

**African Philosophy and Ubuntu: Concepts Lost in Translation**

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## Abstract

This study is based on African philosophy and ubuntu as a way of life. The main argument is that ubuntu is indeed a philosophy that is common amongst all or most African societies. The argument is that African philosophy should be given the same status as western philosophy, and that ubuntu should not be looked at through the western lenses and measured against what is considered as philosophy by the West.

Africans since time immemorial have had the ability to think and develop knowledge. The argument that Africans did not and could not have had philosophy pre-colonial times is based on a flawed premise that Africans were not capable to think rationally.

I argue that ubuntu is a concept and philosophy that should be developed and applied by the courts when interpreting and applying the law. The Constitutional court as the highest court of the land should promote the spirit of ubuntu. There should be more scholarly articles written on ubuntu to falsify the claims that it is a term and concept that cannot be applied in contemporary South Africa as a whole.

The last chapter deals with the criticism levelled against ubuntu and how the constitutional court addressed these criticism. The word ubuntu in this study is not written in italics it is written as any other word because placing it in italics renders it to be a foreign term or word.

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## Chapter One: Introduction

### 1.1 Research problem

The purpose of this study is to explore the relationship between ubuntu and the African philosophy of life in order to argue for the inclusion of the concept of ubuntu within the work of the Constitutional Court. The introduction of ubuntu in the 1994 Constitution demonstrates that the drafters of the Constitution sought to make it a living document; that would take into account the values of a people. While there is no explicit mention of ubuntu in the 1996 Constitution, section 39(1) of the Constitution places human dignity, equality and freedom at the core of interpreting the Bill of Rights and other subsequent pieces of legislation.<sup>1</sup> These are also values which are inherently part of ubuntu.

Clarie Oppenheim holds that ubuntu is a way of life that is conceptually embodied in extensive parts of Sub Saharan Africa.<sup>2</sup> From Oppenheim's conception of ubuntu it is evident that, firstly ubuntu is a way of life, and secondly it is practiced by people located in Sub-Saharan Africa. It is this notion that the study will be hinged upon when arguing that the Constitutional Court should expansively incorporate it into the law.

If we subscribe to the view that philosophy is 'always produced in a particular culture and language, and develops particular sets of concepts,'<sup>3</sup> to reject the existence of African philosophy is to deny that Africans have a culture which is inherently African; to 'reject the idea of philosophy' and to 'close a door of communication of with what we do not know.'<sup>4</sup>

My argument in this study is that, in developing ubuntu and African philosophy, scholars at least within a legal context are not attempting to develop and apply ubuntu the way it was applied in pre-colonial times. They are rather developing the law embedded in African values. There is no doubt that ubuntu is a concept of some religious and cultural significance in the African philosophy and culture. Ali Mazrui, as quoted by Yvonne Mokgoro observes that, '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 modernisation under indigenous impetuses.'<sup>5</sup> With the changes that came with colonialism it is not possible to

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<sup>1</sup> Constitution of the Republic of South Africa 1996.

<sup>2</sup> C Oppenheim *Religion* (2012) 3.

<sup>3</sup> A Shutte *Philosophy for Africa* (1994) 17.

<sup>4</sup> PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 7.

<sup>5</sup> Y Mokgoro 'Ubuntu and the Law' D Cornell and N Muvangua *Law in the uBuntu of South Africa* (2012) 365.

revert back to ubuntu in its pre-colonial 'pure form'.<sup>6</sup> We live in an ever-changing society, and therefore the principles and the philosophies which guide communities change and evolve as well. While this study is not a full philosophical investigation of African philosophy and ubuntu, its aim is to establish the fact that, for a long time in Western thinking, the existence of African philosophy has been denied.

## 1.2 Background

Mogobe Ramose contends that denying the existence of African philosophy is done in order to maintain a status quo in education and this subsequently undermines the quality of education and its sciences.<sup>7</sup> On the other hand to advance for African philosophy, as this study intends to do, is to affirm that an African perspective has been undervalued and misplaced from the recipe of Western Philosophy and that which has been omitted is an essential component for authentic philosophy.<sup>8</sup> Ramose further submits that, authentic philosophising is reached when there is an inclusion of what has been intentionally omitted in this case – African philosophy.<sup>9</sup>

Valentin-Yves Mudimbe is of the view that in order to understand the concept and content of African philosophy, one is obliged to have a thorough understanding of the historical evolution of Africans.<sup>10</sup> Furthermore, it is of the utmost importance to understand the context in which history developed. Mudimbe submits that some proponents of African philosophy affirm African philosophy on a flawed premise, which is an 'archive that comes to them from western anthropologies.'<sup>11</sup> This flawed premise is used to deny the existence of African philosophy.

According to Paulin Hountondji, African philosophy can only exist in the form of written literature.<sup>12</sup> The lack of written literature by Africans is by no means a justification of the non-existence of African philosophy. Africans are known for their oral tradition, in which

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<sup>6</sup> S Biko 'Some African cultural concepts' in A Stubbs (ed) *Steve Biko: I write what I like, Selected writings* (2004) 44-51.

<sup>7</sup> PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 6.

<sup>8</sup> PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 7.

<sup>9</sup> PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 7.

<sup>10</sup> VY Mudimbe *The invention of Africa: Gnosis, philosophy, and the order of knowledge* (1988) 186 as cited by D Cornell and K Van Marle 'Exploring ubuntu: Tentative reflections *African Human Rights Law Journal* (2005)197.

<sup>11</sup> VY Mudimbe *The invention of Africa: Gnosis, philosophy, and the order of knowledge* (1988) 186 as cited by D Cornell and K Van Marle 'Exploring ubuntu: Tentative reflections *African Human Rights Law Journal* (2005)199.

<sup>12</sup> P Hountondji 'African Philosophy: myth or reality' in T Serequeberhan *African philosophy: the essential readings* (1991) 124.

information is passed from one generation to another through memory. In the *Oral Traditions of Africa*, the World Affairs Council of Houston put forward that oral traditions are used to share information from one generation to another using speech and song which often take the form of folktales, fables, epic histories, narration, proverbs as well as songs.<sup>13</sup> Ramose correctly asserts that writing is the brainchild of the spoken language, furthermore that, the speaking human being (*homo loquens*) precedes the writing human being (*homo scriptans*).<sup>14</sup> This supports the notion that written archiving does not confer philosophical title, it is merely one of the many ways of storing information.

The denial of the existence of African philosophy is based on a Eurocentric view, this is further supported by the fact that indigenous law has been and still is interpreted through a common law lens. This assertion is supported by Gerrit Pienaar, who argues that courts in mixed jurisdictions rely on common law principles to determine the outcome of customary land tenures as well as to adjudicate customary disputes in traditional communities.<sup>15</sup>

There needs to be a change of heart and attitude from the West towards African practices in the process of developing African concept(s), more specially the philosophy of ubuntu. The endeavoured change in attitude can be achieved through African historical study in philosophy which goes past the defence, confrontation and corrections. This project of African historical study in philosophy needs to be an authentic exercise in the construction of African philosophy(s) pertaining to its identity; uniqueness; challenges and objectives; findings; advances and successes.<sup>16</sup>

### **1.3 Ubuntu as a contested concept**

There is a variance in opinion as to whether we are still in a transitional stage with regards to ubuntu. There is still no agreement on several issues including whether ubuntu is unique to Africa. In this study, I argue that Africa has always been denied the status of having a philosophy. Gloria Jean Watkins submits that radical post-modernity practice demands that the voices of others (displaced, marginalised, exploited and oppressed Africans) be heard.<sup>17</sup> African philosophy and ubuntu have been the subject of many debates. The debates centre

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<sup>13</sup> World Affairs Council of Houston *Teach Africa*  
<https://static1.squarespace.com/static/53cfd0e5e4b057663ea1bc61/t/57b1e0b746c3c406dd72afd471275383444/Oral+Traditions+of+West+Africa.pdf> accessed 22 June 2017).

<sup>14</sup> PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 8.

<sup>15</sup> G Pienaar 'The method used to interpret customary land tenure' (2012) 15 *Potchefstroom Electronic Law Journal* 3.

<sup>16</sup> PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* (2003) 6.

<sup>17</sup> GJ Watkins *Postmodern Blackness The Norton Anthology: Theory and Criticism* (1995) 2480.



on whether there is such a thing as African Philosophy and whether ubuntu is a unique African philosophy. The concept of ubuntu received recognition in the Preamble of the 1993 interim Constitution of South Africa. The interim Constitution acknowledged and embraced the relevance of ubuntu in a transitional South Africa. Since the landmark case of *S v Makwanyane*<sup>18</sup> the courts have attempted to develop a South African jurisprudence based on ubuntu, a concept peculiar to most South Africans and Africans in general.

The term ubuntu is difficult to translate to English because it has many meanings associated with it, which do not actually convey its true meaning. According to Yvonne Mokgoro, ubuntu is generally translated as “humanness”. Nicholas Bhengu argues that there is no equivalent English word for ubuntu.<sup>19</sup> It is contended that when asking an African philosopher for the meaning of ubuntu, an European will derive that ubuntu means ‘humanness’. Ubuntu has more to it than this polite and forbearing answer; an explanation of ubuntu needs all kinds of associations, images and experiences. ‘Ubuntu resists the dictate of western logic and western rites of argumentation with their demands for distinctive definitions.’<sup>20</sup>

The history of Africa before the period of colonialism still remains under-researched. Ubuntu is a moral value which was practised by most African societies during three recorded periods of history (pre-colonialism, colonialism and post-colonialism). Ubuntu still remains an important aspect in the lives of most Africans to date. The question which still haunts most scholars, particularly in South Africa, is whether ubuntu should be regarded as a constitutional principle because those who practiced it were often described as uncivilised.

The study is premised on the following starting points in regards to ubuntu. First, ubuntu is difficult to define, ‘because the African worldview is not easily and neatly categorised and defined, any definition would be a simplification of a more expansive, flexible and philosophical accommodative idea.’<sup>21</sup> Eusebius McKaiser suggests that what ubuntu means in a legal context ‘depends on what a judge had for breakfast that morning’ and that it is ‘a terribly opaque notion not fit in a normative moral principle that can guide our actions, let alone be transparent and substantive basis for legal adjudication’.<sup>22</sup> It means ‘nothing and everything’.

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<sup>18</sup> 1995 (3) SA 391 (CC).

<sup>19</sup> M.J Bhengu *Ubuntu: The Global Philosophy for Humankind* (2006) 46.

<sup>20</sup> I Keevy, ‘The Constitutional court and ubuntu’s inseparable trinity (2009) 34.

<sup>21</sup> Y Mokgoro ‘Ubuntu and the law in South Africa’ (1998) 1 *Potchefstroom Electronic Law Journal* 2.

<sup>22</sup> E McKaiser ‘Public morality: Is there sense in looking for a unique definition of Ubuntu?’ *Business Day*

Very loosely defined, ubuntu is a multi-layered concept denoting both a traditional African form of life and a communal or communitarian ethic which appears to provide alternative values to liberal legalism and western individualism.<sup>23</sup> Despite the lack of precise definition, it implies a standard behaviour that people are expected to put in practice.<sup>24</sup> Moreso, the phrase was used in the early 1920s, when the traditional Zulu movement, Inkhata, used it as a slogan.<sup>25</sup> The quest for a precise definition is destructive in the sense that it can make the concept of ubuntu elusive.<sup>26</sup>

Second, there are a number of critiques levelled against ubuntu. Thaddeus Metz,<sup>27</sup> argues that ubuntu is moral theory that can be used in South African human rights discourse. His argument that ubuntu is moral theory that can be used in the interpretation of human rights further strengthens the argument that is pursued by this study; that - ubuntu can be regarded as an African philosophy. He identifies three critics against ubuntu. Firstly, that ubuntu is vague. This stems from the fact the word itself does not give the fastidiousness required for making or reaching a particular decision, especially in legal terms.<sup>28</sup> Secondly it is unable to acknowledge the values of individual freedom. Expanding on this point, Metz holds that ubuntu is seen as a collective orientation and that it demands some sort of 'group-think, uncompromising majoritarianism or extreme sacrifice for society.' These requirements are in turn not compatible with the ideals of individual freedom that are promised by the liberal tradition.<sup>29</sup>

The last critique identified by Metz is that ubuntu is limited to traditional, small-scale culture and does not make allowance for modern industrial societies. Elaborating on this point, Metz holds that ubuntu developed from minuscule pastoral societies in the pre-colonial era and their world views were premised on spiritual nuances related to ancestors. It is for this reason

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2 November 2009 as cited by T Metz in 'Ubuntu as a moral theory and human rights in South Africa (2011) 11 *African Human Rights Journal* 552.

