OBUNTU-BULAMU AND THE LAW:

TOWARDS A NEW CONSTITUITONAL DISPENSATION IN UGANDA

ISAAC CHRISTOPHER LUBOGO

This is the first comprehensive book to address the relationship of *Ubuntu* to law in Uganda. It also provides the most important critical information on the use of *Ubuntu*, by the judiciary in Uganda. Although *Ubuntu* is an ideal or value rooted in Africa, its purchase as a performative ethic of the human goes beyond its roots in African languages. Indeed, this book helps break through some of the stale antinomies in the discussions of cultures and rights, since both the courts and the critical essays discuss ubuntu as not simply an indigenous or even African ideal but one that is its own terms calls for universal justification. The efforts of Courts to take seriously competing ideals of law and justice has led to original constitutionalism and law more generally. *Ubuntu*, then, as it is addressed as an activist ethic of virtue and then translated into law, helps to expand the thinking of a modern legal system's commitment to universality by deepening discussions of what inclusion and equality actually mean in a postcolonial country. Since *Ubuntu* claims to have universal purchase, its importance as a way of thinking about law and justice should not be limited to a few which has greatly incorporated the same, it but becomes important in any human rights discourse that is not limitedly rooted in Western European ideals. Thus, this book will be a crucial resource for anyone who is seriously grappling with human rights, postcolonial constitutionalism, and competing visions of the relations between law and justice.

This book will (attempt to) demonstrate the irony that the absence of the values of *Ubuntu* in society that people often lament about and attribute to the existence of the Constitution with its demands for respect for human rights when crime becomes rife, are the very same values that the Constitution in general and the Bill of Rights in particular aim to inculcate in our society.

Furthermore, the new call for an African renaissance that has now become topical globally, I would like to demonstrate the potential that traditional African values of *Ubuntu* have for influencing the development of a new Ugandan law and jurisprudence. I would like you to view this presentation as a contribution to the early debates on the revival of African jurisprudence as part of the total or broader process of the African renaissance.

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D E D I C A T I O N

I dedicate this book to the Almighty God, Creator of the Universe,
the God of “Ubuntu”

A C K N O W L E D G E M E N T S

Psalm 144:

"Blessed be the Lord my strength which teacheth my hands to war, and my fingers to fight: My goodness, and my fortress; my high tower, and my deliverer; my shield, and he in whom I trust; who subdueth my people under me."

Psalm 121:1-4:

"I will lift up mine eyes unto the hills, from whence cometh my help. My help cometh from the Lord, which made heaven and earth. He will not suffer thy foot to be moved: he that keepeth thee will not slumber. Behold, he that keepeth Israel shall neither slumber nor sleep."

"Rev. Dr. Martin Luther King once said and in my own perception about *Ubuntu-bulamu* "...No individual can live alone, no nation can live alone, the world in which we live in is geographically one, the challenge that we have today is to make it one in terms of brotherhood, we must learn to live together as brothers and sisters or we perish together as fools. We are tied to gather in a single garment of destiny. Caught in an inexcusable network of nuetrality. Whatever affects one directly, affects all indirectly. For some strange reason *[Ubuntu-bulamu]* I can never be what I ought to be." Rev. Dr King went on to quote John Donne and said "no man is an island entire of itself, every man is a piece of the continent, a part of the main...any man's death diminishes me because I am involved in mankind...No one suffers alone and being aware of another's pain only makes us stronger and more able to live."

A B S T R A C T

There is a patriotic obligation on all of us not to allow our Constitution and the idea of respect for human rights and dignity to slide into such disrepute.

This book will (attempt to) demonstrate the irony that the absence of the values of *ubuntu* in society that people often lament about and attribute to the existence of the Constitution with its demands for respect for human rights when crime becomes rife, are the very same values that the Constitution in general and the Bill of Rights in particular aim to inculcate in our society.

Furthermore, the new call for an African renaissance that has now become topical globally, I would like to demonstrate the potential that traditional African values of *ubuntu* have for influencing the development of a new Ugandan law and jurisprudence. I would like you to view this presentation as a contribution to the early debates on the revival of African jurisprudence as part of the total or broader process of the African renaissance.

