa.”<sup>146</sup> It is further to this that the African Charter contains provisions for individual duties. This notion of an individual having duties towards his family, community and country aligns with *ubuntu*. By African norms, an individual has a duty to help, protect and save members of his family, community and country from harm. Cornell (2014) illustrates this as follows:

...in living customary law, there's a very hefty duty to rescue another person. In Anglo-American law, and Roman-Dutch law, there is no duty to rescue, unless it's an immediate family member. But to walk by somebody who's drowning and not save them would be to condemn yourself to complete marginalization in the community under *uBuntu*. So the idea of individualism is completely rejected by *uBuntu*, but not individuation. And individuation is always a relational project. There's no individual who becomes him or herself without community support...<sup>147</sup>

Accepting *ubuntu* would address the inconsistencies and contradictions in the African Charter if the former is adopted as an interpretive framework for the latter. *Ubuntu* as a philosophy breeds harmony and peace in a society. It implies respect and compassion for others and promotes the virtues of patience, hospitality, loyalty, respect, sociability and sharing among its adherents.<sup>148</sup> As such, it sets the boundary for the enforcement of group rights without denouncing individual rights. It is in this vein that Langa, J, said in *S v Makwanyane*, that *ubuntu* calls for the balancing of the interests of society against those of the individual, for the maintenance of law and order

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<sup>146</sup> OAU Doc. CAB/LEG/67/3, Rev. 1 at 1.

<sup>147</sup> Coletti, H., 'Interview: Drucilla Cornell,' Rutgers University, Expositions 7.2 (2013) 41–51.

<sup>148</sup> Olinger, H. N., *Western privacy and/or Ubuntu? Some critical comments on the influences in the forthcoming data privacy bill in South Africa (Volume 39, Issue 1, March 2007) 31–43.*

but not for dehumanizing and degrading the individual.<sup>149</sup> Sach, J., elaborates more on this point in *Port Elizabeth Municipality v Various Occupiers*:

Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>150</sup>

One possible concern that critics may have with the proposition of *ubuntu* as an interpretive framework for the African Charter is that it is not compatible with the Western idea of human rights and individual liberty. The response to that is that such comments are ethnocentric. We need to use our own African values and human rights ideals to judge *ubuntu* and not Western values. Both the African Charter and *ubuntu* being proposed as an interpretive framework are African and for African people, but not for the West. If critics of *ubuntu* were to insist that the Western human rights ideal should be the yardstick to measure the suitability of *ubuntu*, would they also use the Western human rights ideal to judge the African Charter itself? And since there is a considerable difference between the ideals of human rights in the West and the provisions in the African Charter, would they deem the African Charter ineffectual or inappropriate for African people? If we profess to understand both *ubuntu* and the African Charter in the light of

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<sup>149</sup> 1995 (3) SA 391; 1995 (6) BCLR 665 (CC) par 250.

<sup>150</sup> 2005 (1) SA 5 17; 2004 (12) BCLR 1258 (CC) par 37 237E-238A.

the history and cultural values of the African people, it would be easy to see that *ubuntu* is indeed very suitable as an interpretive framework for the African Charter.

#### **4.5 Ubuntu as a framework in Adjudication**

This section endeavours to stress the point that despite perceptions and arguments, there are diverse definitions and descriptions accorded to the concept of *Ubuntu*. However the concrete aims of *ubuntu* are specific and elaborative and provide clear guidance to achieve their objective. In support of this, Lephhalala argues that ‘the score of *ubuntu* is the recognition of a value system that acknowledges people as social and co-dependent beings’.<sup>151</sup> *Ubuntu* espouses those values which are intended to bring about harmony and to promote the collective wellbeing of society.<sup>152</sup> South Africa, has tried to achieve harmony and promote the collective wellbeing of the society in the spirit of *ubuntu* by promulgating the Child Justice Bill of 2008 on juvenile justice reform that advocates rehabilitation of children who have violated the law.<sup>153</sup> This also informed the abolition of death penalty in the Constitutional Court. These two above-mentioned instances prove that in South Africa, where there has been serious inequality before the law, discriminatory treatment and prejudices against certain races, the rehabilitation and reconciliation, which the country hoped for, have been informed by *ubuntu*. It could therefore be argued that the very same *ubuntu* could also be considered to be a guiding principle or theoretical lens for

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<sup>151</sup> MMK Lephhalala ‘Between past and present: Conflict in schools, an ubuntu/RA perspective’ last accessed at <https://www.educ.cam.ac.uk/research/projects/restorativeapproaches/seminartwo/LEPHALALA%20%20UBUNTU-RA%20-%20PAST%20PRESENT.pdf> on 28 December 2015.

