UBUNTU IN THE AGE OF HUMAN RIGHTS

2023 Edition

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Foreword

Ian McDougall

The historical roots of the rule of law are a frequent topic in my speeches and articles. When I was asked to write a foreword for this volume on ubuntu and its intersection with important global challenges in modern times, I was struck by how ubuntu supports the theme that I advocate regarding origins of the rule of law. The present work also brings the history of diverse and rich African cultures forward to the present.

It is remarkable how often we see consistent themes across many different traditions all around the world, which go to support one key underlying theme. No matter where you are from, no matter what social background you come from, deeply engrained in there is a basic connection to principles of the rule of law, a genuinely global concept. Ubuntu adds a sophisticated layer of social interaction on top of those basic concepts: how to address complex problems through a community view that saw, and sees, the individual as an important part of the whole community, and how the community gives strength to the individual.

The particularities of ubuntu were new to me, but the lessons they teach are familiar. Finding the patterns and consistent themes through history and articulating their relevance to society at the time gives me hope for the future. Hammurabi's famous Code, which made the law visible to everyone, was a literal embodiment of the pillar of law and was thus an early example of the concept of the transparency and universal applicability of the law. The law could be literally touched and seen, and could be read and understood by people before they acted, preventing a retroactive effect of the law.

The Magna Carta was an inflection point in history, when the English nobility reacted to a series of violations of their rights and held King John to a principle which established that the king himself was not above the law of the land (Hammurabi had voluntarily made himself subject to the law thousands of years before). This standard establishes the principle of equality under the law. Concepts we can identify as the rule of law in India can been seen in the Upanishads, a series of writings that established a framework of justice which also touches on morality and

ethics – what one owes to others as well as oneself. (Note the similarity to ubuntu here?) This concept establishes for the Hindu religion the concept of individual rights, weaving into justice and fairness for all – again, what we would call equality under the law.

These examples highlighted some fundamentals about human nature and laid the groundwork for change and advancement. They brought the concepts articulated therein to our societies and allow us to use them even now to move ourselves and our communities towards the fairness and stability any society needs to function and to flourish.

What we also see is room to expand our vision and include other important voices in this collection from history. This is where the contribution of ubuntu is being explored in this fascinating work. These chapters address the concept of ubuntu, which, with no fixed definition, is a quilt of ideas and responsibilities of the individual to and within society. Once ubuntu is established as a concept to be followed, its application to water rights, climate change, and other complex global problems comes into focus.

Each contribution shows that ubuntu and its concepts predate colonialism and reflect the values and practices of many cultures and societies before they were colonised. The concepts have the simplicity and power to speak to a modern world. Like the Magna Carta, ubuntu tells us that an individual is not – and should not be – above the rules the community needs to prosper, the very heart of the concept of equality under the law.

Preface

Ubuntu

Ubuntu describes a set of universal moral principles guiding conduct that tends to preserve the integrity, stability and cohesion of a community through which its members enjoy identity, freedom and dignity for themselves and behave in a way that tends to promote the well-being of others.

Ubuntu is linked to the UN's Sustainable Development Goals[1] and their attainment. The present work will reveal and elaborate on the links between ubuntu and the SDGs and will be updated annually, in line with emerging jurisprudence.

In the coming years, this work will provide the global legal fraternity with substantial opportunities to enrich its own thinking by observing ubuntu where it is manifest in judicial decision-making generally. Each contribution addresses the challenges of reconciling the collectivity of ubuntu with the individuality of human rights, beginning with a systematic consideration of the concept of ubuntu and its application to water as human right and to climate justice. Subsequent volumes will address ubuntu and land, ubuntu and resource rights, and ubuntu and restorative justice.

Judicial Action Group

This work is the brainchild of the Judicial Action Group (JAG), a judicial, peer-led African resource created in 2014 by Protimos. It is an independent mutual support network and thought-leadership resource for judges in apex courts across Africa, which has become a collaborative professional body whose purpose is to ensure the rollout of judicial enrichment and mutual support across African judiciaries.

1 <https://www.undp.org/sustainable-development-goals>.

Members of the JAG confer regularly with one another to discuss complex legal issues and the professional challenges that arise in their jurisdictions.[2] Current JAG members are

- Justice Tijjani Abubakar, Supreme Court of Nigeria
- Justice Barbara Ackah-Yensu, Supreme Court of Ghana
- Justice Amina Augie, Supreme Court of Nigeria, Co-Vice-Chair of JAG
- Justice Awa Bah, Supreme Court of the Gambia
- Justice Mohamed Elghannam, Court of Appeal, Egypt
- Judge Reginald Fynn, Court of Appeal, Sierra Leone, Co-Vice-Chair of JAG
- Justice Charles Hungwe, Supreme Court of Zimbabwe and Court of Appeal of Lesotho
- Justice Esther Kisaakye, Supreme Court of Uganda
- Justice Jody Kollapen, Constitutional Court of South Africa
- Justice Isaac Lenaola, Supreme Court of Kenya, Chair of JAG
- Judge Molefi Makara, Court of Appeal of Lesotho
- Justice Thomas Masuku, Constitutional Court of Namibia
- Justice Carlos Mondlane, Supreme Court of Mozambique
- Justice Nigel Mutuna, Supreme Court of Zambia
- Judge Zione Ntaba, High Court of Malawi, Secretary of JAG.

Protimos

In their work in Africa, Protimos lawyers enable impoverished client communities to use their own laws to protect their social, economic and environmental interests. Our Community Legal Empowerment (CLE) programme trains community-based lawyers to represent communities and advise them on their rights to land and water resources and on climate change, amongst other issues. In the JAG, senior judges consider emerging legal norms such as ubuntu, new ESG jurisprudence on climate-change liability, and parent-company liability for the actions of its African subsidiaries. Our Green Light Programme (GLP) provides framework agreements that reflect respect for community rights and enables businesses to exploit natural resources in legal and equitable ways.

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2 The JAG meets quarterly online and annually in person for a multi-day conference in members consider a range of issues to strengthen their independence, integrity and efficiency. The JAG plans to expand its membership across Africa, whilst developing its own resources to disperse benefits across each of their own judicial systems.

The long-term purpose of this publication is to collate and analyse ubuntu-based thinking and thus to show how it can enrich both rights-based and commercial jurisprudence immeasurably. Conjoining ubuntu with colonial legal systems could redress a series of historical imbalances, to the general benefit of the global rule of law. We believe that an enriched and rigorous understanding of ubuntu will create a wider opportunity for its application, as the principles of ESG become a discipline for the future.

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About the authors

PLO Lumumba

PLO Lumumba is a Professor of Public Law, a holder of an LLD degree on the Law of the Sea from the University of Ghent, Belgium, and of LLB and LLM degrees from the University of Nairobi. He holds an honorary DLitt. degree from the University of Cape Coast in Ghana and an honorary DSc degree from Bells University of Technology in Nigeria.

Professor Lumumba has been trained in Humans Rights at the Institute of Advanced Legal Studies University of London in England, Humanitarian Law at the Raoul Wallenberg Institute of the University of Lund in Sweden and International Humanitarian Law in Geneva, Switzerland. He is an Advocate of the High Courts of Kenya and Tanganyika and a Certified Mediator. He is also a Fellow of the Institute of Certified Public Secretaries of Kenya FCPS (K), a Fellow of the Kenya Institute of Management (FKIM) and Honorary Fellow of the African Academy of Sciences (FAAS). He is the Chairman of Farafina Investment Group in Monrovia, Liberia and of the Economic Strategic Growth and Development Initiative for Africa based in Nigeria.

He is the immediate former Director and Chief Executive Officer of the Kenya School of Law, a former Secretary of the Constitution of Kenya Review Commission and a former Director of the defunct Kenya Anti-Corruption Commission (KACC). He is the Founding Trustee of the African Institute for Leaders and Leadership (AILL) and founding Chairman of the Association of the Citizens Against Corruption (ACAC). He was the Founding Dean, Kabarak University School of Law, and is a former lecturer at the University of Nairobi (UON), the United States

International University (USIU Africa) and Widener University USA (Nairobi Summer School).

Professor Lumumba is a renowned legal practitioner who has written several books including *Criminal Procedure in Kenya*, *An Outline of Judicial Review in Kenya*, *Kenya's Long Search for a Constitution: The Postponed Promise* and *An Introduction to Judicial Review and Administrative Law in Kenya*. He has published numerous articles in refereed journals and several book chapters. He has also edited several books including *Devolution in Kenya* (with Professor Mbondenyi and Dr Kabau), *The Constitution of Kenya: Contemporary Readings* (with Professor MK Mbondenyi and SO Odero). He has co-authored *The Constitution of Kenya, 2010 An Introductory Commentary* (with Dr Luis Franceschi) and several books on ethics. Professor Lumumba's non-legal books include *Swearing by Kenya*, *A Call for Political Hygiene in Kenya*, *The Searching Soul*, *Sanitizing Kenyan Politics*, *Mhh Africa!* (in Kiswahili), *Ang'o Marach* (in Dholuo) and *Watim Ang'o* (also in Dholuo). He has also co-authored thirteen other books on Integrity as School Series. He recently ventured into fiction with his book *Stolen Moments* and translated the Kiswahili play *Kigogo* into English as *The Leader*.

In 2004, Professor Lumumba received a commendation from the Kenya Scouts Association for service to society. In 2011, Bishop Okullu of the College of Theology of the Great Lakes University of Kisumu awarded him the order of St Paul the Apostle for restoration of good governance and right values in society. In 2012, the East African Association of Anti-Corruption Authorities recognised him for his valuable and exemplary contribution in the fight against corruption.

Professor Lumumba has been recognised by the International Commission of Jurists (Kenya Section) and the Law Society of Kenya for his exemplary contribution to the legal profession. He was recognised by the Kenya–USA Association for the Martin Luther King Jnr., Leadership Award in 1996 and was received the 2008 Martin Luther King Africa Salute to Greatness Award from the Martin Luther King Jr. Africa Foundation. He has also been included in the Marquis Who's Who in the World and was the Distinguished Mwalimu Julius Nyerere Lecturer at the University of Dar es Salaam for 2014 and the 11th Kwame Nkrumah Lecturer at the University of Cape Coast in Ghana, in 2016. On 27 May 2017, he was invested Chief Tamba Taylor of Liberia for his Pan-Africanist activities. He was the 5th Abram Tiro Onkgopotse Lecturer at the University of Limpopo in South Africa, in 2017, and the 5th Apollo Milton Obote Lecturer, in 2017. He was the Nelson Mandela Centenary Memorial Lecturer at Walter Sisulu University in South Africa, in 2018,

and the 2nd Ray Phiri Memorial Lecturer at the University of Mpumalanga, in 2019. He gave the inaugural Samora Machel Memorial Lecture in Maputo, Mozambique, in 2021. He was the 10th Saraki Memorial Lecturer in Abuja, Nigeria, in 2022, the 9th Sir Ahmadu Bello Memorial Lecturer in Lafia Nasarawa State, Nigeria, in 2023, and the 10th Professor J Atta Mills Lecturer at Kwame Nkrumah University of Science & Technology in Kumasi, Ghana, also in 2023.

In 2017, Professor Lumumba received a Lifetime Achievement Award for Patriotism and Advocacy from the African Forum and was recognised by *New African Magazine* as one of the 100 most influential Africans. In January 2018, he received the following awards and recognition:

- African Luminary Award from the African Cultural Association in the United States of America
- Freedom of the City of Lowell in the Commonwealth of Massachusetts in the United States of America for his role in the fight against corruption and bad governance in Africa
- Recognition from the House of Representatives of the Commonwealth of Massachusetts in the United States of America for exemplary work in the fight against corruption and bad governance in Africa.

Professor Lumumba practises law with Lumumba and Lumumba Advocates and coordinates activities under the aegis of the PLO Lumumba Foundation.

Caiphas Brewsters Soyapi

Caiphas is an Associate Professor of Law at North-West University (NWU), South Africa, but is presently undertaking a research Fellowship at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. His current research is focused primarily on environmental constitutionalism in Africa, broadly exploring rights-based approaches to environmental protection, the place of international environmental law principles in African courts and African judicial environmentalism.

Ndjodi Ndeunyema

Dr Ndjodi Ndeunyema is a practising solicitor in England and Wales and an International Strategy Forum Fellow (Africa) for 2023. Before transitioning into legal practice, Ndjodi was a Modern Law Review Early Career Research Fellow at the University of Oxford after defending his DPhil in Law without corrections and being awarded the 2021 Professor Subedi Prize for the best Oxford University law doctoral thesis. He subsequently published his book *Re-Invigorating Ubuntu Through Water: A Human Right to Water under the Namibian Constitution*, with Pretoria University Law Press.

Ndjodi completed an MPhil degree in Law, a BCL (LLM equivalent), and an MSc degree in Criminology and Criminal Justice while studying at Oxford as a Rhodes Scholar. His undergraduate BJuris and LLB degrees were awarded by the University of Namibia. From 2017 to 2021, he was Research Director at the Oxford Human Rights Hub and a founding editor of the *University of Oxford Human Rights Hub Journal* and served as an editor of the *Oxford University Commonwealth Law Journal* from 2016 to 2019. His scholarship has been published in leading journals including the *Journal of African Law*, *Michigan Journal of International Law*, and *Global Journal of Comparative Law*. He has previously served as a Legal Fellow at the African Court of Human and Peoples' Rights in Arusha, Tanzania. Ndjodi's contributions to this publication represent his own views.

1

The imperative of ubuntu in contemporary judicial decision-making: A case for the utility of ubuntu in understanding rights

PLO Lumumba

1.1 Introduction

Life in Africa has always been centred on the community. African people have always viewed community as a group of people working collectively in order to construct an interdependent society of individuals living together in harmony.[1] Individuals do not exist alone in African society but depend on the community for their actualisation as part of a greater collective.

In the African approach to human existence, therefore, individuals rely on the community as much as the community relies on them. This is encapsulated in the philosophy of ubuntu.

The term ubuntu derives from a group of languages from sub-Saharan Africa known as the Bantu languages. Among the plethora of Bantu languages, the term appears in many variations, all of which refer to the same idea. The Zulu and Xhosa people of South Africa call it ubuntu, as do the people of Rwanda and Burundi. The Abaluhya communities of Kenya call it *omundu*. Swahili speakers call it *utu*, while the Setswana of Botswana call it *botho*. These are all variations of the same word, but they encapsulate the same philosophy: the quality or essence of being a person that is part of a community.

The term ubuntu does not have a direct English translation, and the philosophy is perhaps best encapsulated by the Zulu expression *umuntu ngumuntu ngabantu*, which loosely translates to a person is a person through other people.

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1 Mkhusenli Tyani 'An African understanding of community' (2019) para. 2 <https://www.academia.edu/11255597/An_African_understanding_of_community> (accessed 2 October 2023).

John Mbiti explains the concept of ubuntu succinctly thus:

> What happens to the individual happens to the whole group, and whatever happens to the whole group, community or country happens to the individual. People, country, environment and spirituality are intricately related. The individual can only say: 'I am because we are; and since we are, therefore I am'.[2]

1.2 Origins of ubuntu

Victor Oladokun writes that language is more than a mere means of communication: it is a repository of the values, customs and culture of a people, an embodiment of who they are.[3] The philosophy of ubuntu is reflected in many African languages.

Among the Shona people of Zimbabwe, the phrase *munhu munhu nekuda kwevanhu* has the same meaning as the Kikuyu saying *ndi ni tondu wanyu*, which is to say 'I am because we are, and since we are, therefore I am'.

The key principles of ubuntu are enshrined in the Bantu languages themselves. The languages of communities practising the ideals of ubuntu are littered with phrases denoting the philosophy and its application to every aspect of human existence.

Among non-Bantu speakers, the Luo of Kenya, a Nilotic-language-speaking people, say *an dhano nikech wantie*, which translates to 'my humanity comes from those around me'. The Amharic people of Ethiopia, whose language is Semitic, have a proverb that says *der biyaber anbesa yasir*, which translates to 'when spider webs unite, they can trap a lion'. This proverb reflects the idea of strength in unity that pervades their community.[4]

From the foregoing, it is evident that the philosophy of ubuntu is woven into the fabric of African society, even among non-Bantu African peoples.

1.2.1 Values and principles of ubuntu

Although the values and practices among the various African ethnic groups may vary, the overarching principle remains the same: the individual human being is part of a larger and more significant relational, communal, societal, environmental and spiritual world.[5]

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2 John Mbiti *African Religions and Philosophy* (Heinemann, 1969) 106.

3 Victor Oladokun 'Why African languages matter' *New African Magazine* 15 March 2022 <https://newafricanmagazine.com/27937> (accessed 2 October 2023).

4 Jacob Rugare Mugumbate et al. 'Understanding ubuntu and its contribution to social work education in Africa and other regions of the world' (2023) *Social Work Education* 1 <DOI: 10.1080/02615479.2023.2168638>.

5 Ibid.

Professor James Kamwachale Khomba describes ubuntu as the capacity in an African culture to express compassion, reciprocation, dignity, humanity and mutuality in the interests of building and maintaining communities with justice and mutual caring.[6] He further states that Africans are not rugged individuals but a part of a larger community and therefore that all challenges are overcome only through community solidarity.[7]

Ubuntu manifests in African societies' traditional approach to parenting. Blessing Shambare states that while African societies are far from homogeneous with regard to cultural practices, there is a common ground of consciousness shared among the peoples of Africa.[8] The communal approach to parenting among African societies is a manifestation of the principles of ubuntu. Children belong to the community and their well-being is beneficial to the whole community in that it safeguards the community's future. As such, the responsibility of care, nurture and instruction is undertaken collectively by the members of the community.

Ubuntu envisages the good of the community and the good of the individual as being mutually inclusive. It emphasises the importance of community and collective well-being. It encourages individuals to view themselves as part of a larger whole and to consider the welfare of the community above their own self-interest. By emphasising our interconnectedness, ubuntu encourages members of a community to consider the effect of their individual actions on the well-being of others in the community.

Ubuntu also encourages a communal approach to the navigation of the various milestones of life. The birth of a new baby is a communal celebration. Likewise, the death of a member of the community is mourned by the community. Marriage is viewed as the joining of two families, and, by extension, two communities, and is celebrated as such.

Collective responsibility is encouraged under the ubuntu philosophy. Actions and measures taken for the betterment of a community are viewed as a shared duty, with every member of the community, from oldest to youngest, having his or her part to play in the collective effort.

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6 James Kamwachale Khomba 'Redesigning the balanced scorecard model: An African perspective' (PhD thesis, University of Pretoria, 2011) 127.

7 Ibid.

8 Blessing Shambare 'The *ubuntu* parenting: Kairos consideration for the 21st century dynamics and globalization', *Parenting: Challenges of Child Rearing in a Changing Society* (IntechOpen 2023) <https://www.intechopen.com/chapters/78649> (accessed 3 October 2023).

1.3 Ubuntu and African traditional justice systems

Writing in the late 1950s, during a time when Africa was undergoing a paradigm shift in the social, economic and political arena, author Chinua Achebe, in his novel *Things Fall Apart*, describes a society at a crossroads.[9] The Umuofian (African) society is described as being engulfed by the new ways of the arriving Europeans whilst at the same time losing its traditional way of life.

Achebe narrates the events of a trial conducted in accordance with Umuofian traditions. It is the trial of a man accused of physically harassing his wife. For nine years, the cruel man abused his wife. When his in-laws can no longer bear it, they go to the man's compound, beat him up and take the wife away. After some time, the man goes to his in-laws and demands the bride price back, which leads to the trial. The trial is presided over by nine of the greatest masked spirits in the clan, who are known as the egwugwu, in front of titled men and elders. The nine egwugwu represent the dead fathers of the nine villages of Umuofia. From afar, the villagers follow the proceedings. After the trial, the man is ordered to take a pot of palm wine to his in-laws and beg for his wife to be returned to him. He is reminded that it is not bravery for a man to fight a woman.

In the last chapters of this great book, Chinua Achebe tells of yet another trial, but this time conducted by the recently installed European District Commissioner.[10] The accused are the elders and leaders of Umuofia, charged with assaulting other people and destroying their property. The men are handcuffed and beaten and their heads shaved by the District Commissioner's men. They are locked in cells only to be released upon payment of an imposed fine. At the end of the book, the main character Okonkwo, sensing that the Umuofians will not rise up against the white man, hangs himself, sending the message that there is a new dawn in the land of Umuofia and that those who cannot adapt to the new dispensation will perish.[11]

The two stories demonstrate the key disparities between African and European ways of solving disputes and conflicts. Where a crime is committed, European legal systems attempt to establish who committed it, what laws were broken and what should be done to punish the offender. In contrast, African justice systems focus on who was harmed, the nature

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9 W Rodney *How Europe Underdeveloped Africa* (London: Verso, 2018, originally published 1972).

10 Chinua Achebe *Things Fall Apart* (Heinemann, 1958) Chap. 23, 175–180.

11 PLO Lumumba 'The state of African politics', speech delivered at Harvard University, Massachusetts (12 October 2018) <https://www.youtube.com/watch?v=ZGXikZP5JAk&t=271s> (accessed 8 October 2023).

of the harm, what needs to be done to make it right or to repair the harm, the person responsible for this repair, and how the delinquent can be returned to law-abiding life. In African justice systems, the offending person is not solely responsible for atoning for and repairing the harm he or she has caused; that responsibility also falls on his or her family and on the clan as a whole.

Other early African writers such as Kenya's Ngũgĩ wa Thiong'o tell the same story: an African continent trying to find its new identity amidst the remnants of departing Europeans.[12] Indeed, most of the African literature from the colonial period provides the reader with samples of African traditional culture at its best, with all its virtues and foibles. Among these traditional ways of life are salient instances of conflict resolution at domestic, personal, and intercultural level.[13]

There are several conflict resolution mechanisms among traditional African societies. These mechanisms include mediation, negotiation, adjudication and reconciliation and were often presided over by societal figureheads such as kings, chiefs, ancestors and elders.

Regardless of the mechanism used, the overriding objective is always to provide the parties involved with an opportunity to interact and build consensus.

The aim of traditional dispute resolution mechanisms is restorative justice. Restorative justice seeks to reintegrate offending individuals into their community by restoring their relationship with the survivors and community at large. It seeks to bring perpetrators and survivors together again.

The foundational basis underlying traditional African justice systems is the concept of ubuntu, also known as *botho* or *utu* or *hunhu*. The normative ubuntu values promote social cohesion and the general well-being of society.

1.4 Ubuntu in pre-colonial Africa: Colonialism and its effects

There can be no discourse on the cultures and practices of the people of the African continent without due recognition of the manner in which the colonial enterprise affected people. Part of the process of colonisation

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12 See generally Ngũgĩ wa Thiong'o *Weep Not, Child* (Heinemann, 1964), *The River Between* (Heinemann, 1965), *The Black Hermit* (Heinemann, 1968), and *A Grain of Wheat* (Heinemann, 1967).

13 SB Olorounto 'The notion of conflict in Chinua Achebe's novels' (1986) 1(3) *Obsidian II* 17–36 <http://www.jstor.org/stable/44484839>.

was a concerted condescending effort to 'civilise' the 'savage' ways of African people.[14]

Furthermore, the 'divide-and-conquer' methods employed by colonisers meant that the people of Africa were pitted against each other, with their very survival dependent on their ability to kowtow to colonial overlords, often to the detriment of their fellow Africans. The administrative structures imposed by colonial regimes eschewed the traditional principles and ideals of African people, which were grounded in ubuntu, in favour of the more individualistic Western approach.

This is perhaps best captured by the introduction of individual property tenure systems and their effect on traditional African property regimes. HWO Okoth-Ogendo, in his seminal work 'The tragic African commons',[15] writes that among traditional African communities land was not viewed as a mere resource but as an extension of the community itself. It belonged to the whole community not only as it was constituted at a given moment but also as a beneficiary of past members of the community and as a custodian for future generations.

There existed adequate mechanisms to determine allocation and usage. There were means to resolve any disputes that might have arisen. There were no formal delineations of boundaries, and access was simply predicated on membership to the community. The use of resources such as land was guided by ubuntu, which made those resources sustainable over multiple generations owing to the due regard given to ensuring that the resources served the interests of the community over those of the individual.

With the advent of colonialism, however, colonial regimes completely and deliberately disregarded this form of tenure and declared the land unoccupied under the doctrine of *terra nullius* (land belonging to no one). They then introduced legislation allocating radical title to these lands to themselves and proceeded to administer them in accordance with their individual-centric property tenure systems. Under such systems, ubuntu was discarded and individualism encouraged.

Ubuntu and the struggle for liberation

The struggle for independence from colonial overlords was replete with rhetoric founded on ubuntu. Luminaries such as Kwame N'Krumah

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14 Michael Onyebuchi Eze 'I am because you are' (Oct.–Dec. 2011) *UNESCO Courier* <https://en.unesco.org/courier/octobre-decembre-2011/i-am-because-you-are> (accessed 3 October 2023).

15 HWO Okoth-Ogendo 'The tragic African commons: A century of expropriation, suppression and subversion' (2003) *University of Nairobi Law Journal* 1.

championed Pan-Africanism and insisted that Ghana's pioneering liberation was meaningless unless it was linked to the total liberation of Africa. Mwalimu Julius Nyerere of Tanzania promulgated the *ujamaa* ideology upon the attainment of Tanzania's independence.

Ubuntu and individualism

The European invasion of Africa had a significant impact on Africa. It had a negative impact on African cultures, encouraging Western civilisation among the locals while assimilating them. As a result, Africa's identity has been weakened, with the fundamental morals and values that guided existence tossed out the window.

Individualism is a notion that glorifies the self and puts the autonomous individual at the centre point of value in society.[16] This westernised way of thinking is individual-based and regards personal interests as more important than any other. Individualism rarely goes beyond self, and when it does it is either limited to one's own family or transactional.

Furthermore, individualism contradicts the African values of communalism and care, whereas ubuntu emphasises that people's identities are constantly developing in the context of their reciprocal relationships with others, and that supporting and nurturing others enhances one's own identity and life quality.[17]

Tutu, in describing the quintessential role of an individual within ubuntu, notes that

> A person with Ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.[18]

1.5 Ubuntu in post-colonial Africa: A solution for Africa

Ubuntu is a deeply rooted value system in African societies. Although the term ubuntu is predominantly used to describe the quality or essence of being a person amongst many sub-Saharan tribes of the Bantu language

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16 Sabelo Mhlambi 'From rationality to relationality: Ubuntu as an ethical and human rights framework for artificial intelligence governance', Carr Center Discussion Paper 2020-009 (2020).