The debate over whether or not *ubuntu* can be translated into a justiciable principle turns not only on the definition one gives to *ubuntu*, but also on how and why ubuntu can be considered an 'African' value. *Ubuntu*, or something very close to it, appears in most African languages what remains therefore is the complex ethno-philosophical questions of whether or not *ubuntu* actually represents a key ethical principle or ideal in African philosophy generally. In doing so one should be able to realise, at the very least, that the question of 'what is' and 'what can' constitute an 'African' legal philosophy lies at the very heart of this discussion. A related question therefore becomes what role should this African philosophy, including African political and ethical philosophy; play in the development of a constitutional jurisprudence for Uganda.

In this book, I construct an ethical principle that not only grows out of indigenous understandings of *ubuntu*, but is fairly precise and clearly accounts for the importance of individual liberty, and is readily applicable to addressing present-day Uganda as well as other societies. To flesh out these claims, I explain how the *ubuntu*-based moral theory I spell out how it serves as a promising foundation for human rights. Although the word *ubuntu* does not feature explicitly in most Constitutions that were ultimately adopted in some countries, my claim is that a philosophical interpretation of values commonly associated with *ubuntu* can entail and plausibly explain this book construal of human rights. In short, I aim to make good on the assertion made by sound Constitutional jurisprudence that *ubuntu* is the 'underlying motive of the Bill of Rights'.
Note that this is a work of jurisprudence, and specifically of normative

philosophy, and hence that I do not engage in related but distinct projects that some readers might expect. For one, I am not out to describe the way of life of any particular people. Of course, to make the label *ubuntu* appropriate for the moral theory I can struct, it should be informed by pre-colonial African beliefs and practices (since reference to them is part of the sense of the word as used by people in my and the reader's linguistic community). However, aiming to *create* an applicable ideal that has an African pedigree and grounds human rights, my ultimate goal in this book is distinct from the empirical project of trying to accurately *reflect* what a given traditional black people believed about morality something an anthropologist would do. For another, I do not therefore engage in legal analysis, even though I do address some texts prominent in African legal discourse. My goal is not to provide an interpretation of caselaw, but rather to provide a moral theory that a jurist could use to interpret caselaw, among other things.

I begin by summarizing the *Ubuntu*-based moral theory that is developed elsewhere and then articulate its companion conception of human dignity. Next, I invoke this concept of human dignity to account for the nature and value of human rights of the sort characteristic required as a sound Ugandan constitution.

I apply the moral theory to some human rights controversies presently facing Uganda (and other countries as well), specifically those regarding suitable approaches to dealing with compensation for land claims, the way that political power should be distributed, and sound policies governing the use of deadly force by the police. My aim is not to present conclusive ways to resolve these contentious disputes, but rather to illustrate how the main objections to grounding a public morality on *Ubuntu*, regarding vagueness, collectivism and anachronism, have been rebutted, something I highlight in the conclusion.

As with any other system, the *Ubuntu* philosophy and the African socio-cultural framework present some challenges. Most of the challenges that are reviewed are based on my experience and my own observation as part of the African community. The findings of others who have researched this and related questions are also referred to accordingly.

L A M E N T A T I O N

"*I have travelled across the length and breadth of Africa and I have not seen one person who is a beggar, who is a thief such wealth I have seen in his country, such high moral values, people of such caliber, that I do not think we would ever conquer this country, unless we break the very backbone of this nation which is her spiritual and cultural heritage and therefore , I propose that we replace her old and ancient education system, her cultural, for if the Africans think that is foreign and English is good and greater than their own, they will lose their self-esteem, their native culture and they will become what we want them, a truly dominated nation."*

Lord Macaulay's
Address to the British Parliament on 2nd Feb 1835

Table of Contents

CHAPTER ONE

OBUNTU-BULAMU AND THE LAW IN UGANDA: TOWARDS A NEW CONSTITUTIONAL DISPENSATION

1.1 Introduction

You might have much of the world's riches and hold a portion of authority, but if you don't have Ubuntu, you don't amount to much.
Archbishop Desmond Tutu (1999).

The law as it is today has undergone several modifications and development processes and currently provides guidance, rules, and sanctions on almost everything. In Africa, a continent with a strong customary and cultural foundation, there has been consistent contention as to the place of culture, customs and traditional norms. Many aspects of life in Africa are governed by customary laws and traditional institutions, which were before imperialism the only sources of law. It is now a phenomenon that customary rules exist and almost have to compete with bodies of Domestic Constitutional Law, Statutory law, Common Law, and International Human Rights Treaties (Fenrich et al,2011). African scholars have in fact suggested that despite developments in the law, *Ubuntu*, customs and traditional practices are still relevant, and that it is therefore important to ensure that they are properly codified and applied in jurisdictions in Africa. Some important aspects of customs include the role and power of traditional authorities; customary criminal law; customary land tenure, property rights, and intestate succession; and the relationship between customary law, human rights, and gender equality (Fenrich et al, 2011).

