

## **MND 800 – Mini-Dissertation**

**Conquest and Nature: The Ecology of the South African Legal Order**



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# 1. Introduction

A protracted history of conquest, colonialism and apartheid have undoubtedly adversely affected the legal, social, political, ethical, and economic frameworks in contemporary South Africa. As such, the country's responses to and capacity to respond to problems within agricultural industry and environmental sustainability are rendered as rather meagre. This jaded past has also rendered the infusion of historically suppressed Indigenous knowledge into various dimensions of the modern South Africa as legally irrelevant, continuing the historical and colonial trend of under-acknowledgement. With neo-liberalised<sup>1</sup> capitalism<sup>2</sup> and liberal democratic values being subsumed into modern South African legal and ethical functions, culture and thought, African philosophical frameworks promoting conceptions of relational harmony with one another, and the society-nature relationship<sup>3</sup> have been ignored or inadequately incorporated into various facets of the country's organisation. African philosophies such as *Ubuntu* reject frameworks positing a dualistic human-nature relationship and socially and culturally obligate its protection.

Considering the above, this study takes a multidisciplinary/intersectional and critical/jurisprudential approach in aim of scrutinizing the historical underpinnings of South Africa's current legal framework through the lens of agricultural industry, climate justice and environmental sustainability. Through this, the study contains the ardent intention of highlighting how South Africa's history of conquest has hindered climate justice, the law, as well as the development and incorporation of African knowledge systems and agroecological approaches to agriculture and environmental stewardship. As such, improper, capitalistic, Western, and predatory environmental practices can adversely affect human (and more than human) rights *en masse*. It is

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<sup>1</sup> See: A Hudson 'Law as capitalist technique' (2018) 29 *KLJ* 58-87. This notion will be explained in more detail in the discussion of the neoliberal capital influence behind environmental and agricultural practices in Sections 2.1.2, 2.1.3 and 3.3.3.2.

<sup>2</sup> See: DM Trubek 'Max Weber on law and the rise of capitalism' (2007) 3 *DGVLR* 151. This notion will also be explicated further in this paper's explanation on Marx's metabolic rift theory in Section 2.2.3.

<sup>3</sup> See: KK Kerry & L Sealey-Huggins 'Racial capitalism and climate justice: White redemptive power and the uneven geographies of eco-imperial crisis' (2023) 145 *Geoforum* 1-7. This notion will be explicated later in this paper in Section 2.2.3.

important to note that environmental decimation and climate change can affect an abundance of human rights with an incredibly broad stroke, especially the human rights of the most marginalised.

## 1.1 Motivation of the Study

As a member of the Community of Life<sup>4</sup> of all living things, one cannot sit idly by while climate justice is not afforded to all others within such Community. Furthermore, the vast, already observed and otherwise underacknowledged adverse effects of climate change and *mala fide* agro-industrial practices pose a threat to all, with the power to effect so many living beings altogether. Considering the above, this study is motivated by the urgency of the environmental and agricultural crises, and by the quest for environmental justice and emancipation through the codification, realisation, and implementation of historically snubbed African ways of knowing and being.<sup>5</sup> These indigenous African modalities of knowing and being prescribe both the protection of the Community of Life<sup>6</sup> and care for one another. Importantly, the Earth and other life also constitute 'one' and 'another' for the attainment of a state of Communal harmony.

## 1.2 Problem Statement/Research Problem

The results of a century-long escapade of a cycle of conquest, subjugation, dominance, and exploitation of Africa by white Euro-Western conquerors have undoubtedly infiltrated a plethora of fields within contemporary South Africa. This historical conquest was tied to the "paradigm of difference"<sup>7</sup> or "exotic prism"<sup>8</sup> which was a lens through which white Euro Westerners refracted falsities of African identity, religion, history, and philosophy. From these stemmed forced assertions of Eurocentric

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<sup>4</sup> Encompassing the invisible and visible elements that make up the living world.

<sup>5</sup> Also referred to as '*gnosis*' which is the common Greek noun for knowledge.

<sup>6</sup> Extended to humans, animals, plants, microbial life, and nature (including mountains, streams and minerals).

<sup>7</sup> J Parker & R Rathbone *African History: A Very Short Introduction* (2007) 3. This was an exotic prism through which outsiders, mostly Europeans, refracted images of themselves and the African 'other' to create divisions.

<sup>8</sup> Parker & Rathbone (n7 above) 3.

history writing and universally advanced distortions of both the African and the idea of Africa, with such Euro Western refractions alluding to the notorious conquerors behaviour of casting an amalgam of obfuscating lines to enact their rationalisation of violent subjugation. The complexities and problematics of this violent history emerge in critical contemplation of the current South African legal order which holds covert permutations of historical power structures which taint the country's social, legal, agricultural, and industrial culture.

The achievement of climate justice requires a confrontation with South Africa's history of conquest, colonialism, and imperialism<sup>9</sup> and, as such, decolonisation and underrepresented African knowledge contemplation and upliftment is required in the environmental space for the resolution of pressing climate crises.

### **1.3 Research Aims**

1. To demonstrate how South Africa's protracted history of conquest, colonialism and apartheid have shaped our contemporary understanding of human-nature relationships and their expressions in the South African legal/jurisprudential order.
2. To investigate, against the backdrop of Western and colonial frameworks, how African Indigenous knowledge can offer more just alternatives for future environmental treatment and harmonious human-nature relationships.
3. To conceptualise a contemporary *Ubuntu* philosophy apropos an environmental ethics based on restoring sustainable human-nature practices and knowledge production and dissemination.

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<sup>9</sup> J Murphy 'Environment and imperialism: why colonialism still matters' (2009) 20 *SRI* 4.

## 1.4 Literature Review

As a starting point to this study's literature review, a critical legal and historical analysis of the conquest and colonialism perpetrated in South Africa will be embarked upon. Thus, this part of the literature review will be devoted to the literature that offers such historical lens and conveys the precarious underpinnings of South Africa's current legal order. When looking to South Africa's history of conquest, it is understood through the works of Dladla that there exists a "history of conquest as well as the conquest of history".<sup>10</sup> First, various literature will be used to contextualise conquest itself and second, various literature will be used to convey the evolution of the rationalisation for conquest by the conqueror, and how these tainted the image of the African even in modernity. Winter describes the Hobbesian derivation of conquest as discharging a definition that is two-fold. Conquest, here, is victory itself in addition to acquisition through the victory of a right over "the persons of men".<sup>11</sup>

The works of Ramose will be key in providing a succinct review of the evolution of how violent conquest and subjugation was rationalised by conquerors. Firstly, and through the lens of reason and unreason, the African was denied humanity through being deemed as an irrational animal with unreason.<sup>12</sup> Secondly, conquerors differentiated between barbarism and civilisation with Africans in their view being unable to grasp the complexities known to conquerors as civilisation and as such, Africans could be deemed simply as barbarians.<sup>13</sup> This differentiation lends itself to what Winter refers to as a justification for conquest in the aim of protecting the innocent and civilised from the African barbarian.<sup>14</sup> Through Ramose's works the next line is cast, that being a line of religious differentiation whereby Euro-Western and Christian absolutism was deemed to unseat all other metaphysical gods and make a distinction between Euro-Western "fidels"<sup>15</sup> and African "infidels".<sup>16</sup> Ramose alludes to the last obfuscating line

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<sup>10</sup> N Dladla 'The liberation of history and the end of South Africa: some notes towards and Azanian historiography in Africa, South' (2018) 34 *SAJHR* 415-416.

<sup>11</sup> Y Winter 'Conquest' *Political Concepts: A Critical Lexicon* (2011).

<sup>12</sup> M Ramose 'Historic Titles in Law' in Coetzee & Roux (eds.) *The African Philosophy Reader* (2003) 544.

<sup>13</sup> Ramose (n12 above) 545.

<sup>14</sup> Winter (n11 above).

<sup>15</sup> Ramose (n12 above) 547.

<sup>16</sup> Ramose (n12 above) 547.

of differentiation as emerging from the contrast between just and unjust wars or *ius ad bellum* and *ius ad bello*.<sup>17</sup> The works of Nuzzo will add to this last line in alluding to the contradiction of principles of diplomacy and *territorium nullius* which were used differently within European territorial expansion in their own land and in Africa.<sup>18</sup>

After having placed South Africa against its historical and conquest-based backdrop, the lasting effects of such history in the areas of contemporary climate justice and environmentalism will be contemplated. The work of Murphy lays a good foundation for such contemplation by conveying how colonial legacies construct contemporary environmental issues, how imperialism moves through the environment in the current day, and how a deeper understanding of the swift-approaching environmental crises requires a confrontation with imperialism.<sup>19</sup> This lends to Whyte's diversely supported sentiments that settler colonial domination is a "violence that disrupts human relationships with the earth".<sup>20</sup> Whyte's writings will add an element of multi-disciplinarity to this study as such work relies upon the Anishinaabe intellectual tradition, emerging from the indigenous peoples of the great lakes region.<sup>21</sup> Salmon's writings will also add a comparative and multidisciplinary dimension to this study. Salmon posits *kincentric ecology* stemming from indigenous peoples of North America which, like ways of understanding through *Ubuntu*, view life in an environment as viable only when life in such environment is viewed as 'kin' (constituted by all natural elements surrounding).<sup>22</sup> In essence, Salmon posits indigenous manifestations of *kincentric ecology* as tantamount to preserving ecosystems,<sup>23</sup> a sentiment which this study aims to levy regarding *Ubuntu* as a solution to addressing environmental catastrophe and malpractice while thwarting snubbed indigenous knowledge and modes of thinking into common parlance and practice.

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<sup>17</sup> Ramose (n12 above) 547.

<sup>18</sup> L Nuzzo 'Territory, Sovereignty, and the Construction of the Colonial Space' in Koskenniemi *et al* (eds.) *International Law and Empire: Historical Explorations* (2017) 263-264.

<sup>19</sup> J Murphy 'Environment and imperialism: why colonialism still matters' (2009) 20 *SRI* 4.

<sup>20</sup> K Whyte 'Settler Colonialism, Ecology and Environmental Injustice' (2018) *Environment and Society* 125.

<sup>21</sup> Whyte (n20 above) 131.

<sup>22</sup> E Salmon 'Kincentric Ecology: Indigenous Perceptions of the Human-Nature Relationship' (2000) 10 *Ecological Applications* 1327.

<sup>23</sup> Salmon (n22 above) 1332.

Tantamount to this study's central investigation is the South African philosophy of *Ubuntu*, and thus conceptualizing such philosophy for the purpose of paving a way forward is vital. The writings of Ramose provide for an apt starting point for such conceptualization. Ramose alludes to a restoration of *Ubuntu* via the African aphorism of *motho ke motho ka batho*, which is a Sotho proverb affirming that recognition of one's own humanity requires the recognition of the humanity of others, and the subsequent humane relationship with others.<sup>24</sup> Humaneness here, is conceptualized as the complex and multi-layered ecosophical interaction of all entities in the universe.<sup>25</sup> 'Humaneness' is important as it refers to the polite and respectful treatment of other human beings as the regulative principle of wholeness underpinning *Ubuntu*, and that renders an individual incomplete without the other individual.<sup>26</sup> 'Wholeness' here is also vital as it essentially extends this relational humaneness of human beings to their "physical or objective nature".<sup>27</sup> With this principle of wholeness involving the interdependence of human beings and the nature around them, Ramose conveys that to care for one another is to fulfil the duty of caring for the environment as well.<sup>28</sup>

With the above sentiments which *Ubuntu* exudes, it becomes quite stark that it is not a principle fundamental to all areas of South African society. Le Grange will be contemplated in tandem with the above as Le Grange alludes to the erosion of society, the self and nature through South Africa's retention of capitalism and history of colonialism, conquest and apartheid.<sup>29</sup> Le Grange uses *Ubuntu* as an educational framework aimed at healing the self to transversally heal society and nature.<sup>30</sup> This study will extend such framework of *Ubuntu* 'healing society' to legal education and agro-industrial practices for the purposes of solving the inability of South African law and legal culture in addressing environmental and agro-industrial catastrophe. *Ubuntu* as an educational framework, here, could salve the 'self' to which Le Grange refers to,

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<sup>24</sup> M Ramose 'Ecology Through Ubuntu' in Meinhold (ed) *Environmental Values* (2015) 70.

<sup>25</sup> Ramose (n24 above) 69.

<sup>26</sup> Ramose (n24 above) 70.

<sup>27</sup> Ramose (n24 above) 70.

<sup>28</sup> Ramose (n24 above) 70.

<sup>29</sup> L Le Grange 'Ubuntu, Ukama and the Healing of Nature, Self and Society' (2012) 44 *Education Philosophy and Theory* 56.

<sup>30</sup> Le Grange (n29 above) 56-57.

thus changing social and cultural norms and practices in South Africa to be more aligned with Ramose's notion of caring for the individual as commensurate to caring for the environment surrounding the individual.

## 1.5 Methodology

This research will make use of the Desktop Method of research which entails writing, followed by thinking and subsequent re-reading and re-writing in contemplation of a multitude of online source databases in tandem with primary and secondary sources. In essence, this method allows for this study to posit its interpretations of close reading of various texts. Furthermore, this research will be qualitative as it involves the collection and analysis of data, the development and modification of theory, the elaboration of research aims and the identification of threats to the validity of the study.<sup>31</sup> In line with qualitative research methods, this study will carry the aim of being reflexive in its research process throughout all stages of such research.<sup>32</sup>

## 1.6 Theoretical Framework

Since the research problem which this study will gauge is incredibly broad and intersectional, a brief summary of the theories relied upon by this study shall be enunciated, with most being branches of Critical theory. By way of the assertions that achieving climate justice requires a confrontation with South Africa's history of conquest, colonialism, and imperialism,<sup>33</sup> a critical decolonial framework will underpin all other theoretical frameworks of this study. This is primarily as decoloniality intends on "rolling back the mechanisms of coloniality"<sup>34</sup> and western intellectual hegemony. Through this overarching lens of decoloniality, emerges a complementary theoretical

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<sup>31</sup> L Brickman & DJ Rog *The SAGE handbook of Applied Social Research Methods* (2008) 215.

<sup>32</sup> Brickman *et al* (n31 above) 214.

<sup>33</sup> Murphy (n19 above) 4.

<sup>34</sup> JO Chimakonam & LU Ogbonnaya *African Metaphysics, Epistemology, and a New Logic* (2021) 1.

framework upon which this study shall rely, that being critical legal theory. Critical contemplation of the South African Constitution's internal and external limitations will lend to truly understanding the extent of locating the problem of agro-industrial and legal environmental culture. This study will also be critical of South Africa's legal disparity between recognised customary law in the South African Constitution, and the actual regulation of customary practice as alluded to through the *Gongqose v Minister of Agriculture, Forestry and Fisheries*<sup>35</sup> case.<sup>36</sup> In tandem with critical contemplation of the law will be a comparative law approach, entailing the comparison of regional and international law standards and conventions surrounding current legal operationalisation regarding environmental protection and climate justice law to South Africa's homegrown legal and environmental imagination and construction.

Apart from the varieties of Critical theory relied upon above, this study will rely heavily upon a historical approach to ensure that the study itself is correctly, critically, and historically grounded for the purposes of linking South Africa's historical events and continuations to current legal improprieties. Furthermore, this study will lean on a modern derivation of the Marxian metabolic rift theory, which is a social, historical, and ecological concept conveying a rupture in human-nature relations due to the disruption of natural processes under capitalism.<sup>37</sup> Essentially, this theory centres historicism, labour practices and ecological processes to prove an epistemic and ontological rift under capitalism.

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<sup>35</sup> *Gongqose and Others v Minister of Agriculture, Forestry and Others* 2018 3 All SA 307 (SCA).

<sup>36</sup> L Monyamane & MP Bapela 'Gonhqose v Minister of Agriculture, Forestry and Fisheries – A Tale of Customary Rituals and Practices in Marine Protected Areas' (2019) 22 *PELJ*.

<sup>37</sup> M Schneider & P McMichael 'Deepening and repairing, the metabolic rift' (2010) 37 *JPS* 461.

## **2. History, the Law, and their Discontents**

Given that the law is intrinsic to contemporary institutional, ethical, and social frameworks, a comprehensive exploration into prevailing environmental legislation and development approaches in South Africa necessitates the consideration of its political economy. In this regard, the law serves as an instrument facilitating such colonially tethered contemporary political economy, and this paper's integrated analysis. Furthermore, the inquiry above is predicated upon a rigid contemplation of South Africa's violent history, dubious Western historiography, and the political, economic, and philosophical underpinnings of the country's contemporary legal order. The primary objective of this chapter is to unveil how colonial and apartheid modes of power, as underpinned by Western philosophical, political, and economic foundations, have penetrated contemporary legal institutions and discourse. This process has resulted in a significant epistemic and ontological rift betwixt the contemporary South African human-nature relationship. In tandem with this aim, this chapter intends to link South Africa's current and precarious environmental ethics and legal arrangements with the subsummation of capitalism, and *mala fide* and anthropocentric agro-industrial and environmental approaches. Such approaches have ostensibly perpetuated a continuation of the historical themes of suppression of Indigenous ontological and epistemological modalities which promote values that, in the context of this dissertation, mandate harmonious synergy between the interconnected self, society (community) and the natural environment.

### **2.1. South Africa's Tempestuous History and the Law**

Contemplation of South Africa's contemporary legal order and constitution undoubtedly necessitates an elucidation of the country's history of violent and racialised subjugation. This notion owes to the fact that such historical backdrop is characterised by colonialism, apartheid, and eventual independence, all of which involved a transfer of legal institutions and laws. This transfer also involved political, economic, and philosophical streams and influences transmitted among distinct

societies. These societies maintained distinct systems of knowledge or epistemologies, and distinct belief frameworks or ontologies. Additionally, these societies possessed distinct legal, social, economic, philosophical, and ethical guiding systems. It is important to note that, as per Allot, notions of the law and its practice as estranged from indigenous Africans until the advent of colonisation manifest as indefensible.<sup>38</sup> In the same vein, M'Baye conveys that indigenous African systems saw organisation rooted in their indigenous conception of the law and that such notion exists through a myriad of evidentiary information.<sup>39</sup> A sound historical inquiry thus facilitates the grounding of the various historical influences permeating through the modern South African legal dispensation and which, as this paper intends to convey, are core to failures in salving the injustices of history and environmental injustices of the present. In essence, this section will unravel how the historical obfuscations buttressing conquest have influenced contemporary South African law and political economy, among other areas. These influences perpetuate the contemporary overriding of indigenous African epistemology, ontology, sovereignty, ecology, and liberation.<sup>40</sup>

### **2.1.1 The History and Philosophy of the Conqueror**

To embark on this historical inquiry, vexing Western history writing and the myriad of other Western legal and non-legal rationalisations and justifications for conquest will serve as the starting point of this section. Moreover, emphasis must be placed upon the complexities core to Western teleological and utilitarian loading of South Africa's history, otherwise known as the "longue durée"<sup>41</sup> of history. This Western application of history is rooted in Western historiography, or history writing, which served to platform rationalisations for conquest and manifested through what Dladla designates as the "history of conquest as well as the conquest of history".<sup>42</sup> Concretising Dladla's

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<sup>38</sup> AN Allot *Essays in African Law* (1960) 13.

<sup>39</sup> K M'Baye 'VII. The African Conception of Law' in Drobnič *et al* (eds) *International Encyclopaedia of Comparative Law Online* (2018) 138.

<sup>40</sup> Liberation here extends to emancipation from colonially influenced environmental and agricultural practices for the entirety of South Africa.