<sup>23</sup> N Bohler-Mullar 'The story of an African value' (2005) 20 *A South African Public Law Journal* 266.

<sup>24</sup> 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 she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed. IJ English 'Ubuntu: the quest for an indigenous jurisprudence' *South African Journal on Human Rights* (1996) 2 641.

<sup>25</sup> TW Bennett 'Ubuntu African Equity' *Potchefstroom Electronic Law Journal* 2011(14) 4 at 32.

<sup>26</sup> Tshoose C 'The emerging role of the constitutional value of Ubuntu for informal social security in South Africa' (2009) *African Journal of Legal Studies* 14.

<sup>27</sup> "Ubuntu as a moral theory ad human rights in South Africa"

<sup>28</sup> Metz 'Ubuntu as a moral theory ad human rights in South Africa' 2011(11) *African Human Rights Law Journal* 533.

<sup>29</sup> Metz 'Ubuntu as a moral theory ad human rights in South Africa' 2011(11) *African Human Rights Law Journal* 533.

that the ideals of ubuntu are challenged in their capacity to be applied in the context of large-scale industrial modern societies with multiple cultures, who are predominantly secular.<sup>30</sup>

Finally, this study recognises that the courts have taken an active role in the development of ubuntu in jurisprudence. The application of ubuntu by courts is an attempt to respond to the critiques levelled against ubuntu. The interim and final South African constitutions imposed a duty on courts to promote the values which underlie a democratic society based on freedom, equality and human dignity.<sup>31</sup> The courts recognise African Customary Law as part of the sources which sections 35 and 39 of the Constitution require the courts to promote. Ubuntu received recognition in the epilogue of the interim constitution, and was first applied in the *Makwanyane* case.

#### **1.4 Research questions**

The main research questions raised in order to address the research problem identified above are:

1. How to define ubuntu?
2. What are the main critiques levelled against ubuntu?
3. In what way has ubuntu been developed in the jurisprudence of South African courts and how could these developments respond to the critiques raised against it?

#### **1.5 Theoretical approach/ method**

In this study I use a textual analysis. I attempt to answer the research questions by a thorough inquiry and critical analysis of scholarly work on ubuntu and African Philosophy.

Critical analysis and review of text, jurisprudence on African philosophy through desk top research is used in this study. The theoretical foundation is used to argue that ubuntu is an African philosophy and can be developed and used by the courts in interpreting the law.

#### **1.6 Structure**

This study is divided into four chapters. The current chapter provides some background to understanding the concept of ubuntu and outline the main arguments and assumptions underlying this study. The research questions driving this study argue that because ubuntu is an African philosophy which is inherently African, to deny ubuntu as an African philosophy

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<sup>30</sup> Metz Ubuntu as a moral theory ad human rights in South Africa 2011(11) *African Human Rights Law Journal* 534.

<sup>31</sup> Section 39 of the final Constitution and section 35 of the interim Constitution.

would be akin to denying that South Africans and Africans have a culture that shapes their way of life. In the course of this study it is argued that ubuntu is an established African philosophy.

Chapter two of this study begins by answering the question '*What does it mean to say that ubuntu is an African philosophy of life?*' Chapter two expands on the traditional view of African Philosophy, as well as introduces the views of African professional philosophers. This is done in order to gain a full of understanding of African philosophies before trying to qualify ubuntu as an African philosophy that is unique and inherently present amongst South African and African communities. In an attempt to provide an elaborate argument, the study examines what Kwame Gyekye's assertion that the African philosophical concept can be found in African religious beliefs and rituals, linguistic expressions, African proverbs, myths and folktales and in customs and traditions of the African societies.<sup>32</sup>

Having established what it means to say that ubuntu is an African philosophy of life, the study investigates whether there is a philosophy which is unique and inherently African. In doing so, the study hopes to identify African philosophy/philosophies that can stand alongside ubuntu.

Chapter two unpacks some of the standing definitions of ubuntu. Ramose provides that ubuntu stems from the experience of the peoples who have been identified and later identified themselves as Africans. In contrast to Ramose, Gyekye is of the view that 'philosophy is a cultural phenomenon, that philosophical thought is grounded in cultural experiences.'<sup>33</sup> He further argues that to deny that there is an African philosophy is to deny that Africans have cultural experiences that are uniquely African. Gyekye's argument furthers the point asserted through this study, that to deny that Africa has a philosophy that is uniquely and inherently African is equivalent to saying that Africans do not have a philosophical guide to their own concepts or ideals. The arguments posited by Ramose, Gyekye and Théophile Obenga are set out in order to counter the critique that ubuntu is too vague to be legally interpreted and applied, as pointed out by Metz.

Having expanded on what ubuntu is, this study establishes a link between ubuntu and other African philosophies. This section of chapter two, relies on Théophile Obenga's position that 'the spirit of Chinese philosophy, Indian philosophy, African philosophy, European

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<sup>32</sup> K Gyekye 'An essay on African philosophical thought, the Akan conceptual scheme' (1987) 322.

<sup>33</sup> K Gyekye *An essay on African philosophical thought, the Akan conceptual scheme* (1987) 322.

philosophy and Mayan philosophy can differ greatly in their treatment of the subject but philosophy always deals with human knowledge and the elevation of the mind.<sup>34</sup> Obenga's position assists in determining whether ubuntu can truly be said to be a philosophy that is imbedded within South African, as well as in African communities as a whole.

Chapter three of this study looks at the South African case law on ubuntu to investigate whether the philosophy of ubuntu has been effectively developed by the judges of the Constitutional Court. The notion that ubuntu is a way of life becomes clearer when one examines the daily lives of Africans and how they interact.<sup>35</sup> It is therefore fitting for South African courts to develop the law using concepts which ordinary South Africans can relate to. In cases such as *State v Makwanyane*,<sup>36</sup> the court emphasised that ubuntu is an indigenous African concept. Additionally, in *Port Elizabeth Municipality v Various Occupiers*,<sup>37</sup> the court emphasised that ubuntu is related to interdependence, and in *Dikoko v Mokhatla*<sup>38</sup> it was held that ubuntu focuses on restorative justice as opposed to retributive justice.

Chapter three engages with the main critiques of ubuntu. Since its introduction in the preamble of the interim constitution of South Africa, ubuntu has been a subject of much debate. Some scholars have rejected it, claiming that it is 'synonymous' with religious values.<sup>39</sup> Ubuntu is ethnophilosophy: a value and belief system derived from an African religion; and a religious philosophy that entrenches patriarchal hierarchies, gender inequality, discrimination and the violation of the human dignity of woman, lesbians, homosexuals and others.<sup>40</sup>

Chapter four is the conclusion of this research. In this chapter the research findings about ubuntu being an African philosophy are explained. It brings together the findings that indeed

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<sup>34</sup> T Obenga 'Egypt: ancient history of African philosophy' in K Wiredu *A companion to African philosophy* (2004) 3.

<sup>35</sup> Y Mokgoro 'Ubuntu and the Law' D Cornell and N Muvangua *Law in the uBuntu of South Africa* (2012) 364.

<sup>36</sup> 1995 3 SA 94 (CC).

<sup>37</sup> 2004 SA 217 (CC).

<sup>38</sup> 2006 ZACC 10 (CC).

<sup>39</sup> I Keevy 'Ubuntu: Ethnophilosophy and the core Constitutional value(s) Africa' in D Frank (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 24.

<sup>40</sup> I Keevy 'Ubuntu: Ethnophilosophy and the core Constitutional value(s) Africa' in D Frank (ed) *Ubuntu, Good Faith and Equity: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 24.

ubuntu is an African philosophy hence it is an African way of life and should be developed and applied by the courts of law.

## Chapter Two: Ubuntu as an African philosophy of life

### 2.1 Introduction

The main research question addressed in this chapter is how to define African Philosophy? This is done to gain a sense of African philosophy(s) prior to qualifying ubuntu as an African Philosophy that is inherently unique to South Africa and Africa as a whole. This is done by examining literature on African philosophy and discussing the two schools of thought on African philosophy.

The questions 'What does it mean to say that ubuntu is an African philosophy of life?' and 'is there an African Philosophy?' have been the subject of much philosophical debate. These questions have been raised mainly for two reasons. The first reason was 'to falsify claims by anthropological theses' that Africans are incapable of evolving a 'scientific and reason orientated culture.'<sup>41</sup> According to Bondy, these questions can only be asked if the person posing them seeks to determine whether 'the people of African origin from time in memorial were capable and competent to do philosophy.'<sup>42</sup> Rene Descartes, a French philosopher, is of the opinion that all human beings have the ability to reason, and Aristotle proclaimed that 'man is a rational animal,'<sup>43</sup> meaning that all humans have ability to reason and to develop philosophy. Africans, since time immemorial, have had the ability, and still have the ability, to develop philosophy.<sup>44</sup>

The second reason was the need for an African post-colonial identity.<sup>45</sup> The call for freedom during colonial rule was etiologically linked to African consciousness of the human being, conditions of oppression and the inalienable right to self-determination. Africans fought oppression in all forms in order to assert themselves as human beings, as well as an African collective.

Kwasi Wiredu is of the opinion that the debate is about what would *constitute* African philosophy, rather than about developing the philosophy.<sup>46</sup> African philosophy exists, it emphasises the style of life, experiences and values of African societies. To deny that there is an African philosophy is to deny that Africans have cultural experiences uniquely African,

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<sup>41</sup> D Kapgagawani 'What is African Philosophy' in Coetzee & Roux (eds) *Philosophy from Africa* (2000) 86.

<sup>42</sup> As quoted by MB Ramose *African philosophy through Ubuntu* (1999) 41.

<sup>43</sup> MB Ramose *African philosophy through Ubuntu* (1999) 1.

<sup>44</sup> MB Ramose *African philosophy through Ubuntu* (1999) 41.

<sup>45</sup> D Kapgagawani 'What is African Philosophy' in Coetzee & Roux (eds) *Philosophy from Africa* (2000) 86.

<sup>46</sup> Wiredu as cited by D Kapgagawani 'What is African Philosophy' in Coetzee & Roux (eds) *Philosophy from Africa* (2000) 86.

meaning that Africa does not have a philosophical guide to its own concepts or ideas. Ramose is of the view that the denial is based on the will to dominate Africa:

Of course, this imaginary right, supported by material power designed to defend and sustain the superstition that Africa is incapable of producing knowledge, has got far-reaching practical consequences for the construction of the knowledge of Africa. The self-appointed heirs to the right to reason have thus established themselves as the producers of all knowledge and the only holders of the truth. In these circumstances, the right to knowledge in relation to the African is measured and determined by passive as well as uncritical assimilation coupled with faithful implementation of knowledge defined and produced from outside Africa.<sup>47</sup>

To develop African philosophy, scholars must reflect upon 'the culture and experiences of African people.'<sup>48</sup> There should be a sincere understanding of African culture. During the period of enlightenment, the West had absolute monopoly on what philosophy is, and what it was about. During colonialism the West imposed their philosophical paradigm and universalised sameness. African practices which did not meet the standard of the West's 'reality, knowledge and truth' were regarded as meaningless.<sup>49</sup> Still to a certain extent even to date, philosophy is philosophy according to Western predetermined standards.<sup>50</sup> Third World approaches to international law argue that decolonisation has not led to complete self-determination because its vehicle, which is international law, is in itself oppressive.