1.2 What is *Ubuntu*?

The term *Ubuntu* generally refers to the quality, potential or instance of being human; it embodies the notions of "personhood" and "humanness" and the

requisite qualities these notions espouse. It has been interpreted to mean: "I am because we are" (Tutu, 2013). The word *Ubuntu* is common in the Nguni dialects of Southern Africa and other Bantu languages spoken in different societies in sub-Saharan Africa (Hailey, 2006; Murithi, 2006). Popular variants of the term include *bumuntu* (Kisukama and Kihaya in Tanzania), *bomoto* (Bobangi in Congo), *gimuntu* (Kikongo and Gikwese in Angola), *umundu* (Kikuyu in Kenya), *umunthu* (Malawi), *vumuntu* (Shi Tsonga and Shi Twa in Mozambique), and *obuntu* (various ethnic groups in Uganda).

The concept of *Ubuntu* bodes with the very human existence and lies at the heart of legitimate and progressive communication relationships. As Archbishop Desmond Tutu asserts:

"*A person with Ubuntu is open, and available to others, affirming of others, does not feel threatened that others are able and skillful. He or she has a proper self-assurance coming from knowing that he or she belongs in a greater whole, and diminishes when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are" (Tutu, 2016).*

This observation seems to draw from Murove (2004), who suggests that the concept originated with the Bantu people as part and parcel of their cosmology and the implied individual ontology. There are different variants of the term *Ubuntu* in different ethnic communities and therefore its meanings, though similar, somewhat diverge, rendering the concept "general purpose" among different African cultures. In Uganda, for example, the Baganda in the central region talk of *obuntu bulamu* (humanness) and the Banyankole, Bakiga, Banyoro, and Batoro in the western region simply *obuntu* (humanness).

According to Broodryk (2002:17), it does not matter that different African languages have different names for *Ubuntu* because its basic meaning and worth remains the same for all Africans. In the landmark, South African constitutional case of *S v. Makwanyane* (CCT 3/94; [2012] ZACC 3; 2012 (6) BCLR 665; 2012 (3) SA), Justice Abbe Sachs described *Ubuntu* as a shared value and ideal that runs like a golden thread across cultural lines. Expounding on the *Ubuntu* values, he observed:

[Ubuntu] envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, […] in its fundamental sense it denotes humanity and morality (CCT 3/94, 308).

Interestingly, each of the six judges in *Re Makwanyane* who invoked *Ubuntu* laboured to describe the phenomenon but not to define or explain it. For instance, while Langa viewed the concept as "a culture which places some emphasis on communality and on the interdependence of the members of the community" (224), to Mokgoro it translates into "humanness" (308) and to Mahomed it "expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women" (263). The three viewpoints speak to a notorious lack of consensus on the definition of a concept that seemingly has a stable meaning.

There is indeed considerable difficulty in defining *Ubuntu* as an African concept. Mokgoro (1998) has observed that defining an African notion in a foreign language and from an abstract approach not only defies its very essence as an African concept, but its meaning can also be particularly elusive. The *Ubuntu* concept has also been viewed not merely as an African concept but generally as a worldview of African societies and a determining factor in the formation of perceptions that influence African social conduct (Broodryk, 1997; 2002). Unfortunately, this viewpoint has further complicated the definition of *Ubuntu* because as an African worldview, it cannot be neatly categorized and defined. It has thus been argued that any attempt at definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea (Mokgoro, 1998). Accordingly, the easier way of understanding *Ubuntu* is by experiencing it; as Mokgoro puts it, "*Ubuntu* is one of those things which you recognize when you see it" (Mokgoro, 1998:51; see also Bohler-Muller, 2005:267).