<sup>41</sup> J Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34 *SAJHR* 300.

<sup>42</sup> Dladla (n10 above) 415-416.

notion, Ndlovu-Gatsheni aptly strips Eurocentric and Western historiography down through the notion that conquest was “founded on theft of history”.<sup>43</sup> Western falsehoods regarding Africa and its peoples are umbilically linked to what Parker *et al* refer to as the popular Eurocentric belief Africa did not hold a “historical consciousness”.<sup>44</sup> These falsehoods regarding African history, but also philosophy, religion and identity, were disseminated through what Parker and Rathbone dub as the “exotic prism”<sup>45</sup> or “paradigm of difference”.<sup>46</sup> This prism facilitated the refractions of white and Euro-Western universalist societal anxieties out upon indigenous African peoples. By way of this, and as key to rationalising conquest, Indigenous African peoples were ‘othered’ through a multi-dimensional irruption of dehumanising, derogatory and racialised aspersions and discourse.

Parker and Rathbone designate the differential and inimical discourse above as the Euro-Western “invention of Africa”.<sup>47</sup> This designation provides a foundation for the justifications and rationalisations conducive to the legitimisation of colonial conquest. Flowing from the conqueror’s invention of Africa is the classification of conquest as a “civilising mission”.<sup>48</sup> To embark upon this ‘civilising’ inquisition, the African was othered through an arbitrary obfuscation of reason and unreason. Through this obfuscation, African indigenous peoples were denied humanity via being construed as irrational animals with unreason.<sup>49</sup> This, in tandem with Euro Western notions of an Africa void of historical consciousness, allowed for pre-colonial indigenous philosophies to be characterised as “ethnophilosophy”.<sup>50</sup> This was essentially a conquest-based prescription which eschewed such philosophies as pseudo-philosophy.<sup>51</sup> This manifests by way of McDonald’s conveyance of Euro Western and

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<sup>43</sup> SJ Ndlovu-Gatsheni, ‘Genealogies of Coloniality and Implications for Africa’s Development’ (2015) 40 *Africa Development* 16.

<sup>44</sup> Parker & Rathbone (n7 above) 3.

<sup>45</sup> Parker & Rathbone (n7 above) 3.

<sup>46</sup> Parker & Rathbone (n7 above) 3.

<sup>47</sup> Parker & Rathbone (n7 above) 3.

<sup>48</sup> BM Magubane ‘Whose memory – whose history? The illusion of liberal and radical historical debates’ in H Stolten (ed) *History Making and Present Day Politics: The Meaning of Collective Memory in South Africa* (2007) 253.

<sup>49</sup> M Ramose ‘Historic Titles in Law’ in Coetzee & Roux (eds) *The African Philosophy Reader* (2003) 544.

<sup>50</sup> J Murungi *A Companion to African Philosophy* (2005) 520.

<sup>51</sup> Murungi (n50 above) 520.

colonial pursuits to apprise, “sanitise”<sup>52</sup> and monopolise indigenous history and philosophy,<sup>53</sup> though this paper will explore the extension of such sanitisation to indigenous African ecologies as well. This also coincides with Wolfe’s notion of the colonial logic of elimination which operates based upon a dissolution or “liquidation of Indigenous people”<sup>54</sup> to concretise the notion that colonial “invasion is a structure not an event”.<sup>55</sup>

The multi-faceted obfuscating differentiation above legitimated colonial expansion as an enlightening assistance in transcending the indigenous African ‘savage’ from an alleged “primitive life to a modernised and civilised one”.<sup>56</sup> This rendered the international stature of Africa and its indigenous peoples as permanently downgraded, tarnishing the ‘image of Africa’ and contested African contributions to history, humanity, academia and development.<sup>57</sup> A large influence for this was differentiation by derogatory racialisation, which buttressed notions of an ordained civilising mission. Conquerors sprouted the emergence of scientific racism, which furnished the concealment and wider ‘othering’ of Indigenous African peoples, their ontologies, and their epistemologies. Mlambo dubs these streams of scientific racism as the Western fields of pseudo-social sciences which included Darwinism, ethnology and other racist forms of Western anthropology and historiography. These fields emerged amidst the Enlightenment era in Europe, though ‘othering’ ideas of Indigenous African peoples and the African continent also manifested through European art and literature.<sup>58</sup>

The law also proved differential in its initial facilitation of colonial conquest, as presented through Merry’s charge of dual legal systems having underpinned conquest.<sup>59</sup> Merry notes that these dual colonial legal systems manifested through

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<sup>52</sup> J McDonald (2015) ‘We deserve histories that have not been sanitised’ 25 May <https://mg.co.za/article/2015-05-25-we-deserve-histories-that-have-not-been-sanitised/> (accessed 16 August 2023).

<sup>53</sup> McDonald (n52 above).

<sup>54</sup> P Wolfe ‘Settler colonialism and the elimination of the native’ (2006) 8 *Journal of Genocide Research* 388.

<sup>55</sup> Wolfe (n54 above) 388.

<sup>56</sup> DT Chibvongodze ‘Ubuntu is Not Only About the Human! An Analysis of the Role of African Philosophy and Ethics in Environmental Management’ (2016) 53 *JHE* 162.

<sup>57</sup> Ndlovu-Gatsheni (n43 above) 16-17.

<sup>58</sup> AS Mlambo ‘Western Social Sciences and Africa: The Domination and Marginalisation of a Continent’ (2006) *ASR* 165.

<sup>59</sup> Merry, S ‘Law and colonialism’ *LSR* (1991) 890.

differential Euro Western application of their legal system between the conqueror and conquered indigenous.<sup>60</sup> The disparate application of the laws of war and territorial acquisition will be the first insight, with just and unjust wars being understood via legal assertions of *ius ad bellum*<sup>61</sup> and *ius in bello*.<sup>62</sup> In addition to this, war is only considered just where *iusta causa*<sup>63</sup> and *intentio recta*<sup>64</sup> exist, and through such war being waged by sovereign authority. The last just war condition thus inherently carries implications that Indigenous African peoples held no capacity for title to or sovereignty over their own territories. The application of the laws and principles governing just war is limited to situations where all alternative peaceful or diplomatic resolution mechanisms have been thoroughly and tentatively exhausted.<sup>65</sup> It is worth noting the contrasting approaches taken by Ottoman and European states in matters pertaining to territorial disputes. Reliance here was placed on suzerainty and consular law for territory-related issues, though a simultaneously embracing of the concept of *territorium nullius* was relied upon when acquiring colonial territories.<sup>66</sup> Bearing this in mind, it manifests as defensible to conclude that colonial wars were and are inherently unjust. This notion is supported by Ramose who states that Indigenous African peoples lost their land and their sovereignty over such land despite the colonial wars manifesting as unjust according to the just war doctrine.<sup>67</sup>

The tainted and racialised frameworks above were undoubtedly informed by Euro Western philosophical, economic, and political streams. While Eurocentric and supremacist philosophies facilitated rationalisations for subjugation and served as a foundation for pseudo-science, colonial and post-colonial legal institutions and trends also saw the basal embrace of Euro-Western philosophies. In 1806, after the British annexation of the Cape, Austinian positivism prevailed in South Africa.<sup>68</sup> This retention of positivism is also linked to a two-fold decline of natural law within England, as well

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<sup>60</sup> Merry (n59 above) 890.

<sup>61</sup> The permissibility or reasons for war.

<sup>62</sup> The conduct of war.

<sup>63</sup> Just cause.

<sup>64</sup> The right intention.

<sup>65</sup> Ramose (n49 above) 547.

<sup>66</sup> L Nuzzo 'Territory, Sovereignty, and the Construction of the Colonial Space' in Koskenniemi *et al* (eds) *International Law and Empire: Historical Explorations* (2017) 263-264.

<sup>67</sup> MB Ramose 'An African Perspective on Justice and Race' (2001) 3 *Forum for Intercultural Philosophy* 4.

<sup>68</sup> J Dugard 'The Judicial Process, Positivism and Civil Liberty' (1971) 88 *SALJ* 184.

as the pervasiveness of English legal influence internationally.<sup>69</sup> The Western legal doctrine of positivism is fundamentally tethered to the conceptions of renowned teleological thinkers, Aristotle and Plato.<sup>70</sup> Aristotle espoused the concept of specific justice which saw a division into distributive and rectificatory justice.<sup>71</sup> Distributive justice is important here, serving to prevent social mobility by placing individuals in ‘designated’ positions.<sup>72</sup> On the other hand, Plato defended the social hierarchy and such hierarchy promotes inequity and asserts the potential, by a “natural superior master race”,<sup>73</sup> for totalitarian rule.<sup>74</sup> Flowing from this came Plato’s conception of justice, which envisioned an ordered state established on individual rights, though this was superseded by notions of an ordered state’s precedential stability, as based on class distinction.<sup>75</sup> Legal and philosophical positivism in consequently served to rationalise colonial conquest and to allow the apartheid judiciary to impose a racialised and hierarchy-based system of authoritative governance. This ties to Murungi’s conveyance of the positivist and Euro-Western legal streams underpinning apartheid manifesting as “jurisprudence of subjugation”.<sup>76</sup>

### **2.1.2 Conquest as The Arbiter of Human-Nature Separatism**

The same othering conquest discourse of rational versus irrational and civilised versus uncivilised manifested in the realm of indigenous African conceptions of the human-nature relationships, as well as the management and conservation of nature. Chibvongodze provides an apt starting point for insights on the shift of focus of colonisation from the subjugation of Indigenous territory, people, and their psyche to a subjugation of their ecologies. Colonial discourse touted an anthropocentric rationality to elevate humanity as a “sole valuer of nature”.<sup>77</sup> As per Plumwood, a capitalist

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<sup>69</sup> Dugard (n68 above) 184.

<sup>70</sup> Dugard (n68 above) 184.

<sup>71</sup> S Ratnapala *Jurisprudence* (2009) 133.

<sup>72</sup> Ratnapala (n71 above) 133.

<sup>73</sup> Ratnapala (n71 above) 131.

<sup>74</sup> Ratnapala (n71 above) 131.

<sup>75</sup> Ratnapala (n71 above) 131.

<sup>76</sup> Murungi (n50 above) 521.

<sup>77</sup> Chibvongodze (n56 above) 161.

infused anthropocentrism drains nature's agency and sees nature relegated to being simply a resource for the advancement of humanity.<sup>78</sup> This is a stark departure from indigenous African identity and ontology, with Mawere alluding to the religious underpinnings of African conceptions regarding relationships with nature.<sup>79</sup> In tandem with the othering notions expressed in the previous section, conquerors scientifically rationalised dualistic views of nature which grounded notions of human-nature separation and ensured the pliability of nature toward exploitation.<sup>80</sup> Nature's pliability through colonialism saw what Plumwood notes as an insistence on nature and land being adapted to Euro-Western models. This instrumentally reduced nature to a resource rather than an ancestral force, disrupting reciprocal "ecological identity and ecological rationality".<sup>81</sup> An instance of this dualistic view of nature manifest through the history of colonial authorities engineering protected areas in South Africa, with the purpose of extracting resources and revenue, maintaining control and dispossessing the Indigenous.<sup>82</sup>

Chidvongodze asserts that through the anthropocentric colonial denial of African existentiality and nature, Indigenous African peoples were stripped of the capacity to be sound ecological agents.<sup>83</sup> Plumwood links this notion to conqueror rationalisations through denying recognition that the Indigenous could "actively manage the land"<sup>84</sup> and natural resources. Through such, further falsehoods of indigenous African peoples were disseminated with Burke noting that the intimate nature and animal related social and economic practices<sup>85</sup> of the indigenous were dubbed as unhygienic, primitive, and backward.<sup>86</sup> Contrary to this, indigenous farming was actually imbued with agroecological practices like diversified farming methods, polycultures, inter-cropping,

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<sup>78</sup> V Plumwood 'Decolonizing relationships with nature' in W Adams & M Mulligan (eds) *Nature for Conservation in a Post-colonial era* (2003) 61.

<sup>79</sup> M Mawere "Buried and Forgotten But Not Dead": Reflections On 'Ubuntu' In Environmental Conservation in Southeastern Zimbabwe' (2012) 3 *AAJSS*

<sup>80</sup> M Mabele; J Krauss & W Kiwango 'Going Back to the Roots: Ubuntu and Just Conservation in Southern Africa (2022) 20 *Conservation and Society* 93.

<sup>81</sup> Plumwood (n78 above) 63.

<sup>82</sup> Mabele *et al* (n80 above) 93.

<sup>83</sup> Chibvongodze (n56 above) 162.

<sup>84</sup> Plumwood (n78 above) 59.

<sup>85</sup> Cattle herding, farming, hunting and gathering.

<sup>86</sup> T Burke *Lifebuoy Men, Lux Women: Commodification, Consumption and Cleanliness in Modern Zimbabwe* (1996) 20-23.

multi-crop rotation cycles, and complex agroforestry techniques to name but a few.<sup>87</sup> This is why, as per Le Grange, contemporary South Africa's subsummation of capitalism in tandem with a history of colonialism and apartheid have led to an erosion of society, the self and nature.<sup>88</sup> In a different text, Le Grange conveys notions of indigenous African ecological togetherness, with pre-colonial African ontology regarding the harmonious interconnectedness of everything in the cosmos.<sup>89</sup> With human and the natural environment comprising this cosmology, humans have a duty towards environmental care and kin-like co-existence.<sup>90</sup> This is in stark contrast to the anthropocentric and capitalist environmental perceptions manifesting in contemporary South Africa, and which perpetuate the marginalisation of indigenous ontology and epistemology.

### 2.1.3 Contemporary Symptoms of The History of Conquest

Veering into the contemporary political economy of contemporary South Africa, streams of positivism underpinning the apartheid judiciary saw a rupture and abandonment after the end of apartheid, with the 'new' South Africa latching onto liberal democratic ideals and values in 'post-apartheid'. The principles of liberalism guiding the formation of 'post-apartheid' South Africa include individual rights and, as per Van Riet, "impotent (formal) rights-based solutions".<sup>91</sup> These formal and individual rights based values purported to alleviate chronic and pervasive structural disparities such as: racism, physical insecurity, poverty, and an amalgam of modes of violence.<sup>92</sup> Van Riet shares sentiments of Mamdani emerging in 1997, which dubbed Western political developments in the 'post-apartheid' transition of South Africa's as denial of justice, manifesting as the superseding of meaningful action.<sup>93</sup> Van Riet links this denial to neo-liberalism, rapid inequality growth, and white *mala fide* sentiments

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<sup>87</sup> L Figueroa-Helland; C Thomas & AP Aguilera 'Decolonizing Food Systems: Food Sovereignty, Indigenous Revitalization, and Agroecology As Counter-Hegemonic Movements' (2018) 17 *PGDT* 181.

<sup>88</sup> Le Grange (n29 above) 56.

<sup>89</sup> L Le Grange 'Ubuntu, Ukama, Environment and Moral Education' (2012) 41 *JME* 333.

<sup>90</sup> Le Grange (n89 above) 333.

<sup>91</sup> G Van Riet 'The Limits of Political Development and Constitutionalism in South Africa' (2016) *New Contree* 99.

<sup>92</sup> Van Riet (n91 above) 99.

<sup>93</sup> Van Riet (n91 above) 99.

regarding reconciliation.<sup>94</sup> Apart from the contemporary South African subsumption of liberal values, Madlingozi asserts that human rights-based emphasis was core to the 'post-apartheid' South Africa's legal dispensation and political discourse.<sup>95</sup> Visser conveys South Africa's contemporary private law sector as emersed in linear Euro Western historical consciousness. Echoing the history of conquest via a concentration of civil liberties to an elite group, Indigenous Africans pushed to the floor of South Africa's historically hierarchical legal system were ignored.<sup>96</sup>

This shift from apartheid parliamentary sovereignty to 'post-apartheid' liberal constitutional democracy and supremacy aligns sentimentally with Ramose and Madlingozi, who dub this shift as the merger of historical injustices through establishing a second cycle of conquest by consent.<sup>97</sup> Constitutional supremacy renders a marred law, legal culture, political economy, and political economic culture which find themselves embedded deeply into the 'post-apartheid' South African polity. These legal, constitutionalist and capitalist political economic cultures manifest themselves through streams like optimistic constitutionalism, monumental constitutionalism, constitutional deification, and constitutional worship.<sup>98</sup> These also manifest through faulty environmental outlooks which perpetuate Indigenous knowledge suppression. On this last notion, Indigenous knowledge suppressing, and anti-Black trends manifest via African universities as a construction of Renaissance Europe's enlightenment visions, rather than being rooted in pre-colonial African knowledge.<sup>99</sup> Thus, the jurisprudence, epistemology, ontology, and environmental outlooks of Indigenous African peoples remains snubbed in an the 'post-apartheid'. This links itself to notions of constitutional supremacy rendering South African Indigenous and customary law subordinate streams of law.<sup>100</sup> This disparately reveals

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<sup>94</sup> Van Riet (n91 above) 114-115.

<sup>95</sup> T Madlingozi 'Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution' (2017) 28 *SLR* 128.

<sup>96</sup> DP Visser 'The Legal Historian as Subversive or: Killing the Capitoline Geese' in D Visser (ed) *Essays on the History of Law* (1981) 19-21.

<sup>97</sup> Madlingozi (n95 above) 141.

<sup>98</sup> See: J Modiri 'Azanian Political Thought and the Undoing of South African Knowledges' (2021) 68 *Theoria* 74-77.

<sup>99</sup> M Mamdani 'Between the Public Intellectual and the Scholar: Decolonisation and Some Post-independence Initiatives in African Higher Education' (2016) 17 *Inter-Asia Cultural Studies* 68-71.

<sup>100</sup> MB Ramose 'In Memoriam: Sovereignty and the 'New' South Africa' (2007) 16 *GLR* 326.

customary and Indigenous law recognition in the constitution versus the actual constitutional regulation of such. Merry concretises this notion through allusions to tendencies among conquered nations in grappling with precolonial Indigenous law implementation and the pluralistic unification of historically oppressive dual legal systems when recognising such law.<sup>101</sup>

Constitutional optimism, as mainstream constitutionalist dimension, is rooted in liberalism which Fukuyama notes to have emerged from enlightenment Europe for 3 reasons. Firstly, for the achievement of peace in diversity and secondly, as a modality of morality aimed at the protection of human dignity and autonomy.<sup>102</sup> Lastly, Fukuyama links liberalism's emergence to justifications of economic means which flow into liberal protections for the right to transact, economic growth and property rights.<sup>103</sup> Constitutional optimist discourse is often intertwined with monumental constitutionalism, or as Van Marle describes it, the commemorative optimism in South Africa's supposed contemporary constitutional achievements.<sup>104</sup> As per Modiri, optimism in legal, political, academic and public spheres branches off into what he refers to as constitutional worship.<sup>105</sup> Modiri goes even further by designating constitutional worship as so rampant in its nature that it can be referred to as constitutional "fetishism".<sup>106</sup> As will be explored in chapter 3, this ties to legal and academic dismissals of indigenous knowledge in law, especially in environmental law and ethics arenas.

Constitutional supremacy, optimism and fetishism all represent the constitution as a supreme rationality, rendering contemporary South African legal culture as unable to think outside of current constitutional constraints.<sup>107</sup> As such, constitutional optimism is tethered to and somewhat emanates from fetish-like constitutional worship, manifesting in Modiri's assertion of a tainted South African legal and constitutionalist

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<sup>101</sup> Merry (n59 above) 890.

<sup>102</sup> F Fukuyama *Liberalism and its Discontents* (2022) 8.

<sup>103</sup> Fukuyama (n102 above) 8.