17 B Mayaka and R Truell R '*Ubuntu* and is potential impact on international social work' (2021) 64(5) *International Social Work* 646–662 <https://journals.sagepub.com/toc/iswb/64/5> (accessed 30 September 2023).

18 Desmond Tutu *No Future Without Forgiveness* (New York, NY: Random House, 1999).

family, the concept of ubuntu is to be found in diverse forms in many societies throughout Africa.

Ubuntu generally is viewed and understood, correctly, as an African concept, a cultural world view that tries to capture the essence of what it means to be human. Even though there is a diversity of African cultures, there are commonalities to be found among them in areas such as value system, beliefs, practices and others. Ubuntu is an old philosophy and way of life that has for many centuries sustained African communities in sub-Saharan Africa in particular and in Africa generally.[19]

On the other hand, the propounders of the incompatibility school, who have constantly argued that ubuntu is mundane and incompatible with the changing dynamics of modern Africa, have disregarded the hallmarks of ubuntu, supporting a Western culture that promotes individualism and unequal distribution of wealth.[20]

A pro-ubuntu perspective maintains that the philosophy of ubuntu is now, more than ever, relevant to Africa. Furthermore, ubuntu has taught us that our interdependence is inevitable and that whatever happens to one of us happens to all us.

African people suffered many atrocities in pre-colonial Africa, were forced into slavery, colonised and are now subjected to neo-colonialism. The brainwashing by colonial powers gave Africans a false sense of being. They were made to believe that they were a lesser – a 'useless' – people.

Colonial overlords despised and degraded African cultures and imposed their civilisation on African people, in many ways erasing the traditional African way of life. The unfortunate result of this is that many African people today hold Western cultures as being superior to the traditional African way of life.

Things have changed! Africa is now aware, Africa is smart, and Africa has realised its worth. Africans are not a lesser race; they are just as human as any other race in the world. Ubuntu teaches us this and tells us that when we connect to others on the basis of our common humanity, when

19 M Mnyaka and M Motlhabi 'The African concept of *Ubuntu*/Botho and its socio-moral significance' (2005) 3(2) *Black Theology: An International Journal* 215–237: T Murithi 'An African perspective on peace education: *Ubuntu* lessons in reconciliation' (2009) 55 *International Review of Education* 221–233; MB Ramore 'The death of democracy and the resurrection of timocracy' (2010) 39(3) *Journal of Moral Education* 291–303.

20 Peter Mwipikeni 'Ubuntu and the modern society' (2018) 37(3) *South African Journal of Philosophy* 322–334.

we truly regard self and other as one, all of our relationships will flourish.[21]

This rekindling of ubuntu will help address Africa's problems of hunger, isolation, deprivation, poverty and so on. Fostering this philosophy will require the inculcation of communalism, brotherly and sisterly concern, cooperation, care and sharing.

1.6 Ubuntu and restorative justice

When conflicts arise, ubuntu encourages a restorative approach to resolving disputes. This approach involves seeking solutions that restore harmony and balance within the community rather than punitive measures. Restorative justice practices can help mend relationships and promote a feeling of community.

Despite the onslaught of European legal systems such as common law, civil law and Roman-Dutch law, which are employed in the majority of African countries, traditional dispute settlement procedures have remained resilient. Communities continue to apply the values and principles of traditional justice systems in settling disputes even today. This is because these systems are based on the normative concepts of *utu* (humanness). The central element of these systems is the fostering of restorative justice, with the primary goal of restoring relationships rather than allocating rights amongst disputants.[22]

1.6.1 Ubuntu and the South African legal system

As already stated, ubuntu is a term from the Nguni group of languages, which includes Xhosa, Zulu, Ndebele, Swati, Hlubi, Phuthi, Bhaca, Lala, Nhlangwini. It is no surprise, therefore, that most of the literature on ubuntu emanates from South Africa and mostly makes reference to the people of southern Africa. The works of Archbishop Desmond Tutu are particularly instructive on ubuntu in the South African context. The works and life of President Nelson Rolihlahla Mandela exemplified the values and principles of ubuntu.[23] The Interim Constitution of South Africa[24]

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21 Gabriella Beckles-Raymond *Ubuntu: The African Practice of Living Life Well, Together* (2020).

22 ICJ 'Interface between formal and informal justice systems in Kenya' (ICJ, 2011) 32.

23 According to US President Barrack Obama, Mandela 'understood the ties that bind the human spirit'. See B LoGiurato 'Here is Barack Obama's powerful tribute to Nelson Mandela' *Business Insider* (10 December 2013) <https://www.businessinsider.com/obama-nelson-mandela-memorial-service-speech-full-text-2013-12> (accessed 8 October 2023).

was perhaps the first legal text to make direct reference to the term ubuntu. In its postamble, it declared that

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed *on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation* [emphasis added].

This historic declaration marked the beginning of the incorporation of ubuntu normative values into South Africa's legal system. It was the first time in South Africa's modern history that a traditional African concept – ubuntu – was incorporated in the state's official law. Not long after, the Constitutional Court in the much-cited case of *S v Makwanyane*,[25] in finding that the death penalty was unconstitutional, illustrated the principle of ubuntu to define constitutional values.

Central to this finding were the ideas of humaneness, social justice and rehabilitation. Capital punishment was incompatible with the principle of ubuntu in that it offered no chance for rehabilitation – it was cruel and inhumane.[26] Mokgoro J describes ubuntu as embodying the key values of 'group solidarity', 'conformity to basic norms' and 'collective unity'.[27] The court in *S v Makwanyane* used an adapted version of the Savignian model of constitutional interpretation to arrive at its unanimous finding that the death penalty was unconstitutional.

Apart from the textual and purposive modes of interpretation, the court also employed systematic interpretation and historical situating. Systematic interpretation is a manifestation of contextualism, calling for an understanding of a specific provision in the light of the text or instrument as a whole and of extratextual indicia. The court held that a constitutional provision should not be construed in isolation but in its context, which includes the history and background of the provision.

Historical situating method, on the other hand, involves situating a provision in the tradition from which it emerged and allowing qualified recourse to information concerning the genesis of the text in which the provision occurs and concerning the provision itself. The court held that

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24 Constitution of the Republic of South Africa Act 200 of 1993 <http://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> (accessed 5 October 2023).

25 *S v Makwanyane* 1995 (3) SA 391 (CC).

26 Ibid. paras 215 and 235.

27 Ibid. para. 308.

the history and background of the adoption of ubuntu, together with the other provisions of the Constitution itself, in particular the provisions of the Bill of Rights, must be taken into account when interpreting constitutional provisions.[28] It is worth noting, however, that even though the judgment was unanimous the reasoning of the judges differed. Six of the judges premised their arguments on the right to life, with two reasoning that this right could not be qualified. Three based their findings on the view that the death penalty constituted cruel and inhumane punishment, while two said that the death penalty violated the right to dignity and equality and was therefore arbitrary and unconstitutional.

Unlike the Interim Constitution, the 1996 Constitution of South Africa does not expressly mention ubuntu, although the concept of ubuntu permeates that Constitution generally and is conspicuously manifested in Chapter Two, which embodies the entrenched fundamental human rights and freedoms. Read as whole, the 1996 Constitution exemplifies ubuntu's ideas of humanness, social justice and fairness.

Later decisions such as that in *Port Elizabeth Municipality v Various Occupiers*[29] have promoted the thematic development of the concept of ubuntu in the direction of restorative justice. The trajectory of the judicial application of the concept of ubuntu in South Africa has been linked to restorative justice. Scholars maintain that restorative justice has been the driving force behind the application of ubuntu to several divergent areas of law such as criminal law, defamation law and eviction cases.[30] Other scholars have attempted to link the concept of ubuntu as a notion of African communal justice to Rawls's idea of justice as fairness.[31] This school of thought argues that Rawls's theory of justice, in which the subject of justice is the basic structure of a society through which individuals cooperate as free and equal persons, bears striking similarities to the normative values of ubuntu.

The concept of ubuntu being applied in judicial decisions has not been without criticism, especially as it was used in *Makwanyane*. The concept of ubuntu as a legal notion has been attacked on various points, ranging from 'its ambiguity to its redundancy, to perceptions of dichotomies, and

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28 A Klaasen 'Constitutional interpretation in the so-called "hard cases": Revisiting *S v Makwanyane*' (2017) 50(1) *De Jure* <http://dx.doi.org/10.17159/2225-7160/2017/v50n1a1>.

29 2005 (1) SA 217 (CC).

30 C Himonga, C Taylor and A Pope 'Reflections on judicial views of *Ubuntu*' (2013) 67 *Potchefstroom Electronic Law Journal* <https://www.saflii.org/za/journals/PER/2013/67.html> (accessed 1 October 2023).

31 M Letseka '*Ubuntu* and justice as fairness' (2014) 5(9) *Mediterranean Journal of Social Sciences* 544; Himonga et al. (n. 30).

issues of exclusion'.[32] Other scholars have also maintained the position that ubuntu is linked with 'public morality' in a manner that compromises human rights adjudication and, in particular, the rights of minorities.[33]

When the concept of ubuntu is examined through the eyes of the South African courts and the manner in which it has been implemented is considered, it is evident that ubuntu can be applied to virtually any area of law. The hundreds of cases from South Africa's judicial system making reference to ubuntu contribute to the development of the concept. As it is, the concept of ubuntu is sufficiently broad to have far-reaching application in our legal systems:

> The secure and progressive development of our legal system demands that it draw the best from all the streams of justice in our country. This would include benefiting from the learning of those judges who in the previous era managed to articulate a sense of justice that transcended the limits of race, as well as acknowledging the challenging writings of academics ...[34]

1.6.2 *Utu*/ubuntu and the Tanzanian legal system

In Kiswahili, a language spoken throughout most of East Africa, particularly Kenya, Uganda and Tanzania, ubuntu translates to *utu*, which means humanness. It is a concept that condemns acts and deeds that seem even slightly unfair. *Utu* is present in the region's folklore and other traditional stories and proverbs:

> *Asiyejua utu si mtu* (One who isn't humane isn't a person)
> *Mwacha mila ni mtumwa* (One who renounces his culture is a slave)
> *Usiharibu utu kwa kitu, afadhali haribu kitu kwa utu* (Don't spoil your humanity with a thing; it is better to spoil a thing with your humanity. Use things to make you a better human being.)[35]

The writings of scholars such as Ali Mazrui,[36] Ustadh Ahmad Nassir,[37] John Mbiti,[38] Abdilatif Abdalla[39] and Shaaban bin Robert[40] (also known

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32 Himonga et al. (n. 30).
33 R English '*Ubuntu*: The quest for an indigenous jurisprudence' 1996 *SAJHR* 641–648.
34 *S v Makwanyane* 1995 (3) SA 391 (CC) para. 364.
35 <http://swahiliproverbs.afrst.illinois.edu/abuse.html> (accessed 5 October 2023).
36 Ali Mazrui *Summary of The Africans: A Triple Heritage* (Little Brown and Company, 1986).
37 Ustadh Ahmad Nassir *Utenzi wa Mtu ni Utu* (Macmillan, 1979).
38 John Mbiti *African Religions and Philosophy* (Heinemann, 1969).
39 A Abdalla *Sauti ya Dhiki* (Nairobi and Dar es Salaam: Oxford University Press, 1973).
40 Shaaban Robert *Adili na Nduguze* (Macmillan, 1956).

as Shabaan Robert) are particularly instructive on East Africa's experience on *utu* philosophy. Mazrui saw Africa as a continent that depicts 'a clash of cultures'. He speaks of Black Jews worshipping in Ethiopia and Yoruba divination in Nigeria. He mentions the layers of culture in Egypt as a good example of African diversity. In Kenya Mazrui sees a triple heritage of law: a synthesis of Western, Muslim, and African traditions. However, the English system of law has become the most influential.[41] He laments that the African Union is divided by language. For a common language, AU members must use a foreign language such as English or French to discuss African affairs. Nevertheless, he asserts that, 'in any fruitful union of the Triple Heritage, the indigenous culture must be the foundation'. He also advocates for 'self-colonization' by Africa:

> I am advocating self-colonization by Africa. I am against the return of European colonialism and the equivalent of Pax Britannica. But I fear that if Africans do not take control of their destiny themselves, including the use of benevolent force for self-pacification, they will once again be victims of malevolent colonial force by others.[42]

Shaaban Robert employs folkloric materials in order to present different issues relating to *utu* (humanness). He uses Swahili folklore and language to discuss social and philosophical aspects through the lens of African philosophy.[43] In his novel *Adili na Nduguze*,[44] Robert reflects the concept of humanness as it is viewed among Africans.

The novel follows the story of three brothers Hasidi, Mwivu and Adili after the death of their parents. The brothers inherit immense wealth. Hasidi and Mulvu lose their fortune after a shipwreck. Adili decides to share his wealth with his two brothers. Thereafter, a conflict arises amongst the brothers over Adili's friend Mwelekevu. Adili is thrown into the sea by his two brothers but is eventually rescued by a 'genie', who punishes the two brothers by turning them into apes. Adili is ordered to whip the apes every night. The conflict is later resolved through the intervention of kings.

The tale of *Mji wa Mawe* in *Adili na Nduguze* reveals an ontological conflict which can be easily understood through the meaning of *utu*. The attempt of the two brothers Hasidi and Mwivu to drown their brother is severely punished when they are condemned to be beasts.

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41 Mazrui (n. 36).

42 AA Mazrui 'Self-colonization and the search for Pax Africana: A rejoinder' (1995) 2 CODESRIA Bulletin 20–22.

43 Ibid. 38.

44 Robert (n. 40).

Nevertheless, turning human beings into beasts and subjecting them to regular whipping is also contrary to the restorative ubuntu approach to justice. Thus, the two brothers are turned back into human beings when the curse placed upon them is removed.[45]

Ubuntu allows a delinquent who confesses and repents to be accepted back into the community because he or she is deemed to have regained his or her humanness; he or she becomes a person once more.

1.6.3 *Utu*/ubuntu: A Kenyan experience

Utu was the main philosophy governing Bantu speakers of East Africa in pre-colonial times. It's import was that everything was done was for the benefit of the whole community. In Luhya (*umundu*), Kikuyu (*undu*), Meru (*untu*) and Kisii, spoken mainly in the western, central, eastern and Nyanza regions of Kenya, *utu* stands for humanness or the act of being humane to other human beings and to nature in general.

When Kenya attained independence in 1963 and the British colonisers left (some argue that they never actually left), the new republic was left with many legal systems: an African traditional justice system, English common law, Indian laws and Sharia laws. Notably, African customary law was to be applied in so far as it was not 'repugnant to justice and morality'.[46] The repugnancy clause has been retained in Kenya's laws to date. Article 2(4) of the Constitution of Kenya, 2010 provides thus: 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this constitution is invalid'.

The repugnancy clause has been a subject of interesting scholarly and judicial discourse.[47] Some have argued that 'justice and morality' were and are still being interpreted from the perspective of English common law and the English people,[48] that English culture is the standard against which Kenyan cultures, values and traditions are judged.

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45 JP Madoshi 'Folk narratives and the reflection of (*utu*) humanness in Shaaban Robert *Adili na Nduzuze*' (2015) 6(1) *Venets: The Belogradchik Journal for Local History, Cultural Heritage and Folk Studies* <https://doaj.org/article/7bb7b3a6aa5745ec9671966de48b12ee> (accessed 9 October 2023).

46 S 3(2) of the Judicature Act Cap 8; arts 2(4) and 159(3)(b) of the Constitution of Kenya, 2010.

47 *PZG & 2 others v TMT* (2019) eKLR <http://kenyalaw.org/caselaw/cases/view/180956> (accessed 10 October 2023).

48 See generally Konrad Adenauer Stiftung *History of Constitution Making in Kenya* (2012); N Kamunde-Aquino 'Kenya's constitutional history' (2014) <http://www.cbgoumaadvocates.co.ke/wp-content/uploads/2017/11/Nelly-Kamunde-Aquino-Kenyas-Constitutional-History-1.pdf>; HWO Okoth-Ogendo 'The politics of con-

[*continued on next page*]

Kenya's 1963 Independence Constitution[49] was subjected to several amendments and finally repealed in 1969.[50] The reintroduced Constitution faced the same fate as that of the Independence Constitution – undergoing profound changes and eventually ending up being what Okoth-Ogendo called a 'Constitution without constitutionalism'.[51] The 1969 Constitution, having lost its value content and significance as a result of numerous amendments, made Kenyans demand and agitate for a new constitution, ultimately giving themselves and their progeny the Constitution of Kenya, 2010. It is against this background that the traditional justice systems and the application of the concept of *utu*/ubuntu is examined in this section.

Despite the onslaught of the English legal system, traditional dispute resolution mechanisms have remained resilient, and communities continue to apply the values and principles of traditional justice systems in settling disputes in Kenya today. This is because these systems are based on the normative concepts of *utu*. As already described, the underlying theme in these systems is restorative justice, the main aim of which is restoration of relationships and peace-building as opposed to the allocation of rights among disputants.[52] It calls on the courts to accept and apply these principles in rendering their decisions. The Honourable Justice SN Mutuku stated thus:

> Judicial officers are human beings and this 'humanness' ought to reflect in our daily duties. We deal with all manner of personalities and sometimes our call of duty goes beyond the official duty. In the normal course of my official duties, I have come to realize that trying to understand parties before me and the actions they take helps a lot. I call it discharging judicial duties with a human face.[53]

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stitutional change in Kenya since independence, 1963–69' (1972) <https://www.jstor.org/stable/720361> (accessed 5 October 2023).

49 Act 1968 of 1963.

50 The 1963 Constitution of Kenya, after being amended severally times, was eventually repealed and reintroduced and passed as Act No. 5 of 1969 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Constitution/HistoryoftheConstitutionofKenya/Acts/1969/ActNo.5of1969.pdf> (accessed 3 October 2023).

51 HWO Okoth-Ogendo 'Constitutions without constitutionalism: An African political paradox' in D Greenberg, SN Katz, B Oliviero and SC Wheatley (eds) *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York and Oxford: Oxford University Press, 1993).

52 ICJ (n. 22).

53 Criminal Revision 3 of 2013, *Muema Syengo Kiti v Republic* [2013] eKLR <http://kenyalaw.org/caselaw/cases/view/90947>.

In its preamble, the 2010 Kenyan Constitution reflects the lived history of Kenyans and their determination to live and coexist harmoniously in the spirit of *utu*. It reads:

> We, the people of Kenya –
>
> *… Proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:*
>
> *Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:*
>
> *Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:*
>
> *Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:*
>
> … Adopt, enact and give this Constitution to ourselves and to our future generations [emphases added].

Even though the Constitution does not make express mention of the term *utu*, *utu*'s fundamental concepts are present throughout the text. For example, article 10 lists the national values and principles of governance as including human dignity, national unity, rule of law, sharing and devolution of power, equity, social justice, inclusiveness, equality, human rights, protection of the marginalised, and participation of the people. These are all the fundamental elements of *utu*/ubuntu. Article 11 recognises culture as the foundation of the people and as the cumulative civilisation of the Kenyan people and nation. The provision obligates the state to promote all forms of national and cultural expression and to recognise the role of indigenous technologies in the development of the nation.

Article 44 of the 2010 Constitution vests in every person the right to use the language and participate in the cultural life of their choice. Article 45 recognises the family as the fundamental unit of society and as the necessary basis for social order. The family thus enjoys the recognition and protection of the state. The Constitution has entrenched and given constitutional underpinning to reconciliation and restorative justice as some of the methods of justice and alternative dispute resolution.

The Kenyan Victim Protection Act defines restorative justice as the promotion of reconciliation, restitution and responsibility through the involvement of the offender, the victim, their parents (if the victim and offender are children) and their communities and as a systematic legal response to victims or immediate community that emphasises healing the injuries resulting from the offence.[54]

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54 S 2 of the Victim Protection Act No. 17 of 2014.

The Judiciary Alternative Justice Systems (AJS) Baseline Policy[55] recognises the importance of traditional justice systems in the resolution of both civil and criminal disputes. It adopts the agency theory of jurisdiction as the constitutionally permissible modality to determine the acceptability and propriety of a particular dispute, controversy or issue to be put before an AJS mechanism. This theory also challenges judicial officers to go beyond the narrow view that considers criminal cases as disputes between the state and an individual and not as between two individuals. Human rights are guaranteed to all individuals. According to the Baseline Policy, universality theory requires that the rights notion of humanness (or *utu* in Swahili) is found everywhere and its contents are the same.[56] The Policy thus concludes that the idea that human rights are a Western concept must be rejected.

Article 159 of the 2010 Constitution, on judicial authority, provides:

> (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles …
>
> (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. subject to clause (3);
>
> (3) Traditional dispute resolution mechanisms shall not be used in a way that–
>
> (a) contravenes the Bill of Rights;
>
> (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
>
> (c) is inconsistent with this Constitution or any written law.

The courts have had an opportunity to interpret and apply the provisions of article 159(2) of the Constitution on several occasions. In the case of *Republic v Mohamed Abdow Mohamed*[57] the accused was charged with murder and pleaded not guilty. On the hearing date, the court was informed that the family of the deceased had written to the Director of Public Prosecutions (DPP), requesting that the murder charge be withdrawn on account of a settlement reached between the families of the accused and the deceased respectively. Subsequently, counsel for the state, on behalf of the DPP, made an oral application to have the matter marked as settled, contending that the parties had submitted themselves

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55 Judiciary of Kenya 'Alternative Justice Systems Baseline Policy: Traditional, informal and other mechanisms used to access justice in Kenya (alternative justice systems)' (Nairobi, August 2020).

56 Ibid. 30.

57 Criminal Case 86 of 2011, *Republic v Mohamed Abdow Mohamed* [2013] eKLR <http://kenyalaw.org/caselaw/cases/view/88947> (accessed 10 October 2023).

to traditional and Islamic laws, citing article 159 of the Constitution, which allowed courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

For context and clarity, the following excerpt from the letter sent by the deceased's family is reproduced:

> *The two families have sat and some form of compensation has taken place wherein camels, goats and other traditional ornaments were paid to the aggrieved family*. Actually, one of the rituals that have been performed is said to have paid for blood of the deceased to his family as provided for under the Islamic Law and customs. These two families have performed the said rituals, the family of the deceased is satisfied that the offence committed has been fully compensated to them under the Islamic Laws and Customs applicable in such matters and in the foregoing circumstances, they do not wish to pursue the matter any further be it in court or any other forum … *it's worth noting that it goes against our tradition to pursue the matter any further and/or testify against the accused person once we have received full compensation in the matter of which we already have* … It's our instruction that the matter and/or court case be withdrawn as our family wishes to put a stop to the matter[58] [emphases added].

The court was faced with two questions: (1) can a murder charge be withdrawn on account of a settlement reached between the families of an accused and the deceased? and (2) can alternative dispute resolution mechanisms as espoused by the Constitution of Kenya, 2010 be extended to criminal matters? The court held that under article 157 of the Constitution, the DPP is mandated to exercise state powers of prosecution and may discontinue criminal proceedings against any person at any stage. The court deemed it fit and just that the case be withdrawn as the ends of justice would be met by allowing rather than disallowing the application.

The High Court, facing a similar case in *Republic v Musili Ivia & another*,[59] arrived at the same finding, holding that:

> In the circumstances of this case, I do not find the settlement agreement to be inconsistent with the spirit and purpose of Article 159(2)(c) and (3) of the Constitution of Kenya 2010 … I am also not aware of any written law or International Convention that prohibits the amicable settlement proposed. The victim is already dead, and close relatives agree to the settlement. I have not been told that there is any objection from the community or the public. *I will therefore accord the clan settlement consideration in this matter* … the Director of

58 Ibid.

59 Criminal Case 2 of 2016, *Republic v Musili Ivia & another* [2017] eKLR <http://kenyalaw.org/caselaw/cases/view/143113> (accessed 10 October 2023).

> Public Prosecutions has power to discontinue criminal proceedings subject to the permission of the court. He has now asked for such discontinuance of the criminal proceedings, on the above reconciliation agreement. He has stated that as a result of the settlement reached, he cannot be able to avail prosecution witnesses. In my view, *this court is entitled to promote the reconciliation as requested* and I thus allow the request of the Director of Public Prosecutions and order that the criminal proceedings herein against the two accused herein for murder be and are hereby discontinued [emphases added].

A close examination of the two cases reveals that they were withdrawn only because the DPP was the party applying for withdrawal.[60] What would have happened if the DPP had opposed the applications for withdrawal? Would the courts have arrived at the same decision? It would not be long before the courts had an opportunity to answer these questions.

In *Republic v Abdulahi Noor Mohamed (alias Arab)*[61] the court was faced with facts similar to those of the two cases above, except that, in this case, it was the accused who applied for withdrawal of the case, which application the DPP opposed. The families of the accused and the deceased had reached a settlement after some compensation was made, rituals were conducted and an agreement of reconciliation was signed.

The court disagreed with the manner in which *Mohamed Abdow Mohamed* had been determined, pointing out that the accused and the DPP ought to have reduced the settlement to a plea agreement and presented it to the court. However, the court further stated that even though the Constitution recognised alternative justice systems as one of the principles guiding courts in the exercise of their judicial authority and did not exclude criminal cases, there were 'no policy guidelines on how to incorporate the alternative justice systems in handling criminal matters'.[62]

The court also found that the statutory provisions[63] limited the application of alternative dispute resolution mechanisms to civil disputes and misdemeanours in criminal matters.

Mournful of the lack of a formalised structure whereby informal justice systems can be applied to criminal matters and their scope of operation specified, the court proceeded to rely on the case of *Juma Faraji Serenge*

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60 See also Criminal Case 32 of 2012, *Republic v Ishad Abdi Abdullahi* [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/128857> (accessed 10 October 2023).

61 Criminal Case 90 of 2013, *Republic v Abdulahi Noor Mohamed (alias Arab)* [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/125467> (accessed 10 October 2023).