## 2.2 African philosophy: A definition

In 1945, Tsenay Serequeberhan published a book on his discovery of Bantu philosophy, in which he admitted that 'the Bantu/African is not a mere beast devoid of consciousness, but a human being whose conscious awareness of existence is grounded on certain foundational notions.'<sup>51</sup> This formulation went against Plato's definition, who defines philosophy as an individual critical inquiry of the mind. Bantu philosophy is a communal philosophy. The 'fathers' of philosophy could not agree on the definition of philosophy; 'Western philosophers define philosophy in different ways.'<sup>52</sup> Throughout history, there has never been a standard definition of philosophy. It has been described as 'love of wisdom,'

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<sup>47</sup> MB Ramose *African philosophy through Ubuntu* (1999) 2.

<sup>48</sup> MB Ramose *African philosophy through Ubuntu* (1999) 46.

<sup>49</sup> MB Ramose *African philosophy through Ubuntu* (1999) 45.

<sup>50</sup> I use the terms 'West' and 'Western' in this work the same way Clarence Dias uses the terms 'North' and 'South' to refer to concepts rather than geographical regions.

<sup>51</sup> T Serequeberhan 'African Philosophy: the point in question' in Serequeberhan (ed) *African philosophy: The essential reading* (1991) 11.

<sup>52</sup> D Kapgagawani 'What is African Philosophy' in Coetzee and Roux (eds) *Philosophy from Africa* (2000) 98.



'the search for truth' and 'the sense of wonder'.<sup>53</sup> Why should African philosophers define African philosophy the same way?

African philosophers are in agreement that African philosophy exists, even though there is no single definition of it.<sup>54</sup> To define African philosophy would entail pinning it down, for it to be definite and finite, and to do this would defeat the purpose of reconstructing this philosophy. It is somehow impossible to have a precise definition because African philosophy is based on the experiences of African societies. Despite the difficulties that stem from trying to give a finite definition of African Philosophy, Olatunji Oyeshile attempts to give such a definition. He holds that

African philosophy encompasses traditional African thoughts which include myths, proverbs, and modern works of African philosophers who have been schooled in a Western philosophical tradition which concerns itself with the evaluation and analysis of contemporary workings that aggravate the African minds such as African socio-political philosophy.<sup>55</sup>

Philosophical concepts are influenced by culture, therefore they reflect the attitudes of a cultural group and not universal attitudes.<sup>56</sup> All philosophies come from the experiences of an individual or society:

Whether it is a Plato from Greek antiquity, a Hegel from modern philosophy, or a contemporary philosopher like Heidegger himself, the conclusion is the same, namely, that their thought is inscribed and their problematic dictated by the non-philosophy which is their own cultural background, especially their religious beliefs and myths.<sup>57</sup>

The plurality of philosophy and different global perspectives should be celebrated and not used to undermine and deny the existence of other philosophies.<sup>58</sup> The African philosophical concept can be found in African religious beliefs and rituals, linguistic

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<sup>53</sup> I Onyewuenyi 'Is there as African philosophy' in Serequeberhan (ed) *African philosophy: the essential readings* (1991) 37.

<sup>54</sup> Richard Bell in his book titled *Understanding African Philosophy: A Cross-cultural Approach to Classical and Contemporary Issues* states that 'the growing consensus is that there is no single 'African' philosophy, partly because African culture is highly pluralistic and partly because the nature of philosophy itself is such.'

<sup>55</sup> O Oyeshile 'On Defining African Philosophy: History, Challenges and Perspectives' (2008) 3 *Humanity and Social Science Journal* 61.

<sup>56</sup> J Prinz 'Culture and Cognitive Science' (2011) *The Stanford Encyclopaedia of Philosophy* <http://plato.stanford.edu/archives/win2011/entries/culture-cogsci/> (accessed on 10 September 2017).

<sup>57</sup> T Okere cited by T Serequeberhan '*African Philosophy: the point in question*' in Serequeberhan (ed) *African Philosophy: the essential readings* (1991) 10.

<sup>58</sup> T Obenga 'Egypt: ancient history of African Philosophy' in K Wiredu *A Companion to African philosophy* (2004) 31.

expressions, African proverbs, myths and folktales and in customs and traditions of the African societies.<sup>59</sup>

### 2.3 General understanding of African philosophy

African philosophy refers to 'the understanding, attitude of mind, logic and perception behind the manner in which African peoples think, act or speak in different situations of life'<sup>60</sup>

According to Gyekye 'philosophy is essentially a cultural phenomenon; it is part of cultural experience and tradition of a people.'<sup>61</sup> African philosophy is informed by the cultural experience of the peoples who have identified themselves as Africans. Philosophy not based on African thought cannot be regarded as African philosophy even though it was written by an African philosopher.<sup>62</sup>

There are two schools of thoughts on African philosophy, the African traditionalists and African professional philosophers (universalists). The debate is two-fold, it is firstly on whether traditional African philosophy can be said to be a part of the universal philosophy; and secondly, on whether African philosophy is a single philosophical school of thought, or is it composed of several different movements or streams, or does African philosophy even constitute philosophy at all?

#### 2.3.1 The traditional view

The traditionalists believe that African philosophy is based on the culture and traditions<sup>63</sup> of traditional African people. Malegapuru Makgoba is of the view that 'Africans are linked by shared values that are fundamental features of African identity and culture.'<sup>64</sup> African philosophy is best explained through a thorough understanding of African family's lineage (kingship), ways of life and their underlying traditions.<sup>65</sup> John Mbiti sees kingship as a system that connects all members of a society, they are all interconnected as sisters and brothers. The connection continues even after death. In African culture, there is a relationship between the living and the dead.<sup>66</sup> When one refers to their family, they are referring to the other family which has been, the family that exists now and the family that will come. Ramose

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<sup>59</sup> T Obenga 'Egypt: ancient history of African philosophy' in K Wiredu *A Companion to African Philosophy* (2004) 31.

<sup>60</sup> J Mbiti *African Religions and Philosophy* (1969) 2.

<sup>61</sup> K Gyekye 'An essay on African philosophical thought: the Akan conceptual scheme' (1987) 33.

<sup>62</sup> K Gyekye 'An essay on African philosophical thought: the Akan conceptual scheme' (1987) 33.

<sup>63</sup> Religious believes, rituals, linguistic expressions, African proverbs, myths and folktales.

<sup>64</sup> MW Makgoba *Mokoko The Makgoba affair: A reflection on the transformation* (1997) 197.

<sup>65</sup> JS Mbiti *African religion and philosophy* (1990) 102.

<sup>66</sup> JS Mbiti *African religion and philosophy* (1990) 74.

also holds the same view, African philosophy can only be understood in terms of 'inseparable trinity.'<sup>67</sup> How can there be a today without yesterday, and tomorrow without today? This school of thought holds that their beliefs and practices are not primitive, it is not a myth. It is an essential cultural identity which should be protected.

There are people who believe that in African societies there is no individual, that the individual exists for the community and the community exists for the individual, and that the essence of individualism is the community. This is however not the true reflection of the African society, individualism is better supported and protected in African culture because the individual is not one lonely person standing on a mountain of rock.<sup>68</sup> It is an individual standing in the community of other people with the entire social fabric at the disposal of that person. Individualism is protected, but within this nest of community interest.<sup>69</sup> In the case of *Makwanyane* the court held that African communalism is:<sup>70</sup>

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 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 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.

The presumption that Africans did not view the individual rights the way Western societies did, could be true, but claiming that individual rights were unknown by non-Westerners is not true.<sup>71</sup>

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<sup>67</sup> MB Ramose *African philosophy through Ubuntu* (1999) 122.

<sup>68</sup> D Cornell and K Van Marle 'Exploring ubuntu: Tentative reflections (2005) *African Human Rights Law Journal* 205 'For what is at stake here is the process of becoming a person or, more strongly put, how one is given the chance to become a person at all. The community is not something 'outside', some static entity that stands against individuals. The community is only as it is continuously brought into being by those who 'make it up', a phrase we use deliberately. The community, then, is always being formed through an ethic of being with others, and this ethic is in turn evaluated by how it empowers people. In a dynamic process, the individual and community are always in the process of coming into being. Individuals become individuated through their engagement with others and their ability to live in line with their capability is at the heart of how ethical interactions are judged.'

<sup>69</sup> L Senghor *Negritude* (1966) 5: 'African communalism is based both on the community and on the person...because it was founded on the dialogues and reciprocity, the group had priority over the individual without crushing him, but allowing him to blossom as a person.

<sup>70</sup> 1995 (3) SA 391 (CC) at para 224.

<sup>71</sup> M Mutua 'The Banjul Charter and the African Cultural Finger Print' in An-Naim (ed) *Cultural Transformation and Human Rights in Africa* (2002) 73.

### 2.3.2 The view of African professional philosophers (African Universalists)

Universalists assert that Western philosophy is a yardstick for all philosophies. According to this school of thought, philosophy is universal. It must have the same meaning in all cultures as it is not culture specific. Paulin Houtondji, one of the proponents of the universal view, argues that African philosophy is not a unique philosophy, rather it is a written philosophy addressed to Africans.<sup>72</sup> Traditional view or thought is not uniquely African; therefore, Africa should not claim uniqueness of its philosophy.<sup>73</sup>

This philosophy must be 'written and not oral, scientific, exclusively of African geographic and ethnic origin purely dialectical.'<sup>74</sup> Any philosophy which does not comply with the four requirements cannot be regarded as neither philosophy nor African philosophy.

This view is controversial and extreme. Houtondji's misunderstanding of philosophy as philosophical literature perpetuates and promotes the argument that the oral culture of African society, and of African philosophy will never attain the status of philosophy. According to him, writing is a prerequisite of any philosophy. Does this mean that African oral literature texts are not philosophy? According to this theory, Africans did not have philosophy before colonialism because Africans could not read nor write in colonial languages. Africans have always been rational thinkers; the non-western articulations of thought of Africans should not be seen as primitive. Africans could not have survived before colonisation if they did not have belief based on evidence.<sup>75</sup> Knowledge and superstition are common in both Western and African thought, 'the truth then is that rational knowledge is not the preserve of the modern West, nor is superstition a peculiarity of the African.'<sup>76</sup>

Henry Odera Oruka who is also universalist, departs from Houtondji's view that literacy is a prerequisite of African philosophy. He does not see oral tradition as primitive and irrelevant. In his Sage philosophy he contends that elders (Sages) had wisdom and knowledge, and were usually consulted by the community for guidance.<sup>77</sup> This knowledge and wisdom was based on 'a reflective exercise that reevaluates culture philosophy without the benefit of writing or contact with Europe.'<sup>78</sup> Sages are people who can 'demonstrate their ability and

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<sup>72</sup> PJ Houtondji *African Philosophy: Myth and Reality* (1996) 120.

<sup>73</sup> K Wiredu 'Philosophy and an African Culture' (1980) 39.

<sup>74</sup> PJ Houtondji 'African Philosophy: Myth and Reality' (1996) 120.

<sup>75</sup> According to C Freeman in *The closing of the Western Mind: The Rise of Faith and the Fall of Reason* (2003) 6 there is evidence that Africans were rational thinkers and were able to provide 'rational adaptations to their changing environment 70 000 years ago'.

<sup>76</sup> K Wiredu 'Philosophy and an African Culture' (1980) 43.

<sup>77</sup> O Oruka Sage Philosophy: *Indigenous Thinkers and Modern Debate on African Philosophy* (1990) 38.

<sup>78</sup> O Oruka Sage Philosophy: *Indigenous Thinkers and Modern Debate on African Philosophy* (1990) 5.

practice in critical thinking' and at 'best a good narrator of traditionally imposed wisdom and myths.'<sup>79</sup> However Oruka, like Houtondji, holds the view that philosophy has to be universal; 'philosophy is the exercise of subjecting one's cultural world to the standard of reason.'<sup>80</sup>

A thorough and critical scientific analysis of Africa's oral tradition reveals the philosophical thought behind the oral tradition and assist in reconstructing the African philosophy.<sup>81</sup> Philosophical perspective and the methods that one uses to analyse and interpret culture should be the same.<sup>82</sup> According to the universalist theory there is a standardised philosophical perspective and methodology.