<sup>152</sup> Swanson DM ‘Ubuntu: An African contribution to (re) search for/with a humble togetherness’ 2007 *Journal of Contemporary issues in education* at 57.

<sup>153</sup> MMK Lephhalala op cit note 151.

adjudication.<sup>154</sup> Therefore, it is the duty of judges to interpret the Constitution (1996) in a way that facilitates the transformation which the Constitution (1996) aims to achieve.<sup>155</sup> The judiciary interprets this *ubuntu* concept in a particular legal setting, which in turn gives it the content which is specifically tied to the interpretation intended.<sup>156</sup> This dictates that judges should ensure that the concept of *ubuntu* is considered when reaching a determination in an adjudicative process as *ubuntu* ideally encompasses a spirit of humanity that will ensure fairness, as well as application to virtually any area of the law with the aim of achieving reconciliation and restorative justice as opposed to retribution.<sup>157</sup>

*Ubuntu* that echoes many historical principles of law and ethics guides the judiciary in its daily activities. As is stated in *S v Makwanyane*<sup>158</sup> by Mokgoro J the Constitution (1996) requires courts to develop and interpret entrenched rights in ‘terms of a cohesive set of values , ideal to an open and democratic society.’<sup>159</sup> In addition, Langa J also states that what distinguishes *ubuntu* from important constitutionally-entrenched rights is the value it puts on life and human dignity.

This he explains by stating that:

It is a culture, which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of

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<sup>154</sup> C Himonga, M Taylor & A Pope ‘Reflection on judicial views of ubuntu’ (2013) 16 (5) *PER/PELJ* at 373, are of one accord that *ubuntu* is a fundamental value which informs the regulation of African interpersonal relations and dispute resolution.

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid* at 376.

<sup>157</sup> *Ibid.*

<sup>158</sup> 1995 (3) SA 391 (CC)

<sup>159</sup> *S v Makwanyane* *ibid* para 302.

that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>160</sup>

On the basis of this, this researcher seeks to demonstrate that *ubuntu* is a way in which we see ourselves as a part of the society which courts should be aware of. *Ubuntu*, as conceptualized, should give rise to fresh or novel modes of judicial thought and have an actual impact on the outcome of cases for its introduction to be justified and its continuation guaranteed.<sup>161</sup> Drawing on *Makwanyane*, Jajbhay states as follows:

In South Africa the culture of *ubuntu* is the capacity to express **compassion**, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community. *Ubuntu* speaks to our inter-connectedness, our common humanity and the responsibility to each that flows from our connection.<sup>162</sup>

This statement in essence implies that, among other things, justice is the **expressive capacity** of *ubuntu* to which during adjudication the judiciary should also adhere to or use as a guiding principle to bring about restorative justice, as well as to ensure that reconciliation and restoration have been properly served. The spirit of *ubuntu* seeks to achieve togetherness as well as humanity among the societies. As in the case with *Afri- Forum v Malema*<sup>163</sup> the court relied on the principle of *ubuntu*, because despite the recognition of freedom of expression in South Africa, it condemned the words uttered and their effect. *Ubuntu* aims to stop gross violations of fundamental human rights. It can therefore be stated that ‘an *ubuntu* –based jurisprudence has

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<sup>160</sup> Ibid para 224.

<sup>161</sup> C Himonga, M Taylor & A Pope op cit note 154 at 389.

<sup>162</sup> *City of Johannesburg v. Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) para 63.

<sup>163</sup> 2011 (6) SA 240 (Eqc).

been developed particularly by the Constitutional Court in an endeavour for the pursuit of national unity, the wellbeing of all South African citizens and peace. *Ubuntu* is recognised as being an important source of law within the context of strain or broken relationships amongst individuals or communities and as an aid for providing remedies which contribute towards more **mutual** acceptable remedies for the parties in such cases.<sup>164</sup>

*Ubuntu* needs to be interpreted in a more promising way if it is to provide concrete guidelines for resolving present-day disputes and bringing about justice for all citizens. This can be achieved by not adhering to the established rules per se, but rather by looking to other factors such as peace and stability, and a spirit of oneness which unites societies. In this way the contentious issues surrounding the interpretation of *ubuntu* such as vagueness, collectivism and anachronism can be rebutted successfully.<sup>165</sup> Furthermore, *ubuntu* has always been regarded as a tool that prioritises human dignity. As a result, this seems to have led to significant judicial manipulation, with an increase rather than a decrease in judicial discretion.<sup>166</sup> The researcher aims to clarify **this point**. The abovementioned is currently regarded as one of the significant attractions to judges and litigants alike, as dignity provides a convenient language for the adoption of substantive interpretation of human rights guarantees.