62 Ibid. para. 22.

63 S 3(2) of the Judicature Act; s 176 of the Criminal Procedure Code.

alias Juma Hamisi v Republic,[64] which was decided in the previous constitutional dispensation. In the end, the court disallowed the application, holding that:

> A crime is an injury not only against the affected individual(s) but also against the society. Offences are prosecuted by the state, which in so doing protects the social rights of all citizens. Therefore, at a minimum, the prosecution should be consulted before having the reconciliation agreements and customary laws applied in resolving criminal cases. In this case, the prosecution turned down any an offer by the accused to negotiate a plea agreement proposal. By asking this court to enforce an arrangement between the accused and the family of the accused, to the exclusion of the prosecution amounts to a disregard of the law on the exercise of prosecutorial powers. That cannot be the object envisioned under Article 159 when recognizing alternative justice systems as one of the principles to be promoted by courts when exercising judicial authority. Application of alternative dispute resolution mechanisms must be consistent with the Constitution and the written law of the land.[65]

The court in this case did not appreciate the goodwill of the accused person's family and that of the deceased's family in their quest to have the matter settled out of court. Rightly or wrongfully, the court interpreted the Constitution and the law in a manner that did not promote the use of traditional dispute resolution mechanisms that focus on restorative justice. The court instead chose to give the DPP the only key to the doors of traditional dispute resolution mechanisms in criminal matters. Unfortunately, later decisions followed this trend, and it has almost become settled law that without a plea agreement and the consent of the DPP criminal cases cannot be withdrawn on article 159(2) grounds.[66]

The courts in Kenya have noted that the criminal offences codified in the Penal Code, the Sexual Offences Act and other written laws often come into conflict with traditional African and specifically Kenyan cultures. For instance, the High Court in *JMN v Republic*[67] grappled with section 22(2)(a) of the Sexual Offences Act, which provides for the degrees of consanguinity in relation to the offence of incest. The court, quashing the conviction of the appellant, held that 'the wording of Section 22(2)(a)

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64 Misc Crim Appli 42 of 2006 *Juma Faraji Serenge alias Juma Hamist v Republic* [2007] eKLR <http://kenyalaw.org/caselaw/cases/view/36920> (accessed 11 October 2023).

65 *Republic v Abdulahi Noor Mohamed (alias Arab)* (n. 61) para. 27.

66 See generally Petition 285 of 2016, *Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another* [2016] eKLR <http://kenyalaw.org/caselaw/cases/view/128484> (accessed 11 October 2023).

67 Criminal Appeal 11 of 2020, *JMN v Republic* [2023] eKLR <http://kenyalaw.org/caselaw/cases/view/210472> (accessed 11 October 2023).

of the Sexual Offences Act is of an ambiguous nature and often comes in[to] conflict with traditional African and Kenyan cultures definition of relatives'.

The same thoughts were voiced in *Ismael Hassan Medza v Republic*:[68]

> My interpretation of the offence of incest under Section 20(1) of the Act was meant to prohibit sexual intercourse between persons so closely related that marriage between them is forbidden by Law. However, the common definition in Section 22 of the Act embodies the views of parliament which one may term as amorphous in both dictionary and legal definitions. Why do I say so? The scope of consanguinity varies from one race, tribe, ethnic society, community and country, for reason that various societies have stringent cultures customs and taboos which govern incestuous acts and prohibitions.

Kenyan law reports are riddled with instances where the courts have applied the normative values of *utu*/ubuntu in rendering their decisions especially in instances where there were gross violations of human rights and no clear policy guidelines on the granting of reliefs/remedies.[69] Kenya still has a long way to go before fully adopting *utu*/ubuntu concepts in its legal system.

The adoption of the judiciary's Alternative Justice Systems (AJS) Policy is seen as an effort to break down conceptual structures of legal practice and thought adopted from our colonial and post-colonial contexts. During the launch of the Judiciary Alternative Justice Systems, the Honourable Chief Justice emeritus David K Maraga said:

> Kenyan communities have, for generations, had their own justice systems that have held, and continue to hold, societies together. … Alternative Justice Systems as espoused in this Policy are community-centered and reflect the lived realities of the people and, therefore, eminently more accessible to people.[70]

1.6.4 Rwanda and Burundi legal systems

In Kinyarwanda and Kirundi, the national languages of Rwanda and Burundi respectively, ubuntu means human generosity as well as

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68 Criminal Case 111 of 2017, *Ismael Hassan Medza v Republic* [2023] eKLR <http://kenyalaw.org/caselaw/cases/view/207185> (accessed 11 October 2023).

69 Petition 3 of 2018, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (*Amicus Curiae*)* [2021] KESC 34 (KLR) <http://kenyalaw.org/caselaw/cases/view/205900> (accessed 11 October 2023).

70 Moses Muoki 'Maraga launches Alternative Justice System to reduce case backlog' Capital News (28 August 2020) <https://www.capitalfm.co.ke/news/2020/08/maraga-launches-alternative-justice-system-to-reduce-case-backlog> (accessed 11 October 2023).

humanity.[71] When in these languages people say *gira* ubuntu they are asking for members of a society to be generous, to have consideration and be humane towards others.

Vision Burundi 2025 states that it regards 'the protection and the promotion of cultural identity as an effective means to rebuild social cohesion'. It also pronounces that:

> Within this framework, in addition to the fundamental values of Burundian society that are in particular Ubuntu (the ethical concept of African origin), tolerance, respect for the other, sharing, etc. Kirundi, the language of communication between all Burundians, forms the principal cultural identity of the country and is a unifying factor.[72]

Burundi places particular emphasis on training the population and the youth in positive traditional cultural values such as solidarity, mutual social assistance, forgiveness and mutual tolerance, patriotism; a sense of discretion (*ibanga*) and responsibility, dignity (*ubupfasoni*) and respect for others and oneself; and humanism and personality (ubuntu).[73]

Rwanda and the Gacaca courts

Rwanda has perhaps been in the forefront of promoting the normative concepts of ubuntu. There are practical examples to demonstrate this: in an exemplary act of ubuntu, Rwanda signed a deal with the UN refugee agency (UNHCR) and the African Union (AU) to host hundreds of African migrants who were being held in dire and inhumane conditions in Libya.[74]

The revival of Gacaca courts following the Rwandan genocide of 1994 is one of the best examples of an African country using its traditional justice system to resolve its internal conflicts when Western systems fail.

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71 Wichtner-Zola Y '"Ubuntu" is powerful thinking' (2012) <https://www.canr.msu.edu/news/ubuntu_is_powerful_thinking>.

72 United Nations Development Programme 'Vision Burundi 2025' <https://www.undp.org/sites/g/files/zskgke326/files/migration/bi/UNDP-bi-vision-burundi-2025_complete_EN.pdf> (accessed 10 November 2023).

73 Republic of Burundi, Ministry of Human Rights. Social Affairs and Gender 'African Charter on the Rights and Welfare of the Child Initial Implementation Report' (August 2017) <https://www.acerwc.africa/sites/default/files/2022-06/EN-Rapport-du-Burundi-sur-la-mise-en-oeuvre-de-la-Charte-Africaine-des-___.pdf> (accessed 11 October 2023).

74 This Is Africa 'Rwanda sets exemplary act of ubuntu signing a deal to host 500 African migrants trapped in Libya' (10 September 2019) <https://thisisafrica.me/politics-and-society/rwanda-Ubuntu-deal-to-host-migrants-in-libya> (accessed 11 October 2023).

Gacaca courts were introduced by the Rwandan government as an alternative to national justice after the Rwandan genocide. The Gacaca courts were a state-administered structure which used communities as a basis for judicial fora.[75] They were instituted in response to the failure of the Western-styled national courts to process all the suspects of the genocide.

Gacaca trials were based on indigenous local justice, with ubuntu ethics being an underlying element of the system.[76] The conduct of the trials was traditionally informal, organic, and patriarchal.

The revived Gacaca courts were a modernised indigenous justice system that established an organisational structure and included reforms such as the inclusion of women.[77]

The Gacaca courts of Rwanda symbolise how ubuntu is still practised in Africa in being a forum where people could openly confess their crimes and apologise to the families of the offended. They were an indigenous form of restorative and transitional justice.

Unfazed by criticisms from the international community,[78] the Gacaca courts persisted and are reported to have been able to solve hundreds of cases in all the districts of Rwanda without necessarily punishing the convicted persons but by trying to reintegrate them into the community. Some scholars maintain the view that mainstream courts could have taken more than a decade to solve the cases solved by the Gacaca courts.[79] Rwanda's Gacaca courts remain one of the largest community-based judicial undertakings of the century.

Rwanda, Burundi, Kenya, South Africa, Tanzania and many other African countries share similarities in the social, economic and political framework of their societies. Their people share similar traditional values and dispute resolutions mechanisms. Countries with the same former colonial 'masters' share even more similar legal systems.

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75 A Meyerstein 'Between law and culture: Rwanda's *Gacaca* and postcolonial legality' (2007) 32(2) *Law & Social Inquiry* 467–508.

76 E Žebrauskaitė 'The ethics of ubuntu as a basis for African institutions: The case of Gacaca courts in Rwanda' <https://www.unav.edu/en/web/global-affairs/detalle/-/blogs/the-ethics-of-ubuntu-as-a-basis-for-african-institutions-the-case-of-gacaca-courts-in-rwanda> (accessed 11 October 2023).

77 MA Drumbl 'Post-genocide justice in Rwanda' (2020) 22(1–4) *Journal of International Peacekeeping* 247–262.

78 The Gacaca trials received criticism for not complying with international standards for the distribution of justice. For example, Amnesty International invoked art. 14 of the ICCPR and stated that Gacaca trials violated the accused's right to be presumed innocent and to a fair trial. See also Meyerstein (n. 75).

79 S Hinton 'The connection between Ubuntu indigenous philosophy and the Gacaca traditional judicial process in Rwanda' (2016) 5(1) *US–China Education Review* 392–397.

This is not to paint the lives of the people of Africa with broad strokes. The African continent is extremely heterogeneous and the lived experiences of its people are diverse and distinct.

The differences come alive in the multiplicity of cultures and traditions found all across the continent. These differences notwithstanding, the spirit of *utu*/ubuntu is almost invariably discernible in the myriad cultures and civilisations in Africa.

1.7 Ubuntu and the use of natural resources

The concept of ubuntu, as already indicated, has permeated the lives and societies of Africans. The foregoing eclectic survey has served to give only a broad synoptic history of ubuntu and has therefore dealt with dispute resolution in a broad sense; but ubuntu also manifests in the use of resources such as water, which, as the cliché goes, is life. As noted by Okoth-Ogendo, the lasting impact of such indigenous philosophy throughout Africa's existence is 'still the only significant framework for the organisation of social and economic livelihoods in Africa'.[80]

Mabele et al. write that the discourse on resource use and conservation has, thus far, been led by and centred on models and policies fashioned by Western ideologies.[81] This Western approach, they elaborate, is premised on the idea of the separation of the environment from people's use of it. They propose that a decolonised approach centred on ubuntu would provide a system of conservation that emphasises not only the interconnectedness of all humans in their enjoyment and use of natural resources but also the mutually beneficial symbiotic relationship between humans and nature that ought to be at the heart of conservation efforts.

Ojakorotu and Olajide[82] emphasise that an ubuntu-centric approach to resource use would divest Africa of the constraints of neo-colonialism and promote the aims of Pan-Africanism. They speak of the resource curse that plagues Africa, a continent that accounts for 30% of the world's resources yet is constantly the victim of economic upheaval and socio-political strife.

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80 Okoth-Ogendo (n. 15).

81 Mathew Bukhi Mabele, Judith E Krauss and Wilhelm Kiwango 'Going back to the roots: *Ubuntu* and just conservation in southern Africa' (2022) 20(2) *Conservation & Society* 92.

82 V Ojakorotu and BE Olajide 'Ubuntu and nature: Towards reversing resource curse in Africa' *Ubuntu: Journal of Conflict and Social Transformation* <https://journals.co.za/doi/10.31920/2050-4950/2019/sin2a2> (accessed 18 October 2023).

Ubuntu, they reiterate, would promote governance and use of natural resources that will emphasise not only interpersonal relationships amongst Africans, but also the relationship between humanity and nature, with a view to preserving nature for the benefit of future generations.

In the face of climate change, water, owing to its finite nature, has attracted a great deal of attention. Many resolutions and treaties such as United Nations General Assembly[83] (UNGA) resolutions, United Nations Sustainable Development Goals (SDGs) Goal 6, and the African Union's Agenda 2063, among others, have been entered into to ensure water as a resource is evenly distributed within Africa.

Water as a resource is crucial for life, and access to clean and safe water is a fundamental human right. It is essential for drinking, sanitation, food production, and overall human well-being. The recognition of water as a human right underscores the importance of ensuring that all individuals have access to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use.[84] Africa is home to nearly 19 lake/river basins including Congo, Niger, Nile, the Senegal, Juba Shebelle, Lake Chad, Lake Turkana, Limpopo, Ogoague, Okavango, Orange, Volta, and Zambezi, all of which account for nearly 64% of Africa's renewable freshwater resources.[85]

In the spirit of ubuntu, the transboundary usage of water would ensure that the resource is used in a manner that is beneficial to all. These basins, if properly exploited, can offer the continent great riches and liberate it from the clutches of sorrow and want. They offer the opportunity for the generation of hydroelectric power, fisheries, and transboundary transport among many other benefits.

Water, just like land, in pre-colonial Africa was considered *terra nullius* and its access open to all. Such resources would be held in trust for the

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83 UNGA Res 68/157 'The human right to water and sanitation' (18 December 2013) A/RES/68/157 (adopted without a vote); LINGA Res 70/169 'The human right to water and sanitation' (17 December 2015) A/RES/70/169 (adopted by consensus); HRC Resolution 'The human right to safe drinking water and sanitation' Resolution A/HRC/RES/15/9 (30 September 2010) [3] (adopted without a vote); HRC Resolution 'The human right to safe drinking water and sanitation' A/HRC/RES/16/2 (24 March 2011) para. 1 (adopted without a vote).

84 The Convention on the Rights of the Child (CRC), adopted by the United Nations General Assembly in 1989, emphasises the right of every child to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.

85 See PLO Lumumba 'Role of transboundary water cooperation in accelerating the attainment of the Sustainable Development Goals', speech given at the Nile Basin Development Forum held at Kampala, Uganda, on 16 October 2023.

benefit of the community and enjoyed individually in terms of usufructuary rights. Our rivers, lakes, and aquifers know no boundaries, and the waters that sustain us transcend political and geographical demarcations. In this context, it becomes evident that the challenges we face in ensuring access to clean water, sanitation, and sustainable management of this precious resource are best addressed through ubuntu and transboundary water cooperation.

Fully cognizant of disparities in Africa, and aware that some regions, countries or people are 'blessed' (resourcewise) in one way or another, ubuntu philosophy is critical to ensuring even distribution of resources to marginalised groups. Africa needs a concerted effort to counter underdevelopment and soaring poverty rates. An even distribution will require that resources such as water be made available to every African, ultimately reducing resource-disparities and promoting equity.

Water is the thread that weaves through the fabric of our world, touching every facet of our lives, from agriculture to industry, from health to energy, from human survival to the health of our ecosystems. It is therefore essential that we harness this resource for the benefit and development of our world. Ubuntu emphasises the interconnectedness of all individuals and the value of community, compassion, and empathy. It is a useful framework for directing the allocation of resources, especially in circumstances where communal well-being and social harmony are important factors. Ubuntu encourages the idea that members of a community share a collective responsibility for one another's well-being. When allocating resources, this philosophy promotes a focus on ensuring that everyone's basic needs are met before addressing individual wants or desires.

Through colonialism in the late 19th century, European powers imposed new political boundaries across Africa, further complicating resource allocation and management. The arbitrary division of the continent's river systems among different colonial territories disregarded centuries-old water usage patterns and traditional resource management practices.

In the late 20th century, awareness of the need for a comprehensive approach to transboundary water management began to gain traction. Regional organisations such as the African Union and the African Development Bank emerged as platforms for fostering cooperation and dialogue among African nations. These institutions facilitated the development of frameworks and policies aimed at promoting equitable and sustainable management of transboundary resources, mainly water.

The opportunities available to Africa through harnessing its water resources are innumerable and span different sectors such as the energy sector, the transport sector, fisheries, industry, and urban development among others. In Kinshasa, the Great Inga Dam has the potential to power

the whole of Africa if it is well developed and collaboratively managed. In Niger, the Kainji Dam also holds great potential as regards the amount of hydroelectric power it can generate and supply.

These opportunities are made visible through the different initiatives Africa has taken such as the Africa Water Vision 2025,[86] Africa Agenda 2063[87] and the global Sustainable Development Goals (SDGs).[88] The Africa Water Vision 2025, developed by the African Union (AU) and its member states, provides a comprehensive road map for water resources management in Africa. It recognises the importance of transboundary water cooperation and emphasises the need for integrated approaches to water management. The Vision aims to ensure equitable access to water resources, enhance water governance, and promote sustainable development.

By fostering ubuntu among African nations, the Africa Water Vision 2025 seeks to address challenges relating to water scarcity, pollution, and climate change, ultimately contributing to poverty reduction and socio-economic development across the continent.[89] As it comes to an end, the Africa Vision 2025 should be interrogated to establish whether it has been instrumental in developing water resources throughout its period of application, and to decide whether Africa should develop something similar for the years to come.

Africa Agenda 2063, another key strategic framework of the AU, envisions a prosperous, united, and integrated Africa. Water resources management is identified as a critical component in achieving this vision. The agenda emphasises the sustainable use and management of water resources as a catalyst for socio-economic transformation under aspiration 1. It recognises the importance of transboundary water cooperation in fostering regional integration, peace, and stability.

By promoting cross-border collaboration, Africa Agenda 2063 seeks to unlock the potential of transboundary water resources for agriculture, energy, industrial development, and environmental sustainability, aligning with the AU's aspirations for a prosperous and united Africa.

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86 The Africa Water Vision for 2025: Equitable and Sustainable Use of Water for Socioeconomic Development (2000).

87 Agenda 2063: The Africa We Want (2013).

88 The 17 goals were adopted by all UN member states in 2015 as part of the 2030 Agenda for Sustainable Development, which sets out a 15-year plan to achieve those goals.

89 Ojakorotu and Olajide (n. 82).

Furthermore, SDG 6 of the United Nations' 2030 Agenda for Sustainable Development focuses specifically on water and sanitation.[90] This global goal is aimed at ensuring the availability and sustainable management of water and sanitation for all. In the African context, SDG 6 provides a framework for addressing water-related challenges including transboundary water management issues.

SDG 6 calls for rekindling ubuntu and cooperation among countries sharing water resources, highlighting the importance of integrated water resources management and the protection of water ecosystems. By working towards SDG 6, African countries can enhance their capacity for transboundary water governance, strengthen water infrastructure, and improve access to safe water and sanitation services, contributing to overall development and well-being.

Collectively, these frameworks have a significant impact on water resources management in Africa. They provide a shared vision, a lighthouse guiding countries towards sustainable development and cooperation. They promote the adoption of integrated water management approaches, the conservation of water ecosystems, and the equitable allocation of water resources among riparian countries. They also underscore the importance of addressing the impact of climate change, improving water infrastructure, and ensuring access to clean water and sanitation services for all.[91]

By marrying ubuntu with their policies, strategies, and actions and the Africa Water Vision 2025, Africa Agenda 2063, and SDG 6, African countries can foster dialogue, enhance knowledge-sharing, and strengthen institutional frameworks for water governance.

1.8 Conclusion

In conclusion, it is essential to recognise that while the application of ubuntu in judicial systems and other areas may vary in practice across different African cultures and contexts, it cannot be gainsaid that 'ubuntuism' is in many cases the unseen golden thread that informs and irrigates decision-making. *A fortiori*, jaundiced arguments that ubuntu belongs to pre-industrial and unsophisticated societies is destitute of logic.

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90 Goal 6: Clean Water and Sanitation <https://www.unep.org/explore-topics/sustainable-development-goals/why-do-sustainable-development-goals-matter/goal-6#:~:text=Sustainable%20Development%20Goal%206%20goes,of%20people%20and%20the%20planet> (accessed 8 November 2023).

91 Mabele et al. (n. 81).

The multifaceted nature of ubuntu ensures its adaptability and inherent flexibility, which makes ubuntu a valuable tool with significant jurisprudential value across various settings and periods with distinctive nuances that resonate with diverse judicial ecosystems. Embracing ubuntu within diverse legal systems *ipso facto* has the potential to foster more inclusive, just and sustainable approaches to addressing complex challenges in diverse spheres of human endeavour.

2

Ubuntu and climate justice

Caiphas Brewsters Soyapi

2.1 Introduction

Climate justice has gained significant traction in global and national dialogues pertaining to climate change action. Recently, even courts have been tasked with adjudicating climate justice issues in a phenomenon known as climate litigation. Climate justice discussions often revolve around the inclusion of marginalised communities, indigenous peoples in developing nations, and, more recently, small island states in climate action and responses. These discussions also grapple with challenging issues such as the balancing of interests, assigning liability for past actions exacerbating climate change, addressing loss and damage, and defining future state obligations and commitments to prevent climate catastrophe.

Consequently, there has been a surge in climate change discourse, prompting global efforts to comprehend its implications for state responsibilities. As a result, a potentially groundbreaking climate justice case was launched in Germany, and requests for advisory opinions have been submitted to two prominent global judicial bodies: the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS). These requests seek to address crucial questions concerning states' obligations in the context of climate change.

Running parallel to these climate justice discussions is a surge in interest in the African philosophy of ubuntu and its potential to guide us through the numerous crises confronting the world today. This philosophy, originating in sub-Saharan Africa,[1] has piqued the curiosity of the humanities, sparking a multitude of questions. What specific aspects of this philosophy have garnered such fascination? Does ubuntu possess a solid conceptual foundation that could serve as the basis for coordinated efforts

1 To clarify, when we refer to Africa, we are generally speaking about sub-Saharan Africa. Our reference to common or shared values does not imply that every country in Africa shares these values but indicates a sense of generality or a prevailing commonality within the region.

or policy reforms aimed at tackling global challenges including climate change? Could it serve as a value framework for judicial decision-making?

In an attempt to contribute to the global discourse on climate justice, this discussion aims to make a case for the inclusion of ubuntu in such deliberations. The basic argument offered here is that ubuntu presents a normative premise that could potentially serve as an overarching 'value' in resolving global issues related to climate change. Ubuntu's communitarian ethos offers the world a set of principles that could enable us to share and distribute our natural resources more equitably while safeguarding the environment for future generations.

In light of this, the following discussion is structured into five parts. First, it will briefly establish an understanding of the African narrative within the context of colonialism and capitalism.[2] This foundational framework is essential for comprehending the struggles of African indigenous communities to adapt and the historical relationship of these communities with the environment.[3] The discussion then proceeds to provide a generalised exploration of the key themes within the discourse of climate justice. We identify fairness and financing as the two overarching and interrelated themes that underpin our understanding of the complex issues surrounding climate justice. In the fourth section, we introduce the three cases mentioned above: the German case and the two recent requests for advisory opinions submitted to the ICJ and the ITLOS. Our contention is that judicial bodies, especially international judicial forums with advisory capabilities, can play a pivotal role in advancing climate justice discourse when they assume the role of imparting expository justice instead of only adjudicating disputes. We provide the context for how considerations inspired by ubuntu 'ecosophy'[4] can inform such expository justice decision-making.[5]

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2 Christelle Terreblanche 'Ubuntu and the struggle for an African eco-socialist alternative' in Vishwas Satgar (ed.) *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (Wits University Press, 2018) 173.

3 Reflecting on the past should not be seen as a means of assigning perpetual blame or pointing fingers at the Global North. The past serves as a crucial foundation for comprehending current perspectives on matters of justice and for navigating the ongoing debates surrounding the contours of climate justice.

4 See the discussion under § 2.5 below.

5 We do not propose that ubuntu provides all the answers to the challenges associated with understanding and addressing climate justice issues. Instead, we acknowledge the importance of exploring alternative perspectives on how to approach climate justice strategies, and suggest that ubuntu could serve as one of many valuable theoretical frameworks for gaining such insights. See further discussion in Aïda C Terblanché-Greeff 'Ubuntu and environmental ethics: The West

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Furthermore, we delve into the broader perception of ubuntu within sub-Saharan Africa, emphasising the implicit normative attributes inherent in ubuntu as a worldview.[6] We illustrate the climate justice considerations inspired by ubuntu that a judicial forum, whether international or national, would need to grapple with in defining states' obligations regarding climate change. Thereafter, we conclude the discussion.

2.2 Colonialism and capitalism as the grand context for (environmental) injustice

Indigenous communities generally have historically placed significant emphasis on environmental stewardship, a responsibility that endures because of its fundamental role in sustaining survival in an era of unpredictable climatic change.[7] This unpredictability was made more pronounced by colonialism, during which acts of 'vicious sedimentation'[8] were intentionally imposed on colonial territories to reshape livelihoods. On one hand, this 'vicious sedimentation' occurred through actions such as forcibly displacing indigenous communities and demarcating large sections of land to establish game parks, national parks, or protected areas.[9] These measures were seen as ways to maintain the pristine state of wilderness by severing human–nature interaction.

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can learn from Africa when faced with climate change' in Munamato Chemhuru (ed.) *African Environmental Ethics: A Critical Reader* (2019) 95.

6 Voices from Third World nations have often been absent from global debates on international law in general and climate change governance in particular. This absence has given rise to scholarly approaches such as Third World Approaches to International Law (TWAIL), which aim to rectify these imbalances and provide alternative perspectives. Our hope is that our discussion contributes to this ongoing discourse. For further discussions on TWAIL and climate justice, see Olabisi D Akinkugbe and Adebayo Majekolagbe 'International investment law and climate justice: The search for a just green investment order' (2023) 46 *Fordham International Law Journal* 169; Julia Dehm 'Carbon colonialism or climate justice? Interrogating the international climate regime from a TWAIL perspective' 33 *Windsor Yearbook of Access to Justice* 129; Jan Wilkens and Alvine RC Datchoua-Tirvaudey 'Researching climate justice: a decolonial approach to global climate governance' 98 *International Affairs* 125.

7 Kyle Whyte 'Settler colonialism, ecology, and environmental injustice' 9 *Environment and Society* 125 133. We will return to discussing the underpinnings of this stewardship in § 2.5 below.

8 Vicious sedimentation was coined by Whyte to illustrate 'how constant ascriptions of settler ecologies onto Indigenous ecologies fortify settler ignorance against Indigenous peoples over time' ((n. 7) 140).

9 See, for example, ss 48–50 of the South African National Environmental Management: Protected Areas Act, 2003. The irony is that hunting in these very spaces

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On the other hand, an economic ruse emerged, asserting that indigenous communities possessed all the resources required for prosperity if only they would relinquish their attachment to nature and embrace opportunities presented by exploiting natural resources. This mindset encapsulated the capitalist approach and governing notion that capitalism can freely manipulate nature to its advantage, treating nature as an external entity that can be segmented, quantified, and rationalised to serve economic growth, social progress, or other perceived greater goods.[10]

The audacious manner in which the capitalist mindset and development paradigm sidelined the beliefs and traditions of traditional communities exemplifies the lackadaisical approach that modern governance, particularly in African countries, has taken towards nature and the ecosystems indigenous communities inhabit. Yet, as we shall see below, the significance of traditional ways of life and interactions with nature should not stem from external validation but from the inherent value they hold for those who engage in them.[11]

Consequently, past efforts to disrupt traditional livelihoods or interactions with the environment can be characterised as instances of ecological violence.[12] Regrettably, ecological violence continues. In contemporary

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often happens and, even worse, that mining in spaces like protected areas is allowed if authorities approve it. In South Africa, there have been issues around the mining of coal near the Mapungubwe World Heritage Site for a number of years. See also *Mining and Environmental Justice Community Network of South Africa v Minister of Environmental Affairs* (50779/2017) [2018] ZAGPPHC 807 (8 November 2018).