## **2.4 Ubuntu and ujamaa: Parallel African Philosophies**

This section attempts to address the question of whether ubuntu is an African philosophy of life? A general understanding of ubuntu is provided as a way of answering this question, while keeping in mind however, that there is no singular definition of ubuntu because ubuntu is an African way of life that cannot be neatly defined. The 'African way of life' is also examined. The objective of this section is to make clear why ubuntu is considered the root of African philosophy.

### **2.4.1 What is ubuntu**

From the outset, it must be noted that ubuntu cannot be confined to an abstract meaning because its meaning is derived from the concrete context in which it thrives, to define it destroys its essence.<sup>83</sup> Like other African philosophies, ubuntu has no standard definition.

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<sup>79</sup> O Oruka *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy* (1990) 5.

<sup>80</sup> S O Imbo *An Introduction to African Philosophy* (1998) 26.

<sup>81</sup> K Wiredu *Philosophy and an African Culture* (1980) 37.

<sup>82</sup> O Okura as cited by S O Imbo *An Introduction to African Philosophy* (1998) 26.

<sup>83</sup> N Bohler-Muller 'Some thoughts on the ubuntu jurisprudence of the Constitutional court' in D Cornell and N Mavungua (eds) *Law in the Ubuntu of South Africa* 2012 480 'Pinning down the meaning of Ubuntu in order to render it useful and less worthless may actually diminish the potential of this value in African philosophy.' According to Koka and others Ubuntu is difficult to define, 'it resists the dictate of Western logic and Western rites of argumentation with their demands for distinctive definitions in M.J Bhengu *Ubuntu: The Global Philosophy for Humankind* (2006) 46.

Ubuntu implies a standard behaviour that people are expected to put in practice.<sup>84</sup> Ubuntu is the root of African philosophy,<sup>85</sup> it is the 'fundamental ontological and epistemological category in African thought of the Bantu-speaking people.'<sup>86</sup>

Love More Mbigi sees ubuntu as 'our way of life, our collective solidarity, born out of our kinship culture and it is the heart and soul of our existence.'<sup>87</sup> Ubuntu is generally described as a world-view of African societies and as a determining factor in the formulation of perceptions which influence social conduct.<sup>88</sup>

Augustine Shutte as cited by Ramathate Dolamo submits that:

The concept of ubuntu embodies an understanding of what it is to be human and what is necessary for human beings to grow and find fulfilment. It is an ethical concept and expression of a vision of what is valuable and worthwhile in life. This vision is rooted in the history of Africa and is at the centre of the culture of most south Africans.<sup>89</sup>

Ubuntu in the Nguni languages (isiZulu, isiNdebele and isiSwati) of South Africa refers to 'personhood'. In Sotho languages of South Africa (Spedi, Setswana and Sesotho) the word is translated as botho.<sup>90</sup> Ubuntu is an African concept unique to Africans. It is part of African culture which is found among many African ethnic groups. For example, in Shona 'unhu', in Tsonga 'bunhu', in Tshivenda 'vhutu', in Xhitsonga 'numunhu', in Shona from Zimbabwe 'nunhu', Kwaswahili 'utu' and in Ugandan 'abantu'. The concept of ubuntu is at the heart of all African communities, it reflects African philosophy of life. This philosophy represents 'humanity, personhood, humanness and morality.'<sup>91</sup> Ramathate Dolamo maintains that multiple African societies live according to the traditions and observe the values encompassed in ubuntu.<sup>92</sup>

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<sup>84</sup> 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 she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.

<sup>85</sup> MB Ramose *African philosophy through Ubuntu* (1999) 40.

<sup>86</sup> D Kaphagwani and J Malherbe 'Epistemology and the tradition in Africa: Introduction, African epistemology' in P Coetzee and A Roux (eds) *The African Philosophy Reader* (2002) 271.

<sup>87</sup> L Mbigi *Ubuntu The African Dream in Management* (1997) 30.

<sup>88</sup> SF Khunou and S Nthai 'The Contribution of ubuntu to the development of the Constitutional Jurisprudence in a democratic South Africa' in D Frank (ed) *Ubuntu, Good Faith and Equity legal Principles in Developing a Contemporary Jurisprudence* (2011) 52.

<sup>89</sup> A Shutte 'An Ethic for a New South Africa' 2001 Cluster Publications.

<sup>90</sup> R Dolamo 'Botho/Ubuntu: The Heart of African Ethics' 2013 (1) *Scriptura Journals* 112.

<sup>91</sup> Y Mokgoro 'Ubuntu and the Law in South Africa' in D Cornell and N Mavungua (eds) *Law in the Ubuntu of South Africa* (2012) 363.

<sup>92</sup> R Dolamo 'Botho/Ubuntu: The Heart of African Ethics' 2013 (1) *Scriptura Journals* 112.

The meaning of ubuntu can be understood from the Zulu proverb 'umuntu ngumuntu ngabantu' which means 'a person is a person through others'.<sup>93</sup> Or alternatively in the Sesotho translation 'motho ke motho ka batho'.<sup>94</sup> An individual is protected within the group, and the group is not privileged over the individual. Interdependence is the backbone of African societies; the individual needs the society to survive and the society needs the individual to function. Andrea Ng'weshemi further adds that in African communities an individual is not human simply by birth. He asserts that one *becomes* human through a progression of amalgamation into society and as such, one cannot speak of ubuntu outside the scope of the community.<sup>95</sup>

To understand ubuntu and its dynamics, one must understand how the communities which practice it, live and apply ubuntu in their day-to-day life. Mbiti clearly explains the traditional life of African societies:<sup>96</sup>

In traditional life, the individual does not and cannot exist alone except corporately. He owes his existence to people, including those of past generations and his contemporaries. He is simply part of the whole. The community must therefore make, create, or produce the individual; for the individual depends on the corporate group ... Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual. The individual can only say: 'I am, because we are; and since we are therefore I am.'

Ubuntu as a way of life is best encapsulated by Donne who asserted that 'no man is an island entire by itself'.<sup>97</sup> Broodryk further adds that ubuntu is a wide-ranging ancient African philosophy which is premised on the principles of 'intense humanness, caring, respect, compassion and is associated with values ensuring a happy and qualitative community life in the spirit of family'.<sup>98</sup>

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<sup>93</sup> Y Mokgoro in Makwanyane stated that ubuntu Metaphorically expresses itself in this Zulu proverb 'describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to the basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation'.

<sup>94</sup> R Dalomo 'Botho/Ubuntu: The Heart of African Ethics' 2013 (1) *Scriptura Journals* 112.

<sup>95</sup> Ng'weshemi Rediscovering the Human: The Quest for a Christi-Theological Anthropology in Africa in R Dalomo *Botho/Ubuntu :The Heart of African Ethics* 2013.

<sup>96</sup> J Mbiti *African Religions and Philosophy* (1969) 78.

<sup>97</sup> The Phrase Finder <http://www.phrases.org.uk/meanings/no-man-is-an-island.html> (accessed 4 July 2017).

<sup>98</sup> J Broodryk 'Understanding South Africa: the Ubuntu way of Living' Pretoria Ubuntu School of Philosophy 2008.

Archbishop Desmond Tutu, as cited by Mbaya, provides an explanation of ubuntu similar to Ramose. He asserts that a person is a person through other people. He goes on further to submit that one would not know how to be human being at all had they not learned from others. Tutu contends that we (human beings) are made up of a delicate network of relationships that are interdependent and that we are meant to balance on another.<sup>99</sup> He further adds that ubuntu is in no way similar to Western concepts that places heavy emphasis on the individual, instead ubuntu denotes an individual's identity and fulfillment within a community.<sup>100</sup>

From the account provided by Tutu, Mbaya derives that ubuntu dictates that the relationships of African people are interdependent.<sup>101</sup> It is perhaps for this reason that Tutu, Shutte and Setiloane stress the importance that relationships and networks play in defining the identity of an individual in the African community.<sup>102</sup>

Not only does ubuntu imply an interrelatedness amongst individuals, but it is also a way of life. Ubuntu cannot only be explained in text but, in order to fully understand the African's way of life one must first understand the philosophy of ubuntu.

As already mentioned in the preceding sections of this study, defining ubuntu would prove to be a tiresome task more so it would to tie down the ever-changing philosophy. However, in an attempt to provide a working scope, the study outlines some of the standing definitions that best explain the philosophy, without limiting its scope. Despite the lack of precise definition, it implies a standard behaviour that people are expected to put in practice.<sup>103</sup>

Drucilla Cornell on one hand asserts that:

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<sup>99</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' 2010 104 *Scriptura* 367-376.

<sup>100</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' 2010 104 *Scriptura* 370.

<sup>101</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' 2010 104 *Scriptura* 367-376.

<sup>102</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' 2010 104 *Scriptura* 370.

<sup>103</sup> 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 she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed. IJ English Ubuntu: the quest for an indigenous jurisprudence' (1996) 12 *South African Journal on Human Rights* 641.



‘uBuntu is an ethical demand which promotes the actual experience of building, enhancing and, at times, repairing the moral fabric of an aspirational community inherent in the notion of the uBuntu as the African principle of transcendence’<sup>104</sup>

Narnia Bohler-Muller defines ubuntu as a multi-layered concept denoting both a traditional African form of life and a communal or communitarian ethic which appears to provide alternative values to liberal legalism and western individualism, as do some forms of feminism.<sup>105</sup>

### 2.4.2 Ubuntu: African way of life

‘Motho ke motho ka batho’<sup>106</sup>

This phrase[s]<sup>107</sup> describes the essence of being in most African languages. Ramose meticulously explains the meaning of this African proverb by asserting that ‘to be human is to affirm one’s humanity by recognising the humanity of others and, on that basis, establishes human respectful relations with them.’<sup>108</sup> Dignity is the bedrock of the whole community, ‘a person is truly human in the context of actual relations with other human beings.’<sup>109</sup> Whatever affects an individual affects the whole community. The nature of ubuntu is perhaps why poverty was a foreign concept in most African traditional societies prior to colonisation.<sup>110</sup> The network of relationships and family hood requires that people work together to ensure the wellbeing of the whole community, and as a result a community would not let a member of a community suffer if the community is able to assist the individual.

Nqosa Mahau contends that the three generations of human rights - civil and political rights; economic, social and cultural rights; and collective rights - were inseparable in traditional African societies and ‘...African jurisprudence adopts this integrated approach to human

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<sup>104</sup> D Cornell *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation* (2014) 113

<sup>105</sup> N Bohler ‘The story of an African Value’ (2005) 20 *South Africa Public Law Journal* 266 267.

<sup>106</sup> MB Ramose in *African philosophy through Ubuntu* (1999) 193.

<sup>107</sup> ‘Motho ke motho ka batho’; ‘umuntu ngumuntu ngabantu’.

<sup>108</sup> MB Ramose *African philosophy through Ubuntu* (1999) 193; ‘I am human only because you are human’ in general, the statement appropriately and specifically describes motho ke motho ka batho. This context confers on man a consciousness germane only to social beings: spirituality, language, technical abilities, a value system, etcetera. Ellenberger offers an insight into the significance of civic obligations in the following terms: ‘Every Mosuto was responsible for his neighbour. A father was responsible for all the members of his family until they married. African jurisprudence exhumed’ (2010) 317 *XLIII Comparative and International Law Journal of South Africa* 326.

<sup>109</sup> MB Ramose *African philosophy through Ubuntu* (1999) 193.