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<sup>164</sup> Ibid para 18.

<sup>165</sup> Thaddeus Metz ‘Ubuntu as a moral theory and human rights in South Africa’ (2011) 11 *African Human Rights Law Journal* at 559.

<sup>166</sup> Christopher McCrudden ‘Human dignity and judicial interpretation of human rights’ (2008) 19 (4) *The European Journal of International Law (EJIL)* at 655.

It is accepted that in the sphere of private law, the concept of *ubuntu* is not an easy concept to apply, therefore the courts tend to be conservative when applying it.<sup>167</sup> In case law it has been proved to work, but in contract law there is resistance to the concept of *Ubuntu*, nevertheless in certain cases, notably *Botha and Another v Rich No*,<sup>168</sup> has the promotion of good faith and fairness been taken cognizance of. The courts realised that the established rules should be applied despite their adverse consequences which affected parties negatively. This approach aims to promote the principle of *ubuntu* which advocates neighbourliness, where simple justice is administered to settle disputes between the parties. Legal certainty is always invoked by judges in an endeavour to resist transformation. However, they miss the fact that because *ubuntu* advocates reconciliation, invoking its principles could bring amicable dispute resolution between the parties.

Finally it can be argued that although there is no clear undisputed definition of *ubuntu* and the fact that it is argued it is cited as being vague and ambiguous, when settling a dispute the courts could use the principles of *ubuntu* as a guide in reaching a decision. Certain established legal rules could be called upon to incorporate the transformation advocated by the Constitution (1996). *Ubuntu* promotes humanness that could be on centre stage to embrace equality, dignity as well as freedom of the litigants as members of society. Despite the lack of a common definition, it could assist in settling disputes between the parties when trying to effect restorative justice and reconciliation.

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<sup>167</sup> TW Bennett 'Ubuntu: an African equity' (2011) 14 (4) *PER / PELJ* at 46.

<sup>168</sup> [2014] ZACC 11.

## 4.6 *Ubuntu* demonstrated

Legal certainty has always been a scapegoat for judges who refuse to engage the fairness standards when settling disputes. The principles of *ubuntu* are purposely ignored, despite the fact that should they have been adhered to in the quest to reach an amicable settlement. Earlier in this chapter *ubuntu* is referred to as an African philosophy and theory which presupposes human beings to be inextricably connected to one another, and promotes “the belief in a universal bond of sharing that connects all humanity”<sup>169</sup>. This implies powerful commitment of individuals to the good of the community in which their identities have been forged, which implies that they experience their lives as bound up with that of their community.<sup>170</sup>

It should however be taken into consideration that courts’ reluctance to involve the concept of *ubuntu* in adjudication has led to negative or one-sided judicial decisions which *ubuntu* aims to guard against. To demonstrate the injustices which non-application of *ubuntu* can lead to, the researcher highlights two cases in which, had the concept of *ubuntu* been applied, the outcomes would have been different.

### 4.6.1 *Maphango v Aengus Lifestyle Properties (Pty) Ltd*<sup>171</sup>

This case involves Lowliebenhof which is a block of apartments in the inner city of Johannesburg. It is a ten storeyed apartment block in Braamfontein in which the applicants had different rental agreements in terms of which they lived there.<sup>172</sup> Initially, agreements that were

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<sup>169</sup> ‘About the Name.’ Official Ubuntu Documentation. op cit note 97.

<sup>170</sup> Nkondo, G. M., op cit note 98 at 90.

<sup>171</sup> 2012 5 BCLR 449 (CC).