10 Jason W Moore 'The Capitalocene, Part I: on the nature and origins of our ecological crisis' 44 *The Journal of Peasant Studies* 594 601. Carbon majors, big oil, gas and coal producers, have exhibited significant culpability in this context. Arguably, one of the most extensively documented cases of egregious environmental destruction in Africa is that of Nigeria's Ogoniland, situated in the Niger Delta region of southern Nigeria. The terrible fate of Ogoniland must unequivocally serve as a stark reminder of the potential repercussions of carbon-intensive activities and the considerable losses that indigenous communities may suffer. See Oluwole Ojewale and Alize le Roux 'Endless oil spills blacken Ogoniland's prospects' (2022) <https://issafrica.org/iss-today/endless-oil-spills-blacken-ogonilands-prospects> (accessed 3 October 2023). The Indigenous Environmental Network recently published a report detailing global resistance to carbon activities. See Indigenous Environmental Network 'Indigenous resistance against carbon' (2021) <https://www.ienearth.org/wp-content/uploads/2021/09/Indigenous-Resistance-Against-Carbon-2021.pdf> (accessed 3 October 2023).

11 Danford T Chibvongodze 'Ubuntu is not only about the human! An analysis of the role of African philosophy and ethics in environment management' (2016) 53 *Journal of Human Ecology* 157 160.

12 Whyte (n. 7) 136.

times, ecological violence manifests in subtler ways including the insidious displacement of traditional cultural practices through narratives that emphasise broader economic advancement, often cloaked in promises of new employment opportunities and community progress. This approach undermines a community's 'collective continuance',[13] its ability to evolve and adapt to shifts by invoking a shared sense of responsibility among its members. Instead, such practices are frequently supplanted in favour of modernised growth and development-oriented lifestyles.

In essence, the inherently conservation-oriented ethos of indigenous communities is, in part, rooted in their deeply interconnected relationship with lands, territories, and resources. As we shall show below, ubuntu serves as a foundational basis for this relationship, and it is from this relationship that the concept of indigenous sustainability emerges. This profound relationship is precisely why indigenous communities are vulnerable to the adverse impacts of climate change, and why there have been recent attempts to reinvigorate ubuntu-driven sustainability thinking and approaches to addressing those impacts. Climate justice, it turns out, provides a useful framework for this endeavour.

2.3 Climate justice: Key issues

In this overview, we aim to provide a concise summary of some of the key points that often arise in discussions of global climate justice.[14] As a concept, '[c]limate justice fundamentally is about paying attention to how climate change impacts people differently, unevenly, and disproportionately, as well as redressing the resultant injustices in fair and equitable ways'.[15] On the other hand, Murcott, Tigre, and Nesa[16] define climate injustice as

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13 Ibid.

14 The pursuit of climate justice arises from the effects of climate change, which the IPCC defines as '[a] change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal processes or external forcings, or to persistent anthropogenic changes in the composition of the atmosphere or in land use' (M Tignor and PM Midgley *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: A Special Report of Working Groups I and II of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2012) 5).

15 Farhana Sultana 'Critical climate justice' (2022) 188 *The Geographical Journal* 118 120. Also, according to the Grantham Research Institute on Climate Change and the Environment, climate justice 'places an ethical challenge at the heart of the argument for climate action. It identifies climate change as a symptom of

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> the uneven and unjust distribution of climate change vulnerabilities and impacts within and among states with reference to the underlying or root causes of such maldistribution, including colonialism, patriarchy, and a lack of recognition and exclusion of people from participation in climate-related decision-making due to uneven concentrations of political and economic power.

While the concept can be granulated in various ways, we believe that two primary issues can be inferred from the above (issues that certainly come to the forefront in climate discussions): fairness in climate action and the financing required for mitigation and adaptation efforts.[17] We agree that, in general, the impacts of climate change affect countries differently. Consequently, the responsibilities of states in addressing these impacts are usually tailored to reflect these differences. Therefore, we take a bird's-eye-view approach, looking at the generic themes of fairness and financing, which resonate with the general concerns of many developing countries and small island states.

2.3.1 Fairness

Fairness in climate scholarship cuts across multiple interwoven aspects. We, however, limit our discussion to issues of historical pollution, participation and intergenerational equity.

2.3.1.1 *Historical pollution*

Injustice lies at the core of the pursuit of fairness in climate justice deliberations. Indeed, discussions surrounding fairness inevitably lead us to grapple with the issue of historical pollution, an injustice that has left many low-income and developing nations struggling to contend with the climate crisis.

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unfair and unrepresentative economic, social and political institutions' (Grantham Research Institute on Climate Change and the Environment 'What is meant by "climate justice"?' (2022) <https://www.lse.ac.uk/granthaminstitute/explainers/what-is-meant-by-climate-justice> (accessed 14 August 2023)).

16 Melanie Murcott, Maria Antonia Tigre and Nesa Zimmermann 'Transnational insights for climate litigation at the European Court of Human Rights: A South-North perspective in pursuit of climate justice' 56 *VRÜ Verfassung und Recht in Übersee* 299 302.

17 In its recently adopted Nairobi Declaration on Climate Change and Call to Action, the African Union highlights the need for global fairness when addressing climate action. It also notes that climate finance commitments have not been honoured, fossil fuel subsidies are still prevalent, and the Loss and Damage facility is yet to be operational. See African Union *Nairobi Declaration on Climate Change and Call to Action* (6 September 2023) <https://au.int/en/decisions/african-leaders-nairobi-declaration-climate-change-and-call-action-preamble> para. 12.

It is undeniable that over time various countries have made disparate contributions to the current climate crisis. This historical pollution is the very reason we have the principle known as Common but Differentiated Responsibilities and Respective Capabilities (CBDRRC) within the context of climate change discourse. This principle can be traced back to the United Nations Framework Convention on Climate Change[18] and continues to be a crucial underpinning aspect of the Paris Agreement.[19] Fairness is recognising that the need to implement urgently the CBDRRC responsibilities is not merely theoretical but embedded in the harsh realities that some nations continue to face.

2.3.1.2 *Participation*

Considering the injustices noted above, the participation of low-income, developing, and small island states is imperative in the global climate change discourse.[20] Having a voice means that these states have a seat at the negotiating table and the capacity to have their concerns taken seriously.[21] Participation concerns can be observed in discussions concerning a just transition. For instance, African countries argue that they want to decarbonise to preserve the environment for present and future generations. However, their efforts will be encumbered by the need to ensure that those who presently hold jobs in carbon-intensive industries are catered to during the transition to greener economies. The voices of such groups deserve to be heard.

2.3.1.3 *Intergenerational equity*

Fairness also encompasses generational issues. Concerns relating to human rights such as the right to a healthy environment, clean air, and sanitation are affected by climate change and not only affect the current generation but also have the potential to affect the next. The present generation owes future generations an environment that is healthy for their well-being, and part of that responsibility involves recognising that this generation must embark on ambitious climate action if there are to be any results.[22]

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18 See art. 3 of the *United Nations Framework Convention on Climate Change* (1992).

19 See arts 2(2) and 4 of the UN General Assembly, *Paris Agreement to the United Nations Framework Convention on Climate Change*.

20 This aligns more with procedural climate justice. See Peter Newell et al. 'Toward transformative climate justice: An emerging research agenda' (2021) 12(6) *Wiley Interdisciplinary Reviews: Climate Change* e733 4.

21 Newell et al. (n. 20) 5.

22 Ibid. 7.

While there is a framework for nationally determined contributions under the Paris Agreement,[23] it is important to note that the framework is not legally binding. The lack of binding obligations poses a challenge when it comes to enforcing climate commitments. Additionally, there is a risk of climate washing, where countries may commit to ambitious climate targets, they are unlikely to meet and use these commitments to create the appearance of making a fair contribution while not taking meaningful action. This is perhaps why globally there has been a rise in youth-led climate activism and climate litigation driven by the need to ensure genuine action aimed at addressing intergenerational justice for future generations.[24]

2.3.2 Financing

We have broadly categorised our discussion of climate justice issues related to finance under the following themes: accountability, vulnerability and capacity, commitments, and access.

2.3.2.1 *Accountability*

Climate diplomacy, exemplified by the Paris Agreement and its predecessors, has successfully drawn global attention to the issue of climate change.[25] However, the practical implementation of climate initiatives has been slow, and a complex web of interconnected political dynamics and injustices has further complicated the situation. This complexity includes worsening climate conditions in some regions and the prevalence of climate politics and denialism in others.

Accountability is a crucial aspect of climate financing. It entails recognising that those countries that have historically contributed the most to climate change bear a greater financial responsibility and commitment to addressing climate action. In other words, countries that are still struggling to adapt to and mitigate the impacts of climate change, often because of factors such as their geographical location or low-income status, require financial assistance. It is worth noting that developed countries, which are the least affected by climate change, have contributed the most to its causes.

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23 See the outlines in arts 3 and 4 of the Paris Agreement.

24 See, for example, Fridays for Future <https://fridaysforfuture.org>.

25 Dominic A Okoliko and James O David 'Ubuntu and climate change governance: Moving beyond conceptual conundrum' (2021) 21 *Journal of Public Affairs* e2232 1.

2.3.2.2 *Vulnerability and capacity*[26]

Many African countries have experienced periods of colonialism that resulted in environmental degradation and limited developmental progress. When considering their climate commitments, it is crucial to acknowledge the vulnerability of these countries to extreme weather patterns owing to their histories, already struggling economies and high levels of poverty.[27] Small island states face their own challenges, marked by disproportionate vulnerabilities stemming from factors like sea-level rise and extreme weather events.[28] These intersecting vulnerabilities directly impede the capacity of these states to finance climate action adequately.

2.3.2.3 *Commitments and access*

The acknowledgement of accountability runs parallel to the need for redress. Often, such redress comes in the form of financial commitments to fund climate action; however, these commitments are complicated. In a strongly worded statement addressing the global community's tendency to make financial commitments that are sometimes left unfulfilled, South Africa's president, Cyril Ramaphosa, expressed the sentiment that African countries are occasionally made to feel like beggars.[29] He made these remarks during the recent New Global Financing Pact Summit. During a live broadcast, he commented that Africans are not convinced that many of the summits have meaningful outcomes, and that there is a lack of confidence that many developing countries are genuinely committed to acting on the promises they make regarding climate financing.[30]

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26 Vulnerability can be linked to the concept of climate justice as a form of recognition. In this context, justice cannot be achieved without initial acknowledgement of pre-existing vulnerabilities. See Newell et al. (n. 20) 6.

27 See Okoliko and David (n. 25) 3, who note that '[a]rguably, for those in the communities where climate severity stresses life, the commitment to climate action is a matter of surrealism and not so much about rationality-understood in the context of an obsessive need to push back uncertainty in the science of climate change'.

28 See generally Sam Adelman 'Climate justice, loss and damage and compensation for small island developing states' (2016) 7 *Journal of Human Rights and the Environment* 32.

29 Vince Chadwick 'Frustration and tentative progress at Macron finance summit' (2023) <https://www.devex.com/news/frustration-and-tentative-progress-at-macron-finance-summit-105789> (accessed 1 October 2023).

30 The Presidency of the Republic of South Africa 'President Ramaphosa's remarks at Closing Ceremony of the New Global Financing Pact Summit in France' (2023) <https://www.youtube.com/watch?v=bR36kuEzhz8&t=52s> (accessed 1 October 2023).

In the light of the reports of the Intergovernmental Panel on Climate Change indicating that Africa is experiencing a faster rate of warming than the rest of the world, African leaders, in their recently agreed-upon Nairobi Declaration on Climate Change and Call to Action, called upon the global community to honour the commitment made 14 years ago at the Copenhagen conference to provide $100 billion in annual climate finance.[31] They also urged the swift operationalisation of the Loss and Damage facility agreed upon at COP27.[32] It goes without saying that the implementation of the Loss and Damage facility must consider not only past injustices that have led to extreme changes in climate patterns but also the potential impact on future generations. This impact is exemplified by the slow onset of events such as rising sea levels and the melting of glaciers,[33] which are causing global mass migration, especially from small island states and developing countries in Africa where droughts and floods are becoming increasingly prevalent.[34] The specific details of how this facility functions and who can access its funds will depend on various factors including lobbying and strategic diplomacy by vulnerable nations.

In summary, climate justice is a complex and contentious topic, and different regions approach it differently according to their unique circumstances and views on climate-related issues. Recently, however, owing to the complexity of climate diplomacy, the lengthy negotiation processes, and the slow actions taken by some states within their jurisdictions to address climate justice, courts have become pivotal in resolving climate justice disputes. In the following section, we will focus on two recent judicial processes that have garnered global attention.

2.4 Adjudicating climate justice

It is our contention that climate justice may find its true meaning, full potential impact, and rightful vindication through the adjudicatory process. As is customary, courts, tribunals, and other legal accountability forums serve as platforms for upholding and vindicating rights. It is no surprise, then, that climate litigation has been on the rise globally, with dedicated centres focusing on documenting climate cases, litigation

31 African Union (n. 17) para. 12(b).

32 Ibid. para. 12(c).

33 For a general discussion of loss and damage, see Adelman (n. 28).

34 International Organisation for Migration 'In the face of climate change, migration offers an adaptation strategy in Africa' (2022) <https://www.iom.int/news/face-climate-change-migration-offers-adaptation-strategy-africa> (accessed 6 November 2023).

strategies, and climate litigation scholarship.[35] In recent times, however, three noteworthy developments have attracted global attention in the realm of climate justice. First, a climate justice case is brewing in Germany that has the potential to set a precedent for litigation against corporations regarding their past and present emissions. Secondly, two advisory opinions have been sought from two global bodies on climate justice matters. These developments are explored below.

2.4.1 *Luciano Lliuya v RWE AG*

Saúl Luciano Lliuya's pursuit of climate justice against the German company RWE is a significant case with global implications.[36] Lliuya, a small-scale farmer in the Peruvian Andes, resides in an area that is home to almost all the world's tropical glaciers. His livelihood, which also involves working as a tour guide, is threatened by the melting of these glaciers, which also poses immediate risks such as the potential flooding of Lake Palcacocha.[37] With the support of the environmental organisation Germanwatch and legal representation by Hamburg lawyer Roda Verheyen, Lliuya seeks accountability from RWE. His primary goal is to secure a $20 000 contribution from RWE to a fund dedicated to stabilising Lake Palcacocha.[38] While the case was initially dismissed at the first instance, an appeal to the Higher Regional Court, Hamm, in the case of

35 See, for example, the climate change database at Sabin Center for Climate Change Law 'Climate change litigation databases' <https://climatecasechart.com> (accessed 5 September 2023) and the database of climate change laws at Grantham Research Institute on Climate Change and the Environment 'Climate change laws of the world' <https://www.lse.ac.uk/granthaminstitute/research-areas/climate-change-governance-legislation-and-litigation> (accessed 5 October 2023). See also the extensive climate change reports at Sabin Center for Climate Change Law 'Climate change litigation' <https://climate.law.columbia.edu/content/climate-change-litigation> (accessed 5 October 2023) and Grantham Research Institute on Climate Change and the Environment 'Climate change governance, legislation and litigation' <https://www.lse.ac.uk/granthaminstitute/research-areas/climate-change-governance-legislation-and-litigation> (accessed 5 October 2023).

36 Noah Walker-Crawford 'Climate change in the courtroom: An anthropology of neighborly relations' 23 *Anthropological Theory* 76 77. RWE is considered Europe's largest emitter of GHG emissions (Dan Collyns 'German judges visit Peru glacial lake in unprecedented climate crisis lawsuit' *The Guardian* (27 May 2022) <https://www.theguardian.com/environment/2022/may/27/peru-lake-palcacocha-climate-crisis-lawsuit> (accessed 12 October 2023)).

37 Walker-Crawford (n. 36) 86.

38 Ibid.

Luciano Lliuya v RWE AG,[39] determined that the claim for damages was admissible.

The crux of this case revolves around 'attribution studies', which aim to establish a direct link between the melting of glaciers and anthropogenic greenhouse gas (GHG) emissions, specifically those produced by RWE. Lliuya and Verheyen argue that there is a '"calculable and measurable" correlation between global warming and the amount of CO_2 emitted' by RWE into the atmosphere.[40] RWE's emissions are estimated to account for approximately 0,47% of total global emissions from 1751 to 2010.[41]

The establishment of this causal link is a significant milestone because it moves the climate change discourse from mere possibilities and insinuations about attribution to concrete discussions about responsibility and accountability. This development validates the concerns and fears of individuals like Saúl Lliuya in Peru, residents of small island states, and indigenous communities in Africa who have been grappling with the consequences of climate change for years.

We believe that the case highlights important justice implications including issues of vulnerability, historical pollution, accountability, financing for adaptation measures, and loss and damage. Moreover, it is evident from the facts that Lliuya's territory has experienced noticeable climatic changes and continues to do so. He and his community lack the financial means to fund necessary adaptation measures. Additionally, Peru and the broader region are not historically significant contributors to gross anthropogenic GHG emissions. The case, as described by Walker-Crawford,[42] emphasises the concept of 'neighbourliness', which reframes 'climate change in terms of morally charged interactions between those responsible for greenhouse gas emissions in one part of the world and those who endure the detrimental consequences of global warming thousands of miles away'. As we will see, these neighbourly relations exemplify the communitarian ethos of ubuntu.

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39 Case No. 2 O 285/15 Essen Regional Court.

40 Walter Frenz 'Mining damage liability for climate change in Peru?' in Walter Frenz and Axel Preuße (eds) *Yearbook of Sustainable Smart Mining and Energy 2021: Technical, Economic and Legal Framework* (Springer, 2022) 81.

41 Dan Collyns 'Peruvian farmer demands climate compensation from German company' *The Guardian* <https://www.theguardian.com/environment/2015/mar/16/peruvian-farmer-demands-climate-compensation-from-german-company> (accessed 12 October 2023); Walker-Crawford (n. 36) 86.

42 Walker-Crawford (n. 36) 78.

2.4.2 The ITLOS and ICJ advisory opinions

It is worth repeating that the existing climate change regime, encompassing legal and policy frameworks and the associated negotiation processes, frequently faces challenges relating to effective implementation.[43] Consequently, many countries in the Global South, as well as small island states, are finding it increasingly challenging to rely solely on ongoing negotiations that have persisted for decades without yielding concrete and practical outcomes.[44] It is perhaps for this reason that in 2023 two advisory opinions were sought, one by the United Nations General Assembly from the ICJ[45] and the other by the Commission of Small Island States on Climate Change and International Law[46] from the ITLOS.[47]

Neither advisory opinion is binding but both carry significant persuasive authority. For example, the ICJ explicitly states that its advisory opinions 'carry great legal weight and moral authority'.[48] Similarly, the ITLOS, in a recent decision on preliminary objections, emphasised that, although an

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43 Jianping Guo, Wanqiang Li and Haoyu Tian 'The climate advisory opinion: A medicine with side-effects?' (2023) 156 *Marine Policy* 105817.

44 Ibid.

45 UN General Assembly 'Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change' (2023).

46 This Commission was formed against the backdrop of the 26th session of the Conference of the Parties, during which two small island states, Tuvalu and Antigua and Barbuda, signed an agreement that led to the establishment of the Commission. The primary objective of establishing the Commission was to create an entity with the capacity to seek an advisory opinion from the ITLOS. While there may be concerns regarding whether the ITLOS has jurisdiction to hear a matter and whether the matter itself is admissible, these concerns fall outside the scope of this work. For more on ITLOS admissibility and jurisdictional issues, see Yoshifumi Tanaka 'The role of an advisory opinion of ITLOS in addressing climate change: Some preliminary considerations on jurisdiction and admissibility' (2023) 32 *Review of European, Comparative & International Environmental Law* 206.

47 'Request for an advisory opinion submitted by the Commission of Small Island States on Climate Change and International Law' (Request for advisory opinion submitted to the Tribunal). Submissions and the text of the request are available at <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal>. For a full summary of the arguments submitted, see Maria Antonia Tigre and Korey Silverman-Roati *ITLOS Advisory Opinion on Climate Change: Summary of Briefs and Statements Submitted to the Tribunal* (2023).

48 International Court of Justice 'Advisory jurisdiction' <https://www.icj-cij.org/advisory-jurisdiction#:~:text=Despite%20having%20no%20binding%20force,help%20to%20keep%20the%20peace> (accessed 29 October 2023).

advisory opinion is not binding, it 'entails an authoritative statement of international law on the questions with which it deals'.[49]

For the ICJ, the questions for which an opinion is sought are as follows:

> (a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations;
>
> (b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
>
> (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
>
> (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?[50]

On the other hand, the questions posed to the ITLOS are as follows:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea ('UNCLOS'), including under Part XII:
>
> (a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
>
> (b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[51]

Climate justice also appears to be the central theme encompassing the questions posed to both the ICJ and ITLOS. As neither institution nor the German Court has yet issued its opinion, it is worth considering how the principles of ubuntu could inform the forthcoming deliberations. Given the challenges associated with litigating for climate justice, and considering the urgency and complexities of the matter, we assert that

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49 *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius/Maldives)* Case No. 28 Judgment (2021) para. 202.

50 The request can be found at <https://www.icj-cij.org/case/187/request-advisory-opinion>.

51 The request can be found at <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Request_for_Advisory_Opinion_COSIS_12.12.22.pdf>.

these judicial bodies could make the most substantial global impact by engaging in what is often referred to as 'expository justice'.[52]

2.4.3 The utility of an expository justice model for adjudicating climate justice

While courts play a unique role in settling climate disputes, their less explored but perhaps more crucial role is shaping and developing norms and standards relating to rights and fundamental values.[53] This approach was popularised by Spann four decades ago.[54] Spann argues that the notion that courts primarily resolve disputes is a charade; their more significant contribution lies in their expository role, which holds greater benefits for the broader population through its capacity to induce changes in attitude while facilitating social progress. Spann further argues that when a court dispenses justice under the expository model 'it does far more than prescribe outcomes in litigated cases. It dispenses understanding of the terms of our social contract-understanding that permits an appreciation of why those outcomes are just.'[55]

Fisher, Scotford and Barritt[56] expand on this argument by asserting that climate change is 'legally disruptive', and that this disruption necessitates a shift in legal thinking and adjudication. An expository justice model, the argument goes, could effectively reflect this change, where the establishment and articulation of climate norms within any community are viewed as a response to the failures of other institutions such as state and global regulatory bodies that have failed to address climate change adequately.[57] Our view is that if judicial forums adopt an expository justice model grounded in ubuntu they could facilitate a pragmatic, timely, and potentially precedent-setting understanding of climate justice. These forums are uniquely able to address both the moral and legal dimensions of climate change, offering guidance on how liability can be pursued and how states should address climate justice concerns.

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52 Girardeau A Spann 'Expository justice' (1983) 131 *University of Pennsylvania Law Review* 585.

53 Elizabeth Fisher, Eloise Scotford and Emily Barritt 'The legally disruptive nature of climate change' (2017) 80 *The Modern Law Review* 173 197.

54 Spann (n. 52).

55 Ibid. 586. See also Joanna Miles 'Standing under the Human Rights Act 1998: Theories of rights enforcement & the nature of public law adjudication' (2000) 59 *The Cambridge Law Journal* 133 153–154.

56 Fisher, Scotford and Barritt (n. 53) 198.

57 Ibid.

2.5 Ubuntu ecosophy

Ubuntu, in general, is a product of African figurative/proverbial language, much of which is the bedrock of individual and social morality.[58] For this reason, ubuntu's 'ecosophy', as we shall refer to it here, is simply a multi-layered story of African people's ethical relationship with the environment.[59] Without the narrative story element, it may be dismissed as mere mythology. Therefore, our starting point is that ubuntu ecosophy is, above all, a tale of communities and their commitment to environmental protection.

While Himonga refers to the 'attributes' of ubuntu, which Ndeunyema labels 'principles', we refrain, for the purposes of this chapter, from asserting that ubuntu possesses a universally applicable set of attributes or principles, but we acknowledge the existence of specific defining normative attributes inherent in the comprehension and implementation of the concept. Our preference for normativity aligns with the concept of ecosophy in that any ecosophy must be based on certain defining normative principles concerning nature. However, before delving into these principles, it is essential to clarify our understanding of ubuntu as a concept.

In his chapter 'The value of ubuntu in the pursuit of the human right to water', Ndjodi Ndeunyema explores the expansive and collective significance of ubuntu as a pan-African concept.[60] He rightly notes that 'ubuntu remains a unifying and enduring value that cuts across communities of African indigeneity'.[61] This unifying value can be traced to the meaning of ubuntu. For context, we follow the basic interpretation of ubuntu from its most common expression, *motho ke motho ka batho*, which implies that one is a complete human being when one recognises the humanity of others.[62] It is crucial to emphasise that this does not diminish the importance of the individual. In fact, it is the multiplicity of individuals,

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58 See chap. 3.

59 There is a burgeoning literature around ubuntu and ecology which has culminated in the moniker 'ubuntu ecosophy'. See, for example, Lesley Le Grange 'Ubuntu/Botho as ecophilosophy and ecosophy' (2015) 49 *Journal of Human Ecology* 301–308; Mogobe Ramose 'Ecology through ubuntu' in Roman Meinhold (ed.) *Environmental Values Emerging from Cultures and Religions of the ASEAN Region* (Konrad-Adenauer-Stiftung, 2015) 69–76; Okoliko and David (n. 25); Rob Elkington 'Ancient wisdom for ethical leadership: Ubuntu and the ethic of ecosophy' (2020) 13 *Journal of Leadership Studies* 48.

60 See chap. 3.

61 § 3.2.2.

62 Mogobe B Ramose *African Philosophy Through Ubuntu* (Mond Books, 1999) 106; Okoliko and David (n. 25) 4.

with their unique identities, that collectively constitutes the community. Communion therefore highlights the value of the individual through an implicit moral imperative to act in ways that safeguard the well-being of the community.[63] This moral imperative aligns seamlessly with traditional ecological perceptions. Indigenous ecological knowledge (IEK) and its enduring legacy reflect normative foundations for how communities relate to their environment.