<sup>110</sup> *Ancient Africa Has Africa Always Been Poor?* <https://sites.google.com/site/samdenbow123/has-africa-always-been-poor> Accessed 8 November 2017.

dignity. It is anchored in a philosophy that professes human dignity to encapsulate physical, spiritual, cultural and material wellness. From this perspective, political and civil rights are inseparable from socio-economic and collective rights – together they make up the totality and indivisibility of human dignity.<sup>111</sup> African communities were un-individualistic, each individual's dignity was strongly protected to ensure the well-being of the community. The African community has 'always been man-centred'.<sup>112</sup>

Ubuntu is a philosophy which embraces African culture; it is an African philosophy of life. Mfuniselwa Bhengu describes ubuntu as an 'African product, it is indigenous to African philosophy. It is an African way of life. It was not imported from Eastern or Western Europe. 'It is something out of Africa.'<sup>113</sup> It is contended that to understand ubuntu and its dynamics one must understand how the communities which practice it live and apply ubuntu in their day to day life.

In a narrative written by Stephen Lundin and Bob Nelson, the authors share how a young manager (John Peterson) in a leading company struggled in his new position. The staff that he led were not productive, and as a result he found himself having to pick up from where they left off in order to ensure that the department stayed above water. One weekend, John comes into the office and is assisted by an African male who came to America from a small village in Africa. That weekend John is introduced to the philosophy of ubuntu, and soon after his relationship with his staff takes a positive incline. The manner in which John thought about his staff also changed and ultimately the way he thought about himself changed as well. The department he managed started to pick up the pace and John found himself not having to pick up from where they have left off anymore.<sup>114</sup>

This narration offered by Lundin and Nelson is but one narrative that illustrates that ubuntu is a way of life. It furthers illustrates that the philosophy can be carried through varies spaces and the ability to appreciate it is of undoubtful value.

Another example that illustrates that ubuntu is indeed a way of life can be taken from Vuyisile Msila in her work – 'ubuntu: shaping the current workplace with (African) wisdom'. In this

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<sup>111</sup> LN Mahao 'O se re ho morwa 'morwatowe! African jurisprudence exhumed' (2010) 317*XLIII Comparative and International Law Journal of South Africa* 326.

<sup>112</sup> S Biko 'Some African cultural concepts' in A Stubbs (ed) *Steve Biko: I write what I like, Selected writings* (2004) 44-51.

<sup>113</sup> M Bhengu *Ubuntu: the Essence of Democracy* (1996) IX.

<sup>114</sup> S Lundin and B Nelson *Ubuntu: An inspiring story about an African tradition of teamwork and collaboration* (2010).

publication Msila asserts that ubuntu is an ancient African concept. She further adds that it is a way of life that was equivalent to religion in African societies before the arrival of colonisation. Msila goes on to submit that 'ubuntu means to sacrifice for others selflessly, caring and protecting your fellow human being'.<sup>115</sup> Msila contends that ubuntu can be used in shaping the current workplace by using the values and wisdom the philosophy. She further adds that an ubuntu-inspired workplace focuses on 'Dependability; Team work; Interconnectedness; Caring; Being led by a collective vision; Performance; Loyalty; Openness; Honesty and Transformation leadership'.<sup>116</sup>

The last and probably the most relevant illustration that ubuntu is a way of life can be seen from African structures of participation such as *indaba's and imbizo's*. Indaba (derived from the Zulu language) and Imbizo (derived from the isiXhosa language) entails a discussion or conference.<sup>117</sup> Henry Mbaya correctly submits that the existence of traditional participation structures promotes consensus on critical matters facing a community. According to Mbaya, in such gatherings there is an attempt to get maximum participation from members of that community.<sup>118</sup> These discussions, according to Shutte, are continued until unanimity is reached.<sup>119</sup> The terms imbizo and indaba have frequently been used for various conferences and meetings in and around South Africa.<sup>120</sup> One can therefore argue that this is done in order to call for individuals from a certain community or even organisations that share common characteristics to come and thoroughly discuss a subject matter until unanimity is reached. This in turn illustrates that ubuntu has not remained in the ancient rural societies where it was originally practised.

### 2.4.3 Ujamaa

Johann Broodryk asserts that ubuntu is present in all African languages. In Kiswahili, the native tongue of Tanzania, the word/concept is *Ujamaa*.<sup>121</sup> The term Ujamaa is associated with Julius Nyerere as a social and economic development policy. Bonny Ibhawoh and Ramathate Dihua hold that the philosophy of Ujamaa find its roots in traditional African

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<sup>115</sup> V Msila *Ubuntu: shaping the current workplace with (African) wisdom* (2015).

<sup>116</sup> V Msila *Ubuntu: shaping the current workplace with (African) wisdom* (2015).

<sup>117</sup> English Oxford Living Dictionaries <https://en.oxforddictionaries.com/definition/indaba> (accessed 9 July 2017).

<sup>118</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' (2010) 104 *Scriptura* 370.

<sup>119</sup> A Shutte 'Ubuntu an Ethic for a New South Africa' (2001) 28.

<sup>120</sup> Various imbizo's that have been held in South Africa include – ANC Policy Imbizo 2017; South African Communist Party Imbizo 19 May 2017; Tourism Indaba 4 January 2017.

<sup>121</sup> J Broodryk 'Ubuntu- African Life Coping Skills Theory and Practice' *CCEAM Conference* 2006.

values and emphasis on family hood and communalism of traditional African societies.<sup>122</sup> They further maintain that Ujamaa is based on three values namely: freedom, equality and unity. They assert that the model society should be based on these three ingredients.<sup>123</sup> Nyerere, as cited by Ibhawoh and Dibua, argues that these three ingredients are not a new concept to Africa and that they have been part and parcel of a traditional social order.<sup>124</sup>

Ujamaa as a philosophy has been implemented on various levels. The most notable implementation was during and post-1967 in the campaign of Ujamaa Vijijini, which was designed for continuing and later completely transforming rural communities into socialist communities where political and economic activities are cooperatively organised.<sup>125</sup> It is submitted that Nyerere presented Ujamaa as an ideology which strived to construct a sought society or way of living. In this way, Ujamaa, like ubuntu, can be observed as normative concept. Nyerere asserted that solidarity, the norm for Ujamaa already existed in Tanzanians. The existence of the solidarity asserts that Africanness is central to the philosophy of Ujamaa.<sup>126</sup>

The works of Broodryk explicitly point out that ubuntu is the equivalent of the Tanzanian philosophy – Ujamaa. The underlying similarity between the two concepts lies in that they both hold family hood and socialism at the heart of their philosophies, notwithstanding that the philosophies are implemented to reach varied outcomes.

Ujamaa and ubuntu share common traits and can be said to be African philosophies that are inherently and uniquely African, and that come about as the result of experience, culture and a way of life of African people.

## 2.5 Conclusion

This chapter provides a working definition of ubuntu based on the concepts offered by Cornell<sup>127</sup>, Bohler-Muller<sup>128</sup> and Ramose. The chapter seeks to establish a broad understanding of ubuntu. According to the research conducted it is clear that there is no one

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<sup>122</sup> B Ibhawoh and JI Dibua 'Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Ques for social and economic development in Africa' (2003) 8*African Journal of Political Science* 1.

<sup>123</sup> B Ibhawoh and JI Dibua 'Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Ques for social and economic development in Africa' (2003) 8*African Journal of Political Science* 1.

<sup>124</sup> B Ibhawoh and JI Dibua 'Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Ques for social and economic development in Africa' (2003) 8 *African Journal of Political Science* 1.

<sup>125</sup> Boesen, *et al* 'Ujamaa- Socialism from Above' Scandinavian Institute of African Studies 1977.

<sup>126</sup> C Schweigan 'Ujamaa, a phantom Quest' (2001) 15 *African Journal of Philosophy* 2.

<sup>127</sup> D Cornel *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation* (2014) 113.

<sup>128</sup> N Bohler-Mullar 'The story of an African value' (2005) 20 *South African Public Law Journal* 266.

standard definition of ubuntu, however, it is noteworthy to appreciate that the philosophy is best understood as a way of life that carries characteristics such as community;<sup>129</sup> interdependence; family hood<sup>130</sup> and understanding that a person is a person because and through their interaction with others in their community.<sup>131</sup>

Ubuntu as a philosophy needs to be developed in the same light that the common law is developed with the changing times. It is undoubtable that more scholarly research is needed to develop the concept. This view is also supported by former President of South Africa President Mbeki. President Mbeki is one of the main proponents of the African Renaissance. Renaissance is commonly used to describe the 'rebirth of classical ideas in Europe in the thirteenth to sixteenth centuries.'<sup>132</sup> Mbeki in his Heritage Day address in 2005 correctly pointed out that not enough has been done to articulate and elaborate on what ubuntu means and to further promote this important value system in a manner that should define the unique identity of South Africans.<sup>133</sup> For Africans to properly understand and use the concept 'renaissance' they must 'understand what it means learning from the great African philosophers, law makers, and artistic and technological guises of the past.'<sup>134</sup> Universalists do not agree with this proposal; for them, anything which comes out of Africa cannot be regarded as philosophy if it does not adhere to whatever predetermined standard of philosophy. Van Hook argues that universalism should be abandoned as it does not contribute anything to the development of African philosophy.<sup>135</sup>

In preparing an understanding of ubuntu, the chapter also unpacks the notion of an African-specific approach to philosophy. 'African philosophy can be understood as traditional African thoughts which include myths, proverbs, folkers and modern works of African philosophers who have been schooled in Western philosophical tradition which concerns itself with the

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<sup>129</sup> MB Ramose *African philosophy through Ubuntu* (1999) 193.

<sup>130</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' (2010) 104 *Scriptura* 373.

<sup>131</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' (2010) 104 *Scriptura* 376.

<sup>132</sup> K Camara 'From Contemporary African Customary Laws to Indigenous African Law: Identifying Ancient African Human Rights and Good Governance Sensitive Principles as a Tool to Promote Culturally Meaningful Socio-Legal Reforms' in Fenrick, J *et al* (eds) *The Future of African Customary law* (2011) 494.

<sup>133</sup> T Mbeki 'Heritage Day Celebration' <https://www.mbeki.org/speeches/pdf> Accessed 9 July 2017.

<sup>134</sup> K Camara 'From Contemporary African Customary Laws to Indigenous African Law: Identifying Ancient African Human Rights and Good Governance Sensitive Principles as a Tool to Promote Culturally Meaningful Socio-Legal Reforms' in Fenrick, J *et al* (eds) *The Future of African Customary law* (2011) 494.

<sup>135</sup> M Van Hook *African Philosophy and the Universalist Thesis –The Metaphilosophy foundation and Blackwell Publishers* accessed on 4 July 2016 386-396.

evaluation and analysis of contemporary workings that aggravate the African minds such as African socio-political philosophy.<sup>136</sup> While determining that there is indeed a school of African Philosophy this section reveals, that there is no single unique philosophy that is inherent to Africa. However, what is common is that African philosophies possess characteristics that are similar, such as those found in Ujamaa and ubuntu. The common traits being family hood and socialism. What is also revealed by the study is that Philosophical concepts are influenced by culture, therefore they reflect the attitudes of a cultural group and are not necessarily universal attitudes.

From the two schools of thought it can be deduced that the main difference between traditionalists and universalists is that the traditionalists hold the view that there is a unique African philosophy, while universalists are of the view that philosophy is universal. Universalists are in agreement that philosophy can never be the same, that subject matter might differ but there is a standard philosophy. Both schools of thought agree that there is an African philosophy, the difference is in the approach and understanding. In developing African philosophy, all forms of knowledge must coexist, 'the serious philosopher will seek to interpret traditional modes of life in the light of their interaction with science, technology and industrialisation.'<sup>137</sup> African philosophers should work together in the process of decolonisation to develop a strong and legitimate African philosophy.

In the process of decolonisation we have to be aware that knowledge was developed through the eradication of cultural thought. This process was not completed however, hence the need for knowledge coexistence. The contradictory views on African philosophy leave room for the development of an authentic African philosophy. Kwasi Wiredu contends that a process of decolonisation will result in the development of a legitimate African philosophy. Ramose bases knowledge on culture. Most of his articles begin with an African proverb. He therefore extrapolates a theory of knowledge based on a specific proverb and specific saying. He bases his thesis on a certain proverb. An inclusive definition is needed to help in strengthening African philosophy.