<sup>104</sup> K Van Marle 'The Spectacle of Post-apartheid Constitutionalism' (2007) 16 *GLR* 412.

<sup>105</sup> Modiri (n41 above) 307.

<sup>106</sup> Modiri (n41 above) 307.

<sup>107</sup> Modiri (n41 above) 308.

culture.<sup>108</sup> This tainted culture carries symptoms which render constitutional critique as an anti-constitutional discourse and relegate such critique to a realm of formal exclusion in legal discourse.<sup>109</sup> The inability for critique shifts constitutional fetishism, worship and optimism to constitutional deification, which frames critique as impiety.<sup>110</sup> This further concretises notions of South African legal, political, social and academic culture as incapable of critical thought outside of constitutional framing.<sup>111</sup> Additionally, the optimism, worship, deification and fetishism for the constitution is somewhat tethered to widespread constitutional symbolism, with the constitutional presenting itself as the overriding arbiter for the shift from apartheid.<sup>112</sup> Modiri notes this as a Hegelian philosophical conceit which designates a teleological understanding of historical progress, though he raises the indigenous philosophical aphorism '*molato ga o bole*' which places a moratorium upon the automatic end to historical debts which law and time are not empowered to end.<sup>113</sup> With this principle in mind, South Africa's independence manifests as dismissing of African philosophy from its very inception.

In tandem with the constitutional symbolism above, Brown asserts notions of political idealization,<sup>114</sup> while Kilonzo alludes to the triumph of the politics of memory as opposed to the historical memory.<sup>115</sup> Political memory and idealisation serves only to optimistically undercut the lasting wounds of colonial subjugation in the areas of indigenous ontology, epistemology, geography, indigenous institutional conceptions and the indigenous psyche.<sup>116</sup> In essence, the contemporary constitutional dispensation and its various societal effects echo apartheid parliamentary sovereignty by way of the inability for constitutional criticality of apartheid Parliament's passed laws.<sup>117</sup> Tethered to the problematic legal and constitutionalist cultural dimensions is what Madlingozi notes as the values of the constitution being incorporative of

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<sup>108</sup> Modiri (n41 above) 306-307.

<sup>109</sup> D Terblanche 'An ethical (anti-)constitutionalism? Transformation for a Transfigured Public' (2014) 46 *Acta Academica* 118.

<sup>110</sup> Modiri (n41 above) 308.

<sup>111</sup> Modiri (n41 above) 308.

<sup>112</sup> Modiri (n41 above) 307.

<sup>113</sup> Modiri (n41 above) 314.

<sup>114</sup> W Brown 'Political idealisation and its Discontents' in *Edgework: Critical Essays on Knowledge and Politics* 17.

<sup>115</sup> JM Kilonzo 'Commemoration and Human Rights in Africa: Revisiting the Politics of Memory Through Visual Arts in Kenya' in Adeola *et al* (eds) *The Art of Human Rights* (2019) 86.

<sup>116</sup> Kilonzo (n115 above) 86.

<sup>117</sup> M Mutua 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *HHRJ* 105.

principles of social justice which triumphed over the necessity for decolonisation.<sup>118</sup> Through the constitutional social justice paradigm, Madlingozi designates 'post-apartheid' South Africa as having prioritised freedom over liberation, in tandem with a fetishisation of human rights.<sup>119</sup> Modiri concretises this sentiment through asserting that the 'post-apartheid' constitution chose freedom, inclusion and democratisation as priorities over liberation, consequently promoting historical and subjugation-based modes of power.<sup>120</sup> Optimistic worship of the constitutional, human rights and social justice frameworks serve to venerate civil society,<sup>121</sup> further infusing optimism within the South African polity and culture.

Buttressing the constitutional supremacy and worship elucidated above is what Murungi espouses through *stare decisis* or the rule of law. *Stare decisis* is a principle ostracising those guilty of non-conformity to the principle, designating non-conformists as the enemies of law.<sup>122</sup> *Stare decisis* conformity is said to "[anaesthetize]"<sup>123</sup> conformists, preventing them from unveiling the impairments ostensibly inflicted.<sup>124</sup> 'Anaesthesia' can be enjoined to what Modiri dubs as the concept of colonial unknowing, which renders permissibility for omissions regarding South Africa's unjust colonial war and muzzles the contemplation and implementation of the necessitated developments of decolonisation.<sup>125</sup> This permissibility manifests as trite through South Africa's conquest-based history which cannot simply be untethered from the egregious reality it finds itself inextricably linked to.<sup>126</sup> Since the political, economic, environmental and legal complexities grounded through South Africa's "longue-durée"<sup>127</sup> of history have not been salvaged by the contemporary constitution, the constitutional project itself manifests as contemporarily untenable. This adds to Modiri's notion of the current constitutional dispensation as rendering an anti-black

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<sup>118</sup> Madlingozi (n95 above) 129.

<sup>119</sup> Madlingozi (n95 above) 129.

<sup>120</sup> Modiri (n41 above) 307.

<sup>121</sup> Madlingozi (n95 above) 129.

<sup>122</sup> J Murungi 'The life of law in Africa' in *African philosophical currents* (2018) 99.

<sup>123</sup> Murungi (n122 above) 99.

<sup>124</sup> Murungi (n122 above) 99.

<sup>125</sup> Modiri (n41 above) 307.

<sup>126</sup> Magubane (n48 above) 257-259.

<sup>127</sup> Modiri (n41 above) 300.

and bifurcated South African society.<sup>128</sup> The maladies of the constitution and constitutionalism render as promoting a perpetuation of white hegemony through a restructured and paradoxically covert but pervasive form of white dominance.<sup>129</sup> Madlingozi refers to this as an era of “neo-apartheid”<sup>130</sup> discourse, with Dladla dubbing this as an intentional colonist-preservation strategy characterised as an “evolutionary constitution”.<sup>131</sup>

## **2.2 The Law, Under the Decolonial Lens of Critical Climate Justice and Agroecology**

In contemplating the law through the utilisation of a decolonial infusion of an agroecological and climate justice-based lens, the law’s tether to justice needs elucidation. Thus, this dissertation endorses Ramose’s notion that between law and justice, an “indissoluble link”<sup>132</sup> exists via the law’s aim at the pursuit and actualisation of the needs of justice.<sup>133</sup>

### **2.2.1 Conceptualising Critical Climate Justice**

Building on the notions above, environmental justice as a precursor to climate justice, is the social movement and discourse framework manifesting in contemporary environmental politics. Seeing popularisation through the First National People of Colour Environmental Leadership Summit in 1991, environmental justice allegedly emerged from protests regarding toxic landfill dumping in vastly poor and black areas of Warren County, North Carolina.<sup>134</sup> This summit saw Asian-American, African-

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<sup>128</sup> Madlingozi (n95 above) 142-143.

<sup>129</sup> Madlingozi (n95 above) 142-143.

<sup>130</sup> Madlingozi (n95 above) 123-124.

<sup>131</sup> Dladla (n10 above) 439-440.

<sup>132</sup> MB Ramose ‘An African Perspective on Justice and Race’ (2001) 3 *Forum for Intercultural Philosophy* 2.

<sup>133</sup> Ramose (n132 above) 2.

<sup>134</sup> D Schlosberg & LB Collins ‘From environmental to climate justice: climate change and the discourse of environmental justice’ (2014) 5 *WIR: Climate Change* 361.

American, indigenous and Latino activists give heed primarily to human and civil rights, health, community vulnerability regarding climate change, and concerns over environmental contexts in everyday life.<sup>135</sup> This summit also constructed the primary principle grounding environmental justice, that being, affirmation of the “sacredness of Mother Earth, ecological unity, and the interdependence of all species”.<sup>136</sup> With linkages amongst sovereignty, cultural practices and life in complex and vulnerable ecosystems being central to indigenous movements, indigenous movements are core to the environmental justice movement.<sup>137</sup> This movement infused everyday environments and environmental sustainability paradigms with the demands of social justice and civil rights.<sup>138</sup> This movements also held contentions over mainstream, affluent and “almost exclusively white”<sup>139</sup> environmental organisations which emphasise sustainable care over environments which are detached from day-to-day life, or the ‘wilderness’.<sup>140</sup> Enjoined to this is Kerry and Sealey-Huggins’ notions of the appeal of ‘Green New Deals’ as destructively reconstructive projects which aim at “redeeming whiteness”,<sup>141</sup> but which manifest as “piecemeal shifts [offering] limited hope of new avenues for life and possibility”.<sup>142</sup> Mabele *et al* trace the origins of these co-opted organisations and projects to the colonial “fortress conservation model”,<sup>143</sup> which carried out the objective of realising “leisure and consumptive utilisation”<sup>144</sup> through a meticulous human-nature separation.<sup>145</sup> As such, Mabele *et al* posit “convivial conservation”<sup>146</sup> which embarks upon the propping-up of new conservation dogmas through a double-movement of the interrogation of pre-existing conservation modalities coupled with a shift in mainstream market-based and capitalist guiding values.<sup>147</sup>

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<sup>135</sup> Schlosberg & Collins (n134 above) 360.

<sup>136</sup> Schlosberg & Collins (n134 above) 360.

<sup>137</sup> Schlosberg & Collins (n134 above) 360.

<sup>138</sup> Schlosberg & Collins (n134 above) 361.

<sup>139</sup> Schlosberg & Collins (n134 above) 360.

<sup>140</sup> Schlosberg & Collins (n134 above) 360.

<sup>141</sup> KK Kerry & L Sealey-Huggins ‘Racial capitalism and climate justice: White redemptive power and the uneven geographies of eco-imperial crisis’ (2023) 145 *Geoforum* 4.

<sup>142</sup> Kerry & Sealey-Huggins (n141 above) 4.

<sup>143</sup> Mabele *et al* (n80 above) 93.

<sup>144</sup> Mabele *et al* (n80 above) 93.

<sup>145</sup> Mabele *et al* (n80 above) 93.

<sup>146</sup> Mabele *et al* (n80 above) 94.

<sup>147</sup> Mabele *et al* (n80 above) 94-95.

The shift from environmental to climate justice allegedly emerged via the confluence of Hurricane Katrina in 2005 and a report from the Black Congressional Caucus entitled 'African Americans and Climate Change: An Unequal Burden'.<sup>148</sup> Through this, focus moved to inequity amongst vulnerable communities suffering disproportionate burdens from climate change, though such communities are often less responsible for climate change.<sup>149</sup> Climate justice involves the shifting of dominant discourse to a critical focus on social outcomes, justice, and impacts.<sup>150</sup> As a "moral and justice issue",<sup>151</sup> climate justice aims to curtail oppression, marginalisation, and exploitation through an enrichment of justice and equity.<sup>152</sup> Climate justice emphasises geographical and historical disparities linked to globalisation, capitalism and colonialism which have rendered unequal climate injustices.<sup>153</sup> Kerry and Sealey-Huggins refer to these disparities as "the crisis of ecological imperialism"<sup>154</sup> and note that indelible "geographies of crisis",<sup>155</sup> unequal historical responsibilities and racialised capitalism require vehement focus for substantive "ecological transformations".<sup>156</sup>

Climate justice rests upon the praxis of critical climate justice, with praxis referring to practice intertwined with reflection and as informed by theory.<sup>157</sup> This praxis demands fundamental changes to address climate injustices through equitable actions aimed at harm reduction.<sup>158</sup> These demands are essential for political action and solidarity in the pursuit of climate justice and the recognition of differential exposure, vulnerability, and risk are crucial to critical climate justice.<sup>159</sup> Accountability, obligations, ethics, and human rights also play a vital role in achieving climate justice, and re-evaluating global economic systems that contribute to such injustices is necessitated. The climate justice praxis also aims to avoid exacerbating inequalities caused by climate change

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<sup>148</sup> Schlosberg & Collins (n134 above) 361.

<sup>149</sup> Schlosberg & Collins (n134 above) 361.

<sup>150</sup> F Sultana 'Critical climate justice' (2022) 188 *The Geographical Journal* 118.

<sup>151</sup> Sultana (n150 above) 118.

<sup>152</sup> Sultana (n150 above) 118.

<sup>153</sup> Sultana (n150 above) 119.

<sup>154</sup> Kerry & Sealey-Huggins (n141 above) 3.

<sup>155</sup> Kerry & Sealey-Huggins (n141 above) 3.

<sup>156</sup> Kerry & Sealey-Huggins (n141 above) 3.

<sup>157</sup> Sultana (n150 above) 119.

<sup>158</sup> Sultana (n150 above) 119.

<sup>159</sup> Sultana (n150 above) 119.

and promotes solidarity and collective action through a critical climate justice perspective that considers various academic theories.<sup>160</sup>

### 2.2.2 Conceptualising Agroecology

This dissertation leans partly on Glassman's evolved definition of agroecology which refers to the stream of integrated research, action, change, and education bringing sustainability to the ecological, economic, and social dimensions of the food system.<sup>161</sup> Dubbed as a science, practice, and social movement,<sup>162</sup> agroecology is predicated upon a three-pronged approach. Firstly, this approach mandates the expanding and betterment of ecological relationships between agricultural domesticated species, their physical environment<sup>163</sup> and natural systems. Drawing on contemporary methods and knowledge, it fulfils the scientific aspect through formulating guiding values for sustainable agroecosystem construction and operation. Practically, agroecology mandates novel, efficacious, sustainable, and food-secure agricultural practices, and systems through emphasis on "local, empirical and Indigenous"<sup>164</sup> agricultural knowledge. Importantly, this serves to thwart divergences between knowledge production and application. Third, agroecology's social change flows total food security advocacy and the knowledge which can provide sustainable changes for such. It's social change also stems from the urgency for a fundamental shift in the human-food relationship, socio-economic food distribution structures, and the relationality between food's role in the distribution of power amongst class, population, and country.

Figueroa-Helland *et al* aptly contextualise the emergence of agroecology, noting that it saw popularisation through responding to industrial agriculture and its environmental impacts. Through Western ecological science, agroecology intended to contemplate environmentally friendly food production practices. While agroecologists noted the

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<sup>160</sup> Sultana (n150 above) 119.

<sup>161</sup> S Gleissman 'Defining agroecology' (2018) 42 *Agroecology and Sustainable Food Systems* 600.

<sup>162</sup> Gleissman (n161 above) 599.

<sup>163</sup> With vast emphasis on the soil ecosystem.

<sup>164</sup> Figueroa-Helland *et al* (n87 above) 181.

unsustainability of 'Green Revolution' technologies, they still commodified nature through contemplations of "more efficient and sustainable exploitation."<sup>165</sup> This shifted by the 1980's when agroecology saw an infusion of geography, anthropology, rural development studies and indigenous agricultural knowledge to integrate values such as food system resiliency, biodiversity preservation, energy efficiency, and social justice.<sup>166</sup>

Rooted in a systems-level and holistic awareness of "food system sustainability",<sup>167</sup> agroecology is designated as action-orientated, transdisciplinary, and participatory.<sup>168</sup> In terms of action, agroecology procures alternative social and policy structures and actions to confront the power structures and political economy facilitating contemporary industrial food systems. In terms of being transdisciplinary, it emphasises a diverse range of food system knowledge and experience. In terms of being participatory, agroecology mandates broad stakeholder engagement "from the farm to the table and everyone in between".<sup>169</sup> Figueroa-Helland *et al* posit a potent combination of agroecology, indigenous revitalization and food sovereignty to engineer movements and organizations which strive for new social relations emphasising autonomous livelihoods beyond anthropocentric, capitalist and heteropatriarchal frameworks.<sup>170</sup> Furthermore, these movements must be rooted in the land, as "grounded"<sup>171</sup> in sustainable Earth-based metabolic cycles which promote planetary regeneration through integrating non-anthropocentric communities. Lastly, these movements must be rooted in indigeneity, prioritising the defence of Mother Earth, the (re)valorisation of indigenous peoples/ontologies/epistemologies, and the decolonization of praxes by relationally and communally (re)indigenizing "all our relations".<sup>172</sup>

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<sup>165</sup> Figueroa-Helland *et al* (n87 above) 181.

<sup>166</sup> Figueroa-Helland *et al* (n87 above) 181.

<sup>167</sup> Gleissman (n161 above) 599.

<sup>168</sup> Gleissman (n161 above) 599.

<sup>169</sup> Gliessman (n161 above) 599.

<sup>170</sup> Figueroa-Helland *et al* (n87 above) 175.

<sup>171</sup> Figueroa-Helland *et al* (n87 above) 175.

<sup>172</sup> Figueroa-Helland *et al* (n87 above) 175-176.

### 2.2.3 Climate Justice and Agroecology: A Decolonial Convergence

To broaden the aims, insights, and solutions of climate justice and agroecological discourse, a decolonial approach is required where consideration is given to the lasting wounds of colonialism. As decoloniality primarily intends on a “rolling back [of] the mechanisms of coloniality”<sup>173</sup> and western intellectual hegemony, historical wounds in the context of nature manifest through conqueror-entrenched contemporary environmental arrangements and understandings, requiring a rolling back. Decoloniality also proves as important in this paper’s endeavour as some of the complexities of contemporary South African legal arrangements stem from social justice and human rights prioritisation over indigenous liberation, emancipation and territory and sovereignty restoration. Thus, with the human rights and social justice aims of agroecology and climate justice, decoloniality is needed to ensure that social justice and human rights deliver sound Indigenous epistemological, ontological, and territorial liberation. Refreshingly and as mentioned above, Sultana posits that the critical climate justice praxis consolidates an amalgam of academic insights, including anti-racist, decolonial, post-colonial and anti-capitalist streams.<sup>174</sup> Additionally, this paper intends to present agroecology as a program of decolonisation through an intertwining of agroecology itself with food sovereignty and indigeneity.<sup>175</sup>

In essence, a decolonial climate justice and agroecology aid in the undercutting of anthropocentric and capitalist agricultural and environmental practices, whilst simultaneously elevating indigenous contributions to environmental, ethical, and legal dimensions. The element of decoloniality will aid in contemplation of racial power, white Euro Western hegemony, and the marginalisation of indigenous ways of knowing and being. However, the Indigenous and decolonial perspectives emphasised in decoloniality, agroecology and climate justice require “critiques of Western philosophy, capitalism, and hegemonic standards of civilization”.<sup>176</sup> Thus, a contemplation of capitalist underpinnings which commodify nature encourages the utilisation of modern

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<sup>173</sup> Chimakonam & Ogbonnaya (n34 above) 1.

<sup>174</sup> Sultana (n150 above) 119.

<sup>175</sup> Figueroa-Helland *et al* (n87 above) 181.

<sup>176</sup> Figueroa-Helland *et al* (n87 above) 181.

derivation of the Marxian metabolic rift theory. In analysing Max Weber's work on capitalism, Trubek notes that European law was "conducive to capitalism"<sup>177</sup> and manifested in bourgeoisie or industrial capitalism.<sup>178</sup> With European law and societal modalities seeing subsumption in post-apartheid South Africa, South African agro-industrial practices also seem heavily conducive to capitalist processes and the continuation of the colonial commodification of nature. Moreover, the law is "central to capitalism"<sup>179</sup> and requires "a profound conceptual revolution"<sup>180</sup> to shift away from the 'ultra-capitalism'<sup>181</sup> seen in South African agricultural and environmental practices.