To be clear, many sub-Saharan African societies have historically relied on IEK, which can be broadly defined as 'the intellectual behavior and beliefs of indigenous societies or local information about the relationship of living beings (including humans) with one another and with their environment'.[64] One distinguishing characteristic of IEK is its strong connection to specific geographic locations, which enables it to highlight 'sensitivities, exposure levels and the adaptive capacity of communities'.[65] Within the African context, for instance, nature is perceived as holistic, forming an interconnected continuum along which humans and non-human entities coexist in harmonious rapport.[66] Communities' actions and lifestyles reflect a commitment to coexisting harmoniously with nature, contributing to the preservation of traditional communities' environments over time.[67] In our view, this forms the foundational basis for recognising the utility and value of ubuntu ecosophy.[68] We believe that the essence of ubuntu ecosophy lies in the concept of harmony with nature through IEK. This essence can be further delineated into two central themes: solidarity and due diligence.

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63 Terblanché-Greeff (n. 5) 99.

64 Olga Laiza Kupika et al. 'Local ecological knowledge on climate change and ecosystem-based adaptation strategies promote resilience in the Middle Zambezi Biosphere Reserve, Zimbabwe' (2019) *Scientifica* 1 <https://doi.org/10.1155/2019/3069254>.

65 Caiphas Brewsters Soyapi, Michael Addaney and Habib Sani Usman 'The role of indigenous and experiential knowledge in advancing enhanced climate action and policymaking in Africa' in Michael Addaney, DB Jarbandhan and William Kwadwo Dumenu (eds) *Climate Change in Africa: Adaptation, Resilience, and Policy Innovations* (Springer, 2023) 65.

66 Chibvongodze (n. 11) 157.

67 One could say there existed an African environmental worldview and ethic centred on the community as constituted by individuals who had a duty of care towards their environment, with the individual gaining worth as part of the community. This worldview is embedded in the ideas of ubuntu.

68 Soyapi, Addaney and Usman (n. 65) 66 make the following observation: '[t]o the extent that it is accepted that climate change impacts are not manifesting in a vacuum, then it stands to reason that those who have experienced some of the challenges associated with climate change have a contribution to make to the adaptation discussion'.

2.5.1 Solidarity

Within ubuntu ecosophy, there is no room for hubris, as there is an implicit recognition that we exist in a shared world. Perception and experience in this shared world are highly dependent on how others fulfil their roles as responsible community members.[69] As Ramose aptly argues, '[t]he universe is understood as the unceasing unfoldment of interaction and interdependence between and among all that there is'.[70] In this unfoldment, the limits of one's own space and existence in relation to the space and existence of others is evident. This reflects the solidarity of ubuntu, which demands an ethical commitment to caring for others and the environment. For example, if climate change is the result of human arrogance and the adverse consequences of a human-centred approach to our interactions with the environment, ubuntu ecosophy offers the possibility of recentring our perspective. It stresses that humans are inseparable from nature: they originate from nature, are an integral part of it, and, when they die, they ultimately return to it. From this standpoint, climate justice extends beyond humans; it encompasses the imperative of ensuring that nature also receives the fairness it deserves. This embodies the essence of solidarity within ubuntu ecosophy and can be further explicated through two lenses: the necessity of collective sufficiency and the role of epistemic justice as a foundation for recognition.

2.5.1.1 *The need for collective sufficiency*

Within ubuntu ecosophy, communities take only what they need, considering anything beyond that as wasteful or even immoral. Mawere's exposition of how certain communities in south-eastern Zimbabwe manage the protection of wild loquat fruit trees and their rules regarding harvesting highlights the presence of an ethic of care and solidarity. For instance, these communities take turns policing the forests to prevent the cutting down of trees during the off-season. There are rules specifying which parts of the community can harvest the fruits and for how long. Additionally, rules dictate how and when visitors can harvest the fruits.[71] Importantly, no one is allowed to harvest more than they need, as the fruit is susceptible to quick rotting. Those who violate these communal rules, including overharvesting, can face trial under a traditional court.[72]

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69 Terreblanche (n. 2) 181.

70 Ramose (n. 62) 109.

71 Munyaradzi Mawere *Environmental Conservation Through Ubuntu and Other Emerging Perspectives* (African Books Collective, 2013) 93–94.

72 Ibid. 94.

Mawere's exposition reveals that over the last two decades there has been a decline in harvests and trees because of the cessation of policing, increased commercial interest in the fruits, and the chiefs' relocation from the communities to urban areas.[73] This narrative underscores the aspect of harmony with nature, of communities that once understood what was sufficient and the potential dangers or consequences of exceeding those limits. Balance is a central concept to grasping solidarity in this context, as communities clearly recognised what constituted 'wrong' actions in their relations with the wild loquat trees and fruits.[74]

This equilibrium 'generally points to harmony comprehensively conceived in the sense of maintaining a balance of relations, amongst humans and between humans and the physical (non-physical) as defining right action from the wrong action'.[75] It deems it morally wrong to harvest more than necessary or to act greedily in exploiting natural resources.[76] In our view, ubuntu's ecosophy sheds light on the perils of excessive consumerism while emphasising the imperative of balance in our utilisation of natural resources.

Excessive consumerism not only causes harm but also disrupts the pivotal interrelationships that revolve around the community as the focal point from which responsibility and concern for others and nature emanate.[77] This form of consumerism can strain human relations, setting humans against one another.[78] It can also create conflicts between businesses and communities or communities and governments. When normal human relations break down, the potential for harmonious human–environment relations diminishes. The current global climate catastrophe is, in part, indicative of strained human interactions, a reality evident in the politics of climate diplomacy.

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73 Ibid.

74 Ramose (n. 62) 106.

75 Okoliko and David (n. 25) 4.

76 This in some ways aligns with the idiom *feta kgomo o tshware motho*, which Okoliko and David (n. 25) 6 explain as follows: 'if and when one is faced with a decisive choice between wealth and the preservation of the life of another human being then one should choose to preserve the life of another human being. Mutual care for one another as human beings precedes concern for the accumulation and safeguarding of wealth as though such a concern were an end in itself.'

77 Terreblanche (n. 2) 181.

78 Ibid. 183. Ubuntu ecosophy does not thrive on the idea of complete property rights and the pursuit of over-privatisation and the commodification of nature. Rather, it accepts that nature is for all of us, that we cannot be without nature.

Ubuntu thinking, with its 'Ancient Wisdom',[79] abhors excessive consumerism and instead advocates for what is described as sustainable use.[80] This ancient wisdom does not view economic value as an end in itself; rather, it prioritises the promotion of eco-communes, which can be understood as 'members of an ecological community, the social and the natural systems that make up our world'.[81] Within an eco-commune, any action that does not contribute to the sustainable development of the commune is considered morally impermissible because it disrupts harmony.[82] A question that then arises is whether capitalism would be compatible with the eco-commune principles.

The problem with capitalism lies in its foundation of *homo oeconomicus* thinking, where 'success and happiness are determined by materialistic gratification'.[83] However, there is an inherent falsehood and irony in the pursuit of 'false needs' in that they can never truly be satisfied. Individuals are thus led into an endless cycle where their behaviour is primarily driven by self-interest and greed.[84] Such a perspective envisions humanity as a collection of individuals competing for natural resources.[85] Ubuntu ecosophy stands in direct contrast to this commodification of nature.[86] This is why some have even suggested that ubuntu's emphasis on collective sufficiency could serve as an approach to degrowth, offering an alternative to conventional notions of sustainable development.[87] Others argue that a paradigm shift is necessary, urging us to transition from *homo oeconomicus* to *homo-empathicus*.[88] In this new paradigm, humans would exhibit empathy towards nature, recognising that they cannot exist apart from it. While this transformation may be a long-term endeavour,

79 Elkington (n. 59) 48–52.
80 Mawere (n. 71) 25.
81 Okoliko and David (n. 25) 6.
82 Ibid.
83 Terblanché-Greeff (n. 5) 101.
84 Ibid. '*Homo œconomicus* – economic human – pursues false needs in the name of economic growth and development with limited attention being allocated to the differentiation between basic and false needs' (op. cit. (n. 5) 100).
85 Aram Ziai 'Post-development concepts? Buen vivir, ubuntu and degrowth' (2014) 148.
86 Terreblanche (n. 2) 169.
87 Terblanché-Greeff (n. 5) 93–109.
88 Ibid. 105. In Nigeria's Niger Delta there is a belief in the *eti uwem* worldview, which is based on restorative justice and demands 'restoration, rather than compensation, for fossil fuel harms. Eti uwem, like ubuntu, means living in harmony with nature and all peoples by communally caring for the environment. As an ethic, it rejects the speculation, exploitation, expropriation and environmental destruction wrought by fossil extraction' (Terreblanche (n. 2) 176).

international judicial forums may play a vital role in balancing competing interests and fostering this evolution

In our view, the judicial process should acknowledge the potential shortcomings of sustainable development, particularly when the interests of indigenous communities and vulnerable societies are pitted against developmental interests. Ubuntu ecosophy thinking calls for a judiciary that favours the environmental interests of communities. While we acknowledge capitalism's legitimate place in the world, we also believe that the solidarity ethos inherent in ubuntu's ecosophy offers insights into the dangers of excessive consumerism and unbridled economic growth. Vulnerable communities and the environment tend to be the primary victims of *homo oeconomicus*, which is why their voices and concerns must be heard. Therefore, a significant part of judicial responsibility lies in navigating the delicate balance between upholding justice and safeguarding legitimate interests. This can be achieved through the aforementioned expository model, which involves setting norms and standards informed by the idea of collective sufficiency while restraining excessive consumerism.

2.5.1.2 *Epistemic justice through ubuntu*

Our view that the concerns of vulnerable communities deserve to be heard is also a matter of epistemic justice, a principle that ubuntu ecosophy embodies. By epistemic justice we mean the recognition and acknowledgement of the vitality and legitimacy of collective experiences, and the acceptance of the value and worth of the environmental beliefs and practices of traditional communities.

Indeed, before colonisation, Africa was known to have pristine lands upon which communities sustained their livelihoods. These livelihoods, while perhaps unsophisticated, were integral to the survival of these communities. However, they were often overlooked by early settlers as 'it was far from their conviction to think that the "nature" was good looking simply because of the way the locals interacted with their environment and all biodiversity in it'.[89] This notwithstanding, it is important to contextualise this interaction of communities within the harsh realities of Africa, a continent renowned for its formidable challenges including deadly diseases and parasites.[90] Early settlers often perceived the continent as a

89 Mawere (n. 71) 89.

90 Desmond Tutu 'Eco-Ubuntu' (2007) <http://www.enviropaedia.com/topic/default.php?topic_id=336> (accessed 25 September 2023).

perilous place, where many succumbed to various ailments.[91] In contrast, indigenous communities had developed an ubuntu 'ethic of relationality',[92] forming a knowledge base that allowed them to coexist harmoniously with nature and address their health and well-being in a challenging environment.[93] This is perhaps why Archbishop Tutu[94] said 'Ubuntu emerged from the African experience of long habitation of this place, this land'.

This epistemic knowledge base extends to conservation practices. Conservation narratives endure through practices that emphasise reverence for forests and water bodies, which are believed to be inhabited by deities, spirits, or ancestors.[95] Another significant conservation practice involves attributing sacred status to certain animals and plants,[96] safeguarding landscapes through cultural taboos because of the perceived sanctity of those landscapes or because they are sources of herbal medicines.[97] These practices are intricately linked to the identity of a clan, assigning its people the responsibility of safeguarding the animals or plants associated with their clan.[98] In some cases, these resources are considered so sacred that they are never to be consumed.

These connections play a crucial role in ensuring that communities refrain from thoughtlessly tampering with or polluting natural resources.

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91 A compelling evaluation was given by some historians: '[i]n addition to malaria, one of the most destructive diseases humans have ever faced, so extensive was the barrage of African diseases that greeted the Europeans – in Crosby's words, "blackwater fever, yellow fever, breakbone fever, bloody flux, and a whole zoo of helminthic parasites" – that Africa quickly became known as the "white man's grave"' (DE Stannard 'Disease, human migration, and history' in F Kiple Kenneth (ed.) *The Cambridge World History of Human Disease* (Cambridge University Press, 1993) 39). Africa is also known as the 'infectious continent' (Charlene Laino 'Africa, the infectious continent' (2003) <https://www.nbcnews.com/id/wbna3072106> (accessed 2 October 2023)).

92 Okoliko and David (n. 25) 5.

93 Lesley Le Grange 'Ubuntu, ukama and the healing of nature, self and society' (2012) 44(2) *Educational Philosophy and Theory* 56 63.

94 Tutu (n. 90).

95 Polycarp A Ikuenobe 'Traditional African environmental ethics and colonial legacy' (2014) 2 *International Journal of Philosophy and Theology* 1 5.

96 Godfrey B Tangwa 'Some African reflections on biomedical and environmental ethics' in Kwasi Wiredu (ed.) *A Companion to African Philosophy* (Blackwell Publishing Ltd, 2005) 389. Totemism is the practice of deifying animals and plants. It is one of the most prevalent yet effortless forms of conservation. See further discussions in Mawere (n. 71) 20–21 and Le Grange (n. 93) 62.

97 Ikuenobe (n. 95) 8.

98 Mawere (n. 71) 20–21 and Le Grange (n. 93) 62.

As a result, communities become conservationists by default, driven by their cultural and spiritual bonds with the environment. Therefore, when we refer to 'river' communities, for example, we acknowledge the inseparable connections between these communities and the environmental elements they rely on for survival and that define their identity. The underlying logic in this thinking is that safeguarding or protecting a river, for example, is not just an environmental act; it is an exercise of responsibility driven by humanness, undertaken for the sake of 'river' communities. Failure to understand or appreciate this basic premise dehumanises the lived experiences of such communities.[99]

In our view, epistemic justice demands that when confronted with narratives of conservation and vulnerability an expository approach consider them as instructive rather than as subservient to contemporary forms of conservation. Embracing a diversity of perspectives can significantly benefit the overall effort to deliver justice while addressing the climate catastrophe through diversified and context-specific processes.[100] It is not surprising, therefore, that some courts in African states have started to acknowledge the importance of respecting and recognising these indigenous communities and their practices.

In the Kenyan case of *Mohamed Ali Baadi and Others v Attorney General and 11 Others*,[101] which revolved around the removal of fishing communities from the Lamu region to make way for the Lamu Port-South Sudan-Ethiopia-Transport corridor, the High Court recognised the indigenous communities' 'views and values on environmental management'.[102] The High Court emphasised that 'when dealing with rights of indigenous communities, their rights are to be taken seriously, sensitively and in such a manner as to maintain their constitutional rights to a livelihood where their livelihood depends on the environment as in the present case'.[103] Even if these communities' practices and beliefs appear unconventional, ubuntu's ecosophy's solidarity dictates that acknowledging and respecting them is a fundamental aspect of humanness. In *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and*

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99 Elkington (n. 59) 49.

100 See Okoliko and David (n. 25) 3, who observe that 'Epistemic justice requires critical attention to lop-sidedness and marginalisation of contributions to policy discourse beyond mainstream Western education'.

101 *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR 115.

102 Ibid. para. 226. See also the South African case *Gongqose v Minister of Agriculture, Forestry and Fisheries* (5) SA 104 (SCA) para. 37.

103 *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR 115 para. 304.

Others (*Shell 1*),[104] which concerned oil exploration, the South African High Court found as follows:

> the customary practices and spiritual relationship that the applicant communities have with the sea may be foreign to some and therefore difficult to comprehend. How can ancestors reside in the sea and how can they be disturbed, may be asked. It is not the duty of this court to seek answers to those questions. *We must accept that those practices and beliefs exist*. What this case is about is to show that had Shell consulted with the applicant communities, it would have been informed about those practices and beliefs and would then have considered, with the applicant communities, the measures to be taken to mitigate against the possible infringement of those practices and beliefs. In terms of the constitution [...] those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment.[105]

In view of the overall discussion, therefore, we firmly believe that a decolonial approach necessitates the acknowledgement of activism and environmentalism within these communities.[106] Solidarity calls for the judicial process to reinvigorate what was lost through colonialism and vicious sedimentation by embracing the erstwhile yet relevant indigenous practices of coexistence with nature.

Epistemic justice mandates that vulnerable communities hold an equal stake in environmental protection, and that their perceptions of their role in this endeavour be no less significant than those of mainstream, formal, state-led approaches. Consequently, epistemic justice can pave the way for the creation of a global village that recognises our interconnectedness, that our collective well-being is contingent on the well-being of others,[107] or neighbourliness, as Walker-Crawford labels the Peru Andes and German RWE connection.[108]

Any court tasked with adjudicating cases that implicate indigenous community practices must value the principles of epistemic justice, emphasising the importance of understanding the perspectives, concerns, fears, and aspirations of vulnerable communities, which are defined by their lived experiences.

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104 *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* [2022] 1 All SA 796 (ECG); 2022 (2) SA 585 (ECG).

105 Ibid. para. 32 (emphasis added).

106 Terreblanche (n. 2) 168.

107 Terblanché-Greeff (n. 5) 105.

108 Walker-Crawford (n. 36).

2.5.2 Due diligence

When an individual harms the environment, he or she indirectly harms the community. This ethic of care instils a profound sense of responsibility in individuals, guiding their interactions with the environment. They remain acutely aware that others within the community will also rely on these environmental resources. Moreover, damaging the environment is akin to an act of self-harm in that doing so ultimately affects the well-being of both the individual and the collective.

In essence, as Archbishop Tutu eloquently stated, 'I am because you are. We are because the planet is.'[109] Tutu's words beautifully encapsulate the essence of due diligence in ubuntu. It requires us to be mindful of our community's needs and to make decisions that prioritise the community's longevity and safeguard the environmental space that facilitates such longevity. Expanding on this imperative, we can identify two crucial aspects: intergenerational equity and stewardship.

2.5.2.1 *Intergenerational equity*

Within Ubuntu thinking, as described by Ramose, there exists a 'triad of the living, the living dead and the yet-to-be born' who together form 'an unbroken and infinite chain of relations which are characteristically a one-ness and a whole-ness at the same time'.[110] This description aptly captures a system often intertwined with spirituality, where the departed are believed to have transitioned beyond our visible world but continue to exist within natural elements such as waters, lands, forests, and mountains. Consequently, irresponsible treatment of these environmental domains is vehemently disapproved of, even in the absence of supernatural repercussions.[111] It is the joint responsibility of the individual and the community to safeguard these environments. This act is not only a sign of respect for and commemoration of those who have passed but also aimed at securing an inheritance for future generations. This view resonates with Ndeunyema's assertion that 'ubuntu represents multi-generational experiences'.[112]

While written records may sometimes be absent, multi-generational ecological imperatives are preserved through oral transmission and daily practices. In a South African case, *Gongqose v Minister of Agriculture,*

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109 Tutu (n. 90).

110 Ramose (n. 62) 86.

111 Annalet van Schalkwyk 'Living in the land: An Oiko-theological response to the Amadiba Crisis Committee of Xolobeni's struggle for ubuntu, land and ecology' 47 *Missionalia: Southern African Journal of Mission Studies* 31 35.

112 § 3.2.3.

Forestry and Fisheries,[113] members of a traditional community appealed against their conviction for fishing without a licence. They argued that they were exercising a customary practice and right. The High Court acknowledged the existence of this generational right, noting that

> Knowledge of the customary system was transmitted from generation to generation, typically from father to son as regards fishing and from mother to daughter with regard to the harvesting of intertidal resources. Knowledge was also conveyed through a range of rituals and practices within the larger customary system within which fishing was located.[114]

In the context of ubuntu ecosophy, the present generation is, therefore, entrusted with the vital role of safekeeping akin to a cell's role within an organism.[115] An individual neglecting this responsibility would be comparable to a 'cell that has forgotten its role in the organism', leading to a cancerous growth within the body.[116]

In essence, the application of ubuntu ecosophy calls upon us to express gratitude to those who have passed before us for bequeathing a habitable world filled with countless blessings and opportunities. It urges us to recognise that 'we are because they were'. Similarly, ubuntu ecosophy enjoins us to extend this same courtesy to future generations, acknowledging that 'they will be because we were'. We bear a profound moral obligation to leave behind an environmental legacy that permits these future generations to look back on us with gratitude.

Furthermore, in the spirit of ubuntu ecosophy, judicial thinking must embrace an understanding of the imperative to protect and respect the intergenerational practices and narratives of vulnerable communities. These groups often possess a humbling awareness of their place in this world as they know they are not here to stay indefinitely. Yet, they are duty-bound to do everything in their power to bequeath a habitable world to future generations.[117] This sense of duty highlights the relevance of narratives relating to fishing, hunting, tilling, gathering, and various other

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113 2018 (5) SA 104 (SCA).

114 Ibid. paras 37–38.

115 Van Schalkwyk (n. 111) 35; Le Grange (n. 93) 62.

116 Tutu (n. 90). Tutu continues the analogy, noting that the cancerous cell 'multiplies and takes in nutrients without reference to the organs and systems around it, eventually overwhelming them'. He concludes that '[a] man with no regard for Ubuntu is a cancer in his community. Let us not be a cancer on the Earth'.

117 Terreblanche (n. 2) 169 observes that 'an ubuntu ethics has already played midwife to the radical notion of post-extractivism, that is, leaving behind for future generations the fossil fuels and minerals that drive destructive capitalist accumulation and its crises, notably climate change'.

practices. These narratives find their true worth when there exists an environment in which recipients of the story can relive and replicate these practices.

2.5.2.2 *Stewardship*

Closely linked to the idea of intergenerational equity is the imperative that such equity places on the present generation: the duty to act as stewards of the environment. In its simplest form, stewardship assigns individuals a responsibility to interact with the environment with due diligence, to recognise its significance for their own well-being, the welfare of their communities, and the prosperity of future generations.[118]

As Elkington astutely observes, the ubuntu worldview acknowledges the existence of a reciprocal relationship between communities and the environment:

> Ubuntu is a systemic worldview that suggests that the greatest good arises from a commitment to mutual beneficence and beneficence toward the planet. When we care for the planet effectively, we will have the resources to support such beneficence. Ubuntu, then, suggests that leadership is stewardship for mutual beneficence.[119]

Implicit in this perspective is the responsibility for maintaining environmental health, as the well-being of communities is intertwined with it, and it serves as a vital legacy for future generations.[120]

In the *Gongqose* case, the South African High Court went to great lengths to assert that even the principles of sustainable development cannot override the environmental imperatives followed by communities and the responsibilities of those communities to safeguard their interests according to their own interpretations of sustainability. In fact, the court emphatically declared that

> Customary rights and conservation can co-exist. And it is important to remember that as regards conservation and long-term sustainable utilisation of marine resources in the MPA, the Dwesa-Cwebe communities have a greater interest in marine resources associated with their traditions and customs, than any other people. These customs recognise the need to sustain the resources that the sea provides. For these reasons, and more particularly, that the customary law of the Dwesa-Cwebe communities provides for sustainable

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118 Tutu (n. 90) has observed that 'We are totally dependent on the ecosystems which support us, so to see those ecosystems as "us", as a system that we are embedded in, as an extension of our being is pragmatic, and accurate. As is the traditional practice of Ubuntu.'

119 Elkington (n. 59) 49.

120 Van Schalkwyk (n. 111) 35.

> conservation and utilisation of resources, the high court's finding that by concluding the restoration agreement, the communities had accepted 'that they would access the sea in accordance with the dictates of the law giving expression to the concept of sustainable development', is insupportable.[121]

The court's statement carries significant weight, resonating with the perspective that these communities, despite their position within humanity's privileged ranks, recognise their inseparable connection to and integration with nature and all its elements. This recognition endows them with a profound sense of stewardship: they understand that they are as integral to nature as bees are to a hive or ants to a nest. In essence, this recognition underscores the idea that '[a] human, or human couple [has] as much chance of survival in the African wilderness as a bee away from the hive, or an ant away from the nest'.[122]

While the relationship between the individual and the community is complementary, with the individual deriving meaning from the community and the community relying on the individual for its completeness and existence,[123] the interactions of the individual and community with nature are more vertically layered. Both the community and the individual are fundamentally dependent on nature for their very existence. It is this shared vulnerability, experienced by the individual when alone and as part of the community, that gives the concept of ubuntu ecosophy its custodial significance and dimension.

2.6 Outlook

Our discussion underscores how ubuntu ecosophy embraces practices that may initially appear unusual or unconventional to outsiders. This is particularly evident in the acceptance of taboos and totemisms, which, on the surface, may not seem grounded in Western rationality. However, within the ubuntu framework, indigenous practices hold deep significance as moral principles that shape behaviour, foster character development, facilitate community socialisation, and cultivate an awareness of the interconnectedness between humanity and nature. Ubuntu ecosophy provides an ethical approach to the environment, rejecting anthropocentrism and recognising our inextricable relationship with the natural world.

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121 *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) para. 56.

122 Tutu (n. 90).

123 Ramose (n. 62) 106.

While climate litigation has gained global prominence, the Peruvian case and the advisory opinions of the ITLOS and ICJ could be pivotal in establishing frameworks in which states can fulfil their climate justice obligations and corporations can play their part by addressing their historical liability for anthropogenic GHG emissions.

With its intrinsic value and influence lying in its narrative-based foundations, ubuntu ecosophy could be relevant for these judicial bodies. By adopting a storytelling approach that encompasses a community's origin and evolution, along with its interdependent relationship with the environment, ubuntu ecosophy adds a human element to the narrative, which could naturally elicit empathy and a sense of shared humanity from those unfamiliar with it. Ubuntu encourages individuals to see themselves in others, enhancing their understanding of the challenges and significance of the circumstances before them.

In the end, it is important to note that an approach to climate change and climate justice that is infused with ubuntu ecosophy is not a one-size-fits-all solution. Instead, it offers a framework for thinking and, for a court, may provide a justifiable basis for finding corporations liable for historical pollution, or for requiring states or administrators to justify their decisions and approaches comprehensively and empathetically.

3

The value of ubuntu in the pursuit of the human right to water

Ndjodi Ndeunyema[*]

3.1 Introduction: A brief profile of water in Africa

Fresh water is an essential resource for not only human societies but also for terrestrial life, ecosystems, and biodiversity.[1] In Africa, the scientific evidence is that 'continental water is stored in various reservoirs, unevenly distributed across geophysical environments and climates',[2] with the water sources including 'seasonal ice and snow, glaciers and ice caps, aquifers, soil water and soil moisture, and surface waters'.[3] These water sources are critical for the survival of every being, for domestic and personal use and for commercial pursuits.