The second part of this chapter reveal that ubuntu is indeed a way of life. From this the study found that the Tanzanian Philosophy of Ujamaa is the equivalent of ubuntu. This

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<sup>136</sup> O Oyeshile 'On Defining African Philosophy: History, Challenges and Perspectives' (2008) 3 *Humanity & Social Science Journal* 61.

<sup>137</sup> S O Imbo *An Introduction to African Philosophy* (1998) 20.

standing supports the argument that there is an African philosophy(s) that are inherently and uniquely African.

In the following chapter, I examine ubuntu, as it has been interpreted and applied by the South African Constitutional Court in the landmark cases of *S v Makwanyane and another*<sup>138</sup>, *Dikoko v Mokhatla*,<sup>139</sup> and the case of *Port Elizabeth Municipality v Various Occupiers*.<sup>140</sup>

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<sup>138</sup> 1995 (3) SA 391 (CC).

<sup>139</sup> 2006 (6) SA 235 (CC).

<sup>140</sup> 2005 (1) SA 217 (CC).

## Chapter Three: Ubuntu and the Constitutional Court

### 3.1 Introduction

Ubuntu was first introduced into law in the 1994 constitution. However, there is no mention of ubuntu in the 1996 South African Constitution. The absence of ubuntu in the 1996 Constitution has prompted the question if it is Anti-African. Opponents of applying ubuntu to a legal context maintain that since we do not find the word in the Constitution we ought not to talk about it. This argument is based on a false premise, particularly because Section 39 (1) of the Bill of Rights gives us an interpretative theory in this regard. It states that the Constitution should not be read in black and white; it clearly states that when reading the Bill of Rights, values that underlie an open and democratic society based on dignity should be promoted. As ubuntu ethics holds precisely these values, it can be argued that we have a direct way to read the Constitution in the light of African characteristic values. The Constitution invites, and indeed expects, to be interpreted widely, even though it does not use the word ubuntu.

The Constitutional Court, being the highest court when it comes to matters of the Constitution, is the most appropriate court to promote and develop ubuntu because for one reason the Constitutional Court has to uphold the values of the Constitution. The opening clause of the Constitution sets out the foundational values and these clauses are fundamental to the South African democracy. Constitutional Court judges have a duty to develop the concept of ubuntu and apply it in their judgements in order to give it legitimacy. This chapter analyses Constitutional Court judgements to determine how the Court applied ubuntu in three cases, namely *S v Makwanyane*<sup>141</sup>, *Port Elizabeth Municipality v Various Occupiers*<sup>142</sup> and *Dikoko v Mokhatla*.<sup>143</sup> These cases were selected because of the Court's different applications and interpretations of the concept of ubuntu.

While arguing that the South African Constitutional Court is best-positioned to take up the challenge of enshrining ubuntu, it is necessary to also recognise and address standing critiques. Firstly, the philosophy of ubuntu is said to be vague, and is therefore lacking the preciseness required when making decisions. Secondly, the Constitutional Court's application of the principle of ubuntu is in relation to contemporary South Africans. It can be argued that because the philosophy was developed in traditional African communities it cannot be applied or effectively used in contemporary South Africa. This is mainly because

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<sup>141</sup> 1995 (3) SA 391 (CC).

<sup>142</sup> 2005 (1) SA 1268 (CC).

<sup>143</sup> 2006 (6) SA 325 (CC).



the structure of contemporary South Africa and other African countries does not allow for community engagement in the same way that ubuntu desires. The last and probably the most controversial criticism against ubuntu is that it places the community above the individual which is against the values of liberalism.

### 3.2 Criticism of ubuntu as a legal framework

Critics argue ubuntu is too vague a principle to enable effective decision-making,<sup>144</sup> that ubuntu fails to acknowledge the right to individual freedom, and is limited to small-scale culture and does not make allowance for modern industrial societies.<sup>145</sup> Panse as quoted by Mbaya argues that 'ubuntu can lead to conformist behaviour in order to achieve solidarity'<sup>146</sup>. Further, Mbaya argues that South Africa's socio-economic context (rural; semi-rural; semi urban; urban) makes it difficult to live in accordance with the values enshrined in ubuntu. He is of the notion that urban South Africa is propelled by a liberal economic system which indorses individualism and places emphasis on material acquisition which undermines the values of sharing; hospitality and familyhood which are at the core of ubuntu.<sup>147</sup>

In his thorough critique of the *Makwanyane* judgment, Van der Walt point out that the references to ubuntu by the judges of the Constitutional Court range from the most absurd to the rather disingenuous.<sup>148</sup> He is of the view that the judgement lacks jurisprudential rigour and that ubuntu is linked to African morality which does not differ much from Christianity. Madala and Mokgoro say a little more about ubuntu, but their substantiations remain thin and jurisprudentially vague, to say the least.<sup>149</sup> Moreover, the sentiments of humanness, solidarity, personhood, compassion, morality, unity and conformity that they stress, do not as such communicate anything markedly different from the Christian morality that has endorsed capital punishment for almost two thousand years.<sup>150</sup> 'In what respect does the

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<sup>144</sup> Metz 'Ubuntu as a moral theory ad human rights in South Africa' *African Human Rights Law Journal* (2011) 11 533.

<sup>145</sup> Metz Ubuntu as a moral theory ad human rights in South Africa (2011)11 *African Human Rights Law Journal* 534.

<sup>146</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' (2010) 104 *Scriptura Journals* 374.

<sup>147</sup> H Mbaya 'Social Capital and the Imperatives of the concept and life of ubuntu in the South African Context' (2010) 104 *Scriptura* 373.

<sup>148</sup> J Van der Walt 'Vertical Sovereign and horizontal plurality: Normative and existential reflections on the capital punishment jurisprudence articulated in S v Makwanyane' (2005) 20 *South African Public Law Journal* 253.

<sup>149</sup> J Van der Walt 'Vertical Sovereign and horizontal plurality: Normative and existential reflections on the capital punishment jurisprudence articulated in S v Makwanyane' (2005) 20 *South African Public Law Journal* 253.

<sup>150</sup> J Van der Walt 'Vertical Sovereign and horizontal plurality: Normative and existential reflections on the capital punishment jurisprudence articulated in S v Makwanyane' (2005) 20 *South African Public Law Journal* 253.

discourse of ubuntu differ sufficiently from that of Christianity so as to warrant the conclusion that the latter's historical endorsement of capital punishment cannot be reconciled with the former? What does ubuntu tell us about capital punishment that Christian and Kantian morality does not and cannot tell us?'<sup>151</sup>

There is an argument that, in the *Makwanyane* case, only the values of ubuntu and no other religious values were considered in the deliberation on capital punishment, and that the judges arguments rendered ubuntu values equivalent to Western values.<sup>152</sup> 'A rigorous jurisprudence must remain dissatisfied with the feel-good flavour of a jurisprudence that has done little more than to add a local, indigenous and communitarian touch to the Christian, Kantian or Millsian respect for the individual that informs Western jurisprudence. A rigorous jurisprudence would ask more probing questions.'<sup>153</sup> Ubuntu remains a "bloated" concept<sup>154</sup> that can mean all things to all men. It can also be misused in the exercise of power.<sup>155</sup> One of the main problems of ubuntu in jurisprudence is the lack of credible sources that provide for a clear meaning of ubuntu.<sup>156</sup> The critics of ubuntu assert that ubuntu is only used by some of the Constitutional Court judges as a catch-phrase in an attempt to strengthen certain judgments.

The utility of the concept of ubuntu in law has also been the subject of differing scholarly opinions.<sup>157</sup> Ubuntu is ethnophilosophy: 'a value and belief system derived from an African religion; and a religious philosophy that entrenches patriarchal hierarchies, gender inequality, discrimination and the violation of the human dignity of woman, lesbians, homosexuals and others.'<sup>158</sup> Keevy further argues that while ubuntu is generally portrayed as the characteristics of love, caring, sharing and hospitable behaviour of traditional African societies throughout sub-Saharan Africa, societies remain silent about its dark side: the

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<sup>151</sup> J Van der Walt 'Vertical Sovereignty and horizontal plurality: Normative and existential reflections on the capital punishment jurisprudence articulated in *S v Makwanyane*' (2005) 20 *South African Public Law Journal* 253 .

<sup>152</sup> I Keevy 'Ubuntu: Ethnophilosophy and the core Constitutional value(s) Africa' in D Frank (ed) *Ubuntu, Good Faith: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 24.

<sup>153</sup> J Van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) 111.

<sup>154</sup> I J Kroeze 'Doing Things with values II: The case of Ubuntu' (2002) 13 *Stellenbosch Law Review* 260.

<sup>155</sup> R English 'Ubuntu The quest for an indigenous Jurisprudence' (1996) 12 *South African Journal on Human Rights* 641 at 646.

<sup>156</sup> D Cornell and K Van Marle 'Exploring Ubuntu: Tentative reflections' (2005) *African Journal on Human Rights* 198.

<sup>157</sup> D Cornell and K Van Marle 'Exploring Ubuntu: Tentative reflections' (2005) *African Human Rights Journal* 195.

<sup>158</sup> I Keevy 'Ubuntu: Ethnophilosophy and the core Constitutional value(s) Africa' in D Frank (ed) *Ubuntu, Good Faith: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 24.

unpopular truth that certain ubuntu values are not in consonance with the core values of the South African constitution.<sup>159</sup> It promotes communal rights over individual rights.<sup>160</sup>

### 3.3 Meaning of ubuntu *S v Makwanyane*

In this matter, the two accused were convicted in the Witwatersrand Local Division of the Supreme Court on four counts of murder; one count of attempted murder, and a second count of robbery with aggravating circumstances, all of which were committed during a robbery. The Constitutional Court had to deal with the validity of the death penalty.

Six Constitutional Court judges, Chaskalson P,<sup>161</sup> Langa J,<sup>162</sup> Madala J,<sup>163</sup> Mahomed J,<sup>164</sup> Mokgoro J,<sup>165</sup> and Sachs J,<sup>166</sup> referred to ubuntu in their judgment in the *Makwanyane* case. Chaskalson P held that the values of ubuntu require a society to institute or develop means which prevent a crime and not to institute penalties which seek revenge.<sup>167</sup> The death penalty does not serve as a deterrent; the effects of the death penalty affect the whole society. If ubuntu denotes that “I am because we are,” then the killing of a human being hurts not only that human being but the whole community.

Langa made a brave attempt to give meaning to ubuntu. He quoted a passage from the judgment of the Court of Appeal of the Republic of Tanzania *DDP v Pete*<sup>168</sup> which echoed the communitarism of ubuntu.<sup>169</sup> Langa inferred from this passage the rather common place

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<sup>159</sup> I Keevy ‘Ubuntu: Ethnophilosophy and the core Constitutional value(s) Africa’ in D Frank (ed) *Ubuntu, Good Faith: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 24.

<sup>160</sup> S Theron *African Philosophy and the Western Tradition: an essay in self-understanding* (1995) 36 ‘Quite simply, if a person is a person through persons then no one is a person. The closest thing to a person seems to be a tribe. Rather, it says that among the appearances of human beings only those are persons, and thus possesses of the corresponding dignity, who are in a certain relation with others persons, who are not, for example, cut off from the tribe.’

<sup>161</sup> *S v Makwanyane* at para 130 and 131.

<sup>162</sup> *S v Makwanyane* at para 223,224, 225 and 227.

<sup>163</sup> *S v Makwanyane* at para 237,241,243,244,245,250,258 and 260.

<sup>164</sup> *S v Makwanyane* at para 263.

<sup>165</sup> *S v Makwanyane* at para 307,308,309,311and 313.

<sup>166</sup> *S v Makwanyane* at para 374

<sup>167</sup> *S v Makwanyane* at para 131 ‘S v Makwanyane at para130 The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimisation.