<sup>172</sup> Ibid para 6.



concluded with various landlords contained a variety of termination and escalation clauses.<sup>173</sup> The first lease agreement dated as far back as 1994. Later on the arrangements changed when a new landlord took the ownership of the block of the apartments. The respondent-landlord took on the management of Lowliebenhof in 2007 through an associated company.<sup>174</sup>

The respondent-landlord took transfer of the entire block of apartments in 2009, improved the building and set out to increase the rent by claiming that the upgrading of the apartment block was in line with the "city's initiative at refurbishing and upgrading the Johannesburg inner city". The respondent-landlord attempted to enforce an increase by cancelling the existing rental contracts and offering new contracts on increased rental terms. It cannot be ignored that although the revised rentals were based on market-related rentals, the revision resulted in significant increases in the existing rentals. For some of the tenants this represented a 100% increase and for others as much as 150%. The landlord based his case on the fact that, since the terms of the existing leases did not allow for rentals to be increased unilaterally without any contact with tenants, the landlord was entitled to use the termination clause to oblige the tenants either to leave or to enter into new leases.

On the other hand, the tenants maintained that the law did not permit the landlord to use the bare power of termination for this purpose.<sup>175</sup>

In both the High Court and the Supreme Court of Appeal, the tenants' main argument was largely based on the Constitution (1996), contract law and public policy, but they also said the

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<sup>173</sup> *ibid* para 6-8.

<sup>174</sup> *Ibid* para 1.

<sup>175</sup> Maphango case para 3.

Rental Housing Act precluded the action of the landlord. Both courts rejected all these arguments, including the one based on the Act. In dealing with this case Froneman J had this to say:

Under the Constitution all law is, or needs to be, infused by constitutional values. Legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights. It is common cause that section 26 of the Constitution is implicated. Interpretation of what constitutes an “unfair practice” under the Act in light of this is thus inevitably a constitutional issue, a matter of law. Interpretation and application of the law under the Constitution is never a mechanical application of rules; it always involves a value judgment. Our Constitution and law are infused with **moral values**. The days of denying the value-laden content of law are long gone.

Despite these well-spoken words of Froneman J, the Constitutional Court avoided dealing with the issue at hand and referred the matter back to the High Court for further deliberation. What is intriguing are the words of Froneman J. He hid behind what has been stated as established legal rules when he stated that, ‘it would be a denial of constitutional responsibility for any court to decide a matter without considering legislation where it was aware of applicable legislation.’<sup>176</sup>

From the facts of this case one realises that this is the case which entails private arrangements between parties therefore their contractual undertakings should be respected on the basis of their respect for their autonomy to decide for themselves. As was stated earlier, judges have always been reluctant to or acted conservatively in private arrangements between parties, more especially where there are established legal rules to be followed. This whole approach ignores the fact that in contractual arrangements between parties, some parties may impose unfair terms

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<sup>176</sup> Maphango case supra note 171 para 152.

which are contrary to the *ubuntu* principles that demand reconciliation and a spirit of togetherness.

If the African Charter boldly attempts to represent the African conception of human rights and incorporates a number of distinctive features which reflect the traditional African cultural values of humanism and group solidarity, the judges, by adhering to the established rules only are undermining the values that the African Charter is striving to achieve. The courts could have considered peculiar features of the Constitution (1996) in relation to right to house, which in actual fact pertains to decent housing, as well as the African Charter, in an effort to promote African cultural values of humanism to resolve the dispute amicably, as opposed to referring litigants from one court to another. The spirit of *ubuntu* could have been restored, with than the landlord not insisting on eviction and extreme increases. The courts should have attempted to find a neutral platform in which the interests of both parties could have been catered for.

Both the concept of *ubuntu* and the objectives of African Charter aim to bring about humanity, dispense restorative justice and ensure the spirit of togetherness which the courts fail to promote. If the court would be willing to apply this concept, the decisions they reach would be welcomed by litigants as advocating unity rather than having a strong case.

#### **4.6.2 Jaftha v Schoeman & Others; Van Rooyen v Stoltz and Others<sup>177</sup>**

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<sup>177</sup> 2005 (2) SA 140 (CC).

These cases concern a sale of execution of property to satisfy a debt. In the first instance, Ms Jaftha was unemployed, in ill health and poor. She had only a standard two level of education. She suffered from heart problems and high blood pressure, which prevented her from working. In 1997 she applied for and was granted a state housing subsidy with which she bought a house in which she lived with her two children.<sup>178</sup> Ms Jaftha's debt of R2500.00 of which few instalments has been paid stood at R 632,00 including interest and costs. Ms Jaftha was hospitalised. On her return home she discovered that her house was to be sold in a sale of execution to pay her outstanding debt to Ms Skaarnek.<sup>179</sup> She was later informed by attorneys that she would need to pay R 5 500, including accrued interest, to retain her house. Having made two payments of R300 and R 200 respectively to the attorneys, she later discovered that she would still have to pay R 7 000 to retain her house.<sup>180</sup> The amount owed by her was beyond her means and she was not presented with a plan to pay her debt. As a result she was forced to vacate her property after sale of execution for R 5 000.<sup>181</sup>