Africa is home to some of the most impressive and expansive freshwater systems globally. These include the world's longest river, the Nile, which also feeds the second-largest water basin in terms of both drainage area and discharge into the ocean.[4] Africa hosts three of the ten largest freshwater lakes on Earth, in terms of area and volume: lakes Victoria, Tanganyika, and Malawi.[5] Moreover, Africa is also home to various wetlands

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1 Fabrice Papa, Jean-François Crétaux, Manuela Grippa, Elodie Robert, Mark Trigg, Raphael M Tshimanga, Benjamin Kitambo, Adrien Paris, Andrew Carr, Ayan Santos Fleischmann, Mathilde de Fleury, Paul Gerard Gbetkom, Beatriz Calmettes and Stephane Calmant 'Water resources in Africa under global change: Monitoring surface waters from space' (2023) 44 *Surveys in Geophysics* 43.

2 Ibid.

3 Ibid.

4 Ibid.

5 Ibid.

and floodplains in the Congo, Chad, Niger, Okavango, and Nile basins, which are of global significance for biodiversity and the carbon and nutrient cycles.[6] Perhaps the most majestic water body is Mosi-oa-Tunya, or 'the smoke that thunders', as Victoria Falls is domestically known. Papa et al. note that some of Africa's regions remain largely covered by tropical forests that act 'as a carbon sink that stores billions of tons of carbon'.[7] Smaller water systems – including streams, reservoirs, ponds, and tanks – also form part of the African landscape and constitute the direct sources of domestic-use water, food, and agricultural activities for many of the largely rural inhabitants in sub-Saharan Africa.[8]

Despite all these impressive water sources, access to water remains a significant challenge for many Africans. Although substantial progress has been made on the continent over the last few decades, too many Africans still lack even a basic level of drinking-water service. The 2023 UN Global Water Security Assessment found that almost 31% of people in the 54 African countries (over 411 million) do not have access to a basic drinking-water service, while only 201 million people (15%) have access to safely managed drinking water, which is the target of United Nations Sustainable Development Goal 6.1.[9] The problem of water scarcity in Africa is expected to worsen in that it is estimated that by 2025 nearly 230 million people in Africa will experience water scarcity while as many as 460 million may be living in areas where water access is under stress.[10] As the Intergovernmental Panel on Climate Change has noted, climate change induced by greenhouse gas emissions has exacerbated the water challenges by increasing the likelihood of severe, pervasive and irreversible climate impacts including intense droughts and water scarcity.[11]

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6 Ibid.

7 Ibid.

8 Ibid. 44.

9 Charlotte MacAlister et al. 'Global water security: 2023 Assessment' (United Nations University, Institute for Water, Environment and Health, 2023) 10 <https://inweh.unu.edu/wp-content/uploads/2023/03/Global-Water-Security-Assessement-2023_F.pdf> (accessed 24 September 2023).

10 African Development Bank Group, 'World Water Day 2023: Accelerating change in solving Africa's water and sanitation crises' (ADB, 22 March 2023) <https://www.afdb.org/en/news-and-events/world-water-day-2023-accelerating-change-solving-africas-water-and-sanitation-crises-59935#_ftn1> (accessed 24 September 2023).

11 Intergovernmental Panel on Climate Change 'Summary for policymakers', Hans-Otto Pörtner et al. (eds) paras. B.1.1–B.1.3, in *Climate Change 2022: Impacts, Adaptation and Vulnerability*. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Hans-Otto Pörtner et al. (eds) <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf> (accessed 24 September 2023).

Ensuring that people in Africa and other regions can fully access water requires that stakeholders intervene in a variety of ways including through financing, infrastructure development, water technologies, and new water management initiatives. In this chapter we consider how the law generally and courts as institutions can play a role in ensuring access to water for every African. In so doing, we consider the value of ubuntu as a *grundnorm* that can be employed to assert the existence of a human right to water in an African constitutional setting.

We have therefore structured this chapter as follows. Following this introduction, section two unpacks ubuntu through its etymology and its core meaning, and identifies five key principles of ubuntu: community, responsibility, interdependence, dignity, and solidarity. Thereafter, we provide a normative analysis of the human right to water in the African context by singling out some constitutions that have expressly asserted the right to water and highlight some seminal water-related judicial decisions from African jurisdictions. We then consider the status of water as a human right under international law, which would potentially be binding in certain African jurisdictions. We therefore discuss international law sources that include either an implied or express right to water. The chapter then moves on to consider how individuals can legally invoke ubuntu to imply a human right to water where a given African constitution does not expressly recognise such a right before rounding off with a forward-looking conclusion.

3.2 Ubuntu: etymology and definition[12]

In this section we introduce the substance of ubuntu and examine its etymological origins as an African value. We define ubuntu and spell out its principles so as to comprehend it legally. Before doing this, however, we advance ubuntu through decolonial practice.

3.2.1 Ubuntu as decolonial thought

Ubuntu is a seminal metaphilosophy, value, and ethic drawn from diverse African indigenous justice systems.[13] Its centrality, particularly in the context of African human rights, is well captured by Himonga's observation that enhancing human rights implementation in Africa is a prominent

12 Ndjodi Ndeunyema *Re-invigorating Ubuntu through Water: A Human Right to Water under the Namibian Constitution* (Pretoria University Law Press, 2021); Ndjodi Ndeunyema 'Reforming the purposes of sentencing to affirm African values in Namibia' (2019) 63 *Journal of African Law* 329.

13 Oko Elechi, Sherill Morris and Edward Schauer 'Restoring justice (ubuntu): An African perspective' (2010) 20 *Int. Crim. Justice Rev.* 73 75.

justification for, at least, investigating the role that African concepts can play in the realisation of human rights including the right to water.[14] It is the lack of actual or perceived cultural legitimacy of human rights among its intended (African) beneficiaries that is often cited as one of the foremost challenges to enforcing human rights in Africa.[15] Scholars have exposed the continuing incongruence between those values that have come to underpin the dominant Euro-American human rights paradigm and 'alien' notions of justice that were first introduced through colonial conquest and have since entrenched themselves in the societies of formerly colonised peoples including Africans.[16] Moreover, top-down transplantations of legal approaches have rarely taken root. At best, they yield poor results. As Lord Denning put it, 'Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England.'[17]

As Mahao explains, 'the values underpinning the dominant rights paradigm are, by and large, removed from notions of justice as understood and lived by the vast majority of people previously colonised in places such as Africa'.[18] Therefore, Mahao continues, 'mainstreaming indigenous juridical principles in the legal system holds the promise of going some distance towards legitimising the system. Inherently, however, this entails an epistemological shift in world outlook'.[19] Consequently, imbuing human rights with localised, participative approaches such as African values can enhance the legitimacy of the idea of human rights.

In the forthcoming sections we advance the substantive justifications for ubuntu, and consider its etymology, meaning, and underlying principles. While ubuntu is not expressly mentioned in any other African constitution,[20] it can, as an unexpressed constitutional value, be asserted and

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14 Chuma Himonga 'The right to health in an African cultural context: The role of *ubuntu*' (2013) 57 *Journal of African Law* 165; Bonny Ibahwoh 'Between culture and constitution: Evaluating the cultural legitimacy of human rights in the African state' (2000) 22 *HRQ* 838.

15 See Himonga (n. 14) 165 and the authorities cited there.

16 Yvonne Mokgoro and Stu Woolman 'Where dignity ends and ubuntu begins: An amplification of, as well as an identification of a tension in, Drucilla Cornell's thoughts' (2010) 25 *SAPL* 400 406 and sources cited there.

17 *Nyali Ltd v Attorney-General* [1955] 1 All ER 646 653.

18 Nqosa Mahao 'Can African juridical principles redeem and legitimise contemporary human rights jurisprudence?' (2016) 49 *Comparative and International Law Journal of Southern Africa* 455 456.

19 Ibid.

20 For a history of ubuntu in South Africa, see Drucilla Cornell and Nyoko Muvangua *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (Fordham University Press, 2012) 7. For a viewpoint on the textual omission of ubuntu from the 1996 South African Constitution, see Stewart Motha, 'Archiving colonial

[*continued on next page*]

grounded in a constitution provided that such an ubuntu reading does no violence to the text or spirit of that constitution. The 1993 interim South African Constitution mentions ubuntu in its postamble/epilogue, in the context of providing 'a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation'.[21]

We also advance ubuntu's centrality as an apposite value premise, given its presence within African indigenous justice systems and its wide acceptance as accurately capturing an overarching African worldview, although ubuntu approaches are not without demur. There is also a comparatively advanced understanding of ubuntu, which is probably result of the concept's extensive application, deconstruction, and endorsement in African socio-cultural life, within the academic literature and in leading judicial pronouncements drawn from African comparative perspectives.[22]

3.2.2 Etymology of ubuntu

When Chinua Achebe in his much-acclaimed novel *Things Fall Apart* affirmed that 'proverbs are the palm-oil with which words are eaten',[23] he captured the figurative essence that the tissue of African language is figurative. It is therefore unsurprising that the etymological roots of ubuntu[24] are found in proverbial expressions. Analysing ubuntu's etymology has proved particularly useful in anticipating and counteracting the potential claim that ubuntu is insufficiently shared by and within African societies. A more 'neutral' value such as dignity, the argument goes, would be more unifying in value-pluralist societies.[25]

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sovereignty: From ubuntu to a jurisprudence of sacrifice' (2009) 24 *SAPL* 305 306, who speculates that this omission may be attributed to the 'the North American "plain language" drafters', or to the notion that ubuntu was 'merely an indigenous flourish that got people through hard times', or that its 'momentary appearance in the interim Constitution [was] the excessive mark of an excessive demand for peace, forgiveness, and community'.

21 Mokgoro and Woolman (n. 16) 402.

22 For a rich resource exploring ubuntu in Africa broadly through theory, judicial decisions and legislation, see Christa Rautenbach 'Exploring the contribution of ubuntu in constitutional adjudication: Towards indigenisation of constitutionalism in South Africa?' in Charles Fombad (ed.) *Constitutional Adjudication in Africa* (OUP, 2017) 293.

23 Chinua Achebe *Things Fall Apart* (Anchor Books, 1958) 6.

24 Scholars have employed linguistic and stylistic variations in their references to ubuntu, including 'ubuntu', 'botho' or 'umbuntu'. We refer to 'ubuntu'.

25 David Bilchitz 'How should judges adjudicate in an African constitutional democracy' in David Bilchitz et al. (eds) *Jurisprudence in an African Context* (OUP, 2017) 67 and 94.

Ubuntu's most common formulation is *umuntu ngumuntu ngabantu*, an isiZulu expression from South Africa that translates approximately to the laconic phrase 'a human being is a human being through (the otherness of) other human beings'.[26] Nevertheless, ubuntu's essence remains an expression of African philosophy[27] and has been described as a centuries-old African philosophy and way of life that has sustained African communities and continues to be 'a set of institutionalised ideals which guide and direct the patterns of life of Africans'.[28] We will return to defining ubuntu and elaborating its principles in the legal sense in the forthcoming sections of this chapter but focus here on the etymological aspects.

Although of Nguni extraction, Kamwangamalu[29] has comprehensively studied ubuntu's meaning from a wider African linguistic perspective. He persuasively argues that the concept of ubuntu is pan-African and can be found in many African languages and cultures. While not necessarily under a common name, ubuntu permeates across African societies through *gimuntu* (giKwese, Angola), *bomoto* (iBobangi, Congo), *umundu* (Kikuyu, Kenya), *vumuntu* (xiTsonga, Mozambique) and *bumuntu* (kiSukuma, Tanzania), to mention a few.[30] Other similar concepts would include *ubumwe*[31] (Kinyarwanda, Rwanda), *humwe*[32] (Shona, Zimbabwe) and *omundu menarovandu* (OvaHerero, Namibia). Despite ubuntu's diverse renditions, the suffix *-ntu*, *-nhu* or *-ndu* found in many African

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26 Ubuntu is often contrasted with René Descartes's *cogito ergo sum* or 'I think therefore I am', which is often said to have become a fundamental element of so-called Western individualism.

27 Mukoma wa Ngugi 'Africa is not a proverb' *Black Commentator* (23 April 2009) <http://www.blackcommentator.com/321/321_africa_not_proverb_guest_wa_ngugi.html> (accessed 21 September 2023).

28 Godwin Sogolo *Foundations of African Philosophy* (Ibadan University Press, 1993) 11; Mluleki Mnyaka 'The African concept of ubuntu/Botho and its socio-moral significance' (2005) 3 *Black Theology* 215. See also VY Mudembi *The Invention of Africa: Gnosis, Philosophy, and the Order of Knowledge* (Indiana University Press, 1988).

29 MN Kamwangamalu 'Ubuntu: A sociolinguistic perspective to a pan-African concept' (1990) 13 *Critical Arts* 24.

30 Christian Gade 'What is ubuntu? Different interpretations among South Africans of African descent' (2012) 31 *SAJP* 486; Dirk J Louw 'The African concept of ubuntu and restorative justice' in Dennis Sullivan and Larry Tifft (eds) *Handbook of Restorative Justice* (Taylor & Francis, 2008) 161.

31 Andrea Purdeková *Making Ubumwe: Power, State and Camps in Rwanda's Unity-Building Project* (Berghahn Books, 2015) 147.

32 Ben Chigara 'The *Humwe* principle: A social ordering *grundnorm* for Zimbabwe and Africa?' in Robert Home (ed.) *Essays in African Land Law* (PUP, 2011) 113.

language groups almost invariably connotes 'person' or 'people' or 'humanness'.[33]

Beyond linguistic intersections, scholars have identified expressions conveying the ethos of ubuntu in parts of east, west, and southern Africa such as *cieng* (pronounced 'cheng') of the Dinka peoples in South Sudan and the Upper Nile region.[34] The Afrocentric philosopher Sheik Anta Diop has gone even further in demonstrating ubuntu's permeation across the divide between North and sub-Saharan Africa through the ancient Egyptian concept of *Ma'at*.[35] However, we confine our analysis to ubuntu as a sub-Saharan African value.

Ubuntu's ubiquity across sub-Saharan Africa deserves emphasis, given the reality that African borders – in their existing territorial sense at least – can be described as an accident of history, conceived through the political and economic self-interest of colonial powers following the infamous Berlin Conference of 1884–1885 that resulted in the malignant carving up of Africa. While a plurality of ethnicities, traditions, cultures, norms, and values exists in Africa, ubuntu remains a unifying and enduring value that cuts across communities of African indigeneity.

While we refer to 'Africa', we do so with ambivalence and caution, aiming to avoid the problematic 'white gaze' of homogenising Africa or perpetuating the monolithisation of its people. This is in full appreciation of the reality that Africa is *not* a country. Africa's diversity is as voluminous as its geography, a truism that cuts across ethos, values, and cultural and social slants.[36]

3.2.3 Defining ubuntu

In African social-cultural life, the substance of philosophies, concepts, and values such as ubuntu is often communicated creatively. This is

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33 S Lwanga-Lunyiigo and J Vansina 'The Bantu-speaking peoples and their expansion' in M El Fasi and I Hrbek (eds) *General History of Africa* Vol. III: Africa from the Seventh to the Eleventh Century (UNESCO, 1988) 140–142.

34 Makau wa Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Va. J. Int'l L.* 339.

35 Cheik Anta Diop *Pre-Colonial Black Africa* (Chicago Review Press, 1988) 141. See also the Manden Charter of the 13th century Malian empire, during the reign of Sunjata Keita, which is considered one of the earliest human rights documents. The Manden Charter is often compared with the Magna Carta of 1215, although the Magna Carta was specifically focused on the freedom of privileged landlords to control their own property. See Laura Quaynor 'Remembering West African indigenous knowledges and practices in citizenship education research' (2018) 48 *Compare: A Journal of Comparative and International Education* 362.

36 Kwame Appiah 'The arts of Africa' (1997) 44 *New York Review of Books* 46.

because, as Ongyango and Mapaure both suggest, indigenous African justice systems and customary laws reflect those values enshrined over time by ancestors.[37] African customary laws and values such as ubuntu are generationally passed down by elders through oral traditions[38] that include idioms, musicology, and folklore, in the process becoming binding on community members 'since time immemorial'.[39] The artistic communication of ubuntu results in varied interpretative renditions from one community to another. This reality may have led to the view of some scholars that ubuntu resists easy definition, being 'recognised when practised', existing 'only when people interact with each other', and being incapable of being 'neatly categorised and defined [as] any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea'.[40]

Some scholars such as Mokgoro assert that ubuntu's content becomes 'elusive' when discussed in a foreign language.[41] However, the more persuasive approach in our view is that advanced by Himonga et al., who maintain that while ubuntu is not easy to define one must nevertheless be able to discuss and understand it in what many may regard as foreign languages.[42] The difficulty in discussing ubuntu should neither surprise nor delegitimise it as a value premise; expressive obtuseness is a feature of various abstract notions (including established concepts like dignity, equality, and liberty) that inform constitutional values, rules, and principles across societies. The reality of expressive obtuseness must be grappled with and debated through language, even colonial ones. The challenge is to strive towards a shared and accepted understanding of

37 Peter Ongyango *African Customary Law: An Introduction* (Law Africa Publishing, 2013) 153; Clever Mapaure 'Reinvigorating African values for SADC' (2011) 1 *SADC Law Journal* 148 152.

38 Effa Okupa 'Is African customary law just?' in Manfred Hinz and Clever Mapaure (eds) *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa* (Namibia Scientific Society, 2010) 341.

39 The phrase 'since time immemorial' is the formulation widely used in an African traditional context to ascertain legitimacy. See Manfred Hinz 'Traditional governance and African customary law' in Nico Horn and Anton Bösl (eds) *Human Rights and the Rule of Law in Namibia* (Macmillan Namibia, 2008) 59.

40 Yvonne Mokgoro 'Ubuntu and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 1 2; John Faris 'African customary law and common law in South Africa: Reconciling contending legal systems' (2015) 10 *International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity* 177 178.

41 Mokgoro (n. 40) 2.

42 Chuma Himonga, Max Taylor and Anne Pope 'Reflections on judicial views of ubuntu' (2013) 16 *Potchefstroom Electronic Law Journal* 374.

ubuntu for communicating how to interpret a bill of rights.[43] We view overcoming this challenge as a *sine qua non* for the acceptance and efficacy of ubuntu as a viable legal concept for incorporation within the breadth of jurisdictions in Africa and on other continents. To this end, we will endeavour to grapple with defining ubuntu and teasing out its substance.

When defined through a socio-cultural lens, ubuntu represents multi-generational experiences. It is a multi-dimensional and relational world-view of African ontological values of interconnectedness, common humanity, collective sharing, obedience, humility, solidarity, communalism, dignity, and responsibility for one another.[44] Ubuntu is a prescription for treating others as one would like to be treated. It also represents a command to care for one another and to embrace the principles of reciprocity and mutual support. While this definitional exposition of ubuntu is a good starting point, it is overly cross-cutting and unhelpfully dense, and therefore will not suffice for the purposes of ubuntu's legal conceptualisation.

The celebrated *Makwanyane*[45] decision of the South African Constitutional Court pioneered the judicial explication of ubuntu as a legal concept. While *Makwanyane* addressed ubuntu in relation to the constitutionality of capital punishment under the 1996 South African Constitution, the Constitutional Court's various concurring opinions were able to define and isolate the key features of ubuntu. Ubuntu carries ideas of 'humaneness, social justice and fairness'[46] and places 'emphasis on communality and on the interdependence of the members of a community', thereby recognising a person's status as a human being who is entitled to unconditional respect, dignity, value, and acceptance from community members.[47] Mahomed J's *obiter dictum* in *Makwanyane*[48] that articulates the ethos of ubuntu is worth quoting:

> [Ubuntu] expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.

43 Ibid. 378.
44 Elechi et al. (n. 13) 75; Kamwangamalu (n. 29) 26; Mnyaka (n. 2828) 215.
45 *S v Makwanyane & Another* 1995 (3) SA 391 (CC).
46 Ibid. [237] per Madala J.
47 Ibid. [224].
48 Ibid. [263] per Mahomed J. See also *Afri-Forum & Another v Malema & Others* [2011] (6) SA 240 (EqC) [18], where the South African Equality Court identifies 12 salient features of ubuntu.

Mahomed J continues to say that ubuntu is personhood and morality, and describes the significance of group solidarity on survival issues so central to the survival of communities.[49] For her part, Mokgoro J asserts that ubuntu 'envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, [which] in its fundamental sense it denotes humanity and morality'.[50]

Beyond the South African judicial landscape, ubuntu has been judicially recognised and asserted in other African jurisdictions. The Lesotho High Court in *Mokoena v Mokoena*,[51] a case concerning succession under customary land rights, determined:[52]

> [T]he widow has a customary law right to expect her late husband's relatives to protect her and the property that her husband left her with … It is contrary to Basotho culture, good conscience and a sense of what is right in the African sense – that applicant should be attempting to deprive the widow of her house and arable lands (*masimo*). *It is not* botho *or* ubuntu *to dispossess a widow*.

Similarly, the Lesotho High Court in *Thabo Fuma*,[53] while not referring to ubuntu *per se*, quotes the South African Constitutional Court's *Hoffmann*[54] decision that linked dignity and ubuntu to conclude that the denial of employment to an HIV-positive soldier constituted unfair discrimination.

In Uganda, the Constitutional Court in *Abuki*,[55] a case concerning the constitutionality of the Ugandan Witchcraft Act, stated:

> Of course, the concept of 'ubuntu', the idea that being human entails humaneness to other people, is not confined to South Africa or any particular ethnic group in Uganda. It is the whole mark [*sic*] of civilised societies […] *It will be recalled that the word 'ubuntu', though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda.*

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49 *S v Makwanyane & Another* 1995 (3) SA 391 (CC) [263] per Mahomed J.

50 Ibid. [307] per Mokgoro J.

51 *Mokoena v Mokoena* [2007] LSHC 14 (Lesotho High Court).

52 Ibid. [36]–[37] (emphasis added). Commenting on *Mokoena*'s recourse to ubuntu, Rautenbach (n. 22) 300 remarks: 'The court did not explain the meaning of ubuntu, and it is evident that, being a native Sesotho speaker, he, and probably everyone else involved in the case, knew exactly what it meant from "experience"'.

53 *Thabo Fuma v The Commander, Lesotho Defence Force* [2013] LSHC 68 (Lesotho High Court).

54 *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

55 *Solvatori Abuki & Another v Attorney-General* [1997] UGCC 10 (emphasis added). See also *Satrose Ayuma v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme* [2013] eKLR [26], where the Kenyan High Court, in the context of forced evictions and the right to housing, refers to the submission of Professor Yash Ghai on ubuntu, where he refers to *Makwanyane*, one of the petitioners, but does not expressly accept or reject the ubuntu reference.

Abuki asserts that ubuntu is not confined to South Africa. It is essential to avoid *oppositionalising* ubuntu as a value within African law and philosophy as opposed to, for example, Eurasian law and philosophy. Admittedly, the attraction of oppositionalisation is strong, given the ubiquity of binarised approaches in legal conceptions. While one should remain alive to the danger of seeking to legitimise the legal worth of knowledge from the Global South and perspectives such as ubuntu through the prism of Western sensibilities, drawing on non-African thought can also help imagine and understand ubuntu as a relatively underexplored legal concept.

Letseka, for instance, invokes comparativism in the context of education to identify the traits shared by ubuntu and the Germanic notion of *bildung*. *Bildung* 'is about linking the self to the world in the most general, most animated and most unrestrained interplay … *bildung* as mimetic, that is, as non-teleological, undetermined and uncertain, and aimed at the reconciliation between outer historic-social and inner individual conditions'.[56] Additionally, the concept of 'recognition', as developed by Hegel and cited by Fredman, has a notable foundational view that retains ubuntuesque features. Like ubuntu, 'recognition' holds that individual identity derives from intersubjective recognition within the context of social relations and, again like ubuntu, allows an individual to become an individual only by recognising others and being recognised by them.[57]

3.2.4 The principles of ubuntu

It may be argued that ubuntu's abstractness and lack of precise definition make it potentially consistent with the very nature of values in a constitution,[58] and that we can best understand and apply ubuntu by identifying its central interrelated principles.[59] We depart from Himonga's references to 'attributes' as 'principles' of ubuntu and will therefore unpack

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56 Moeketsi Letseka 'In defence of ubuntu' (2012) 31 *Studies in Philosophy and Education* 47–60 cites the German *bildung* scholar Wilhelm von Humboldt. Relatedly, the common-law remedy of *amende honorable* (honourable amends) is likened to ubuntu in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) [116] per Sachs J. For a critique of this approach, see Rautenbach (n. 22) 300.

57 Georg Hegel *Phenomenology of Spirit* (OUP, 1977) 104–109, cited in Sandra Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *South African Journal on Human Rights* 215.

58 Himonga (n. 1414) 173. It is important to highlight the fact that Himonga's work on ubuntu is retrospective, looking at the right to health in South Africa and how ubuntu has affected its interpretation.

59 Ibid.

ubuntu's central yet overlapping principles: community, interdependence, solidarity, responsibility and dignity.[60]

3.2.4.1 *Community*

Ubuntu includes the central idea of community whereby a relationship exists between the community and the individual. As Langa CJ describes ubuntu's communitarianism, 'we [Africans] are not islands unto ourselves'.[61] Here, we adopt Gyekye's concept of 'community' as a 'cultural community', which means 'a group of people with shared values and practices and a shared notion of common good, whether or not it has a shared language'.[62] Gyekye's definition of community allows us to conceptualise ubuntu communitarianism notwithstanding the differences in ubuntu's linguistic formulation, focusing more on the shared 'habits, outlooks, practices, institutions, and cultural values' in a community.[63] Thus, the idea of community as an element of ubuntu can apply to groups beyond the extended family. We argue that the ubuntu community would therefore extend to the clan, village, tribe, neighbourhood, city and the nation-state, all being different kinds of community.[64] The construction of community as including the nation-state – in this context an African state – is congruent with the living-law[65] nature of ubuntu as an African customary law value. The nation-state construction of community becomes particularly pertinent in ascribing correlative duties that flow from a right to water.

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60 Himonga (n. 14) 176. Himonga identifies six interrelated attributes: community, interdependence, dignity, solidarity, responsibility and ideal.

61 *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) [53] per Langa CJ, pointing out that the importance of community is not unique to African thought, as community also cuts across Western philosophy.

62 Kwame Gyekye *Tradition and Modernity: Philosophical Reflections on the African Experience* (OUP, 1997) 43; Himonga (n. 14) 174.

63 Himonga (n. 14) 173.

64 Gyekye (n. 62) 43.

65 Characterising African customary law as 'living law' acknowledges its fluidity and adaptability to changing circumstances and that law emerges from the people. Customary law also emphasises oral traditions as sources. As Himonga observes, 'this living customary law represents the unwritten practices observed, and vested with binding authority, by the people whose customary law is under consideration' (Chuma Himonga 'The living customary law in African legal systems' in Jeanmarie Fenrich, Paolo Galizzi and Tracy E Higgins (eds) *The Future of African Customary Law* (CUP, 2011) 35). On living customary law, see also *Bhe & Others v Khayelitsha Magistrate & Others* 2005 (1) SA 580 (CC) 87; Manfred Hinz *Customary Law Ascertained* Vol. 1 (Namibia Scientific Society, 2010).