The metabolic rift theory is the social, historical, and ecological theory elucidating the rupture betwixt the human-nature relationship through the disruption of natural processes under capitalism.<sup>182</sup> As will be thoroughly analysed in chapter 3, Marx's texts are often misinterpreted as focusing only on class struggles in capitalist society, through a neglect of his contributions to ecological and environmental ethics.<sup>183</sup> Chibvongodze notes that Marx was a prominent philosopher who analysed the connection between materialism and environmental exploitation. In his work 'The Poverty of Philosophy', Marx expressed concerns about the negative impact of capitalism on nature and future generations through market-based agriculture. Marx held that labour alienation under capitalism lead to an ecological crisis via commodifying both labour and the environment.<sup>184</sup> McClintock adds that this alienation disrupts indigenous social metabolism, resulting in a rift between humans and their environment<sup>185</sup> as well as an alienation of humans from their food.<sup>186</sup> The metabolic rift also emphasis the de-alienation of human beings from labour and the biophysical and natural environment.<sup>187</sup>

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<sup>177</sup> Trubek (n2 above) 722.

<sup>178</sup> Trubek (n2 above) 722.

<sup>179</sup> Hudson (n1 above) 1.

<sup>180</sup> Hudson (n1 above) 1.

<sup>181</sup> Hudson (n1 above) 2-3. This refers to "company law extracting every last drop of value from viable business," with such extraction logic also seen in agricultural and environmental practices as well.

<sup>182</sup> M Schneider & P McMichael 'Deepening and repairing, the metabolic rift' (2010) 37 *JPS* 461.

<sup>183</sup> Chibvongodze (n56 above) 164.

<sup>184</sup> Chibvongodze (n56 above) 164.

<sup>185</sup> N McClintock 'Why Farm the city? Theorizing urban agriculture through a lens of metabolic rift' (2010) 3 *CJRES* 192.

<sup>186</sup> McClintock (n185 above) 203.

<sup>187</sup> McClintock (n185 above) 202.

Some examples of the agricultural, ecological, and industrial practices which contribute to environmental instability, and which are often a symptom of legal, social, and economic cultures rooted in colonial pasts and the metabolic rift will be elucidated upon next.<sup>188</sup> Firstly, Richmond provides a succinct review of Glyphosate, a chemical contained in the herbicide Roundup™ which was introduced by the Monsanto Chemical Company in 1974.<sup>189</sup> This chemical and an amalgam of Genetically Modified<sup>190</sup> technologies are used at a large scale commercially, and extensively in South Africa.<sup>191</sup> Glyphosate was banned or restricted in 20 countries as of 2020<sup>192</sup> and is linked to detrimental effects towards soil, water and soil organisms.<sup>193</sup> Within the broader ecosystem, fish, earthworms, marine crustaceans, insects and all non-human mammals are also adversely affected.<sup>194</sup> Within the human dimension, glyphosates increase in use over the development of agro-industrial and weed control practices has led to the chemical being classed as a 2A carcinogen for humans by the International Agency for Research on Cancer (hereinafter referred to as ‘the IARC’).<sup>195</sup> Secondly, Okereafor *et al* conveys the devastating environmental effects of toxic metal pollution from mining practices which are reported in “most parts of South African soils, plants, animals and water bodies”.<sup>196</sup> The writings above, in tandem with others to be mentioned in later chapters, specifically convey the inability of poor legislative frameworks<sup>197</sup> and practices in South Africa in terms of addressing environmental and ecological crises, with this study aimed at linking such lacklustre legal capacity and action to shrouded colonial modalities permeating through contemporary legal structures. As such, South Africa should follow suit in legal means of thwarting such

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<sup>188</sup> These practices are also often rooted in capitalistic focuses on growth and outputs over sustainability.

<sup>189</sup> ME Richmond ‘Glyphosate: A review of its global use, environmental impact, and potential health effects on humans and other species’ (2018) 8 *JESS* 416.

<sup>190</sup> Hereinafter referred to as ‘GM’.

<sup>191</sup> Richmond (n21 above) 418.

<sup>192</sup> IM Meftaul *et al* ‘Controversies over human health and ecological impacts of glyphosate: Is it to be banned in modern agriculture?’ (2020) 263 *Environmental Pollution*.

<sup>193</sup> Meftaul *et al* (n24 above) 418-420.

<sup>194</sup> Meftaul *et al* (n24 above) 420.

<sup>195</sup> Richmond (n21 above) 426.

<sup>196</sup> U Okereafor *et al* ‘Toxic Metal Implications on Agricultural Soils, Plants, Animals, Aquatic life and Human Health’ (2020) 17 *IJERPH* 1.

<sup>197</sup> Okereafor (n196 above) 11.

detrimental practices and such law could find much positive sway from infusion with Indigenous environmental stewardship practices, ontologies, and epistemologies.

### **3. The Community of Life within Indigenous Epistemologies and Ontologies**

Apart from the grave importance of the physical environment to a host of Indigenous communities, the importance of recognising and cherishing the broad biodiversity of

the Community of Life also sees emphasis. This section will exemplify indigenous environmental stewardship through the epistemological and ontological tenets of ‘previously’ conquered Indigenous groups of North America and the Great Lakes Regions. These Indigenous groups, while differentiated and unique, present ample knowledge and ecologically conscious skill regarding the natural environment, though colonial domination vehemently obstructed such.

Emerging from the Native American Rarámuri group, Salmon notes a *kincentric ecology* which perceives the viability of human life in a particular environment as possible only when all life in such an environment is viewed as *kin*.<sup>198</sup> While the English term of ‘*kincentric ecology*’ would be incomprehensible to Rarámuri natives, Salmon expands on kincentricity through the Rarámuri term ‘*iwigara*’.<sup>199</sup> *Iwigara* regards a total physical and spiritual “interconnectedness and integration of all life”.<sup>200</sup> In tandem with this is the term ‘*numati*’, which regards all within the natural world as relatives and deems the natural as a world of familiarity and not of wonder.<sup>201</sup> *Kincentric ecology* or *iwigara* are central to Rarámuri land management, horticultural, medicinal, foraging and agricultural philosophies and as such, the Rarámuri utilised ingenious techniques of pruning, selective coppicing, harvesting gathering, transplanting, cultivation, propagation, sowing, weeding and discriminant burning.<sup>202</sup> North American indigenous cultures like the Rarámuri included human communities in their “equations of nature”,<sup>203</sup> rendering humans as proportionate and equal to the rest of the natural world.<sup>204</sup> Through interdependent living with all life forms, social, mental, physical and spiritual health is gauged through harmonious living with the natural world.<sup>205</sup> History, cultural history and the centrality of land to both are considered as continuous an non-linear to the Rarámuri.<sup>206</sup> Furthermore, identity and language shape the indigenous perceptions of the self, with words shaping thought and thought expressing the

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<sup>198</sup> Salmon (n22 above) 1327.

<sup>199</sup> Salmon (n22 above) 1328.

<sup>200</sup> Salmon (n22 above) 1328.

<sup>201</sup> Salmon (n22 above) 1328-1329.

<sup>202</sup> Salmon (n22 above) 1329.

<sup>203</sup> Salmon (n22 above) 1331.

<sup>204</sup> Salmon (n22 above) 1331.

<sup>205</sup> Salmon (n22 above) 1331.

<sup>206</sup> Salmon (n22 above) 1331.

spirit.<sup>207</sup> As human and non-human life are spirit and matter, human-relationships are bound by land, cultural and linguistic histories and as such, one cannot be connected to the natural world or their culture where social, physical, spiritual and mental health are not maintained.<sup>208</sup> By way of this, being intertwined with the natural world implies a responsibility to ensure the mutual survival of the natural world and other non-human life, constructing the base of a reciprocal human-nature *kincentric ecology*.<sup>209</sup>

Whyte provides valuable insights regarding ecology, colonialism and environmental injustice emanating from the Indigenous Ashinaabe peoples of the Great Lakes region. The Ashinaabe peoples include those linked through the Ashinaabe intellectual tradition like the Ojibwe, Potawatomi, and Mississauga peoples.<sup>210</sup> Whyte contemplates 'collective continuance' or the Ashinaabe indigenous conceptions of self-determination and social resilience through interdependence, systems of responsibility and migration.<sup>211</sup> Whyte also stresses that 'the environment' regards relationships amongst non-human life and human life,<sup>212</sup> entities and non-living beings,<sup>213</sup> as well as collectives like watersheds and forests.<sup>214</sup> This broad and cosmologically encompassing notion of 'the environment' gives credence to the Community of Life or the entirety of an Environment's make-up (visible, invisible, living and even non-living). Ashinaabe collective continuance in the context of interdependence places particular human societies as accustomed to particular ecologies and as intertwined through interdependent relationships with the environment.<sup>215</sup> This interdependence, similar to notions of the Rarámuri above, regards a sense of identity bound to the environment and responsibility towards such environment.<sup>216</sup> Interdependence here, also presents as intrinsically valuable through providing human understanding for their place in the world, and it is instrumentally valuable through human motivation for reciprocal or

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<sup>207</sup> Salmon (n22 above) 1331.

<sup>208</sup> Salmon (n22 above) 1331.

<sup>209</sup> Salmon (n22 above) 1331-1332.

<sup>210</sup> Whyte (n20 above) 128.

<sup>211</sup> Whyte (n20 above) 127-128.

<sup>212</sup> Including plants, animals, insects, and humans.

<sup>213</sup> Including elements and spirits.

<sup>214</sup> Whyte (n20 above) 128.

<sup>215</sup> Whyte (n20 above) 129.

<sup>216</sup> Whyte (n20 above) 129.

mutual responsibility towards the kin-like living and non-living environment.<sup>217</sup> The Ashinaabe systematise this reciprocity as environmental identity and responsibility is facilitated by complex cultural, social, political and economic institutions.<sup>218</sup> Regarding systems of responsibility, this tenet of collective continuance regards relationships and their reciprocal expectations.<sup>219</sup> This includes how water has a responsibility to fill just as people do, or how generationally imparted knowledge, morality, labour and inquiry are systematically coordinated to the seasonal round which facilitates hunting, farming, fishing and gathering opportunities and responsibilities.<sup>220</sup> Regarding migration, the Ashinaabe peoples emphasise migratory themes of ceaseless motion, change, mobility, transformation and adjustment.<sup>221</sup> This suggests how societies organise in relation to ecological and social dynamics, rendering interdependence and systems of responsibility as ungrounded to static environmental relationships and as a product of constant transformation.<sup>222</sup>

### **3.1 African Thought, Indigenous Knowledge, and the Earth**

This next section, as grounded in this paper's research aims, will mark a shift from Western and colonial frameworks towards a restoration of historically snubbed Indigenous knowledge. This Indigenous knowledge may serve to greatly restore sustainable and harmonious human-nature relationships and environmental practices. The indigenous African knowledge systems in question include systems like taboos, totems, clan names, folk lore and proverbs which exemplify indigenous environmental stewardship through the African societal reliance on the integration of social and cultural identities with wildlife and the natural environment.<sup>223</sup> Furthermore, Kamga asserts that cogent philosophical arguments can be formulated to communicate the

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<sup>217</sup> Whyte (n20 above) 129-130.

<sup>218</sup> Whyte (n20 above) 130.

<sup>219</sup> Whyte (n20 above) 130.

<sup>220</sup> Whyte (n20 above) 130.

<sup>221</sup> Whyte (n20 above) 131.

<sup>222</sup> Whyte (n20 above) 131.

<sup>223</sup> Chibvongodze (n56 above) 158.

presence of what is perchance dubbed as a “family atmosphere”<sup>224</sup> amongst African indigenous communities.<sup>225</sup> This suggests the impression of a philosophical and cultural kinship and affinity amongst these African indigenous communities.<sup>226</sup> Of course, variations manifest within the broad African indigenous ‘family atmosphere’, though common underlying principles bind all individuals together harmoniously.<sup>227</sup>

Chibvongodze alludes to the importance of African Indigenous knowledge systems in the elucidation of African indigenous environmental conservation modalities and morality. This elucidation is conveyed through clan names, taboos, proverbs and folklores which promote “human tolerance towards plants, animals, mountains and rivers”.<sup>228</sup> African indigenous philosophy advocates for a collective sensibility regarding the responsibility for conservation, which stands in stark contrast to Western philosophy, exemplified by Kantian thought which transmits individualistic moral obligations towards non-human conservation.<sup>229</sup> These modes of environmental stewardship knowledge, to Monyamane and Bapela, are conveyed through narration by elders to future generations and invoke an “emotion in their audience”.<sup>230</sup>

Clan names, often referred to as ‘totems’, construct allusions to the history, origins,<sup>231</sup> and ethnicity of a clan which inform identity.<sup>232</sup> Opland notes that clan names are also vital to African religion through rituals which exists to communicate with the ancestral spirits of the dead.<sup>233</sup> Across Zimbabwe, clan names encourage affinity between humans and wild animals as clan names inform individual social identities through clan

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<sup>224</sup> SD Kamga ‘Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa’ (2018) 18 *AHRLJ* 627.

<sup>225</sup> Kamga (n224 above) 627.

<sup>226</sup> Kamga (n224 above) 627.

<sup>227</sup> Kamga (n224 above) 627.

<sup>228</sup> Chibvongodze (n56 above) 159.

<sup>229</sup> Chibvongodze (n56 above) 159.

<sup>230</sup> L Monyamane & MP Bapela ‘*Gongqose v Minister of Agriculture Forestry and Fisheries – A Tale of Customary Rituals and Practices in Marine Protected Areas*’ (2019) 22 *PELJ* 6.

<sup>231</sup> T Shoko *Karanga Indigenous Religion in Zimbabwe: Health and Well-Being* (2007) 18.

<sup>232</sup> B Lindgren ‘The internal dynamics of ethnicity: Clan names, origins and castes in southern Zimbabwe’ (2004) 74 *JIAI* 180.

<sup>233</sup> J Opland ‘Poets and Poetry’ (1998) 90.

name derivation from wild animal names and gestures.<sup>234</sup> Shoko exemplifies the clan names used by the Karanga dialectical cluster of the Shona peoples, including but not limited to: *Shoko* or monkey, *Hove* or fish, *Shiri* or bird, *Shumba* or lion, and *Shava* or eland.<sup>235</sup> To take this further, MacGonagle notes that the Shona peoples bear animal names as clan names to endorse the collective duty of preventing the harm and/or extinction of such animal.<sup>236</sup> By way of this, the Shona peoples view that animal harm or exodus effects the clan's name similarly.<sup>237</sup> Additionally, the sacredness of an animal used as a clan name places a moratorium on eating such animal or a certain part of such animal.<sup>238</sup> To the Shona peoples, consumption of a clan name animal could lead to bad luck or a loss of teeth.<sup>239</sup>

Proverbs on the other hand, are said by Chibvongodze to be core to African Indigenous knowledge for the provision of responses to contemporary African societal moral or ethical quandaries.<sup>240</sup> As such, Chibvongodze provides several succinct Shona and Ndebele proverbs which directly address environmental conservation and ethics. The Ndebele proverb of '*ihloka liyakhohlwa kodwa isihlahla asikhohlwa*' or 'an axe forgets but the tree does not forget' discourages the mistreatment of humans by humans, but it also speaks to Ndebele empathy towards trees.<sup>241</sup> Chibvongodze links this to the Zulu proverbs of '*isihlahla asinyelelwa*' or 'a tree is not defecated upon' which conveys Zulu encouragement for human contentedness and dignified respect towards trees.<sup>242</sup> Another Ndebele proverb or '*inkomo kayisengwa ngokwehlisa*' or 'do not continuously milk a cow until there is nothing to milk' speaks to how selfish animal exploitation disadvantages other humans.<sup>243</sup> Apart from disadvantaging other humans, Ndlovu and Ncube note that this proverbs conveys Ndebele abhorrence towards

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<sup>234</sup> J Galaty 'Animal spirits and mimetic affinities: The semiotics of intimacy in African human/animal identities' (2014) 34 *Critique of Anthropology* 30-32.

<sup>235</sup> Shoko (n170 above) 7.

<sup>236</sup> J MacGonagle 'Crafting Identity in Zimbabwe and Mozambique' (2007) 55.

<sup>237</sup> MacGonagle (n174 above) 56.

<sup>238</sup> MacGonagle (n174 above) 55.

<sup>239</sup> MacGonagle (n174 above) 55.

<sup>240</sup> Chibvongodze (n56 above) 160.

<sup>241</sup> Chibvongodze (n56 above) 160.

<sup>242</sup> Chibvongodze (n56 above) 160.

<sup>243</sup> Chibvongodze (n56 above) 160.

exploitative over-milking as a calf also needs milk for survival.<sup>244</sup> The Shona proverbs of *'aiva madziva ava mazambuko'* or 'what use to be pools are now crossings' reveals African indigenous connections and sensitivities towards the ever-changing environment, and the obligation to observe such changes.<sup>245</sup> Chivongodze notes that this also challenges the assumptions of modern Western knowledge, which deem local indigenous societies as uncaring or ignorant towards environmental depletion.<sup>246</sup> From the proverbs above, African indigenous knowledge and responsibility is extended to plants, animals and the natural environment and its resources as a whole. This also serves to thwart critiques of African Indigenous environmental knowledge or stewardship techniques (such as *Ubuntu*) as anthropocentric or as giving priority to humans.

Regarding taboos, Colding and Folke provide a fitting starting point through explaining that 'taboo' is derived from the Polynesian term *'tapu'* which refers to a ban or prohibition.<sup>247</sup> This paper intends to take this definition further through application of the Encyclopaedia Britannica definition of 'taboo', which deems such term as the social prohibition of certain actions or behaviours based on beliefs that such actions are either too sanctified or sacred, or "too dangerous and accursed for ordinary individuals to undertake".<sup>248</sup> Colding and Folke note six classifications of resource and habitat taboos of traditional societies, namely: segment taboos, temporal taboos, method taboos, life history taboos, specific-species taboos, and habitat taboos.<sup>249</sup> Colding and Folke consider these taboos as informal institutions which offer improvements to partnership arrangements of ecosystem and biodiversity conservation and stewardship amongst local human communities and conservationists.<sup>250</sup> Segment taboos refer to the age, sex or social status-based prohibition on the human use of

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<sup>244</sup> M Ndlovu & B Ncube 'The philosophy of sustainable development as depicted in the proverbs of AmaNdebele' (2014) 5 *JETERPS* 212.

<sup>245</sup> Chibvongodze (n56 above) 160.

<sup>246</sup> Chibvongodze (n56 above) 160.

<sup>247</sup> J Colding & C Folke 'Social taboos: "Invisible" systems of local resource management and biological conservation' (2001) 11 *Ecological Applications* 584.

<sup>248</sup> Britannica, The Editors of Encyclopaedia 'taboo' 17 September <https://www.britannica.com/topic/taboo-sociology> (accessed 3 October 2023).

<sup>249</sup> Colding & Folke (n247 above) 586.

<sup>250</sup> Colding & Folke (n247 above) 584.

certain species for specific time periods.<sup>251</sup> Examples of such taboos include the Aka Pigmy<sup>252</sup> prohibition on specific mushrooms for married couples and pregnant females, or the prohibition on white-bellied duiker or tree hyrax for children.<sup>253</sup> Additionally, the Mbuti<sup>254</sup> prohibit a host of animal usage due to such animals forming totemic clan names, while the Ntomba<sup>255</sup> prohibit women from using the Bate's antelope and women and children from three specific fish species.<sup>256</sup>

Temporal taboos permit human access to natural resources for specific time periods, with Chibvongodze noting that many rural Zimbabwean communities have specific days wherein fishing, hunting, and firewood and wild plant collection are restricted.<sup>257</sup> Method taboos restrict the human use of specific farming, fishing, and hunting methods which may render a depletion of natural life and resources.<sup>258</sup> The Sakumo lagoon in Ghana has a taboo against draw nets for fishing, while the Djange lagoon has a taboo against the use of draw nets, sticks and poles for fishing.<sup>259</sup> Additionally, spear guns and torches are banned on the Mokil Atoll due to reef fish sleeping patterns and spear fishing and the use of certain toxins for fishing also sees prohibition on the Satawal.<sup>260</sup> Both temporal and method taboos, as per Chibvongodze, reduce hunting and harvesting pressures.<sup>261</sup> On the other hand, specific-species and life history taboos prohibit the use or hunting of species in a vulnerable stage of life history due to age, reproductive status or sex.<sup>262</sup> The Kokre-Bellur village of Karnataka places a life history taboo on painted storks and grey pelicans breeding in village trees, driving hunters and photographers away as the village collects bird guano/fertilizer for their crops.<sup>263</sup> The Fiema and Boabeng villages in Ghana place specific-species taboos upon the black and white colobus, while the Edo State in Nigeria places such taboos

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<sup>251</sup> Colding & Folke (n247 above) 586.