The second scenario involved Ms Van Rooyen who was an unemployed woman with three children. She too was poor and had never been to school. She incurred R 190 debt for vegetables she bought on credit.<sup>182</sup> She was unable to repay the debt. Proceedings were instituted against her, her house was sold after sale in execution for R1 000 irrespective of the fact that housing subsidy she received for that particular house was R 15 000 and the amount owing was R 198.30 including interest and costs.

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<sup>178</sup> Ibid para 3.

<sup>179</sup> Ibid para 4.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid para.

The court holds that once execution has taken place, the judgment debtor has two options: either he or she can vacate the premises voluntarily or can remain in occupation, even though the legal basis for occupation has been terminated. If he or she chooses to vacate the premises, the effective loss of his or her house is caused by the exercise of the debtor's own free will and not by the execution process.

The facts surrounding these cases are petty to say the least. Two individuals and their families were deprived of their right to adequate housing as guaranteed by the Constitution (1996), so is their dignity undermined. As stated earlier, *ubuntu* implies sincere commitment of individuals to the good of the community in which their identities have been formed, so that they may experience their lives as bound up with that of their community. If the principles of *ubuntu* were applied in these cases different outcomes would have been reached. Depriving individuals of their property over a trifling debt proves an inhuman culture which continues to foster discrimination and prejudices of the past.

#### **4.7 Conclusion**

This chapter has shown that the importance of an interpretive framework or aid lies in how it guides the body charged with the responsibility of interpreting the law as it fits in with the intent of the law makers. Surprisingly, the African Charter does not have an interpretive framework. While the preamble to the African Charter contains some helpful pointers on intentions of the drafters, it is neither comprehensive nor explicit. This means that many of the important concepts used in the African Charter have not been sufficiently delineated and are open to abuse. Also, there is no means to address the inconsistencies and conflicting provisions in the Charter harmoniously. This factor has weakened the jurisprudence of the African Commission which in turn has led to divergent opinions on some provisions of the Charter.

This study therefore proposes *ubuntu* as an interpretive framework in the light of which the provisions of the Charter can be read and interpreted. *Ubuntu* aligns itself with the historical experiences and human rights values of the African continent as well as with the aspirations and intentions of the drafters of the African Charter. And more importantly, it has proved to be capable of promoting and protecting the rights and interests of a society without jeopardizing the rights and interests of the individual. It has also shown its capability to balance an individual's duties with his rights or needs harmoniously. With *ubuntu* as the interpretive framework for the African Charter, the researcher believes that the humanist aspirations for the African Charter, which have so far been thwarted, can be achieved. The next chapter contains a summary and presents concluding remarks on the study.

## Chapter Five: Conclusion

This chapter concludes the study by giving a brief summary of the results and implications. The chapter revisits the research objectives as stated in chapter one and draws conclusions.

This research has embarked on a critical analysis of the African Charter and a few aspects of the African philosophy of law. Chapter 1 provided an overview of the differences between the Western conception of human rights and the African conception of human rights. It also showed how the adoption of the African Charter in 1981 represented a landmark event that advanced the African notion and values of human rights. It touched on the researcher's intention to propose *ubuntu* as an interpretive framework for the African Charter. In fact, the study set out to achieve four objectives. These are:

- to determine whether the inclusion of provisions on individual duties and group rights are an African humanist innovation of the African Charter;
- to identify and examine the inconsistencies in the provisions of the African Charter;
- to evaluate the philosophy and legal significance of *ubuntu* in South African jurisprudence;
- to argue that *ubuntu* can be aligned with the provisions of the African Charter to provide an interpretive framework for the African Charter.