Ubuntu communitarianism inevitably reveals tensions in the relationship between the individual and the community or collective. In the context of rights, this requires a reconciliation of the rights of the individual in relation to those of the collective. There are generally two approaches to community: radical and moderate.[66] The radical view would require that the individual's rights and interests be sacrificed on the altar of community. This approach to African communitarianism is embraced in the ideological perspectives of Kwame Nkrumah and Julius Nyerere. The individual can only say 'I am, because we are; and since we are, therefore I am'.[67]

In contrast, moderate communitarianism rejects the view that African communitarianism represents the idea that the traditional African social order was totally communal and blind to the 'status and relevance of individual rights'.[68] Gyekye, who cites the ideology of Senegal's first president, Léopold Senghor, and proverbs from the Akan people of Ghana, argues that the status of individuality and community are relative in the sense that 'no human society is absolutely individualistic, and that it is all a matter of emphasis or priority or basic concern with one or the other'.[69] Gendered language notwithstanding, Steve Biko highlights the individual emphasis within the community by stating that 'the corner-stone of [African] society is man himself – not just his welfare, not his material well-being but just man with all his ramifications'.[70]

Moderate communitarianism would (arguably) assert the importance of both individual and collective rights. Where an irreconcilable tension between the two exists, it would place a greater, but not exclusive, emphasis on communal rights and interests than on those of the individual.[71] Moreover, radical communitarianism may counterintuitively imply that African values should be apotheosised whenever a value

66 Gyekye (n. 62) 43.

67 John Mbiti *African Religions and Philosophy* (Heinemann, 1969) 108–110, cited in Himonga (n. 14) 175; Gyekye (n. 62) 37.

68 Himonga (n. 14) 175; Gyekye (n. 62) 38.

69 It is worth noting that President Léopold Senghor was a driving force behind the adoption of the African Charter on Human and Peoples' Rights and set the communitarian parameters for economic, social and cultural rights when he requested the drafting experts to 'keep constantly in mind our values of civilisation and the real needs of Africa' (address to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/X, reprinted in Philip Kunig et al. (eds) *Regional Protection of Human Rights by International Law: The Emerging African Systems* (Nomos Verlagsgesellschaft, 1985) 121).

70 Steve Biko *I Write What I Like* (UCP, 1978) 46.

71 Himonga (n. 14) 176.

conflict arises. The prioritisation of collective rights over individual ones may also result in approaches that summarily exclude non-conforming individuals and minority groups.[72]

Here, it is worth reflecting on the central ethos of the African Charter on Human and Peoples' Rights to reveal the primordiality of community in Africa. The Charter is distinctive from other human rights instruments (both national and supranational) in that it incorporates all three traditional rights categories – civil-political, social-economic, and group/solidarity – and both individual and collective rights and duties, all of which are rendered justiciable.[73] This concept of rights is informed by African communitarianism[74] in which, as Gyekye puts it, 'a person is only partly constituted by the community'.[75]

3.2.4.2 *Interdependence*

The principle of interdependence can be seen in the various derivative phrases of ubuntu. Take, for example, the isiZulu expression *umuntu ngumuntu ngabantu* or 'persons depend on persons to be persons'.[76] This expression implies a strong interdependence between human beings. The interdependence that is advanced by ubuntu is well captured by Justice Sachs in *Port Elizabeth Municipality v Various Occupiers*:[77]

> we are not islands unto ourselves. The spirit of ubuntu [...] suffuses the whole [South African] constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

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72 Oritsegbubemi Oyowe 'An African conception of human rights? Comments on the challenges of relativism' (2014) 15 *Human Rights Review* 329 334.

73 Manisuli Ssenyonjo 'The influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 *Netherlands International Law Review* 259 262; Chidi Anselm Odinkalu 'Analysis of paralysis or paralysis by analysis: Implementing economic, social, and cultural rights under the African Charter on Human and Peoples' Rights' (2001) 23 *Human Rights Quarterly* 327.

74 Himonga (n. 14) 170–171; O Okere 'The protection of human rights in Africa and the African Charter on Human and Peoples' Rights: Comparative analysis with the European and American systems' (1984) 6 *Human Rights Quarterly* 141 148; R Howard 'Evaluating human rights in Africa: Some problems of implicit comparisons' (1984) 6 *Human Rights Quarterly* 160.

75 Gyekye (n. 62) 59.

76 Himonga (n. 14) 177. See also *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) [53] per Langa CJ; *S v Makwanyane & Another* 1995 (3) SA 391 (CC) [308].

77 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [37].

As such, ubuntu gives voice to our interconnectedness and common humanity and the responsibility we owe one another that flows from our connection.[78]

Again, adopting a moderate form of communitarianism, we argue that 'interdependence should be understood to recognise the status of the individual as equal in moral terms to that of the community while emphasizing communal interests and rights'.[79] The crux nevertheless is the shared responsibility.

3.2.4.3 *Solidarity*

Ubuntu's solidarity requires that people should be able to count on those around them for support and are thus obligated to assist society's needy in augmenting social solidarity.[80] It rejects selfish individual pursuits. Solidarity thus sets down the mutual bonds of loyalty and protection that tie people together. This is consistent with an outlook that does not view a person as an isolated, abstract individual but as 'an integral member of a group animated by a spirit of solidarity'.[81] This outlook informs the strong features of solidarity in African indigenous laws and African institutions.[82] The solidarity principle comes out strongly in the water management regimes that have historically been and are presently inhabited by people of African indigeneity.

3.2.4.4 *Responsibility*

As Himonga notes, responsibility in the ubuntu context refers to

> a caring attitude or conduct that one feels one ought to adopt with respect to the well-being of another person or other persons. Such responsibilities include the responsibility to help others in distress, the responsibility to show concern for the needs and welfare of others, [and] the responsibility not to harm others.[83]

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78 *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) [63].

79 Himonga (n. 14) 178.

80 Ibid. 177. See also R Makgato 'Dignity and ubuntu: Epitome of South Africa's socio-economic transformation' (2016) 5 *Scientific Journal for Theory and Practice of Socio-economic Development* 68.

81 Sandra Fredman *Human Rights Transformed* (2008) 18; Okere (n. 74) 148.

82 See art. 2(1)(a) of the Charter of the Organisation of African Unity of 1963; art. 3(a) of the Constitutive Act of the African Union of 2000: 'The objectives of the Union shall be to (a) achieve greater unity and solidarity between the African countries and the peoples of Africa'.

83 Himonga (n. 14), citing M Munyaku and M Motlhabi 'Ubuntu and its socio-moral significance' in MF Murove (ed.) *African Ethics: An Anthology of Comparative and Applied Ethics* (University of KwaZulu-Natal Press, 2009) 71.

Ubuntu responsibility thus asserts the existence of both rights and duties that are deemed inalienable to all human beings.[84] Himonga notes that 'the community life and the common good of shared relationships are the foundation of moral responsibilities and obligations'.[85] Moreover, Himonga points out that 'responsibilities and obligations within the communitarian morality are not based on the idea of a social contract, on one hand, and acknowledgment of the rights of others, on the other'.[86] To this end, 'people do not carry out their responsibilities and obligations to others because they are bound by a social contract to do so, or on the basis of the corresponding rights of the latter. Instead, they bear and carry out their responsibilities and obligations on account of the "communitarian ethic and its imperatives".'[87]

3.2.4.5 *Dignity*

The dignity principle of ubuntu requires the recognition of the worth of each individual in the community. This is captured in the notion of dignity that ubuntu advances requiring that human beings be 'valued and respected for their own sake' without regard to their gender, ethnicity, race, intellectual or mental capacity, and socio-economic status (an oft-neglected category that is critical in the context of water rights).[88]

The dignity principle inevitably leads to challenges over the meaning of dignity in philosophical theory and as a constitutional value. Dignity, scholars observe, is a broad concept that is overstretched, devoid of content, and vague.[89] It thus is of little surprise that leading ubuntu scholars such as Himonga and Metz have materially differed on the substance of dignity in the context of ubuntu.[90] Nevertheless, ubuntu can facilitate conceptions of dignity that are authentic, localised, decolonial and principled.

In our view, positive duties that arise out of rights can best be justified through an understanding of ubuntu as dignity. Where persons need certain socio-economic goods for their subsistence, they would retain a positive right claim,[91] which gives rise to positive duties. Dignity thus requires a concern for livelihood and socio-economic well-being, which is

84 Himonga (n. 14) 179.
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid.
89 Christopher McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *European Journal of International Law* 655.
90 Himonga (n. 14) 182.
91 Ibid. 183.

to be contrasted with dignity in the Western sense, and which has been found to emphasise negative liberty and individual personality issues generally.[92]

Most African constitutions mention dignity as a human right, and jurisprudence in a number of jurisdictions has variously developed the substantive meaning of dignity. While we do not attempt to displace these national conceptions of dignity, we hold that considering dignity through the value of ubuntu allows us to adopt interpretative approaches that are anchored in concrete and localised values. Some scholars such as Cornell have advocated an interpretation 'that would ground the constitutional *grundnorm* of dignity, and not dignity that calls for the recognition of African humanist principles such as ubuntu'.[93] However, it is not necessary to reconcile ubuntu strictly with dignity. The view taken by Mokgoro and Woolman is compelling:[94]

> No one has suggested that we need to square ubuntu with equality or freedom or reduce it entirely to community rights. We might do well to consider allowing these values to occupy their own separate spaces – closely aligned and overlapping, but with different roles to play when we apply our minds to constitutional conflicts ... ubuntu and dignity do not map directly on to one another, but they do rhyme.

3.3 A normative analysis of water as a human right

Water is recognised a basic human right, and its scarcity is of global concern. Water as a human right is reflected in, for example, the UN General Assembly's various resolutions[95] on the subject, the UN's Sustainable Development Goal 6, and the African Union's Agenda 2063. The centrality of water as a human right in Africa can be seen as emanating from its status as a 'multiplier right': water is of overarching salience in the realisation of other rights as, without water, other rights cannot be fulfilled. As the ESCR Committee frames it, water 'clearly falls within the category

92 Sandra Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 9.

93 Drucilla Cornell *Law and Revolution in South Africa:* Ubuntu*, Dignity, and the Struggle for Constitutional Transformation* (FUP, 2014) 151.

94 Mokgoro and Woolman (n. 16) 407.

95 UNGA Res 68/157 'The human right to water and sanitation' (18 December 2013) A/RES/68/157 (adopted without a vote); UNGA Res 70/169 'The human right to water and sanitation' (17 December 2015) A/RES/70/169 (adopted by consensus); HRC Resolution 'The human right to safe drinking water and sanitation' Resolution A/HRC/RES/15/9 (30 September 2010) (adopted without a vote); HRC Resolution 'The human right to safe drinking water and sanitation' A/HRC/RES/16/2 (24 March 2011) (adopted without a vote).

of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival'.[96] The ESCR Committee goes on to say that water is necessary to realise many of the aims of the International Covenant on Economic, Social and Cultural Rights such as adequate food, ensuring environmental hygiene through a right to health,[97] securing livelihoods through the right to earn a living by work, and the enjoyment of certain cultural practices as part of the right to cultural life.[98]

3.3.1 Water as a human right in African national constitutions

While some African jurisdictions have expressly included the right to water as a human right in their constitutions, other jurisdictions have relied on the incorporation of water as an implied right. What follows is an overview of water as a human right in various domestic contexts. It is worth noting that in African constitutions, the inclusion of water as an enforceable human right was pioneered by the 1996 South African Constitution in section 27(1)(b). Subsequently, other African constitutions such as article 43(1)(d) of the 2010 Kenyan Constitution and section 77(a) of the 2013 Zimbabwean Constitution have also incorporated the right.

In *Mazibuko,*[99] five applicants who were residents of the township of Phiri in Soweto sought to challenge the City of Johannesburg's water policy in the South African Constitutional Court. The principal issue for

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96 United Nations CESCR, General Comment 15: 'The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' UN Doc. E/C 12/2002/11 (20 January 2003) para. 3. In a philosophical discussion of water as part of the right to an adequate standard of living, Copp, commenting on the phrase in the Universal Declaration, concludes: 'Any credible analysis of the concept of a basic need would imply ... basic needs [such as] clean water' (David Copp 'The right to an adequate standard of living: Justice, autonomy, and the basic needs' (1992) 9 *Social Philosophy and Policy* 231 252). Inga Winkler *The Human Right to Water: Significance, Legal Status and Implications for Water Allocation* (Hart Publishing, 2012) 62 also highlights the challenge of determining what forms part of the right to an adequate standard of living in art. 11(1) of the ICESCR and advances Engbruch's assumption that an adequate standard of living is met 'when individuals live in an environment and under conditions that allow them to participate in social life while maintaining their dignity and to realise their rights by their own means'.

97 See also ESCR Committee General Comment 14 on 'The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)' (11 August 2000) E/C.12/2000/4.

98 General Comment 15 (n. 96) [6].

99 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC).

our purposes was whether the supply of 6 kilolitres of free basic water per month to every account holder in the City – regardless of household size – was in conflict with section 27(1)(b) of the 1996 South African Constitution. Section 27(1)(b) entrenches a human right to access sufficient water, while the state is enjoined by section 27(2) to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of that right. Relevant here is the Constitutional Court's approach in adjudicating the water policy of the City in relation to the minimum core concept as a proper interpretation of the relationship between section 27(1) and 27(2) of the South African Constitution.[100] In *Mazibuko* the minimum core issue[101] arose as the applicants had invited the Court to determine the content of their right to water under section 27(1)(b) by quantifying the amount of water sufficient for a dignified life, which the applicants had argued was 50 litres per person per day.[102]

Botswana offers a unique perspective as the 1966 Botswana Constitution does not explicitly include socio-economic rights such as water.[103] The courts in Botswana have, however, upheld a right to water derived from the right not to be subjected to cruel, inhuman and degrading treatment in section 7 of Botswana's Constitution. In *Sesana*[104] the High Court of Botswana was faced with an application for an order declaring that the termination by the government of Botswana of the provision of certain basic and essential services to the Basarwa tribe of the San people in the Central Kalahari Game Reserve (CKGR) was on the legitimate-expectation doctrine unlawful and unconstitutional. The government had relocated the community to new settlements and informed those who refused to relocate that the provision of services would be terminated at the old settlements within six months. The basic and essential services that formed the crux of the request for the order were, for our purposes, the daily provision of drinking water and the maintenance of the supply of borehole water. Relying on the administrative-law principles of legitimate expectation, Dibotelo J, writing for the majority of the High Court, held that the termination of services by Botswana's government was neither

100 Ibid. [44].

101 The idea that every right gives rise to a minimum obligation that a state must realise. See Ndeunyema (2021) (n. 12) 227.

102 *Mazibuko & Others v City of Johannesburg & Others* 2010 (4) SA 1 (CC) [50].

103 For a comprehensive analysis of socio-economic rights in Botswana, see Bonolo Ramadi Dinokopila 'The justiciability of socio-economic rights in Botswana' (2013) 57 *Journal of African Law* 108.

104 *Sesana & Others v Attorney-General* [2006] 2 BLR 633 (HC) (Botswana High Court).

unlawful nor unconstitutional and that the government was therefore under no obligation to restore the provision of the services.[105]

The issues in *Sesana* arose in *Mosetlhanyane*,[106] this time with specific reference to the right to water, before the Appeal Court of Botswana. The facts are similar to those of *Sesana*, which presented, in the Court's own words, a 'harrowing story of human suffering and despair caused by a shortage of water in the harsh climatic conditions of the Kalahari Desert where the appellants and their Basarwa community live'.[107] The Basarwa community was relocated to new settlements in line with the government's then new policy of wildlife conservation areas without human settlements. During the relocations, a pump engine and water tank that had been installed by the government for use at a particular borehole were dismantled and removed. It was turned into 'a white elephant whilst the Basarwa communities in the area continue to suffer on a daily basis from lack of water'.[108] The appellants had sought a court order permitting them to use the existing borehole that the Botswana government had sealed or an alternative borehole within the CKGR, all at their own, not the government's, expense.[109] Applying a derivative-right approach, the Court found that the Botswana government's actions violated the right of the appellants not to be subjected to cruel, inhuman, and degrading treatment under section 7 of the Botswana Constitution.[110]

Read in the context of limited socio-economic rights claims in Botswana, *Mosetlhanyane* is commendable in that the Court compelled the Botswana government to allow the appellants to have access to water as a right. The decision has been celebrated as a 'victory for the [...] judicial enforcement of socio-economic rights in Botswana within a legal framework that does not adequately provide for the protection of such rights'.[111]

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105 Ibid. 723.

106 *Mosetlhanyane & Another v Attorney-General* [2011] 1 BLR 152 (CA) (Botswana Court of Appeal).

107 Ibid. 154.

108 Ibid. 155. The borehole was sunk in 1986 by a private mining company. When the company no longer needed the borehole, it was agreed that it would be used to provide water for the residents of the CKGR, to which use the Botswana government did not object. For over a decade the Ghanzi District Council maintained the engine of the borehole pump. It provided fuel for the pump and regularly took water from the borehole to the Basarwa communities in other parts of the CKGR.

109 *Mosetlhanyane & Another v Attorney-General* [2011] 1 BLR 152 (CA) (Botswana Court of Appeal) 155–158.

110 Ibid. 159–160.

111 Bonolo Ramadi Dinokopila 'The right to water in Botswana: A review of the *Matsipane Mosetlhanyane* case' (2011) 11 *African Human Rights Law Journal* 282.

An analysis suggests that the appellants were cautious, and strategic, in framing their claim as concerning a negative right and obligation (that the government allow them to extract water from boreholes for domestic use) rather than as concerning a positive duty (that the government provide them with boreholes, which would include the care and maintenance thereof). Even so the Court determined the issue as being a negative obligation upon the Botswana government not to interfere with the appellants' right to water instead of as the positive obligation to provide water and protect citizens from inhuman conditions.

The plight of the communities living in the CKGR would be a classic case of people who cannot themselves provide for their essential services and needs, which places an arguably stronger set of positive obligations upon the government to provide water. This is the challenge with the judgment: it avoids the problematic and counterintuitive conclusion that a government would be prohibited from inflicting suffering through deprivation of self-financed access to water but not have to take the initiative to prevent suffering from a lack of water through positive action.[112]

3.3.2 Water as an express human right under international law

Various international agreements recognise expressly the right to water. These include the Convention on the Rights of the Child[113] (CRC), the Convention on the Rights of Persons with Disabilities[114] (CRPD), Convention of the Elimination of All Forms of Discrimination against Women[115] (CEDAW), and the Geneva Conventions. Regional treaties include the African Charter on the Rights and Welfare of the Child[116] (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[117] (African Women's Protocol).

Article 24(1) of the CRC enjoins state parties to recognise the child's right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health, requiring state parties to 'strive to ensure that no child is deprived of his or her right of access to such health care services'. Article 24(2) proceeds to list the appropriate

112 Kristen Snell 'Can water be a human right?' (2014) 19 *Appeal* 131.

113 1577 UNTS 3 (opened for signature 20 November 1989; entered into force 2 September 1990).

114 2515 UNTS 3 (opened for signature 13 December 2006; entered into force 3 May 2008).

115 1249 UNTS 13 (opened for signature 18 December 1979; entered into force 3 September 1981).

116 CAB/LEG/24.9/49 (1990) (adopted 11 July 1990).

117 Adopted 11 July 2003.

measures that state parties 'shall pursue' for the full implementation of article 24(1). Among the measures listed is, '[t]o combat disease and malnutrition, including within the framework of primary health care through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and *clean drinking-water*'.[118] While article 24(2) explicitly refers to clean drinking water as among the appropriate measures that states are to take, it does so only in relation to the child's right to the enjoyment of health.[119] Given the scope of CRC, the right to water is claimable only to the extent that it relates to a child – a human being below the age of 18 years.[120]

While it is obvious that water is indispensable to the basic health of a child (or any person), water is also important for non-health-related reasons. Arguably, a right to water is obligatory under the CRC only in so far as water is the nexus to realise the health of the child. This is a proposition that finds the interpretative support of the CRC Committee, which points to the essentiality to life and other human rights of water and the prevention of water-related diseases.[121] Those scholars who have analysed the CRC's *travaux préparatoires* affirm this interpretation by pointing out that it was India that had proposed the introduction of the expression 'clean drinking water' during the revision of the draft of what later became article 24. This expression was included in recognition of the importance of providing clean drinking water to avoid the risk of serious disease and even the death of children.[122]

A similar approach to that adopted by the CRC in recognising water as crucial to health finds regional expression in article 14(2)(c) of the African Children's Charter.[123] The Children's Charter adopts language and a structure similar to the CRC's, although it refers to *safe* drinking water as

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118 Emphasis added.

119 CRC art. 24(1). The child's right to water can also be inferred from the child's right to an adequate standard of living in CRC art. 27.

120 CRC art. 1.

121 UN Committee on the Rights of the Child, General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24) (17 April 2013) CRC/C/GC/15 [48].

122 Jimena Murillo Chávarro *The Human Right to Water: A Legal Comparative Perspective at the International, Regional and Domestic Level* (Intersentia, 2015) 59; Sharon Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (Brill, 1992) 353.

123 African Children's Charter art. 14: '(1) Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health. (2) States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures [...] (c) to ensure the provision of adequate nutrition and *safe drinking water* [...]' (emphasis added).

opposed to the CRC's *clean* drinking water. The African Children's Charter applies to children under 18 years of age.

Treaties addressing women's rights also expressly affirm the existence of the right to water. CEDAW provides for a right to water in the specific circumstances of *rural* women's right to participate in and benefit from rural development.[124] Article 14(1) and (2) of CEDAW addresses the unique challenges that rural women – who constitute a quarter of the world's population[125] – face in the context of the need for the economic survival of their families and the non-monetised work that they perform. CEDAW requires state parties to take appropriate measures that include ensuring the elimination of discrimination against rural women through rights that include the right to enjoy 'adequate living conditions, particularly in relation to housing, sanitation, electricity and *water supply*, transport and communications'.[126] Article 14 thus 'engenders' the right to water as an intersectionality[127] concern by coupling gender with social-economic class, given the article's specific application to women who are rurally located.[128]

Rural women are explicitly protected under article 14 because they fare worse than rural men, and urban women and men on every socio-economic indicator.[129] Article 14 seeks to ensure that rural women benefit directly from social security programmes and have adequate living conditions including water supply.[130] This is particularly pertinent in

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124 CEDAW Committee 'General Recommendation 34 on rural women' (2016) CEDAW/C/GC/34 [35].

125 Ibid. [3].

126 CEDAW art. 14(2)(h) (emphasis added).

127 On intersectionality, see Kimberley Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and antiracist politics' (1989) *University of Chicago Legal Forum* 139; Sandra Fredman 'Engendering socio-economic rights' in Anne Hellum and Henriette Sinding Aasen (eds) *Women's Human Rights: CEDAW in International, Regional and National Law* (CUP, 2013) 218.

128 For an intersectional perspective, anchored in southern and eastern African case studies, on a woman's right to water, discussing 'intersecting and overlapping marginalizations on the basis of gender, race, ethnicity, political exclusion, and social economic class', see Anne Hellum et al. (eds) *Water is Life: Women's Human Rights in National and Local Water Government in Southern and Eastern Africa* (Weaver Press, 2015).

129 CEDAW Committee (n. 124) [5].

130 Meghan Campbell *Women, Poverty, Equality: The Role of CEDAW* (Bloomsbury Publishing, 2017). The CEDAW Committee (n. 124) [81] states: 'Rural women's and girls' rights to water and sanitation are not only essential rights in themselves, but also are key to the realization of a wide range of other rights, including health, food, education and participation'.

sub-Saharan Africa where less than ten years ago 40 billion hours were spent collecting water every year, with women bearing two-thirds of this burden.[131] A 'holistic approach' to article 14 has also been advanced[132] and is reflected in the CEDAW Committee's General Recommendation 34, which asserts that '[r]ural women's and girls' rights to water and sanitation are not only essential rights in themselves, but also are key to the realization of a wide range of other rights, including health, food, education and participation'.[133]

Similarly, the African Women's Protocol recognises the rights of African women to food security, and imposes a duty upon state parties to ensure that women have the right to nutritious and adequate food. One of the listed measures that the state is to take is to provide women with access to clean drinking water per article 15(a). Like CEDAW, the African Women's Protocol's scope of application is limited to (African) women and girls.[134]

The CRPD expressly provides for the right to water. Through article 28(2) of CRPD, state parties recognise the rights of persons with disabilities to social protection. Article 28(2) has been interpreted as including the right of such persons to clean water services, as affirmed by the UN Committee on the Rights of Persons with Disabilities.[135] The scope of application for CRPD is also limited to the protected group of persons with disabilities.

Given that the guns of conflict are yet to fall silent on the African continent, it is worth assessing the water protections that exist during an armed conflict. International humanitarian law is the body of international law that applies during international or non-international armed

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131 UNICEF 'Water, sanitation and hygiene' <http://www.unicef.org/media/media_45481.html> (accessed 19 July 2018). See also UN Economic and Social Council 'Economic, social and cultural rights: Relationship between the enjoyment of economic, social, and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation', Final report of the Special Rapporteur, El Hadji Guissé, [18]–[19] (14 July 2004) UN Doc. E/CN.4/Sub.2/2004/20, <https://www.cetim.ch/legacy/en/documents/rap-2004-20-ang.pdf> (accessed 24 September 2023).

132 Anne Hellum 'Engendering the right to water' in Malcolm Langford and Anna Russell (eds) *The Human Right to Water: Theory, Practice and Prospects* (CUP, 2017) 316–317.