<sup>168</sup> *DDP v Pete* 1991 LR 553.

<sup>169</sup> *S v Makwanyane* at para 224 ‘The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the other. In effect, this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa.’

understanding of ubuntu as a cultural principle that turns on or embodies a two-directional respect for communal and individual life of dignity.<sup>170</sup> Life and human dignity are integral to ubuntu. Thus 'heinous crimes' and 'treatment which is inhuman or degrading' are not in line with what ubuntu stands for.<sup>171</sup> Ubuntu recognises a person's status as a human being; a human being entitled to unconditional respect, dignity, value and acceptance from the members of the community she happens to be part of.

Langa's attempt to give meaning to ubuntu does give a clear depiction of what ubuntu is and what it entails. He stated that ubuntu is a cultural concept which places emphasis on 'communality and on interdependence.'<sup>172</sup> He went further to show that ubuntu is a principle which sets out the foundational values of the Constitution, which South Africans consider fundamental to democracy. These values are values of human dignity, life, fundamental freedoms and other rights set out in the Constitution. This opinion gives a clear understanding of what ubuntu entails and the meaning of ubuntu in regards to the unconstitutionality of capital punishment.

Mohamed J, explained ubuntu as the 'expressed ethos of an instinctive capacity for the enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognising their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies it releases both in the givers and the society which they serve and served by'.<sup>173</sup> Additionally, Mokgoro described ubuntu at length, where she translated ubuntu as 'umuntu ngumuntu ngabantu' in an African heritage, and further translated it as 'menswaardigheid' in an Afrikaans cultural heritage. This is an attempt to show the flexibility of ubuntu and that any culture can relate to ubuntu. She described ubuntu as a 'shared value and idea that runs across all cultural lines.'<sup>174</sup> She stated that ubuntu translates to humanness. She equated ubuntu to dignity, and further argued that the right to life and dignity are supported by ubuntu.<sup>175</sup>

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<sup>170</sup> J Van der Walt 'Vertical Sovereignty and horizontal plurality: Normative and existential reflections on the capital punishment jurisprudence articulated in *S v Makwanyane*' (2005) 20 *South African Public Law Journal* 253.

<sup>171</sup> *S v Makwanyane* at para 225.

<sup>172</sup> *S v Makwanyane* at para 224.

<sup>173</sup> *S v Makwanyane* at para 263.

<sup>174</sup> *S v Makwanyane* at para 307.

<sup>175</sup> *S v Makwanyane* at para 313.

Sachs' judgment with regard to ubuntu relied on documented history.<sup>176</sup> He seemed to have conducted a significant amount of research on the topic in comparison to the other judges. In paragraph 376, he referred to the study of Tsonga-speaking people by Henri Funod '...the Bantus possess a strong sense of justice. They believe in social order and in the observance of the laws, and although these laws were not written, they are universal and perfectly well known.' Sachs suggested that this rationality is in accordance with the present Constitution and, remarkably, with ubuntu. Beyond this line of reasoning seemed to be the assumption that ubuntu is indigenous and thus part of the researched systems of law enforcement based on rational procedures in traditional society.<sup>177</sup> In this way, Sachs interpreted ubuntu through these 'systems'.

Sachs argued that 'indigenous' legal systems traditionally contained a form of 'rationality' that is still valuable in jurisprudence. Moreover, Sachs suggested that this rationality is in accordance with the present Constitution and, remarkably, with ubuntu.

The case of *S v Makwanyane* was one of the first cases heard by the Constitutional Court, and was the first case to apply and develop ubuntu. By attempting to develop ubuntu into a constitutional principle, the judges articulated and elaborated on what ubuntu means. Ubuntu is in line with the values that underlie the constitution, it may be hard to define, but is easy to describe and apply.

It is no doubt that ubuntu as an African philosophy is greatly contested. Notwithstanding that ubuntu cannot be neatly defined it should not be denied as an African philosophical way of life. Secondly it must be noted that, despite the fact that ubuntu and Christianity have similar traits one must be wary of equating the two because they are not the same. Thirdly, ubuntu must be viewed and appreciated in the same light as African customary law or what is considered living law.<sup>178</sup> The appreciation that ubuntu is an African philosophy that is living will remove the burden of having to give it a strict definition for as long as the main characteristics are maintained. This will also reiterate the fact that ubuntu as a philosophy is best understood as a way of life and as such will evolve with time and the change of

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<sup>176</sup> *S v Makwanyane* para 374 'The materials that I will refer to point to a source of values entirely consistent with the overall thrust of the President's judgment, and, in particular, with his reference to the constitutionally acknowledged principle of ubuntu.' *S v Makwanyane* para 375 'Our libraries contain a large number of studies by African and other scholars of repute, which delineate in considerable detail how disputes were resolved and punishments meted out in traditional African society.'

<sup>177</sup> *S v Makwanyane* para 376.

<sup>178</sup> R Ozeoman 'Living customary law A Truly Transformative Tool?' *Constitutional Court Review* <http://www.constitutionalcourtreview.co.za/wp-content/uploads/2016/09/Living-Customary-Law-CCR-VI-pd>. Accessed 13 July 2017.

community settings whether it is applied in rural; semi-rural; semi-urban or urban societies in and around Africa and South Africa.

### **3.4 Ubuntu focuses on restorative justice as opposed to retributive justice (*Dikoko v Mokhatla* case)**

The applicant in the case of *Dikoko* sought leave to appeal against the Pretoria High Court decision in which it was found that he had defamed the respondent, Mokhatla. The court ordered the applicant to pay an amount of R110 000 as damages to the respondent. The cause of action arose when the applicant was the Executive Mayor and the respondent was the Chief Executive officer of the Southern District Municipality incorporating the Southern District Council.

*Dikoko* is one of the landmark cases with regard to the application and interpretation of ubuntu by the Constitutional Court. Mokgoro and Sachs dealt with ubuntu at length in this case. The Court stressed that ubuntu emphasises restorative justice rather than retributive justice. Restorative justice concentrates more on healing the victim.<sup>179</sup> Mokgoro stated that the courts, in deciding defamation cases, should concentrate on rebuilding the relationship between parties rather than to punish the defendant by giving him a heavy fine because this results in the relationship being broken further. 'The primary purpose of a compensatory measure is to restore the dignity of the plaintiff who has suffered the damage and not to punish a defendant.'<sup>180</sup> Even the critics of ubuntu agreed that Mokgoro J and Sachs J in this case managed to indicate that ubuntu is inherently restorative in nature and seeks for reconciliation.<sup>181</sup>

Mokgoro J further linked the Roman Dutch remedy of amend honourable whereby a public apology was rendered to a victim in the spirit of ubuntu. She held that:

The focus on monetary compensation diverts attention from two considerations that should be basic to defamation law. The first is that the reparation sought is essentially for injury to one's honour, dignity and reputation, and not to one's pocket. The second is that courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of Ubuntu, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the amend honourable is part of our law or not, our law in this area should be developed in

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<sup>179</sup> M Swart 'Sorry seems to be the hardest word: Apology as a form of symbolic reparation' (2008) 24 *South African Journal of Human Rights* 53.

<sup>180</sup> *Dikoko v Mokhatla* para 68.

<sup>181</sup> I Keevy 'Ubuntu: Ethnophilosophy and the core Constitutional value(s) Africa' in D Frank (ed) *Ubuntu, Good Faith: Flexible Legal Principles in Developing a Contemporary Jurisprudence* (2011) 43.

the light of the values of ubuntu emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social inter-dependence. It is an area where courts should be proactive encouraging apology and mutual understanding wherever possible.<sup>182</sup>

In the paragraph above, Mokgoro stated that the courts should encourage justice in the form of reparation. She further stated that justice should be approached from a reconciliatory perspective rather than a retributive point which should be done by promoting the dignity of the two parties involved, and restoring their relationship to the point it was before the conflict. To a point of common respect for each other and restoration of one's dignity rather than focusing purely on monetary reparation because it is not the person's pocket that was injured but rather their sense of self-worth.

Sachs concurred with Mokgoro, who was of the view that monetary compensation alone is not appropriate relief for defamation and that the courts should explore ubuntu's indigenous values of restorative justice.<sup>183</sup> He suggested a development of defamation law that would rather encourage apology with the aim of reparation than punishment.<sup>184</sup> Sachs went on to elaborate what ubuntu is and explained its constitutional value:

Ubuntu - botho is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture. Historically it was foundational to the spirit of reconciliation and bridge-building that enabled our deeply traumatised society to overcome and transcend the divisions of the past. In present day terms, it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution.<sup>185</sup>

Sachs found ubuntu to be on the same footing with the international concept of restorative justice, which is based on reparative rather than purely punitive principles. He described key elements of restorative justice as 'encounter, reparation, reintegration and participation,' and

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<sup>182</sup> *Dikoko v Mokhatla* at para 69.

<sup>183</sup> *Dikoko v Mokhatla* at para 112 'What is called for is greater scope and encouragement for enabling the reparative value of retraction and apology to be introduced into the proceedings. In jurisprudential terms, this would necessitate reconceiving the available remedies so as to focus more on the human and less on the patrimonial dimensions of the problem. The principal goal should be repair rather than punishment. To achieve this objective requires making greater allowance in defamation proceedings for acknowledging the constitutional values of ubuntu—botho.'

<sup>184</sup> K Van Marle 'Laughter, Refusal, Friendship: Thoughts on a Jurisprudence of Generosity' *Stellenbosch Law Review* 2007 1 205.

<sup>185</sup> *Dikoko v Mokhatla* at para 113.

stated that they harmonise well with the process of traditional processes of dispute resolution, and documented history proves this.

During the reign of King Moshoeshoe 1 the founder of the Basotho nation, famine became so bad that humans started hunting for humans. King Moshoeshoe's grandfather was murdered by cannibals. Instead of imposing capital punishment on the perpetrators, King Moshoeshoe welcomed them to his nation. He was of the view that capital punishment would not prevent cannibalism as it would not induce those still roaming in the wild to re-join society.

A traditional ceremony was held for these cannibals and an ox was slaughtered for their cleansing ceremony.<sup>186</sup> This process is parallel to the analysis of Bekker of the *Dikoko* judgment, the victims and the offender were given an opportunity to talk about the hurt done and to find a way to get along in future, Moshoeshoe focused on repairing the harm caused rather than punishment. He contended that since the cannibals had eaten his grandfather they had become a symbolic grave for this grandfather.<sup>187</sup> He integrated them in the society by giving them mafisa cattle and land encouraging them to grow their own food and forsake cannibalism and ensured participation by integrating them in his nation.

Most cultures have used some form of restorative justice as a method of resolving conflicts and harm. Restorative justice is considered as being an old and new concept. 'The more I learn about restorative justice, the more I realise that it is not new, but the most ancient and prevalent approach in the world to resolve harm and conflict.'<sup>188</sup> The legal systems that form the foundation of Western law did not view crime simply as a wrong to society.<sup>189</sup> Although crime breached the common welfare so that the community had an interest in-and responsibility for- addressing the wrong and punishing the offender, the offence was not defined solely as a crime against the state, as it is today. Instead, it was also considered an offence against the victim and the victim's family. Offenders and their families were required to settle accounts with victims and their families in order to avoid cycles of revenge and violence.

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<sup>186</sup> LN Mahao 'O se re ho morwa 'morwatowe! African jurisprudence exhumed' (2010) 371 *XLIII Comparative and International Law Journal of South Africa* 331.

<sup>187</sup> LN Mahao 'O se re ho morwa 'morwatowe! African jurisprudence exhumed' (2010) 371 *XLIII Comparative and International Law Journal of South Africa* 331.

<sup>188</sup> M Liebmann *Restorative Justice and how it works* (2007) 37.

<sup>189</sup> V Ness and Strong *Restoring Justice: An Introduction to Restorative Justice* (2006) 7.