<sup>252</sup> Of the Central African Republic.

<sup>253</sup> Colding & Folke (n247 above) 588.

<sup>254</sup> Of the Democratic Republic of the Congo.

<sup>255</sup> Of the Democratic Republic of the Congo.

<sup>256</sup> Colding & Folke (n247 above) 588.

<sup>257</sup> Chibvongodze (n56 above) 160-161.

<sup>258</sup> Chibvongodze (n56 above) 161.

<sup>259</sup> Y Ntiamoa-Baidu 'Conservation of coastal lagoons in Ghana: the traditional approach' (1991) 20 *Urban Planning* 42-43.

<sup>260</sup> RE Johannes 'Traditional marine conservation methods in Oceania and their demise' (1978) 9 *ARES* 354.

<sup>261</sup> Chibvongodze (n56 above) 161.

<sup>262</sup> Chibvongodze (n56 above) 161.

<sup>263</sup> Colding & Folke (n247 above) 587-589.

on gorillas and chimpanzees as these animals are rated as threatened.<sup>264</sup> Lastly, habitant taboos are placed upon sacred forests, mountains, pools and rivers so to place a moratorium on the access to and hunting/harvesting in such locales by ordinary community members.<sup>265</sup> Habitant taboos are seen in the Malshegu grove of Ghana, the Kayas of Kenya and the Yoroba of Ara in Nigeria.<sup>266</sup>

In essence, all the proverbs, folklore and taboos above allude to the sacred and religious modalities of Indigenous peoples in the context of sustainable environmental and ecological protection and stewardship. Moreover, these taboos convey such for more than just the living environment<sup>267</sup> and for more than just the assurance of human survival and prosperity. These techniques also present how advanced indigenous environmental management and protection modalities are, though Chibvongodze notes that the intimate Indigenous African human-nature relationships were fervently disrupted by colonialism and “globalisation under the neo-liberal project”.<sup>268</sup>

## **3.2 Conceptualizing modern *Ubuntu*: A Point of Departure**

### **3.2.1 Problematising *Ubuntu* Theorisation and Discourse**

Before a contemporary *Ubuntu* can be gestated, the complexities of its conceptualization will first be problematised to ground this paper’s accuracy regarding its application of *Ubuntu*. As per Murove, African ethics have seen relegation to the periphery of mainstream ethical discourse for aeons.<sup>269</sup> A slew of Western scholars have even asserted that Africa lacks any form of ethics altogether,<sup>270</sup> with Western academics also raising suspicions of Africans attempting to advance “hidden

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<sup>264</sup> Colding & Folke (n247 above) 593.

<sup>265</sup> Chibvongodze (n56 above) 161.

<sup>266</sup> Colding & Folke (n247 above) 593.

<sup>267</sup> Plants and animals.

<sup>268</sup> Chibvongodze (n56 above) 161.

<sup>269</sup> MF Murove ‘Ubuntu’ (2012) 59 *Diogenes* 36.

<sup>270</sup> Manifesting as another possible stream of dehumanising discourse towards the African.

agendas”<sup>271</sup> contrary to Western philosophies, where discourse surrounding *Ubuntu*’s philosophical tenets emerge.<sup>272</sup> Contrary to *Ubuntu*’s long-standing prominence amongst various traditional African societies, many scholars play into the trend of trivialising the facts behind *Ubuntu*’s origins.<sup>273</sup> This trivialisation avoids what Topidi notes as colonialism and apartheid’s political shaping of *Ubuntu*.<sup>274</sup>

These trends amongst Western academics in contemplating *Ubuntu* may stem from what Topidi notes as two major streams of *Ubuntu* contention. Firstly, *Ubuntu* is perceived as offering Africa the potentiality to be societally transformative or it is viewed as obsolete outdated, contradictorily inconsistent and vaguely ambiguous.<sup>275</sup> Topidi invokes Metz, who has narrowed down *Ubuntu*’s meaning through suggestions that actions can only be deemed just when they foster harmony and reduce discord within communities.<sup>276</sup> Metz further concludes that self-realisation comes from interpersonal relationships rather than a focus upon material goods.<sup>277</sup> Topidi also points to Enslin and Horsthemke, who subject *Ubuntu*’s content to critique by pointing out African societal weaknesses such as autocracy, corruption, sexism, and environmental deterioration among others.<sup>278</sup> Fierce Contestation also exists regarding the relevance *Ubuntu* philosophy due to fears concerning conservatism and patriarchy embodied therein, leading to a lack of *Ubuntu* allure amongst young Africans.<sup>279</sup> Additionally, Topidi notes *Ubuntu* critique from Matolino and Kwindiwi which touts *Ubuntu*’s non-promotion of constitutionally enshrined equality, owing to a lower status accorded to women.<sup>280</sup> On such note and despite being a collectivist philosophy, *Ubuntu* is seen as maintaining discrimination, patriarchy and inequality against children, lesbians or homosexuals which contrasts fundamental constitutional

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<sup>271</sup> Murove (n269 above) 36.

<sup>272</sup> Murove (n269 above) 36.

<sup>273</sup> Murove (n269 above) 36.

<sup>274</sup> K Topidi ‘3. Ubuntu as a Normative Value in the New Environmental World Order’ in Amirante & Bagni (eds) *Environmental Constitutionalism in the Anthropocene: Values, principles, and Actions* (2022) 50.

<sup>275</sup> Topidi (n274 above) 53.

<sup>276</sup> T Metz ‘Toward an African Moral Theory’ (2007) 15 *TJPP* 331.

<sup>277</sup> Metz (n275 above) 334.

<sup>278</sup> P Enslin & K Horsthemke ‘Can Ubuntu Provide a Model for Citizenship Education in African Democracies’ (2004) 40 *Comparative Education* 545.

<sup>279</sup> B Matolino & W Kwindiwi ‘The End of Ubuntu’ (2013) 32 *SAJP* 197.

<sup>280</sup> Matolino & Kwindiwi (n279 above) 204.

principles.<sup>281</sup> Topidi also conveys that *Ubuntu* may fall victim to political manipulation if vague ideas are propounded, leading to a further lack of appeal.<sup>282</sup>

Secondly, *Ubuntu's* possible universal appeal finds criticism due to an alleged weakening lack of both a rigid framework and homogeneity, which perturbs *Ubuntu's* theorisation.<sup>283</sup> Moreover, Topidi notes *Ubuntu's* primary normative tension through a clash between the communitarian ontology of *Ubuntu* and liberal individual rights, prompting broader notions of *Ubuntu's* human rights compatibility.<sup>284</sup> Section 3.4 of this paper will curb such notions however, through assertions of a strict cosmopolitan *Ubuntu*. Ojatorotu and Bamidele convey the important preface of *Ubuntu* existing as a philosophical guiding principle, though more importantly as a communal way of living which is generationally imparted.<sup>285</sup> By way of this, the intricacies underpinning *Ubuntu* cannot be fully comprehended through theoretical postulations alone and instead, its essence is best gleaned from observations regarding the way in which Africans organize themselves and relationally interact with one another.<sup>286</sup> Moreover, *Ubuntu* differs from the individualistic philosophies emphasising "individual thought and reasoning"<sup>287</sup> as per renowned Western philosophers such as Descartes, Plato, Locke, Rousseau and Kant.<sup>288</sup> Instead, *Ubuntu* takes root in a culture of shared existence amongst people and it embodies an African communal living rather than derivation from individual-based reasoning.<sup>289</sup> Although *Ubuntu* regards power as co-created and jointly empowering, the interpretive openness and universalistic streams of *Ubuntu* flow into vehement critique and the possibility for political manipulation and advancement of patriarchy.<sup>290</sup> However, *Ubuntu* in a post-industrialised Africa sees restriction and contribution to distributive justice oversight under the guise of public-spiritedness or contemporary modes of "cultural nationalism".<sup>291</sup> Topidi does provide

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<sup>281</sup> Matolino & Kwindigwi (n279 above) 204.

<sup>282</sup> Topidi (n274 above) 53.

<sup>283</sup> Topidi (n274 above) 53.

<sup>284</sup> Topidi (n274 above) 54.

<sup>285</sup> V Ojatorotu & EO Bamidele 'Ubuntu and Nature: Towards Reversing Resource Curse in Africa' (2019) 8 *Ubuntu: JCST* 28-29.

<sup>286</sup> Ojatorotu & Bamidele (n285 above) 29.

<sup>287</sup> Ojatorotu & Bamidele (n285 above) 29.

<sup>288</sup> Ojatorotu & Bamidele (n285 above) 29.

<sup>289</sup> Ojatorotu & Bamidele (n285 above) 29.

<sup>290</sup> Topidi (n274 above) 55.

<sup>291</sup> Topidi (n274 above) 54.

reasons for resistance to *Ubuntu* and the critiques above however, noting that *Ubuntu* stands in subversive contrast to adversarial and competitive Western social and legal discourse as it perceives life in society as “not a priori binary and certainly not individualistic”.<sup>292</sup>

The criticisms above, among others, are also curbed further by a variety of academics. As will be discussed later, *Ubuntu* is unquestionably formative to the South African legal landscape, despite this notion and *Ubuntu*'s place as a harmoniously guiding moral value it is contested for its vagueness,<sup>293</sup> its alleged threat to individual freedom,<sup>294</sup> and its obsolescence due to possible gender equality defiance.<sup>295</sup> However, both Kamga and Himonga note that *Ubuntu* finds strength in its vagueness through providing more broad paths for customary reality and human rights realisation.<sup>296</sup> Additionally, Kamga asserts that the African reality of *Ubuntu* promotes human rights and social justice, which can be extended to gender equality, thwarting Cornell's critique above.<sup>297</sup> Similarly, as *Ubuntu* platforms social parity and equity, it applies to the interests of the community at large,<sup>298</sup> though Metz curbs Nkondo's critique above through asserting *Ubuntu*'s precision in individual freedoms acknowledgement in both South Africa and other societies.<sup>299</sup> Kamga also quashes other critiques of *Ubuntu* as a contemporary “cultural nationalism”<sup>300</sup> which marginalises dissenting views under a nation building disguise and which hides redistributive justice necessities through civic virtue and moral renewal promotion.<sup>301</sup> To Kamga, restorative justice prompts social harmony and cohesion through collaborative partnerships and redress for harm without partnership in fragmented communities, as per African norms which guided the TRC.<sup>302</sup>

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<sup>292</sup> Topidi (n274 above) 55.

<sup>293</sup> T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *AHRLJ* 533.

<sup>294</sup> GM Nkondo 'Ubuntu as a public policy in South Africa: A conceptual framework' (2007) 2 *IJARS* 90.

<sup>295</sup> D Cornell 'Is there a difference that makes a difference between ubuntu and dignity' (2010) 25 *SAPL* 389-391.

<sup>296</sup> C Himonga 'The right to health in an African cultural context: The role of ubuntu in the realisation of the right to health with special reference to South Africa' (2013) 57 *JAL* 173.

<sup>297</sup> Kamga (n224 above) 635.

<sup>298</sup> Kamga (n224 above) 635.

<sup>299</sup> Metz (n293 above) 534.

<sup>300</sup> Kamga (n224 above) 632.

<sup>301</sup> Kamga (n224 above) 632.

<sup>302</sup> Kamga (n224 above) 632.

In tandem with the muddling potential of the *Ubuntu* criticisms above, something must be said for the misstep of constraining *Ubuntu's* meaning, theorisation, interpretation and application in the foreign language of English. Tshoose notes that English has no direct translations or linguistic equivalents to various isiZulu and Setswana words, alluding to the insufficiency of capturing *Ubuntu's* essence in English.<sup>303</sup> By virtue of this, Radebe and Phooko point to the unsurprising contestation towards and misunderstanding of *Ubuntu*.<sup>304</sup>

### **3.2.2 Conceptualising an Adroitly Purpose-Made and Ecologically Conscious *Ubuntu***

#### **3.2.2.1 *Ubuntu* as Non-Anthropocentric: Humankind as Bound to Nature and Not atop It**

Before embarking on the next inquiry of this paper, anthropocentrism will be defined to buttress this paper's notion of a non-anthropocentric *Ubuntu*. It is also acknowledged that contention does exist in this regard however, as *Ubuntu* can and has been conceptualised or described as anthropocentric, with non-anthropocentric touting of *Ubuntu* often manifesting as pro-market neo-liberal appropriation or *Ubuntu* capitalism.<sup>305</sup> As per the Encyclopaedia Britannica, anthropocentrism is a philosophical outlook "embedded in many Western religions and philosophies".<sup>306</sup> This viewpoint considers humans as the most central and significant beings in the world, holding superior and intrinsic value which renders humans as justified in exploiting other, less intrinsic entities.<sup>307</sup> As per Goralnik & Nelson, anthropocentrism regards all non-human beings (and nature as a whole) as holding only an instrumental value through an

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<sup>303</sup> CI Tshoose 'The emerging role of the constitutional value of ubuntu for informal social security in South Africa' (2009) 3 *AJLS* 13-14.

<sup>304</sup> SB Radebe & MR Phooko 'Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu' (2017) 36 *SAJP* 240.

<sup>305</sup> See: JH De Villiers 'Thinking outside the cage: sacrifice, equality and the plight of the animal' unpublished LLM dissertation, University of Pretoria, 2012 65-66.

<sup>306</sup> Britannica, The Editors of Encyclopaedia 'anthropocentrism' 11 January <https://www.britannica.com/topic/taboo-sociology> (accessed 11 February 2024).

<sup>307</sup> Britannica, The Editors of Encyclopaedia (n305 above).

“ability to serve humans”.<sup>308</sup> Goralnik & Nelson also point to broad or enlightened anthropocentrism as an ethical anthropocentrism which considers humans in their ecological context and as embedded within “and dependent upon [a] myriad [of] relationships with other beings and systems.”<sup>309</sup> Despite the ease with which a broad anthropocentrism may be transfixed onto *Ubuntu* for environmental ethics, this paper will utilise *Ubuntu* as non-anthropocentric by way of it being ecocentric, as will be elucidated upon later, through Ramose and Le Grange. Goralnik & Nelson assert that ecocentrism and biocentrism are morally inclusive ethics which stand in contrast to anthropocentrism and values the “elements of the natural world as ends in themselves”<sup>310</sup> and not solely as a means for human ends. Through the African traditional outlooks like taboos and folklore expanded on above, animals are not seen as only instrumentally valuable. When considered ecologically and amongst the myriad of relationships between non-human beings and the environment, non-human beings find intrinsic and naturally belonging value not only to humans, but to all other being that they interact with.

For *Ubuntu* to find application as a suitable guide to environmental ethics, it will be classified as non-anthropocentric for this paper to convey that it does not propel human beings above their natural and physical environment. On the contrary, and as per Topidi, one of the more pressing threats to *Ubuntu* is how anthropocentrism, colonisation and globalisation have shaped modes of environmental stewardship and management.<sup>311</sup> Moreover, Le Grange thwarts notions of *Ubuntu* as speciesist and anthropocentric through classifying *Ubuntu* as ecocentric when contemplated under an environmental ethics lens.<sup>312</sup> Going further than ecocentricity, Ramose posits that *Ubuntu* or humaneness as ecosophy through its complex and interconnected view of reality wherein all entities interact with one another in a multi-layered manner which regards the universe’s inherent order.<sup>313</sup> Moreover, Ramose dubs this “multi-

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<sup>308</sup> L Goralnik & MP Nelson ‘Anthropocentrism’ in Chadwick (ed) *Encyclopaedia of Applied Ethics (Second Edition)* (2012) 145-146.

<sup>309</sup> Goralnik & Nelson (n308 above) 145.

<sup>310</sup> Goralnik & Nelson (n308 above) 145.

<sup>311</sup> Topidi (n274 above) 50.

<sup>312</sup> Le Grange (n89 above) 332.

<sup>313</sup> Ramose (n24 above) 69.

directional movement of entities”<sup>314</sup> not as chaos, but as the corporeality of the universe’s intrinsic order, manifesting as the ecosophical dimension of *Ubuntu*, *huhnu* or *botho*.<sup>315</sup> Le Grange touts *Ubuntu* as an ecosophy connected to Guttari’s ecologies of the self, the social and the nature-self<sup>316</sup> which manifests as a complex boundedness between nature and the social.<sup>317</sup> Necessarily, Horsthemke and Enslin note that suffrage on an ecological register is observed on other registers and as such, the *longue-durée* of South African suffrage via colonialism, apartheid, homophobia, genocide, heteronormativity and capitalism (among other incidents) erode *Ubuntu* and the human-nature relationship.<sup>318</sup>

### 3.2.2.2 The Linguistic and Philosophical Origins of *Ubuntu*

Deconstructing *Ubuntu* linguistically, ‘ubu’ and ‘ntu’ respectively refer to ‘being’ and ‘person’ or simply “being-a-person”.<sup>319</sup> This translation exemplifies the notion that an individual is or becomes a person when fostering and establishing humane communal relationships.<sup>320</sup> Primarily, this suggests existence in relation with others, thereby emphasizing *Ubuntu*’s linguistic perspective on human existence and underscoring how individuals become a person through the establishment of human relations.<sup>321</sup> Going further, and exploring *Ubuntu* as a linguistic-philosophical concept, Le Grange conveys *Ubuntu/Botho* as the derivation of an array of Saharan-African proverbs which emphasise how human individuals are to relate to one another.<sup>322</sup> *Ubuntu* becomes more than a purely linguistic concept as it transmits a moral obligation towards others, and is a fundamental element of being a human or *umuntu*.<sup>323</sup> *Umuntu* is intertwined with physical form or *umzimba*, breath or *umoya*, spirit of *umphefumela*, vitality or

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<sup>314</sup> Ramose (n24 above) 69.

<sup>315</sup> Ramose (n24 above) 69.

<sup>316</sup> F Guttari ‘The three ecologies’ in Pindar & Sutton (eds) *Trans* (2001).

<sup>317</sup> Le Grange (n89 above) 334.

<sup>318</sup> K Horsthemke & P Enslin ‘Is there a distinctively and uniquely African philosophy of education’ in Waghid (ed) *African(a) philosophy of education: Reconstruction and deconstructions* (2005) 67.

<sup>319</sup> E Etieyibo ‘Ubuntu, Cosmopolitanism, and Distribution of Natural Resources’ (2017) 46 PP 154.

<sup>320</sup> Etieyibo (n319 above) 154.

<sup>321</sup> Etieyibo (n319 above) 154.

<sup>322</sup> Le Grange (n89 above) 331.

<sup>323</sup> Le Grange (n89 above) 331.