The researcher did a critical analysis of the African Charter by examining its structure as well as that of the newly established African Commission which has been tasked to interpret the African

Charter. The African Charter contains landmark innovative provisions, the most important of which are the enshrinement of group rights and the balancing of rights with duties. In Articles 19-24, the African Charter cites “peoples’ rights” which hitherto have been unknown in the international human rights system. These include the right to equality of peoples, the right to development, the right to national and international peace and security, and the right to a decent environment. In these group rights, the African Charter shows what the rights of an individual are inextricably linked with and can be realized only within the context of the community. It is important to note that these group rights are enforceable as are the other rights in the African Charter because the African Commission recognize their validity in *SERAC v Nigeria*.<sup>183</sup>

Also, in what has been described as the African Charter’s “most radical contribution to human rights law,” there is recognition of individual duties in the African Charter.<sup>184</sup> Unlike the regional human rights instruments where “duty” is usually imposed by a State towards its citizens, or aliens towards a State, Article 29 of the African Charter enshrines the duties of individuals such as respect for the family and care of parents, the preservation of social and natural solidarity as well as a contribution to the achievement of African unity, defence of the State, payment of taxes and cementing of African cultural values.<sup>185</sup>

These innovative provisions are not accidental inclusions in the African Charter. They are products of deliberate attempts by the drafters in pursuance of the directive given them that the African human rights instrument they were to produce should “reflect[s] the African conception

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<sup>183</sup> *Supra*, The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria

<sup>184</sup> *Ibid.*, Mutua, M. W., ‘The Banjul Charter and African Cultural Fingerprint: An Evaluation of the Language of Duties.’

<sup>185</sup> Gittleman, R., ‘The Banjul Charter on Human and Peoples’ Rights: A Legal Analysis,’ 676.



of human rights” and “take as a pattern the African philosophy of law and meet the needs of Africa.”<sup>186</sup> The provisions represent an African humanist approach to the conception and practice of human rights.

Unfortunately, the African Charter does not contain an interpretive framework. The interpretive framework could have come in form of a definition of some concepts or terms used within a section, or as separate interpretative section within the written law, or even as a reference to an external, independent interpretive aid. While the preamble to the African Charter gives some helpful clues, it is inadequate and not comprehensive. In effect the African Charter itself does not provide a guide on how its conflicting provisions could be reconciled, on how to balance rights and duties harmoniously without relegating the former, or on how to balance group rights and individual rights.

The study argues that this huge void in the African Charter and its ripple effects have thwarted the African Charter’s efforts to achieve humanness and group solidarity in the African jurisprudence of rights. They have also weakened the jurisprudence of the African Commission. The researcher proposes and argues that *ubuntu* is a philosophical theory that can effectively be used as an interpretive framework for the African Charter.

To give credibility to its proposition, the study acknowledges the positions of critics who have maintained that *ubuntu* is vague and anachronistic. In response, the research argues that such charges on *ubuntu* are doomed to failure because they are built on the ethnocentric bias of

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<sup>186</sup> OAU Doc. CAB/LEG/67/3, Rev. 1 at 1.

judging *ubuntu* according to the Western human rights ideal instead of according to African human rights values. The study concludes that both will fail because they are based on a lack of understanding of *ubuntu* and not on any inherent defects in *ubuntu* itself. The study shows that *ubuntu* can be made justiciable. Arguments are backed up with South African cases such as *S v Makwanyane*<sup>187</sup> and *Port Elizabeth Municipality v Various Occupiers*<sup>188</sup> where *ubuntu* has been recognized and the principles enforced by the court.

This study asserts that *ubuntu* is a suitable interpretive lens for the provisions of the African Charter. It shows that the Charter conforms with the aspirations and communal human rights values of African people which can be justified against the backdrop of their historical experiences of violence such as colonialism, apartheid and slavery. The proposition is justified on the premise that *ubuntu* has proved to be capable of promoting and protecting the rights and interests of a society without jeopardizing the rights and interests of the individual. *Ubuntu* has also been proved to be capable of harmoniously balancing an individual's duties with his rights or needs.

However, it should be noted that *ubuntu* is a philosophy of the Bantu people of whom there are over 140 million throughout Southeast Africa.<sup>189</sup> As such, this study does not propose that *ubuntu* should be imposed on all African people. However, it remains a potent philosophy that has proved to be effective in advancing the communal good without sacrificing individual rights. The researcher believes it is a suitable interpretive framework for the African Charter so that the

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<sup>187</sup> 1995 (3) SA 391; 1995 (6) BCLR 665 (CC).

<sup>188</sup> 2005 (1) SA 517; 2004 (12) BCLR 1258 (CC).

<sup>189</sup> Philip M. P. and Yankah, K., 'African Folklore: An Encyclopedia.' (Taylor & Francis, (2004), 699.

African humanist ideals of the African Charter can be realized and the jurisprudence of the African Commission strengthened.



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