Sachs contended that even though restorative justice has been applied in criminal law and especially with reference to child justice, it should not be limited to this field only, rather it should be developed to fit other spheres of the law. He went on to state that although 'ubuntu and amend honourable are expressed in different languages intrinsic to separate legal cultures they share the same philosophy and goal.'<sup>190</sup> Both are directed towards promoting face to face encounter between parties as to facilitate resolution in the public of their differences and the restoration of harmony in the community.

He further submitted that trial courts should promote the spirit of ubuntu and shift away from the concept of quantum of damages with regard to defamation cases. He was of the view that if this is not done parties will remain discouraged to sort their issues on their own and will always go to court for a relief. Courts should shift their emphasis from quantum to reparatory. He concluded:

What is needed, then, is more flexibility and innovation concerning the relation between apology and money awards. A good beginning for achieving greater remedial suppleness might well be to seek out the points of overlap between ubuntu – botho and the amend honourable, the first providing a new spirit, the second a time-honoured legal format. Whatever innovatory modalities are employed, and however significant to the outcome the facts will have to be in each particular case, the fuller the range of remedial options available the more likely will justice be done between the parties. And the greater the prospect of realising the more humane society envisaged by the Constitution.<sup>191</sup>

In *Dikoko v Mokhatla* the court applied ubuntu as a constitutional value and showed clearly how it fits into our legal system. Mokgoro and Sachs emphasised that in ubuntu, restorative justice is paramount.

### **3.5 Ubuntu and interdependence (*Port Elizabeth Municipality v Various Occupiers* case)**

The applicant in this matter was the *Port Elizabeth Municipality* which sought an eviction order against 68 people, including 23 children, who erected approximately 29 shacks on privately owned property. The municipality responded to a petition signed by 1 600 people living in the neighbourhood, including the owners of the property, to have these shacks removed. At the time that the proceedings were instituted the occupiers had been living for periods ranging from two to eight years on the property. The occupiers indicated they were

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<sup>190</sup> *Dikoko v Mokhatla* at para 116.

<sup>191</sup> *Dikoko v Mokhatla* at para 121.

willing to leave the property if they were given reasonable notice and provided with suitable alternative land on to which they could move.

In this case, Sachs J made reference to ubuntu in his judgment, he linked ubuntu to the Prevention of Illegal Evictions (PIE) Act.<sup>192</sup> The PIE Act repealed by the Prevention of Illegal Squatting Act (PISA)<sup>193</sup> which gave land owners unlimited rights to evict occupants. The PIE Act was introduced to prevent illegal and unreasonable evictions. It promotes the spirit of ubuntu in the same way ubuntu spreads through the whole constitution, the constitution that recognises both individual and group rights.

In paragraph 18 Sachs portray the true essences of ubuntu.<sup>194</sup> The understanding that 'it is not only the dignity of the poor...' it is distinctive to the philosophy of ubuntu. The community is not an overbearing entity existing outside the individual that seeks automatic priority over all individual interests. Cornell and Van Marle held the same opinion:<sup>195</sup>

'For what is at stake here is the process of becoming a person or, more strongly put, how one is given the chance to become a person at all. The community is not something 'outside' some static entity that stands against individuals. The community is only as it is continuously brought into being by those who 'make it up.' The community then is always being formed through an ethic of being with others, and this is in turn evaluated by how it empowers people.'

Human interdependence in an African society relates to group solidarity, an individual cannot exist outside the community. In *Port Elizabeth Municipality v Various Occupiers* the court articulated that ubuntu means group solidarity. It is a concept which is deeply rooted in African culture. Africans have interdependent relations, and therefore the courts have to balance the rights of all involved and reach an equitable judgement and promote the harmony of the society.

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<sup>192</sup> *Port Elizabeth Municipality v Various Occupiers* at para 37 '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, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'

<sup>193</sup> 52 of 1951.

<sup>194</sup> 'It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual.'

<sup>195</sup> D Cornell and K Van Marle 'Exploring Ubuntu: Tentative reflections' (2005) *African Human Rights Law Journal* 195.

This is also supported by Madala J in the Makwanyane case where he mentioned the preamble of the Constitution and its reference to ubuntu, he commented that ubuntu permeates the constitution generally and more particularly, chapter three, which deals with fundamental rights. According to Madala J ubuntu is associated with ‘ideas of humanness, social justice and fairness’.<sup>196</sup> He further stated that the death penalty does not allow for the possibility of rehabilitation of a convicted person and thus is not in line with the concept of ubuntu.<sup>197</sup> ‘Ubuntu calls for the balancing of the interests of the society against those of the individual, for maintenance of law and order, but not for the dehumanising and degrading individual, and this shows the essence of ubuntu.’<sup>198</sup> He further stated that the courts have managed to use ubuntu in a positive way to show that even though people may engage in criminal activities they are still members of the society and are capable of being rehabilitated.

He concluded by stating that the death penalty does not belong in a society governed by a Constitution which has ubuntu as its underlying principle.<sup>199</sup>

### **3.6 Conclusion**

This chapter highlighted how ubuntu has been applied and interpreted by the Constitutional Court. The study focused on three landmark judgements by the courts namely *S v Makwanyane*; *Port Elizabeth Municipality v Various Occupiers* and *Dikoko v Mokhatla*. This chapter provided a brief overview of the facts of each of the respective cases, and the manner in which the Court interpreted the philosophy of ubuntu when arriving at their decision.

The core components of ubuntu in the cases discussed above are the meaning of ubuntu, interdependence, group solidarity, restorative justice, life and human dignity. The manner in which the Constitutional Court has advanced the philosophy of ubuntu also dismisses the criticism that it (ubuntu) lacks a decisive definition in order to meet the preciseness required when making court decision. In *Port Elizabeth Municipality* the court showed that a harm done to another affects the whole community. It re-iterated that ‘motho ke motho ka batho’, which literally translates to a person is a person through others.

The Constitutional Court further in *Dikoko* has shown that ubuntu and restorative justice can be used in contemporary South Africa. The two people involved in the case were high ranking members in the municipality, people who are fairly educated and live in urban areas.

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<sup>196</sup> *S v Makwanyane* at para 237.

<sup>197</sup> *S v Makwanyane* at para 241.

<sup>198</sup> *S v Makwanyane* at para 250.

<sup>199</sup> *S v Makwanyane* at para 260.

The court in using restorative justice and promoting it was responding to the critique that ubuntu is a concept that cannot be applied in the current South Africa. Ubuntu with its emphasis on restoration promotes reconciliation which is at the heart of the ethos of the Constitution. Recently and often the South African courts especially when it comes to matters involving a child move away from retributive justice and promotes restorative justice through the Child Justice Act of 2008. The spirit of the 2008 Children's act advocates for rehabilitation of the children who find themselves at odds with the law and not for punitive measure.

Albeit that there has been progressive interpretations and applications of ubuntu by other courts in South Africa, there remains a need to conduct continuous research and develop ubuntu further. Academics and judges who are committed to ubuntu as constitutional principle and as a legal principle should pay more attention to the question of how the principle should be interpreted. Judges in their judgments should attempt to make specific reference to elements of indigenous law and ubuntu.

## Chapter Four: Conclusion

This study sought to engage and interrogate the broad problem of African Philosophy, particularly whether ubuntu can be regarded as a philosophical way of living among most African societies. Providing an answer to this question is primarily important because ubuntu has been subject to heavy criticism from scholars and academics who follow the universalist school of thinking. It should be noted that through the study ubuntu is written in lowercase and not in italics in hope to normalise the term and remove it from the realms of a concept which is used by scholars of philosophy to describe a practice by the 'other'.

Before engaging with the criticism that hails over ubuntu the first chapter of this study set out the assumption that this study is premised on. Namely, that ubuntu is a contested concept with the realms of philosophy. Secondly that ubuntu is subject to much criticism. The criticism as outlined in the course of the study include; the lack of a strict definition of ubuntu makes it vague and does not pass the preciseness required in order to make court decision. Secondly that the application of ubuntu is limited to small scale communities and further that the concept cannot be applied in urban as well as semi urban parts of South Africa. Thirdly, that ubuntu places the communities interest above the interest of the individual and as such challenges the liberal value of individualism. The assumption that this study was premised on was that the South African courts have made an effort to develop ubuntu. These assumptions are what guided this study. Throughout the course of the paper I engaged with these assumptions, either proving or challenging them in order to make the argument that ubuntu is indeed a unique way of life that is inherently African.

Chapter two of this study begins by providing an explanation or working definition to African philosophy and ubuntu. This is also done in order to gain a thorough understanding of African philosophy before putting forward the argument – that ubuntu is truly a way of life that is inherently and uniquely African. From research, we learn that African philosophy emphasises the style of life, experiences and values of African societies.<sup>200</sup>

Chapter two subsequently puts forward the two school of thoughts on African philosophy the traditional approach and the universalist view or approach. African philosophy.

Having unpacked the two schools of approaches, the chapter two looks at ubuntu alongside ujamaa a philosophy of brotherhood and socialism which is derived from Tanzanian President Julius Nyerere. From the onset, it must be bore in mind that the study does not

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<sup>200</sup> Wiredu as cited by D Kapgagawani 'What is African Philosophy' in Coetzee & Roux (eds) *Philosophy from Africa* (2000) 86.

bring ujamaa into play in order to evaluate whether it was successful in its implementation as a means for social economic reform as sought by President Nyerere. The comparison between ubuntu and ujamaa is not done in order to establish which philosophy is superior but to illustrate the similarities of the two philosophies and ultimately to argue that ubuntu is not the only African philosophy which is found on the African continent. The main findings in this chapter is that indeed ubuntu is a way of life and an African philosophy.

Chapter three sought not only to discuss how the constitutional court interpreted and applied ubuntu, it also challenged the critique that ubuntu is vague and lacks the preciseness required when making decision in court matters. This chapter also how some of the values that underpin ubuntu are not limited to small scale communities but that they find application even in the diverse geo-socio-economic setting of South Africa.

It also sought to outline some of the criticisms that have been levelled against ubuntu. This is done in order to challenge them as well illustrate that although they raise critical questions there are answers to the doubts that have arisen about ubuntu. In addressing the first criticism that ubuntu is vague and lacks the preciseness required when making court decision, I argue that ubuntu should not be confined to a strict definition as this would narrow the scope and application of ubuntu. I argue further, that ubuntu is a way of life and must be understood as.

Having argued that ubuntu is indeed a philosophical way of life that is uniquely and inherently African the study looks at some constitutional court cases where ubuntu was applied.

The Constitutional Court has used an interpretative framework to develop and apply ubuntu in its jurisprudence. It is contended in this study that the Court has addressed most of the criticisms levelled against ubuntu. The court has shown that ubuntu can be applied in contemporary South Africa and that the concept of restorative justice is closer to the spirit of the Constitution than retributive justice. The aim of the court should be to heal the relationships which have broken down rather than to impose punitive measures. Jurisprudence guided by the values of Ubuntu could contribute to the broader South African society by challenging an over emphasis on the individual.

Ubuntu is philosophy of life and it is central to African philosophy. Ubuntu is a suitable interpretative lens of the law and the South Africa constitution. The courts in applying the law they should strive to develop ubuntu as a constitutional principle. The cases discussed in this paper support the argument that ubuntu is capable of promoting both individual rights and group rights.

Drucilla Cornell in her Inaugural lecture quoted Justice Mkgoro and stated that even though the critics of ubuntu claim that the fact that the word ubuntu is not included in the 1996 constitution ubuntu should not be developed into a constitutional principle. 'Yet Justice Mokgoro herself, whilst questioning the ethical and political wisdom of removing ubuntu from the 1996 Constitution has also argued that, as the African principle of transcendence, it is the spirit that underlies the entire Constitution and should indeed direct the Constitutional Court when dealing with the complex issues raised by the reality of legal plurality in South Africa, and how customary law and the values and ideals it represents should be respected in accordance with dignity'.<sup>201</sup>

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<sup>201</sup> Inaugural lecture by Drucilla Cornell Department of Private Law Faculty of Law 10 September 2008.

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