*Amandla*, emotions or *inhliziyo*, intellect or *umqondo*, language or *ulwimi*, and finally *Ubuntu* as humaneness.<sup>324</sup> Departing from Western individualistic frameworks, *Ubuntu* manifests in a communalist context<sup>325</sup> and as per Battle, *Ubuntu* takes root in the proverbial Xhosa/Zulu<sup>326</sup> expression of '*umuntu ngumuntu ngabanye Bantu*' which regards that an individual's humanity finds ideal and true expression through one's relationships with others.<sup>327</sup>

The writings of Ramose and Ojatorotu and Bamidele<sup>328</sup> serve as concise academic resources for conceptualizing a contemporary *Ubuntu* philosophy, and grounding its applicability (especially in law, environmental ethics, agricultural practices, and moral education). Ojatorotu and Bamidele regard *Ubuntu* as an African philosophy and Bantu ethical, guiding, community-orientated, and relational norm of Sub-Saharan indigenous Africans.<sup>329</sup> Thus, personhood finds recognition via community membership instead of individual recognition.<sup>330</sup> Ramose refers to the restoration of *Ubuntu* through the utilization of the African aphorism '*motho ke motho ka batho*', which is a Sotho proverb declaring that the acknowledgement and understanding of one's personal humanity necessitates the recognition of and respect for the humanity possessed by others, so to establish humane relationships with them.<sup>331</sup> This proverb, in tandem with the Xhosa/Zulu variation above, serve to prove what Ojatorotu and Bamidele deem as the inseparability of individuals from other individuals.<sup>332</sup> The concept of humaneness in this context can be defined as a manifold, comprehensive and intricate interaction between all entities in the universe.<sup>333</sup> The principle of 'humaneness' is crucial here as it pertains to the respectful and courteous treatment of other individuals, and serves as the guiding and regulative standard for 'wholeness', which maintains that one's individuality cannot be fully realized without that of

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<sup>324</sup> Le Grange (n89 above) 331.

<sup>325</sup> Le Grange (n89 above) 331.

<sup>326</sup> Ojatorotu & Bamidele (n285 above) 28-29.

<sup>327</sup> M Battle 'The ubuntu theology of Desmond Tutu' in Hully; Kretzschmar & Lungile (eds) *Archbishop Tutu: The Prophetic witness in South Africa* (1996) 99.

<sup>328</sup> Among others.

<sup>329</sup> Ojatorotu & Bamidele (n285 above) 28.

<sup>330</sup> Ojatorotu & Bamidele (n285 above) 29.

<sup>331</sup> Ramose (n24 above) 70.

<sup>332</sup> Ojatorotu & Bamidele (n285 above) 28-29.

<sup>333</sup> Ramose (n24 above) 69.

others.<sup>334</sup> Mbiti, as cited by Ojakorotu and Bamidele, adds to such notion through the entanglement of *Ubuntu* with notions of “I am, because we are; and since we are, therefore I am”.<sup>335</sup> Furthermore, this understanding underscores how integral 'wholeness' truly is through the extension of human beings' relational humanness into their “physical or objective nature”.<sup>336</sup> Under this rubric of holism, the promotion of interdependence amongst humans and their environment undeniably manifests through what Ramose elucidates as the fulfilment of our duty towards each other inevitably entailing a duty towards caring for Mother Earth herself.<sup>337</sup>

To further extend *Ubuntu's* relational dimensions as intertwined with nature and not just the human, the concept of *ukama* will be elucidated upon. *Ubuntu* exists as the concretised expression of the broader concept *ukama*, which is a Shona concept regarding a relatedness and interconnectedness to the entire cosmos.<sup>338</sup> While *Ubuntu* ports a moral obligation towards stronger human relationships so to achieve full humanity, it also transmits a moral obligation towards the “biotic communities and the entire ecosphere”.<sup>339</sup> Thus, the true and full human self cannot be attained if either the human or nature endure abuse and/or exploitation, as such, *ukama's* interconnectedness of the past, present and future carries the obligation towards maintaining presently enjoyed benefits for the future.<sup>340</sup> *Ukama* carries beliefs regarding ancestors which construct a moral community inclusive of the past, present and future generations which, regarding environmental ethics, emphasises the responsibility towards considering harm towards the environment for future generations.<sup>341</sup> *Ukama's* signification of relatedness to all natural entities suggest the imperative for care towards the natural world, with nature holding intrinsic value.<sup>342</sup> Thus, *Ubuntu* as a concretised *ukama* further impedes environmental ethics and philosophical discourse which categorise *Ubuntu* and African indigenous values as

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<sup>334</sup> Ramose (n24 above) 70.

<sup>335</sup> Ojakorotu & Bamidele (n285 above) 29.

<sup>336</sup> Ramose (n24 above) 70.

<sup>337</sup> Ramose (n24 above) 70.

<sup>338</sup> Le Grange (n89 above) 332.

<sup>339</sup> Le Grange (n89 above) 334.

<sup>340</sup> Le Grange (n89 above) 334.

<sup>341</sup> Le Grange (n89 above) 334.

<sup>342</sup> Le Grange (n89 above) 334-335.

purely anthropocentric and ecocentric.<sup>343</sup> These categories cannot constrain *ubuntu* as human care for others and the self is not “antagonistic towards caring for non-human nature”,<sup>344</sup> intertwining the self, the community and nature so as to render one dimensions regeneration transversally between all dimension.<sup>345</sup>

### 3.2.2.3 *Ubuntu’s* Ethics in Application to Contemporary Environmental Ethics

Moving away from the linguistic, philosophical, and trans-dimensional facets of *Ubuntu*, the concept will be more thoroughly conceptualised as an ethical concept to be transfixed onto contemporary environmental ethics paradigms. As per Mabele *et al*, *Ubuntu* is a salient and decolonial ethic regarding behaviour anent guiding ways of thinking and acting towards all others, human and non-human.<sup>346</sup> Furthermore, Mabele *et al* assert that the crux of *Ubuntu* places emphasis on “communion, relationality and reconciliation”.<sup>347</sup> By way of this, *Ubuntu* carries politically charged implications through the binding of life experiences to the good of a community as opposed to the liberal predisposition of securing conditions which facilitate autonomous life experiences.<sup>348</sup> Accordingly, the competitive, capitalistic, individualistic, and ecologically damning dogma of Western ethics is contested under *Ubuntu’s* discursive lens which regards the knowledge buttressing conservation and ethics as tied to community discourse.<sup>349</sup> Thus, *Ubuntu* aptly embodies a “deliberative epistemology”<sup>350</sup> or what Molefe conceptually dubs as an “ethics of means”.<sup>351</sup>

Expanding on *Ubuntu* as an ethics of means, Molefe notes that development ethics entails a pursuit towards moral objectives and the employment of ethical means for

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<sup>343</sup> Le Grange (n89 above) 335.

<sup>344</sup> Le Grange (n89 above) 335.

<sup>345</sup> Le Grange (n89 above) 335.

<sup>346</sup> Mabele *et al* (n80 above) 96.

<sup>347</sup> Mabele *et al* (n80 above) 96-97.

<sup>348</sup> Mabele *et al* (n80 above) 97.

<sup>349</sup> Mabele *et al* (n80 above) 97.

<sup>350</sup> Mabele *et al* (n80 above) 97.

<sup>351</sup> M Molefe ‘Ubuntu and Development: An African Conception of Development’ (2019) 66 *Africa Today* 99.

attain its goals.<sup>352</sup> This involves the evaluation of different development paths and the development of “the means of means,”<sup>353</sup> to arrive at a morally sound approach. Molefe distinguishes between ethical approaches involving basic or final values for *Ubuntu*-based individual personhood achievement, and economic or engineering-based models which prioritize growth in infrastructure.<sup>354</sup> Therefore, efforts aimed at advancing development must align with specific moral ideals surrounding targeted endpoints like food security or necessary infrastructure provision.<sup>355</sup> Molefe proposes harmonious social relationships are core to an agent achieving the moral goal of virtuous character development.<sup>356</sup> Thus, such relationships are pivotal moral instruments for the achievement of *Ubuntu*, with focus placed upon self-realisation through harmonious and cooperative social relations for achieving *Ubuntu’s* ends.<sup>357</sup>

Accordingly, the moral logic which underpins *Ubuntu* as an ethics of means manifests as participatory and cooperative as *Ubuntu*-based development involves direct or representative participation and cooperation.<sup>358</sup> This moral logic is rooted in deliberative consensus for decision and policy-making regarding externalities like majoritarianism, with majoritarianism often marginalising minorities and consensus accommodating decisions without a basis of “winner-take-all”.<sup>359</sup> Development must consider the cultural values underpinning *Ubuntu*, including pertinent cultural, customary and locality-based norms. Molefe points to indigenous African values which prioritize: consensus over majoritarianism; reconciliation instead of retribution; socially collaborative economic developments over competitive or individualistic developments; and necessitated moral logic-based goods distribution instead of rights-based distribution.<sup>360</sup> These indigenous values articulate a duty of positive responses towards individuals impeded from the achievement of personhood, rendering a just society as one that exists through a logic of responsibility and love as

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<sup>352</sup> Molefe (n351 above) 109.

<sup>353</sup> Molefe (n351 above) 109.

<sup>354</sup> Molefe (n351 above) 109.

<sup>355</sup> Molefe (n351 above) 108.

<sup>356</sup> Molefe (n351 above) 109.

<sup>357</sup> Molefe (n351 above) 109.

<sup>358</sup> Molefe (n351 above) 109.

<sup>359</sup> Molefe (n351 above) 109.

<sup>360</sup> Molefe (n351 above) 109.

opposed to a logic of rights.<sup>361</sup> Furthermore, human capacity for virtue must be respected to mandates and provisions of social goods which are conducive to full personal development.<sup>362</sup>

### **3.3 Joinder: *Ubuntu*, Indigeneity and Precedent in the Legal Landscape as Conquered**

This section intends to probe constitutional, judicial and academic interpretations and applications of *Ubuntu*, as emerging in mainstream contemporary discourse with the advent of the Truth and Reconciliation Commission.<sup>363</sup> *Ubuntu* was influential within the TRC, South Africa's jurisprudence and the attainment of some level of post-apartheid harmony, marking *Ubuntu's* place in the South African legal landscape as undeniable.<sup>364</sup> Through such contemplation, the lacklustre use and even misuse of *Ubuntu* in South African law will be conveyed, adding to the host of contemporary problems arising in theorising, interpreting, and applying *Ubuntu*. Despite TRC and judicial shortcomings regarding *Ubuntu*, this principle has seen a broad reach of influence amongst a variety of socio-legal dimensions, such as: contract law, private law, criminal law, eviction laws, migrants' rights, social security, and various other legal fields.<sup>365</sup>

#### **3.3.1 The Truth and Reconciliation Commission: *Ubuntu* and its Inceptive and Dubious Post-Apartheid Invocation**

By way of the Promotion of National Unity and Reconciliation Act,<sup>366</sup> the TRC was established to restore equilibrium to the post-apartheid South Africa.<sup>367</sup> Entrenched in

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<sup>361</sup> Molefe (n351 above) 109-110.

<sup>362</sup> Molefe (n351 above) 110.

<sup>363</sup> Hereinafter referred to as the 'TRC'.

<sup>364</sup> Kamga (n224 above) 634.

<sup>365</sup> Kamga (n224 above) 639.

<sup>366</sup> The Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>367</sup> Kamga (n224 above) 629.

*Ubuntu*, human rights, and democracy, the TRC was a process of “bridge-building”<sup>368</sup> which marked a shift from South Africa’s violent and tempestuous history.<sup>369</sup> As TRC chairperson, Desmond Tutu called socioeconomic change and reparations through forgiveness by apartheid victims and the taking of responsibility and provisions of profuse apology by apartheid perpetrators.<sup>370</sup> This notion was fiercely criticised due to the impossibility of a reconciliatory focus on a state level as an amalgam of actors, groups and stakeholders were present and thus, reconciliation cannot wholly manifest as political reconciliation.<sup>371</sup> Building and leaning broadly upon African communitarian philosophy and narrowly on *Ubuntu*, the TRC revealed apartheid era human rights atrocities through reconciliatory reflection.<sup>372</sup> The use of *Ubuntu* and its ethos of harmony in TRC proceedings conveyed the power of societal healing for simultaneous living and a peaceful post-apartheid transition.<sup>373</sup>

Regrettably, the TRC is deemed by Kamga as having distorted justice through implications of non-accountability, under the guise of restorative justice, via the granting of amnesty and incommensurable minimum sentences to the perpetrators of human rights atrocities.<sup>374</sup> Kamga invokes Oelofse and Oosthuyzen who assert that the TRC muted strides apropos reconciliation as the post-TRC perceptions of reconciliation never saw fulfilment due to the reconciliatory hindrance that the pain of truth embodied.<sup>375</sup> In addition to this, Kamga points to Mamdani<sup>376</sup> who asserts that true reconciliation is impossible without the core of social reconciliation, that being, substantive reparations.<sup>377</sup> Fleshing out Mamdani’s assertion, Kamga conveys that reconciliation and the protection of apartheid beneficiaries or perpetrators requires legislated and operationalizable compensation for victims so to curb and balance

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<sup>368</sup> Kamga (n224 above) 629.

<sup>369</sup> Kamga (n224 above) 629.

<sup>370</sup> Kamga (n224 above) 630.

<sup>371</sup> Kamga (n224 above) 630.

<sup>372</sup> Kamga (n224 above) 630.

<sup>373</sup> Kamga (n224 above) 631.

<sup>374</sup> Kamga (n224 above) 631.

<sup>375</sup> M Oelofse & A Oosthuyzen ‘The knowledge and perceptions of history students of South Africa’s Truth and Reconciliation Commission (TRC)’ (2014) 10 *TJTRSA* 260.

<sup>376</sup> Kamga (n224 above) 631.

<sup>377</sup> M Mamdani ‘When does reconciliation turn into a denial of justice? Sam Nolutshungu memorial lecture (1998) in Mamdani (ed) *Citizen and subject: Contemporary Africa and the legacy of late colonialism* (1996).

social inequality.<sup>378</sup> The lack of accountability, resolutions and reparations, as per the Apartheid Debt and Reparations Campaign and Jubilee South Africa, has led to the TRC's designation as a "denial of justice".<sup>379</sup> As such, the TRC buttressed cynical arrangements by white South Africans regarding the transfer of political power to black South Africans, all while whites retained economic power, prompting the notion that transformation prevails as "a myth".<sup>380</sup> Through the above, Kamga's allusions to the significance of reparations for reconciliation manifest. Kamga also conveys the dubiousness of distributive justice and egalitarian structural revisions through affirmative action policies for historically disadvantaged groups.<sup>381</sup>

Apart from the ostensible failings of the TRC in reconciling post-apartheid South Africa above, something must be said for Tutu's Christian theological appeals to reconciliation and the problematic infusion of such into *Ubuntu* discourse and criticism. While Tutu did depart from Western ideals through a traditional "African understanding of justice"<sup>382</sup> which rehabilitates perpetrators and victims for reconciliatory healing and forgiveness, Kamga points to August who asserts that the TRC saw sprinklings of Christian theological norms of forgiveness, confession, and repentance.<sup>383</sup> The TRC and *Ubuntu's* entanglement with Christianity rendered as Tutu's "African-Christian version of *Ubuntu*"<sup>384</sup> as restorative justice somewhat aligns with Christian theological norms of forgiveness and indigenous African *Ubuntu*.<sup>385</sup> Regardless of Christian theological and indigenous African correlative potentiality towards social harmony, the tangible tenets of African realities should take credence in the 'new' South Africa.<sup>386</sup> Smit appropriately asserts that South Africa cannot be equated with the kingdom of God as the underpinnings of Christianity<sup>387</sup> are incongruent with South Africa's

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<sup>378</sup> Kamga (n224 above) 631.

<sup>379</sup> Kamga (n224 above) 631-632.

<sup>380</sup> Kamga (n224 above) 632.

<sup>381</sup> Kamga (n224 above) 632.

<sup>382</sup> Kamga (n224 above) 632.

<sup>383</sup> K August 'Reconciliation in the South African political context: A challenge to the church for community building' (2005) 88 *Scriptura* 18.

<sup>384</sup> Kamga (n224 above) 633.

<sup>385</sup> Kamga (n224 above) 633.

<sup>386</sup> Kamga (n224 above) 633.

<sup>387</sup> Such as forgiveness, absolutions and admitting guilt.

“grammar of public jurisprudence”.<sup>388</sup> Essentially, the above also manifested, through the *AZAPO v President*<sup>389</sup> case, in the instrumentalization of *Ubuntu* to elude responsibility and liability for apartheid harms.<sup>390</sup>

South Africa exists as a community dependant not only on faith, but on the regulatory norms underpinning the traditional and social infrastructure informing *Ubuntu*, again alluding to the problematics of Tutu’s adumbration on reference to his Christian infused rendition of *Ubuntu*.<sup>391</sup> Thus, by way of the above, *Ubuntu* was paradoxically trumped by assertions of South African nation building, despite an authentic *Ubuntu* holding harmony and nation building as inseparable due to its core tenet of togetherness.<sup>392</sup> Additionally, as is the problem with interpreting *Ubuntu* under Western or English lenses, linking it to Christian theology further muddles its potential for application and theorisation.

### **3.3.2 Customary Law, *Ubuntu* Precedent and the constitution: The Apotheosis for ‘Othering’ Indigenous Knowledge and Sovereignty**

Moving to the constitution, customary law, and its recognition, S39(3) of the constitution purports that the Bill of Rights does not deny alternative freedoms or rights which are conferred or recognised through customary, law where consistent with the Bill of Rights.<sup>393</sup> Additionally, S211(3) of the constitution purports that where applicable, the courts must apply customary law. To Kamga, this alludes to customary law as echoing of *Ubuntu* and as inspiring to the constitution to make it transformative.<sup>394</sup> Kamga also points to an amalgam of cases which promote customary law values and which echo the harmonious, resolutive, communitarian and reconciliatory aspects of

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<sup>388</sup> DJ Smit ‘The Truth and Reconciliation Commission: Tentative religious and theological perspectives’ (1995) 90 *JTSA* 3.

<sup>389</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (4) SA 671 (CC).

<sup>390</sup> Topidi (n274 above) 59.

<sup>391</sup> Kamga (n224 above) 633-634.

<sup>392</sup> Kamga (n224 above) 634.

<sup>393</sup> The Constitution of the Republic of South Africa, 1996.

<sup>394</sup> Kamga (n224 above) 638.

*Ubuntu*. The *Mayelane v Ngwenyama*<sup>395</sup> case cemented customary law values as a primary source of law corollary to the constitution.<sup>396</sup> Prior to this case, the *Gumede v President*<sup>397</sup> case recognised customary law values through placing customary marriage and marital property arrangements in their own contexts and not against civil marriage common law or divorce legislation principles.<sup>398</sup> The case of *Bhe v Khayelitsha Magistrate*<sup>399</sup> saw the customary rule of male primogeniture being declared as unconstitutional and this, to Kamga, conveys the flexibility of customary law for conflict resolution and familial/community harmony preservation.<sup>400</sup> It must be mentioned however, that the lack of an explicit mention of *Ubuntu* in the constitution makes it difficult to confirm that the constitution “carries within it the spirit of *Ubuntu*”.<sup>401</sup> As the law is generally specific, it is also difficult to perceive that *Ubuntu* is implied in the constitution despite no explicit mention.

### **3.3.3 The Curious Case of *Gongqose v Minister of Agriculture, Forestry and Fisheries***

The sentiments above flow into the disparate state of constitutionally recognised customary law and the real-world regulation and application of customary laws and practices. Through the cases of *Alexkor Ltd v Richtersveld Community*<sup>402</sup> and *Gongqose v Minister of Agriculture, Forestry and Fisheries*,<sup>403</sup> Monyamane and Bapela allude to the dissonance between customary law-based rights and cultural practices, and marine law-based sustainable ecosystem preservation.<sup>404</sup> In addition to s39(3) and s211(3) of the constitution, Monyamane and Bapela convey that when read

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<sup>395</sup> *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC).