133 CEDAW Committee (n. 124) [18].

134 African Women's Protocol art. 1.

135 UN Committee on the Rights of Persons with Disabilities 'Guidelines on treaty-specific document to be submitted by states parties under article 35(1) of the Convention on the Rights of Persons with Disabilities', 18 November 2009, CRPD/C/2/3, 16. The Committee was established under art. 34 of CRPD with the purpose of monitoring the implementation of CRPD.

conflicts.[136] While a right to water can be impacted upon at the level of both *jus ad bellum* (water as a source of armed conflict and water-related conflict situations) and *jus in bello* (the law on the provision of water during armed conflicts), it is through the latter that international humanitarian law offers potential as a source of water-related rights and obligations upon states. In this regard, the Third[137] and Fourth[138] Geneva Conventions, which arguably also reflect customary international humanitarian law by and large,[139] contain provisions that protect access to water in armed-conflict situations. These protections extend to persons such as prisoners of war, internees and civilians, thereby creating water-related rights and obligations that bind parties participating in hostilities.[140] Water as an international humanitarian law concern has been considered by various scholars.[141]

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136 Dapo Akande 'Classification of conflicts: Relevant legal concepts' in E Wilmshurst (ed.) *International Law and the Classification of Conflicts* (2012); Dieter Fleck 'The law of non-international armed conflicts' in Dieter Fleck (ed.) *The Handbook of International Humanitarian Law* (OUP, 2013); C Byron 'Armed conflicts: International or non-international?' (2001) 6 *Journal of Conflict and Security Law* 63.

137 Geneva Convention (No. III) 'Relative to the treatment of prisoners of war' 75 UNTS 135 (12 August 1949) (entered into force 21 October 1950).

138 Geneva Convention (No. IV) 'Relative to the protection of civilian persons in time of war' 75 UNTS 287 (12 August 1949) (entered into force 21 October 1950). See also the analysis in L Boisson de Chazournes *Fresh Water in International Law* (OUP, 2013) 169–173.

139 International Committee of the Red Cross 'Customary humanitarian law: Questions and answers', <https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm#a3> (accessed 21 September 2023).

140 Arts 20, 26, 29 and 46 of Geneva Convention III guarantee sufficient water for drinking purposes and other human needs; arts 85, 89 and 127 of Geneva Convention IV mention water and protects civilian persons in times of war; art. 54 of the First Additional Protocol of 1977 (Protocol [I] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3) prohibits the attack on and destruction, removal or rendering useless of objects indispensable to the survival of the civilian population, including drinking water installations and supplies and irrigation works, 'for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party'. Cf arts 5 and 14 of the Second Additional Protocol (Protocol [II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609).

141 For scholarship on an international humanitarian law right to water, see Inga Winkler (n. 96) 62–64; Mara Tigino *Water During and After Armed Conflicts* (Brill, 2016); Amy Hardberger 'Whose job is it anyway? Governmental obligations created by the human right to water' (2006) 41 *Texas International Law Journal*

[*continued on next page*]

3.3.3 Water as an implied human right under international law

Three key treaties support the legal basis for an implied right to water: the ICESCR,[142] the ICCPR[143] and the African Charter.[144]

3.3.3.1 *Implying water under the ICESCR*

Support for a right to water under the ICESCR finds textual anchorage in two provisions: articles 11(1) and 12. Article 11(1) of the ICESCR reads:

> The States Parties to the present Covenant recognize the *right of everyone to an adequate standard of living* for himself and his family*, including* adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[145]

While article 11(1) does not explicitly refer to water, it has been interpreted as 'including' a right to water as part of a right to an adequate standard of living for individuals and their families.[146] The term 'including' is to be interpreted as implying that rights in the article are not a *numerus clausus* and reflect the legal drafting tradition that is frequently adopted by domestic and international law-making organs. The interpretative inclusion of a right to water in article 11(1) is anchored in a teleological approach to interpretation as the primary rule of treaty interpretation under article 31(1) of the Vienna Convention on the Law of Treaties.[147]

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533 549–568. For a comprehensive analysis of four basic water prohibitions relating to international humanitarian law in so far as they relate to the use of poison as a means of warfare, the destruction of enemy property, attacks on objects indispensable to the survival of the civilian population, and attacks on installations containing dangerous forces, see Ameur Zemmali 'The protection of water in times of armed conflicts' (1995) 308 *International Review of the Red Cross* 550.

142 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (adopted 16 December 1966; entered into force 3 January 1976).

143 International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966; entered into force 23 March 1976).

144 African Charter on Human and Peoples' Rights 1520 UNTS 217 (adopted 27 June 1981; entered into force 21 October 1986).

145 Emphasis added.

146 Although the right is gendered, given the use of 'himself and his family', it applies to everyone, and no limitation upon the applicability of this right to individuals or to female-headed households is implied (ESCR Committee 'General Comment 12: The right to adequate food (art. 11)' UN Doc. E/C.12/1999/5 (1999) para. 1.

147 Vienna Convention on the Law of Treaties, 23 May 1969, UNTS Vol 1155, art. 31(1) the reads: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and

[*continued on next page*]

Furthermore, the phrase 'adequate/acceptable standard of living' is a legal formulation seen in article 25(1) of the Universal Declaration of Human Rights (Universal Declaration).[148] The Universal Declaration omits an explicit reference to water.

The interpretation of article 11(1) to include a right to water has been put forward by the ESCR Committee[149] in its 2002 General Comment 15.[150] General Comment 15 sets out the legal bases of a right to water, its normative content, the state's obligations[151] and corollary violations thereof,[152] the right's implementation at national level[153] and the obligations of non-state actors.[154] Notably, General Comment 15 extends only to water for personal and domestic use and excludes considerations borne out of commercialisation or transboundary concerns around water.[155]

Four principal justifications are relied upon by the ESCR Committee in asserting the legal basis of a right to water. The first is rooted in the *original intent* of the ICESCR drafters.[156] The second justification is water as

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in the light of its object and purpose'. See also Takele Bulto 'The emergence of the human right to water in international human rights law: Invention or discovery?' (2011) 12 *Melbourne Journal of International Law* 298.

148 Universal Declaration of Human Rights UNGA Res 217 A(III) (adopted 10 December 1948).

149 The Committee is tasked with monitoring the ICESCR's implementation by state parties and with developing general interpretations through General Comments. See <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (accessed 21 September 2023).

150 See General Comment 15 (n. 96) [1]. The ESCR Committee's General Comment 4 also specifies a right to sustainable access to safe drinking water for all beneficiaries of the right to adequate housing but only mentions water without elaborating upon its legal source or normative content. General Comment 15 was thus pioneering in offering a *full* exposition of the right to water under the ICESCR. See ESCR Committee 'General Comment 4: The right to adequate housing (Art. 11(1) of the Covenant)' E/1992/23 (13 December 1991).

151 General Comment 15 (n. 96) [17]–[38].

152 Ibid. [10]–[16].

153 Ibid. [45]–[59].

154 Ibid. [60].

155 Ibid. [2]. On the commercialisation and privatisation of water, see C de Albuquerque and I Winkler 'Neither friend nor foe: Why the commercialization of water and sanitation services is not the main issue for the realization of human rights' (2010) 17 *Brown Journal of World Affairs* 167; M Langford 'Privatisation and the right to water' in Langford and Russell (n. 132) 463; A Lang 'Privatisation and regulatory autonomy: The right to water and international economic law' in Langford and Russell (n. 132) 531.

156 General Comment 15 (n. 96) [3].

a *multiplier right*,[157] as water is necessary to realise other socio-economic rights such as adequate food, ensuring environmental hygiene through a right to health, securing livelihoods through a right to earn a living by work, and to enjoy certain cultural practices as part of the right to cultural life.[158] The third justification relates to water as a *derivative right*, derived from the rights to life, dignity and health.[159] The fourth justification is rooted in the right to health in article 12 of the ICESCR from which the ESCR Committee argued that the right to water can be derived,[160] as elaborately advanced in the Committee's General Comment 14.[161] The ESCR Committee states that the article 12(1) right to health is 'an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water'.[162] The Committee also interpreted adequate supply of safe and potable water[163] as being covered by article 12(2)(b) of the ICESCR, which outlined the steps to be taken by state parties to achieve the full realisation of the right to health.[164]

3.3.3.2 *Implying water under the ICCPR*

The ICCPR also supports a right to water through the article 6(1) guarantee of the right to life: 'Every human being has the inherent right to life.

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157 Ibid. In a philosophical discussion of water as part of the right to an adequate standard of living, Copp, commenting on the phrase 'adequate standard of living' in the Universal Declaration, concludes: 'Any credible analysis of the concept of a basic need would imply … basic needs [such as] clean water' (David Copp 'The right to an adequate standard of living: Justice, autonomy, and the basic needs' (1992) 9 *Social Philosophy and Policy* 231 252). Winkler also highlights the challenge of determining what forms part of the right to an adequate standard of living in art. 11(1) of the ICESCR and advances Engbruch's assumption that an adequate standard of living is met 'when individuals live in an environment and under conditions that allow them to participate in social life while maintaining their dignity and to realise their rights by their own means' (Winkler (n. 96) 62).

158 General Comment 15 (n. 96) [6]. See also ESCR Committee General Comment 14 (n. 97).

159 See Chávarro (n. 122) 48; E Bluemel 'The implications of formulating a human right to water' (2004) 3 *Ecology Law Quarterly* 970.

160 On the distinction between an *implied* right and a *derivative* right, see Pierre Thielbörger *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* (Springer, 2014) 228.

161 The Committee also touches on the right to water from the perspective of the right to health in General Comment 15 (n. 96) [3], [8], [11]–[13], [44].

162 General Comment 14 (n. 97) [11].

163 Potable water is water 'fit or suitable for drinking' (*Oxford English Dictionary*, 2017).

164 General Comment 14 (n. 97) [15].

This right shall be protected by law. No one shall be arbitrarily deprived of his life.' 'Life' in article 6(1) can be understood in two senses. The first is in a strict and narrow sense that would impose exclusively negative obligations of restraint or non-interference upon the state – that is, not to deprive a person of his or her life. The second is in a broad sense that would, in addition to imposing negative obligations the state, also obligate it to take positive steps to safeguard life.

A textual argument that narrowly constructs 'life' in article 6(1) as imposing only a negative duty of restraint on the state has been disputed. The HRC in 1982 adopted General Comment 6 on the Right to Life.[165] The HRC lamented the narrow and restrictive interpretation of article 6[166] to eschew a vacuous interpretation.[167] A 'modern and proper' construction of 'life' should not only protect against any arbitrary deprivation of life but also place states under a duty to 'pursue policies which are designed to ensure access to the means of survival for all individuals and all peoples'.[168] While General Comment 6 does not specify water, it states that the protection of the right to life 'requires that States adopt positive measures'.[169] The argument for water's inclusion is relatively elementary yet potent in its forcefulness: water is a non-substitutable resource that is essential at the most basic level to ensure the survival and sustenance of human life.

More recently, in its 2018 General Comment 36 on the Right to Life, the HRC has embraced a wider construction of life and expressly included access to water.[170] General Comment 36 replaced General Comment 6.[171] This construction avoids an interpretative peril that is aptly laid bare by the United Nations Development Programme (UNDP) in stating that lack

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165 HRC General Comment 6: 'Article 6 (Right to life)' (30 April 1982).

166 Ibid. para. 5.

167 Amanda Cahill '"The human right to water – A right of unique status": The legal status and normative content of the right to water' (2005) 9 *International Journal of Human Rights* 397.

168 Antônio Trindade 'The parallel evolutions of international human rights protections and of environmental protection and the absence of restrictions on the exercise of recognized human rights' *Revista IIDH* 13 (1991) 35 51. The HRC stated that the ICCPR 'should be interpreted as a living instrument and the rights protected under it should be applied in context and in the light of present-day conditions' (*Judge v Canada* Communication 829/1988, HRC, UN Doc. CCPR/C/78/829/1998 (2003) [10.3]).

169 General Comment 6 (n. 165) [5].

170 HRC 'General Comment 36 (2018) on article 6 of ICCPR, on the right to life' CCPR/C/GC/36 (30 October 2018) [26].

171 Ibid. [1].

of access to water 'is a polite euphemism for a form of deprivation that threatens life, destroys opportunity and undermines human dignity'.[172]

3.3.3.3 *Implying water under the African Charter*

The African Charter supports an implied right to water. Unlike other regional instruments such as the African Women's Protocol and the African Children's Charter discussed earlier, the African Charter, by virtue of article 2, applies to *all* individuals without limitation *ratione personae*.[173] Pertinently, the African Charter has been widely celebrated as the pioneering international human rights law instrument protecting and rendering justiciable all three 'generations' of human rights – civil-political, social-economic and group (solidarity or peoples') rights.[174]

Nevertheless, the African Charter does not explicitly mention a right to water. However, the right has been developed in the jurisprudence of the African Commission on Human and Peoples' Rights. The African Commission is a quasi-judicial body with a mandate to determine standards and formulate principles and rules aimed at solving legal problems relating to African Charter rights and freedoms.[175] As will be seen below, the African Commission's decisions evince an 'innovative'[176] purposive approach in the African Charter to the right to life,[177] to health[178] and to a generally

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172 UNDP 'Human Development Report 2006 – Beyond scarcity: Power, poverty and the global water crisis' (UNDP, 2006) 5.

173 African Charter art. 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.'

174 See Manisuli Ssenyonjo (ed.) *The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights* (Martinus Nijhoff Publishers, 2012).

175 See generally Rachel Murray *The African Commission on Human and Peoples' Rights and International Law* (Bloomsbury, 2000).

176 Takele Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 342.

177 African Charter art. 4: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

178 African Charter art. 16: '(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health. (2) States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.'

satisfactory environment[179] to accommodate water's interpretative inclusion as a right.

The African Commission's water jurisprudence covers both positive and negative duties.[180] In *Legal Assistance Group v Zaire*[181] it was held that the failure of the Zairean government to provide basic services including safe drinking water constituted a violation of the African Charter's article 16 right to the best attainable state of physical and mental health. The Commission interpreted article 16 as requiring that state parties 'should take the necessary measures to protect the health of their people'.[182] The Commission therefore found a violation based on Zaire's failure to comply with its positive duties to provide water. Similarly, in *Sudan Human Rights Organisation v Sudan*[183] the African Commission found the Sudanese government to be complicit in destroying wells and poisoning water sources in the Darfur region. Citing *Legal Assistance Group v Zaire*, the Commission also found a violation of article 16 of the African Charter in the poisoning of water sources that exposed the victims to serious health risks, a violation of the negative obligation to refrain from interfering with the right to water.[184]

In addition, while the *SERAC*[185] decision does not establish a right to water, it merits analysis for its approach to implicit rights. Here, the African Commission considered a communication alleging that the military government of Nigeria's oil production activities with various multinational corporations violated the Ogoni people's African Charter rights. The Commission established an implied right to food, which was violated through a breach of articles 4 (life), 16 (health) and 22 (development).[186]

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179 African Charter art. 24: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

180 See Manisuli Ssenyonjo 'The protection of economic, social and cultural rights under the African Charter' in D Chirwa and L Chenwi (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (CUP, 2016) 91.

181 *Legal Assistance Group v Zaire* [2000] AHRLR 74 (ACHPR 1995).

182 Ibid. [47].

183 *Sudan Legal Assistance Organisation v Sudan* [2000] AHRLR 297 (ACHPR 1999).

184 Ibid.

185 *Social and Economic Rights Action Centre (SERAC) v Nigeria* [2001] AHRLR 60 (ACHPR 2001).

186 The Commission determined that the government's destruction of food sources, along with its failure to prevent oil companies from doing so, amounted to a breach of a right to food, which right is 'inseparably linked to human dignity' and is implicit in the African Charter's rights to life, health, and economic, social and cultural development (*Social and Economic Rights Action Centre (SERAC) v Nigeria* [2001] AHRLR 60 (ACHPR 2001) [65]).

Although the complainant claimed a violation of the right to water through the contamination of water sources of the Ogoni population,[187] the African Commission did not pronounce on this claim.[188] Nevertheless, the Commission's approach to the right to life here was expansive in that it did not consider the deprivation of life in only the civil-rights sense. Instead, the Commission implicitly recognised the right to a certain *quality* of life in holding that 'the pollution and environmental degradation to a level humanly unacceptable has made living in the Ogoni land a nightmare'.[189] This rejection of the narrow interpretation of life is also seen in the African Commission's General Comment 3, which asserts a right to a dignified life which includes social and economic dimensions.[190] The Nairobi Principles embrace a similar approach.[191]

However, the African Commission has not been consistent in asserting the existence of a right to water. For example, the Commission's General Comment 3 mentions water only in so far as it pertains to the state's article 4 positive obligations to persons held in custody. Likewise, in *Institute for Human Rights and Development in Africa v Angola*[192] before the African Commission, the complainants alleged, among other things,

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187 *Social and Economic Rights Action Centre (SERAC) v Nigeria* [2001] AHRLR 60 (ACHPR 2001) [50].

188 See Bulto (n. 176) 345–346.

189 *Social and Economic Rights Action Centre (SERAC) v Nigeria* [2001] AHRLR 60 (ACHPR 2001) [67].

190 'General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)' [6], [43]. General Comment No. 3 was adopted during the 57th ordinary session of the African Commission on Human and Peoples' Rights held from 4–18 November 2015 in Banjul, The Gambia.

191 'African Commission Principles and Guidelines on Social and Economic Rights in the African Charter on Human and Peoples' Rights' (Nairobi Principles) [87]: 'While the African Charter does not directly protect the right to water and sanitation, it is implied in the protections of a number of rights, including but not, [*sic*] limited to the rights to life, dignity, work, food, health, economic, social and cultural development and to a satisfactory environment.' The Nairobi Principles were adopted at the 47th ordinary session, Banjul, The Gambia, 12 to 26 May 2010, formally launched at the Commission's 50th ordinary session in Banjul, The Gambia, from 24 October to 7 November 2011. For a drafting history of the Nairobi Principles, see International Justice Resource Centre 'Working Group on Economic, Social and Cultural Rights' <http://www.ijrcenter.org/regional/african/working-group-on-economic-social-and-cultural-rights/> (accessed 21 September 2023). For a critique of the Nairobi Principles, see Dejo Olowu 'A critique of the African Commission's draft principles and guidelines on economic, social and cultural rights in the African Charter' (2010) 11 *Economic and Social Rights Review* 7.

192 *Institute for Human Rights and Development in Africa v Angola* 2008 (AHRLR) 292/04 43.

the violation of detainees' right to dignity under article 5 of the African Charter as a result of the failure to provide adequate water for 500 detainees who had only two buckets of water between them for bathing. However, the Commission did not address the alleged violation of their right to water.[193] No reasoning for this silence is apparent in the decision.

While a derivative approach is a plausible avenue for asserting a right to water, it also invites us to assess – or at least be aware of – the limitations in a lack of an autonomous existence of a human right to water under the African Charter. Water rights cannot be claimed unless a 'parent right' is jeopardised by a lack of an adequate quantity or quality of water. Water's subservience to other rights under the African Charter arguably has the consequence of making water dependent on the 'main' right in the interest of which the right to water is protected.[194] Bulto laments that this lack of comprehensive legal protection of water in the African Charter, as the main regional[195] instrument, 'creates a hierarchy within a hierarchy, as it sits on the lowest rung of the already-marginalised socio-economic rights'.[196] It means that a right to water cannot be demanded *per se* and is thus susceptible to lying in the 'shadow' of other rights.[197]

In this context, what is unique about the African Charter and the African human rights system, more broadly, is that the system is not self-contained or insulated, given the explicit permissibility of interpretative inspiration from external human rights systems.[198] The African Commission has therefore had recourse to material from other sources such as the ESCR Committee's General Comments, including General Comment 15, as discussed earlier. While the Commission's jurisprudence has established a violation of predominately negative obligations and only a

193 Bulto (n. 176) 346. For a comparative perspective from the European Court of Human Rights, where failure to provide water was held to be a violation of ECHR art. 3, which prohibits cruel, inhumane and degrading treatment, see *Riad and Idiab v Belgium* ECHR (24 January 2008) App 29787/03 (French text), where asylum seekers were held to have been detained without adequate water for consumption and hygiene; *Tadevosyan v Armenia* ECHR 2 (2 December 2008) App 41698/04, where a detainee was not provided with adequate access to water and sanitation.

194 Bulto (n. 176) 347.

195 The SADC Treaty can also be a potential source of law, but it does not explicitly provide for a right to water and only refers to human rights as one of the principles of the member states (art. 4(c)). See G Matchaya et al. 'Justiciability of the right to water in the SADC Region: A critical appraisal' (2018) 7 *Laws* 18 25.

196 Bulto (n. 176) 342.

197 Ibid. 348.

198 African Charter art. 60 allows the Commission to draw inspiration from human rights sources beyond the African Charter.

few positive obligations of state parties in relation to water rights as derived from various 'parent' rights, it has also failed to articulate the normative content of such water rights.

It is worth emphasising the importance of regional systems generally and Africa's specifically, as being particularly salient in reflecting local values that cannot effectively be reflected in the international system. Hansungule has argued that the 'preoccupation with universal values, though important, can lead to a de-emphasis of certain peculiarities that are nonetheless basic to some societies', allowing for the opportunity to recall societal values for inclusion in the international system, in addition to what can be borrowed from other systems.[199] As Shelton states, regional systems 'have the necessary ability and flexibility to change as conditions around them change, yet are applied in response to regionally-specific problems; they achieve equilibrium between uniform enforcement of global norms and regional diversity'.[200]

3.4 Invoking ubuntu to imply water

Given that ubuntu is the antithesis of human suffering and deprivation, it can be deployed as a normative basis upon which an African constitution can 'create dependable [and durable] socio-economic transformation which safeguards human well-being'.[201] Taken collectively, ubuntu's principles of community, interdependence, solidarity and dignity affirm that all human beings should have access to not only all the means necessary for their survival but also those goods necessary for a dignified existence. Such goods would include the right to water.

Ubuntu also helps us overcome the argument that water can be implied from the right to life in African constitutions. A constitutional right to life should be understood in not only the civil-rights sense in which the state is prohibited from taking a life through capital punishment, the unjustified use of force, or other extra-judicial means. Ubuntu allows us to justify normatively a socio-economic dimension to life, in this case, water. When a constitutional right to life is grounded in ubuntu, it is recognised

199 Michelo Hansungule 'Protection of human rights under the Inter-American system: An outsider's reflection' in Gudmudur Alfredsson and Jakob Möller (eds) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th Möller* (Brill, 2001) 679, 684.

200 D Shelton 'The promise of regional human rights systems' in Burns Weston and Stephen Marks (eds) *The Future of International Human Rights* (Transnational Press, 1999) 351.

201 Makgato (n. 80) 68.

that, without the necessities to sustain human survival, life would be meaningless.

Furthermore, a right to life should not be understood as only the right of a person to exist in the purely biological sense of breathing, etc. Rather, a right to life, in the context of ubuntu, requires all the necessaries of life, which is understood through the prism of the dignity principle that compels us to value and respect individuals and their socio-economic status.[202] The principles of ubuntu, taken together, demand the recognition of the worth of an individual as a member of the community and that the right to life be constructed to require a *material* concern for the livelihood and socio-economic well-being of *all* members of society, which crucially includes their water needs.

In a water-scarce environment like Africa's, it is particularly apposite to apply the communitarian principles that inform ubuntu. As argued, this would be a moderate form of communitarianism, one that does not obscure the rights and interests of the individual to their personal water needs. Moderate communitarianism is also revealed by the solidarity principle accruing from ubuntu. This construction of ubuntu allows the individual-versus-community rights tensions that may arise to be carefully navigated by an understanding that, while individuals are communal in nature, they simultaneously retain individual free will and a vision of the life that they wish and choose to live. This construal would prioritise recognition of the intrinsic value of every individual constituting the community.[203] In line with Metz's application of ubuntu to social-economic aspects, the principle of respecting the communal nature of many African societies would require that we take heed of 'positive' human rights to socio-economic assistance.[204]

International law is resourceful in overcoming the civil-political-versus-socio-economic rights divide that treats the right to life as falling squarely within the latter category. In this regard, the ICCPR is instructive, relying upon the UN HRC's General Comment 36 to advance a broad interpretation of 'life' in article 6 of the ICCPR to include socio-economic dimensions.

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202 Himonga (n. 14) 179.

203 David Bilchitz 'What is a just distribution of resources?' in David Bilchitz, Thaddeus Metz and Oritsegbubemi Oyowe (eds) *Jurisprudence in an African Context* (OUP, 2017) 131, 159.

204 Thaddeus Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532 550.

3.5 Conclusion

This chapter has explored the concept of ubuntu in relation to water as a human right. Ubuntu, a philosophy deeply rooted in African culture, underscores the principles of community, interdependence, solidarity, responsibility, and dignity. While ubuntu is not explicitly mentioned in African constitutions, lawyers and judges can assert and ground it as an implicit constitutional value, enhancing the legitimacy of human rights in the African context and particularly in ameliorating the water access issues that too many Africans face.

This chapter also highlights the importance of imbuing human rights with local, participative approaches such as ubuntu, as this enhances the legitimacy of human rights principles. We advance ubuntu's centrality as an apposite value premise, given its wide acceptance and its alignment with African indigenous justice systems. The South African Constitutional Court's decision in *Makwanyane* played a pivotal role in pioneering the judicial explication of ubuntu as a legal concept, defining it as an ethos of love, respect, and acceptance within a community.

Although ubuntu lacks precise meaning and its abstractness raises dilemmas, we argue that one can nonetheless identify and apply its principles to comprehend ubuntu legally. These principles are community, interdependence, solidarity, responsibility, and dignity. Ubuntu's potential consistency with the nature of constitutional values makes it a valuable concept for incorporation within jurisdictions in Africa and beyond. Ubuntu promises to play a significant part in legal theory and judicial practice. As jurisdictions worldwide continue to grapple with the difficulties of interpreting and applying human rights principles within their unique cultural contexts, ubuntu offers a much-needed framework for understanding and implementing these principles. By emphasising community, interdependence, solidarity, responsibility, and dignity, ubuntu approaches human rights holistically, in a manner that factors in the social, cultural, and historical realities of local societies. By grounding constitutional interpretation in local values and traditions, ubuntu can bridge the gap between abstract principles and the lived experiences of communities. In this fashion, it can foster a sense of ownership and participation among citizens, as they see their norms and cultures reflected in the legal system.

Furthermore, ubuntu can contribute to a more inclusive and transformative approach to justice. In recognising the interconnectedness of individuals and communities, ubuntu challenges the well-established adversarial model of justice and encourages a more collaborative and restorative ethos. This can help develop alternative dispute resolution mechanisms that prioritise reconciliation, healing, and community restoration.

Finally, infusing ubuntu into legal theory and praxis requires that interpreters carefully balance cultural specificity and universal human rights standards. While ubuntu puts forth a tried-and-tested perspective rooted in African culture, interpreters should resist its invocation to justify or perpetuate practices that trample upon fundamental human rights. They must see to it that they construe and apply ubuntu in a manner that upholds the principles of equality, non-discrimination, and the autonomy of individuals, notwithstanding ubuntu's strong communitarian ethos. Such application calls for ongoing dialogue and engagement between jurists, practitioners, judges, and communities to ensure that ubuntu is understood and implemented in a way that promotes justice and human dignity for all.