<sup>396</sup> Kamga (n224 above) 637.

<sup>397</sup> *Gumede (born Shange) v The President* 2009 (3) BCLR 243 (CC).

<sup>398</sup> Kamga (n224 above) 638.

<sup>399</sup> *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

<sup>400</sup> Kamga (n224 above) 637.

<sup>401</sup> Kamga (n224 above) 636.

<sup>402</sup> *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC). Hereinafter referred to as ‘the *Alexkor* case/judgement’.

<sup>403</sup> *Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others* 2018 (5) SA 104 (SCA). Hereinafter referred to as ‘the *Gongqose* case/judgement’.

<sup>404</sup> Monyamane & Bapela (n230 above) 2.

together, sections 30,<sup>405</sup> 31<sup>406</sup> and 24<sup>407</sup> of the constitution further entrench customary and cultural rights.<sup>408</sup> Section 30 purports that everyone holds the right “to participate in the cultural life of their choice”,<sup>409</sup> whilst s31<sup>410</sup> purports that cultural communities “may not be denied the right”<sup>411</sup> to the enjoyment of their culture. As both s30 and s31 mandate consistency with provisions of the Bill of Rights and as per Monyamane and Bapela, the customary and cultural rights flowing from such sections “must necessarily include the right to a safe environment”<sup>412</sup> purported by s24 of the constitution.<sup>413</sup> With the location of constitutional recognition, inclusion and protection of customary and cultural rights and practices established, Monyamane and Bapela allude to the vagueness of these rights and practices within the South African jurisprudential reality through the *Alexkor* and *Gonggose* judgements.

In the *Alexkor* case, the Court asserted “a rather generous description”<sup>414</sup> as to customary law and its role in post-constitutionalist South African jurisprudence.<sup>415</sup> Moreover, the Supreme Court of Appeal<sup>416</sup> in the *Gonggose* gave a “blunt take”<sup>417</sup> on the intertwining of customary law in South African post-constitutional jurisprudence.<sup>418</sup> While these cases further cement the importance of customary law in South African jurisprudence, the *Gonggose* case alludes to the dissonance between the theoretical

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<sup>405</sup> The Constitution of the Republic of South Africa, 1996.

<sup>406</sup> The Constitution of the Republic of South Africa, 1996.

<sup>407</sup> The Constitution of the Republic of South Africa, 1996.

<sup>408</sup> Monyamane & Bapela (n230 above) 2.

<sup>409</sup> The Constitution of the Republic of South Africa, 1996.

<sup>410</sup> “31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community— (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

<sup>411</sup> The Constitution of the Republic of South Africa, 1996.

<sup>412</sup> Monyamane & Bapela (n230 above) 2.

<sup>413</sup> “24. Everyone has the right— (a) to an environment that is not harmful to their health or wellbeing; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that— (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

<sup>414</sup> Monyamane & Bapela (n230 above) 3.

<sup>415</sup> *Alexkor* (n402 above) para 51. “[I]ndigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.”

<sup>416</sup> Hereinafter referred to as ‘the SCA’.

<sup>417</sup> Monyamane & Bapela (n230 above) 3.

<sup>418</sup> *Gonggose* (n403 above) para 1. “This appeal brings customary law, which has not occupied its rightful place in this country, directly to the fore.”

enjoyment of customary rights enjoyment (as per s30,31 and 24 of the constitution) and their practical application.<sup>419</sup> Under the lens of Earth jurisprudence,<sup>420</sup> Monyamane and Bapela probe the enjoyment of customary and cultural rights in marine protected areas.

The appellants of the *Gonggose* case were arrested and charged on 4 counts,<sup>421</sup> respectively including: attempting, without permission, to fish in a marine protected area;<sup>422</sup> accessing, without a permit, a national wildlife reserve area;<sup>423</sup> accessing a national wildlife reserve area while in possession of a trap, weapon, fishing lines, fishing rods and hooks;<sup>424</sup> and wilfully disturbing, injuring or killing wildlife other than fish caught in abundance of the Conservation Decree.<sup>425</sup> Based on exercising their customary right to fishing, the appellants plead not guilty in the Elliotdale Magistrate's Court and, though the customary rights use was found to be positive, the Court convicted the appellants of contravening s43(2)(a) of the MRLA, acquitted the appellants of the other charges, and granted leave to appeal.<sup>426</sup> The most significant ground for granting appeal, to Monyamane and Bapela, was that the Minister declaring the Reserve bordering the Hobeni, Cwebe and Mendwane communities<sup>427</sup> as a Marine Protected Area<sup>428</sup> failed to recognise the customary rights of the appellants.<sup>429</sup> Before such appeal to the High Court, s43 of the MLRA was repealed via the Marine Living Resources Amendment Act,<sup>430</sup> though the High Court upheld the convictions of the appellants and granted leave to appeal to the Supreme Court of Appeal (Hereinafter referred to as 'the SCA').<sup>431</sup> Monyamane and Bapela note four issues flowing from such

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<sup>419</sup> Monyamane & Bapela (n230 above) 3-4.

<sup>420</sup> Monyamane & Bapela (n230 above) 10. A jurisprudential shift from an anthropocentric to an eco-centric focus, valuing the Earth intrinsically and not based upon human valuations.

<sup>421</sup> *Gonggose* (n403 above) para 14.

<sup>422</sup> Contravening s43(2)(a) of the Marine Living Resources Act 18 of 1998 (Hereinafter referred to as 'the MRLA').

<sup>423</sup> Contravening s29(1)(a) of the Transkei National Conservation Decree No 9 of 1992 (Hereinafter referred to as 'the Conservation Decree').

<sup>424</sup> Contravening s29(1)(b) of the Conservation Decree.

<sup>425</sup> Contravening s29(1)(c) of the Conservation Decree.

<sup>426</sup> Monyamane & Bapela (n230 above) 5.

<sup>427</sup> *Gonggose* (n403 above) para 3-4. Known collectively as 'the Dwesa-Cwebe communities' and constituting communities via customary law.

<sup>428</sup> Hereinafter referred to as 'an MPA'.

<sup>429</sup> Monyamane & Bapela (n230 above) 5.

<sup>430</sup> Marine Living Resources Amendments Act 5 of 2014 (Hereinafter referred to as 'the MLRAA').

<sup>431</sup> *Gonggose* (n403 above) para 18-19.

appeal,<sup>432</sup> including; “(1) the status of customary law; (2) whether the appellants proved that they were exercising customary rights of access to and use of marine resources when the offence was committed; (3) whether the MLRA extinguished those rights; and (4) whether the appellants’ conduct was unlawful”.<sup>433</sup>

On the first issue, the SCA leaned on the *Alexkor* judgement<sup>434</sup> to convey that rights may flow from customary law, including the rights to access to and use of natural resources.<sup>435</sup> On the second issue, the SCA found the appellants to have adequately proven the traditional use of marine and terrestrial resources by the Dwesa-Cwebe communities “since time immemorial”.<sup>436</sup> On the third issue, the SCA deemed that the MRLA did not abate the “appellants’ customary right of access to and use of marine resources”.<sup>437</sup> On the last issue, the SCA ruled that where the MRLA or Conservation Decree would extinguish the appellants’ customary rights, such “laws are unconstitutional”.<sup>438</sup> By way of the above, the SCA upheld the appellants’ appeal and set aside their convictions and the High Court’s order.<sup>439</sup> Monyamane and Bapela note that customary law’s constitutional scrutiny unearths the “problems of theoretical location in the new dispensation”.<sup>440</sup> Through the enactment and assertion of the MRLA,<sup>441</sup> customary communities were directly and indirectly limited from practising their cultural customs and beliefs concerning sustainable fishing.<sup>442</sup> This represented a limitation of customary law rights through the promulgation of “foreign provisions of law”.<sup>443</sup> Moreover, this points to the stark “otherness in our legal milieu”<sup>444</sup> and non-enforcement of S211(3) of the constitution.<sup>445</sup> Ironically, customary fishing practices

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<sup>432</sup> Monyamane & Bapela (n230 above) 5.

<sup>433</sup> *Gongqose* (n403 above) para 21.

<sup>434</sup> *Alexkor* (n396 above) para 64. “We are satisfied that under the Indigenous law of the Richtersveld Community communal ownership of the land included communal ownership of the minerals and precious stones”.

<sup>435</sup> *Gongqose* (n403 above) para 25.

<sup>436</sup> *Gongqose* (n403 above) para 39.

<sup>437</sup> *Gongqose* (n403 above) para 59.

<sup>438</sup> *Gongqose* (n403 above) para 67-68.

<sup>439</sup> *Gongqose* (n403 above) para 69.

<sup>440</sup> Monyamane & Bapela (n230 above) 6.

<sup>441</sup> Marine Living Resources Act 18 of 1988.

<sup>442</sup> Monyamane & Bapela (n230 above) 13.

<sup>443</sup> Monyamane & Bapela (n230 above) 13-14.

<sup>444</sup> Monyamane & Bapela (n230 above) 14.

<sup>445</sup> The Constitution of the Republic of South Africa, 1996.

and beliefs ensure the presence of “more fish in the future”<sup>446</sup> just as the MLRA intended to, prompting the notion of what can be learned from customary knowledge regarding sustainable environmental stewardship and practices.<sup>447</sup>

While remaining as a contentious issue today, Radebe and Phooko convey the case of *Afriforum and Another v Malema and Others*<sup>448</sup> to be a rather problematic precedential invocation of *Ubuntu*, dubbing that the “courts’ misunderstanding of ubuntu was its erroneous use to suppress freedom of expression”.<sup>449</sup> In this case, the infamous struggle song of ‘*dubula ibhunu*’ or ‘kill the boer’ was deemed as hate speech by the Equality Court.<sup>450</sup> While this song is baked into South African history and heritage, the Court asserted that the intention behind the use of such words was irrelevant and that ‘the enemy’<sup>451</sup> which the song was originally aimed against, had now become “the friend, the brother”.<sup>452</sup> This seems to undercut the song’s contemporary power as a motif to convey perpetuated colonial or apartheid vexations, especially considering its historical impact. Radebe and Phooko note the courts’ misunderstanding in this case through *Ubuntu*’s embodiment of more than what courts describe or define it as.<sup>453</sup> A simple hate speech judgement seems to muddle the reconciliatory and consensus-seeking aims of *Ubuntu* and what the court deemed *Ubuntu* to mean.

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<sup>446</sup> Monyamane & Bapela (n230 above) 13.

<sup>447</sup> This includes the sustainable fishing methods of the Dwesa-Cwebe communities like that of not catching juvenile fish or fish carrying eggs.

<sup>448</sup> *Afriforum and Another v Malema and Others* 2011 4 All SA 293 (EqC).

<sup>449</sup> Radebe & Phooko (n305 above) 247.

<sup>450</sup> *Afriforum and Another v Malema and Others* 2011 4 All SA 293 (EqC).

<sup>451</sup> That being the colonial and apartheid regime.

<sup>452</sup> *Afriforum and Another v Malema and Others* 2011 4 All SA 293 (EqC).

<sup>453</sup> Radebe & Phooko (n305 above) 247.

### **3.4 *Ubuntu*-based Law and Ethics Under the lens of Climate Justice and Agroecology**

Leaning heavily on the writings of Etieyibo, this next section interrogates how the law, justice,<sup>454</sup> redistribution and human rights discourse can be significantly facilitated through *Ubuntu*, cosmopolitanism, moral education, climate justice, and agroecology. Under the lens of this paper's research aims, this section will both provide for a means of shifting from Western and colonial frameworks, and it will also present substantive pathways for addressing histories of colonialism, imperialism, and apartheid. Moreover, and as per this paper's research aims, this section will convey how the indigenous African philosophy of *Ubuntu* holds the power to sustainably transform environmental ethics, dubious contemporary human-nature relationships and the production and dissemination of Indigenous knowledge. This paper also posits Monyamane and Bapela's rendition of Earth jurisprudence (infused with *Ubuntu*) as an alternative jurisprudence which would aid in meeting climate justice-based and agroecological aims, as well as recognising and asserting customary rights and practices. Through an eco-centric Earth jurisprudence, the Earth exists as a subject with intrinsic value which needs safeguarding from human exploitation and not as a "phenomena that exists for human use",<sup>455</sup> with its value flowing only from human valuation.<sup>456</sup> This type of jurisprudential shift stands to be useful in South African constitutional discourse as s39(1)(c) of the constitution allows for foreign law consultation in court decisions. As such, Monyamane and Bapela lean on Article 71 of the Ecuadorian Constitution which "codifies the rights of nature"<sup>457</sup> and which South Africa would find strength in following suit in.

#### **3.4.1 *Ubuntu* Cosmopolitanism as an Equitable Global Environmental Remedy**

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<sup>454</sup> With emphasis on global justice.

<sup>455</sup> Monyamane & Bapela (n230 above) 10.

<sup>456</sup> Monyamane & Bapela (n230 above) 10-11.

<sup>457</sup> Monyamane & Bapela (n230 above) 11.

Etieyibo posits *Ubuntu* through a strict interpretation of cosmopolitan political and moral theory.<sup>458</sup> Etieyibo asserts that this rendition of *Ubuntu* carries the obligation of humaneness among humans and the endorsement of the redistribution of natural resources for all, regardless of citizenship status, nationality, or locality.<sup>459</sup> Through such, all humans stand to secure equity in justice and its distributive principles, facilitating fitting global justice contributions.<sup>460</sup> Etieyibo postulates that *Ubuntu* is linked to cosmopolitanism as it, as an intercultural philosophy, promotes non-monolithic and non-centrist approaches which transcend narrower regional philosophies.<sup>461</sup> Furthermore, *Ubuntu*-based cosmopolitanism encourages decolonial and indigenous themes in the discourses of contemporary philosophy.<sup>462</sup> Further concretising his use of cosmopolitan *Ubuntu*, Etieyibo asserts that *Ubuntu* carries the obligation of the humane treatment of others<sup>463</sup> and endorses global distributive justice principles where inequality and poverty in lieu of contemporary natural resource distribution are unjust under *Ubuntu*.<sup>464</sup> Citing Jeffers, Etieyibo conveys that a cosmopolitan *Ubuntu* approach is extraordinary as it disrupts Eurocentric norms through the principal endorsement of African subjectivities.<sup>465</sup> Furthermore, a strict cosmopolitan *Ubuntu* may serve to address and curb “Africa’s most virulent problem”,<sup>466</sup> that being the resource curse. This phenomenon regards the rich endowment of natural resources in Africa as being far removed from development and leading to corruption, wastage, poor economic policymaking, and margins of economic instability.<sup>467</sup>

Etieyibo probes the contrasting renditions of cosmopolitanism, differentiating first between political and moral cosmopolitanism, with the former regarding justice, the state and international institutions.<sup>468</sup> Conversely, the latter focuses on the duty

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<sup>458</sup> Etieyibo (n319 above) 139.

<sup>459</sup> Etieyibo (n319 above) 139.

<sup>460</sup> Etieyibo (n319 above) 139.

<sup>461</sup> Etieyibo (n319 above) 139.

<sup>462</sup> Etieyibo (n319 above) 139-140.

<sup>463</sup> With humanness and humanity imbued relations being the subject and object of *Ubuntu*'s obligatory duty.

<sup>464</sup> Etieyibo (n319 above) 140.

<sup>465</sup> C Jeffers 'Appiah's Cosmopolitanism' (2013) 51 *TSJP* 502.

<sup>466</sup> Ojatorotu & Bamidele (n285 above) 27.

<sup>467</sup> Ojatorotu & Bamidele (n285 above) 30-31.

<sup>468</sup> Etieyibo (n319 above) 143.

towards others.<sup>469</sup> Strict and moderate cosmopolitanism are also differential, with the former regarding how the duty towards others and the duty to provide are not strengthened or sacrificed *vis-à-vis* locals or non-locals.<sup>470</sup> Furthermore, such duties are not underpinned by a differentiated balancing of duties depending on whether those involved are locals or compatriots/nationals.<sup>471</sup> Thus, a strict cosmopolitanism would render humans as citizens of a unified global community, untethered by provincial, national or local biases and moral, cultural or political norms.<sup>472</sup> Referring to Scheffler,<sup>473</sup> Etieyibo conveys moderate cosmopolitanism as necessitating the duty of aid provision with special or specific duties towards locals and national compatriots.<sup>474</sup> Thus, moderate cosmopolitanism embodies two categories towards responsibility, including duties of providing aid exclusively to locals/nationals and the universal provision of aid to all humans.<sup>475</sup> As such, this paper endorses Etieyibo's *Ubuntu*-imbued strict cosmopolitan construction as this would more cogently suit *Ubuntu*'s core tenets, as well as a fair and justiciable human rights and global justice restructuring. In essence, *Ubuntu*'s emphasis on humane community and personal relationships would see extension to a broad global community.<sup>476</sup>

Leaning on Desmond Tutu, Etieyibo notes that Tutu conveyed *Ubuntu* cosmopolitanism through notions of an individual possessing *Ubuntu* where such individual consistently conveys enthusiasm towards engaging with and affirming other individuals openly and respectfully.<sup>477</sup> As such, the integrity and virtue of other individuals should not threaten a person with *Ubuntu* due to the self-assurance of belonging to a greater whole as one is diminished when other are.<sup>478</sup> Thus, Etieyibo's notion of *Ubuntu* as cosmopolitan flows from the responsibility towards and unification of all individuals.<sup>479</sup> Normatively, this conveys the political and moral dimensions of an

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<sup>469</sup> Etieyibo (n319 above) 143.

<sup>470</sup> Etieyibo (n319 above) 144.

<sup>471</sup> Etieyibo (n319 above) 144.

<sup>472</sup> Etieyibo (n319 above) 144.

<sup>473</sup> Etieyibo (n319 above) 144-145.

<sup>474</sup> S Scheffler *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* (2001).

<sup>475</sup> Etieyibo (n319 above) 144.

<sup>476</sup> This would also serve to globally hoist indigenous African philosophies and signify their applicability and operationalisation in lieu of contemporary environmental crises and marred discourse.

<sup>477</sup> Etieyibo (n319 above) 145.

<sup>478</sup> Etieyibo (n319 above) 146.

<sup>479</sup> Etieyibo (n319 above) 146.

*Ubuntu* cosmopolitanism and the propensity towards enacting justice in both such dimensions. In addition to becoming human through affirming others' humanity, Etieyibo asserts the importance of humanity as an affirmation of 'being-ness'.<sup>480</sup> This implies being inhuman manifests through not being human or disrespecting the humanity of others.<sup>481</sup>

Regarding distributive justice under an *Ubuntu*-based cosmopolitanism, Etieyibo conveys that since global justice is driven by a global application of distributive justice norms, mainstream accounts of global justice differ surrounding cosmopolitanisms application in societal nationalism, realism and regarding states.<sup>482</sup> Invoking Rawls and Bull, Etieyibo conveys the 'society of state view' which purports that a natural resource distribution principle is inherently the non-application of global distributive justice principles.<sup>483</sup> Through such notion, States are individual entities with a propensity for mutual agreement surround intersectional morals and interests.<sup>484</sup> Thus, cosmopolitanism endorse a moral universalism which perceives all humans to be within ordinary and distributive justice principles, despite differing citizenship, nationality or locality.<sup>485</sup> Concretising this notion, Etieyibo asserts that global ethics standards are non-existent, rendering global distributive justice principles as unfounded.<sup>486</sup>

In contemplating the propensity for the just distribution of resources via *Ubuntu* cosmopolitanism, Etieyibo emphasises criticality towards global justice paradigms and towards the justiciability and adequacy of the global distribution of natural resources.<sup>487</sup> Etieyibo invokes Hayward, who constructs an applicable category for natural resource which is not conceived in terms of "resources under one's feet",<sup>488</sup> available resources or in terms of the economic value of resources.<sup>489</sup> Rather,

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<sup>480</sup> Etieyibo (n319 above) 146.

<sup>481</sup> Etieyibo (n319 above) 146-147.

<sup>482</sup> Etieyibo (n319 above) 147.

<sup>483</sup> Etieyibo (n319 above) 147.

<sup>484</sup> Etieyibo (n319 above) 147.

<sup>485</sup> Etieyibo (n319 above) 147-148.

<sup>486</sup> Etieyibo (n319 above) 148.

<sup>487</sup> Etieyibo (n319 above) 150.

<sup>488</sup> T Hayward 'Global Justice and the Distribution of Natural Resources' (2006) 54 *Political Studies* 359.

<sup>489</sup> Hayward (n487 above) 359.

Hayward's categorisation is based on "ecological space"<sup>490</sup> which regards human interaction with the natural world<sup>491</sup> as an occurrence in a single biophysical world.<sup>492</sup> Thus, cosmopolitan approaches to global justice must have an inclination towards fairness in global justice and equitable natural resource distribution.<sup>493</sup> Etieyibo stresses the question, under a lens of just resource distribution, of how hyper-wealth and opulence exist where others are subjected to "abject penury".<sup>494</sup> In tandem with this inclination, concerns regarding the possibility of developed countries enacting a natural resource transfer<sup>495</sup> to developing countries are pertinent where just and equitable resource distribution is in question.<sup>496</sup> Building on this line of thinking, Etieyibo asserts that *Ubuntu* cosmopolitanism's core of human-ness and community belonging problematises societal bifurcation due to state-lines.<sup>497</sup> Since the obligation towards others spans more than just the provision of aid, but the subsummation of the projects of others, *Ubuntu* cosmopolitanism decries unequal resource distribution promotion.<sup>498</sup>

Etieyibo also addresses notions of *Ubuntu* cosmopolitanism as egalitarianism, as egalitarianism does not place a moratorium upon equity in unequal resource distribution as the subsummation of the projects of others requires recognition of resource inequity and inequality.<sup>499</sup> However, though *Ubuntu* and egalitarianism also do not explicitly disparage resource inequality and inequity, again the contemporary contexts of opulence versus privation address this abstractedly.<sup>500</sup> By way of this, *Ubuntu* as egalitarian and cosmopolitan would place contemporary resource distribution contexts as unjust, again buttressing the notion of a resource transfer from developed to developing countries.<sup>501</sup> Since Etieyibo equates individuals to nations

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<sup>490</sup> Hayward (n488 above) 359.

<sup>491</sup> Including human environmental impacts and natural resource utilisation.

<sup>492</sup> Hayward (n488 above) 359.

<sup>493</sup> Etieyibo (n319 above) 151.

<sup>494</sup> Etieyibo (n319 above) 151.

<sup>495</sup> This may also serve to address the history of colonial resource extraction, or rather, theft. Additionally, this could be a mode of reparation which is key to reconciliation and harmony.

<sup>496</sup> Etieyibo (n319 above) 151.

<sup>497</sup> Etieyibo (n319 above) 151.

<sup>498</sup> Etieyibo (n319 above) 151.

<sup>499</sup> Etieyibo (n319 above) 151.

<sup>500</sup> Etieyibo (n319 above) 151-152.

<sup>501</sup> Etieyibo (n319 above) 152.

through *Ubuntu* cosmopolitanism, such conception does not recognise nation-states and is rooted in a direct and equal egalitarianism which responds to human needs broadly.<sup>502</sup> This assumption underpinning Etieyibo's conception of *Ubuntu* cosmopolitanism thus deems a resource transfer from developed to developing nations as a transfer between and to individuals.<sup>503</sup>

Etieyibo's conception is also based in an assumption of contemporary resource distribution regimes amongst states and individuals being unjust.<sup>504</sup> Additionally, Etieyibo incorporates an assumption that viewing contemporary resource distribution regimes as unjust implies an obligation for the resource transfer betwixt developed and developing nations. Such transfer is a viable possibility from both economic and practical perspectives and as such, Etieyibo's assumptions manifest as valid regarding cosmopolitanism broadly and *Ubuntu* egalitarianism narrowly.<sup>505</sup> In tandem with the acceptability of his assumptions, Etieyibo quells criticism towards strict *Ubuntu* cosmopolitanism. The first critique, known as the 'kinship objection', is rebutted and such rebuttal serves as a response to the other critique, that being the 'nation-state objection'.<sup>506</sup> The kinship objection deviates from *Ubuntu* as grounded in African societies' traditional kinship systems and from *Ubuntu's* emergence from small-scale and homogenous African societies which prioritise mutual recognition.<sup>507</sup> Etieyibo invokes Mbiti<sup>508</sup> and Wiredu<sup>509</sup> who affirm the kinship objection through considering *Ubuntu's* core as contrary to a strict cosmopolitanism through partiality to community neighbours and kin.<sup>510</sup> Despite this, Etieyibo asserts that kinship and local obligations can be transferred to broad and global duties. As such, moderate cosmopolitanism's sympathetically impartial duties to kin and neighbours do not eclipse broad obligations towards strangers.<sup>511</sup>

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<sup>502</sup> Etieyibo (n319 above) 152.

<sup>503</sup> Etieyibo (n319 above) 152.

<sup>504</sup> Etieyibo (n319 above) 152.

<sup>505</sup> Etieyibo (n319 above) 152-153.

<sup>506</sup> Etieyibo (n319 above) 153.

<sup>507</sup> Etieyibo (n319 above) 153.

<sup>508</sup> J Mbiti *African Religions and Philosophies* (1970) 141.

<sup>509</sup> K Wiredu *Cultural Universals and Particulars: An African Perspective* (1996).

<sup>510</sup> Etieyibo (n319 above) 154.

<sup>511</sup> Etieyibo (n319 above) 154.

Since *Ubuntu* linguistically regards one as a person where human relations with others are established, *Ubuntu's* humane values of “caring, sharing, cooperation, solidarity, compassion, reciprocity and empathy”<sup>512</sup> are aimed at “every person *qua person*”.<sup>513</sup> This way of being human is independent of the traditional African kinship valuations or homogenous conception divergences above as *Ubuntu* regards being human through relational modalities based on whether one has more or less *Ubuntu*.<sup>514</sup> Thus, relationality towards other determines personhood over the valuations of traditional African kinship systems and small-scale or homogenous societies.<sup>515</sup> One is a person where humane relations and practices are emphasised and not via “the space that they occupy”.<sup>516</sup> Going further, Etieyibo asserts that grounding *Ubuntu* in kinship system valuations or the mutual recognition ethics of homogenous and small-scale societies makes “*Ubuntu* vacuous”.<sup>517</sup> This would also render *Ubuntu* as even more vacuous or unenviable to Western society or African societies which are not based on kinship systems or are not small-scale and homogenous.<sup>518</sup> Through the above, Etieyibo argues that the non-recognition of nation-states through *Ubuntu's* cosmopolitanism is problematic. Instead, Etieyibo shifts the focus onto whether individual identity is solely reliant upon allegiance to a nation-state. This stamps out kinship objections and emphasizes obligations towards all individuals regardless of location under *Ubuntu's* non-specific tenets of human relationality.<sup>519</sup> From *Ubuntu's* normative ethical components, non-recognition of nation-state allegiance is considered just, in lieu of ethical deontological or Kantian rationalisations for a rejection of nation-state fidelity where autonomy is eclipsed by welfare and happiness concerns.<sup>520</sup>

### **3.4.2 *Ubuntu*-Based Moral Education: Disseminating the *Ubuntu* Ethos Towards an Ecologically Conscious Society**

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<sup>512</sup> Etieyibo (n319 above) 154.

<sup>513</sup> Etieyibo (n319 above) 154.

<sup>514</sup> Etieyibo (n319 above) 154-155.

<sup>515</sup> Etieyibo (n319 above) 155.

<sup>516</sup> Etieyibo (n319 above) 155.

<sup>517</sup> Etieyibo (n319 above) 155.

<sup>518</sup> Etieyibo (n319 above) 155.

<sup>519</sup> Etieyibo (n319 above) 156.

<sup>520</sup> Etieyibo (n319 above) 156.

In tandem with a strict cosmopolitan variant of *Ubuntu* which may address global inequity and the current faulty human rights and resource distribution frameworks, moral education may serve as a vital tool in creating an ecologically conscious South African society. This would also serve to curb current environmental and agricultural practices and disseminate *Ubuntu*-based teachings and practices which hold the potential to revive indigenous ontologies and epistemologies in the contemporary era. Through this, the untreated wounds of the colonial and apartheid *longue-durée* of history may be somewhat remedied. Etieyibo postulates and *Ubuntu*-based framework for moral education in South Africa, noting that such would spread moral teaching regarding political and social citizenship.<sup>521</sup> Salmon, the academic author behind kincentric ecology, has also posited a kincentric ecology infused moral education blueprint which immerses students in nature to create a palpable understanding of kincentricity.<sup>522</sup> This shows the broad applicability of indigenous modes of human-nature relationships in education frameworks.

Through frameworks of relationality and humaneness towards others and the environment, an *Ubuntu*-based moral education interlaces environmental ethics with character and virtue development, fostering values of kindness, respect for others, and shared humanity.<sup>523</sup> This would aid in the broad construction of sustainable environmental outlooks and affirm indigenous philosophy.<sup>524</sup> As such, Etieyibo proposes a triple approach to moral education embodying the intellectual or philosophical virtues of fairness and open-mindedness, the moral virtues of generosity and compassion, as well as the social virtues of respectfulness.<sup>525</sup> By infusing *Ubuntu* teachings with a caring attitude towards the environment and human relations, we can create a society that affirms this indigenous philosophy while promoting sustainability.<sup>526</sup> Etieyibo stresses the need for moral education in schools through exemplifications of dysfunctional conditions and a lack of adequate content, which

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<sup>521</sup> E Etieyibo 'Moral Education, Ubuntu and Ubuntu-Inspired Communities' (2017) 36 *SAJP* 311.

<sup>522</sup> See: E Salmon 'Teaching kincentric ecology in an urban environment' (2015) 10 *JSE* 1-9.

<sup>523</sup> Etieyibo (n521 above) 312-313.

<sup>524</sup> Etieyibo (n521 above) 314.

<sup>525</sup> Etieyibo (n521 above) 314.

<sup>526</sup> Etieyibo (n521 above) 314.

contribute to issues like: apathy, family breakdowns, teenage parenting, vandalism, bullying and gang or drug-related activity.<sup>527</sup> Education that does not honour moral thinking, sociability and philosophical thinking is incomplete and incapable of academically gripping the character and spirit of students as per Etieyibo.<sup>528</sup>

Le Grange has also contemplated and contributed to the knowledge pool regarding *Ubuntu* in moral education. Le Grange notes moral education is necessitated by the erosion of the self, nature and society.<sup>529</sup> *Ubuntu's* goal in moral education is aimed at the development of personhood to promote student capacities to “cherish community”,<sup>530</sup> which would strengthen community relations and emphasise obligations toward the non-disruption of the self-conception of communities.<sup>531</sup> Since rural communities interact with different peoples/groups, knowledge cannot be culture-specific and as such, solidarity and empathy must extend beyond local communities.<sup>532</sup> Additionally, moral educators should not utilise threats or rote learning, but rather encourage voluntary participation through sharing ways of life. Since empathy development and the provision of aid to others are crucial for personal growth, an educator should assist students in the cultivation of sympathy and assistance.<sup>533</sup> Le Grange also emphasises that moral education cannot restrict capacity development towards human community safeguarding, rather, the non-disruption of moral, environmental, food chain and living to non-living dynamic norms should be taught.<sup>534</sup> Such teaching would include guidance towards human and biosphere solidarity and interconnectedness, as well as biotic community, plant, animal and energy flow teachings.<sup>535</sup> Le Grange also stresses critically organisational, collaborative and co-investigative endeavours as vital in the contemplation of environmental issues and mapping moral responsibility to such issues.<sup>536</sup> Educators

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<sup>527</sup> Etieyibo (n521 above) 315.

<sup>528</sup> Etieyibo (n521 above) 315.

<sup>529</sup> Le Grange (n89 above) 335.

<sup>530</sup> Le Grange (n89 above) 335.

<sup>531</sup> Le Grange (n89 above) 335.

<sup>532</sup> Le Grange (n89 above) 335.

<sup>533</sup> Le Grange (n89 above) 335.

<sup>534</sup> Le Grange (n89 above) 336.

<sup>535</sup> Le Grange (n89 above) 336.

<sup>536</sup> Le Grange (n89 above) 336.

cannot disseminate knowledge authoritatively and students cannot be passive recipients of knowledge.<sup>537</sup>

Le Grange also provides succinct and operationalizable frameworks for the application of an *Ubuntu*-based moral education. Lessons of hypocrisy<sup>538</sup> and allowing students to choose which values to adopt through natural and social encounters manifest as patently inadequate.<sup>539</sup> Since moral education based on *Ubuntu* is concerned with the process of human existence and not the nature of being human, anthropocentric categorisations<sup>540</sup> can be thwarted to promote biophysical and community interaction and care.<sup>541</sup> Furthermore, South Africa's post-apartheid curriculum policy requires indigenous knowledge and environmental issues to be integrated into all subjects.<sup>542</sup> As per the National Curriculum Statement for Further Education and Training,<sup>543</sup> infusing education with indigenous knowledge and environmental concerns serves to value human rights and promote justice and inclusivity.<sup>544</sup> *Ubuntu* is also central to FET and General Education and Training<sup>545</sup> curriculums as one of ten core values of the South African Manifesto on values, education and democracy, which aims to restore pre-colonial values eroded by apartheid.<sup>546</sup> Le Grange notes that the Life Orientation field aims towards moral education, though it is often neglected Life Orientation carrying fewer credits for students.<sup>547</sup> Thus, Life Orientation as a mandatory subject from Grade R to Grade 12 needs the appropriate assignment of moral educators for the successful implementation of an *Ubuntu*-based moral education in formal South African education. This would serve to empower learner potential achievements, manifest in learner contributions to society and aid learners in making informed health-related and environmental decisions.<sup>548</sup>

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<sup>537</sup> Le Grange (n89 above) 336.

<sup>538</sup> The notion purporting the inadequacy of moral responsibility teaching through inaction.

<sup>539</sup> Le Grange (n89 above) 336.

<sup>540</sup> Rendering certain humans and non-human entities as inferior.

<sup>541</sup> Le Grange (n89 above) 336.

<sup>542</sup> Le Grange (n89 above) 337.

<sup>543</sup> Hereinafter referred to as 'NCS/FET'.

<sup>544</sup> Le Grange (n89 above) 337.

<sup>545</sup> Hereinafter referred to as "GET'.

<sup>546</sup> Le Grange (n89 above) 337.

<sup>547</sup> Le Grange (n89 above) 337.

<sup>548</sup> Le Grange (n89 above) 337.

Through the entirety of the section above, the multi-dimensional scope of *Ubuntu's* application manifests. Moreover, *Ubuntu* as a global community-crafting cosmopolitanism and as a guide to moral education aid in meeting the aims of climate justice and agroecology. Regarding *Ubuntu*-based cosmopolitanism and climate justice, the mainstream discourse of social impacts, outcomes and justice can be shifted to curtail contemporary and lingering historical oppression and exploitation. This bears scrutiny by way of emphasising accountability and human rights through equal obligations towards all (regardless of locality or nationality) and through a developed-to-developing nation resource transfer. Concerning *Ubuntu*-based cosmopolitanism and agroecology, the obligations towards a just resource redistribution and equal human rights application to all represent the action and change mandated by agroecology. Furthermore, this may also revitalise the indigenous social metabolism via shift from the Western and capitalistic commodification and alienation of labour and nature. The food sovereignty aims of agroecology here are extended to natural resource sovereignty as well.

Regarding *Ubuntu* moral education and climate justice, a discourse shift to an ecologically conscious society can affirm the sacredness of Earth and enact sentiments of ecological unity and the interdependence of all species to thwart capitalistic anthropocentrism. Moreover, academic and theoretical knowledge developments and contributions can be rendered. In terms of moral education and agroecology, *Ubuntu* moral education represents the research and education mandated by agroecology. This would add to the participatory and transdisciplinary tenets of agroecology, with a focus on local and Indigenous agricultural and environmental stewardship knowledge. Both *Ubuntu* cosmopolitanism and moral education may contribute towards attenuating local and global human rights discourse and frameworks, with Topidi conveying *Ubuntu's* power in resonating with regional human rights systems of the African Charter on Human and Peoples' Rights<sup>549</sup> and Kamga asserting the *Ubuntu* as a means of realising human rights and social justice

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<sup>549</sup> Topidi (n274 above) 58-59.

through the relying on local and indigenous African customary realities.<sup>550</sup> *Ubuntu's* communitarian values would also challenge the liberal and individual frame underpinning human rights discourse.<sup>551</sup> The infusion of indigenous knowledge and participation may also curb the issues of customarily restrictive environmental 'protection' legislation as seen in the *Gongqose* case.

## 4. Conclusion

In conclusion, precarious Western and colonial frameworks continue to ensnare and degrade the legal/jurisprudential order, human-nature relationships, environmental and agricultural practices, and indigenous ontologies and epistemologies. This unremitting conquest rests upon an interminable history of colonial, imperialistic and apartheid violence, and subjugation. As such, a bolstering of environmentally and ecologically sustainable and cognisant Indigenous knowledge serves not only to pave a way forward regarding the unavoidable contemporary climate and environmental crisis, but also as a way of providing redress for such violent history and substantive recognition towards Indigenous peoples, their knowledge, and their sovereignty.

While South Africa's history has rendered a marred legal culture, jurisprudential order, environmental outlook and a further bifurcated society in the contemporary era, indigenous African philosophies such as *Ubuntu* and Indigenous African traditions like taboos, proverbs and folklore may provide substantial ethical guides to remedy such. Extending these African Indigenous epistemological and ontological tenets, an *Ubuntu* infused cosmopolitanism serves to buttress a sustainable ethical guide to international legal arrangements and environmental action, while an *Ubuntu* infused moral education serves as a bottom-up pillar for creating an ecologically and environmentally conscious society. This would also greatly increase visibility *vis-à-vis* Indigenous African knowledge, somewhat addressing the still open wounds of a violent colonial and apartheid history. By way of this, the grasp of Western, neo-liberal, capitalistic and

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<sup>550</sup> Kamga (n224 above) 634-635.

<sup>551</sup> Topidi (n274 above) 54.

colonial frameworks upon conquered nations would be vehemently loosened. This also stems from the infusion of critical climate justice and agroecology, which not only bring Indigenous knowledge to the table, but reimagine the dubious complexities of Western contemporary human rights, democratic, social justice, sustainability, and industrial agriculture-based paradigms. While an ethical and moral obligation towards one another flows from being human, this obligation ceases to exist where nature and the physical environment are not also a target of human obligations and responsibilities toward sustainable stewardship. Thus, in the spirit of *Ubuntu* and interconnectedness, humans find exaltation through the upliftment of others, with 'others' including all other living beings and non-living collectives within the natural order of the Earth and the universe.

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