Nevertheless, the meaning of *Ubuntu* becomes much clearer when one views the concept – or worldview – from a vantage point of its social value. There is quite a volume of sources asserting that *Ubuntu* is an age-old collective philosophy of traditional African Bantu speaking peoples, which represents their shared traditional values and belief systems (Broodryk, 1997, 2002; Mbiti, 1991; Ramose, 2002; Gyekye, 1996). The values that *Ubuntu* encapsulates are the same across African societies: they espouse religious, cultural and philosophical importance for Africans (Kroeze, 2012:334; Pieterse, 2007:442); and most *Ubuntu* values are shared in their essentials by all African societies (Gyekye, 1996:55-56).

A body of anthropological literature positions *Ubuntu* as exemplifying how individuals, families, communities and societies should co-exist – an Afrocentric embodiment of values of compassion, reciprocity, dignity, humanity and mutuality in the interests of building and

maintaining communities with justice and mutual caring (Khoza,2006:6; Luhabe, 2002:103; Mandela, 2006: xxv; Tutu,2016:34-35). The *Ubuntu* application is pervasive in almost all parts of Africa and is integrated into all aspects of day-to-day life amongst people of Bantu origin despite the fact that the Bantu languages have evolved since the concept was first formulated (Rwelamila, Talukhaba & Ngowi, 2016:338). In short, *Ubuntu* is the basis of African communal cultural life. It expresses the interconnectedness, common humanity and the responsibility of individuals to each other (Koster, 996:99-118; Nussbaum 2003:21-26).

The element of group solidarity is particularly germane to *Ubuntu*. Some scholars have placed a particular emphasis on this element where solidarity is central to the survival of a community with a scarcity of resources, and where the fundamental belief is that a person can only be a person through others (see, e.g., Mbiti, 1991; Mokgoro, 1998; Tutu, 1999). Group solidarity also renders *Ubuntu*a distinctively African value that inherently embodies deep notions of inclusivity which, according to Keep and Midgley (2007), makes it an ideal overarching vehicle for expressing shared values. Inclusivity also renders *Ubuntu* very well suited to spearheading the development of a genuinely - plural legal culture.

1.3 Ubuntu and African jurisprudence

Ubuntu is an ancient African worldview characterized by community cohesion, group solidarity, mutual existence and other associated values. It is a value of great importance in African communities, and espouses some religious, cultural and philosophical importance for Africans (Kroeze, 2012). *Ubuntu* is thus a fundamental ontological and epistemological category in the African thought of the Bantu-speaking people and indeed lies at the root of African philosophy (Ramose, 1999; Pieterse, 2007). The value of the concept to African communities is manifested by the moral, religious, cultural and philosophical norms it espouses in African communities (Kroeze, 2012). *Ubuntu* is in fact considered the basis of African law (M'Baye, 1974:141; Ramose, 2002:81; Keevy, 2009:22).

African law, variously known as Bantu law, African customary law, African indigenous law, living customary law or unofficial customary law, is often contrasted with the codified version of African law known as codified customary law or official customary law (M'Baye, 1974; Ojwang, 1995; Mutwa, 1998; Bhengu, 2006; Keevy, 2009). This and other extant literature clearly regards African law as the unwritten and uncodified living law, that is,

living African indigenous or customary law representing the oral tradition (e.g. M'Baye, 1974:141; Ojwang, 1995:45; Keevy, 2009:22). As an unwritten law therefore, African law represents African oral culture – a scrupulously preserved tradition that was highly guarded and passed on by living it from generation to generation.

A cursory glance at the foregoing literature reveals a pervading presence of *Ubuntu* in African law. There are a number of references to *Ubuntu* in the different definitions and elaborations of African law. Notable examples are: "unwritten rules of behaviour which are contained in the flow of life" (M'Baye, 1974:141); "…equilibrium, justice, harmony and peace as the implicit aims of African law" (M'Baye, 1974:141); "the social control systems and the cultural orientation of the [African] societies [and] their shared values and beliefs" (Ojwang, 1995:45); "the seeds of local values and community morality" (Ojwang, 1995:56); and "social control, unity and cosmic harmony in African societies" (Ramose, 2002:81).

The *Ubuntu* aspect of African law was largely the driving force of the law regulating the relationships between African peoples in their traditional societies and consisted of the moral rules to be handed down between generations (M'Baye, 1974:149; Ebo, 1995:39, 145). In most African traditional communities, the *Ubuntu*-driven legal and judicial systems provided a considerable basis for face-to-face relations among the people, a means of dispute settlement, group solidarity and a common ideology (Ojwang, 1995:44, 56). These systems of law and justice constituted the African jurisprudence, which existed and regulated African societies long before the advent of colonialism.

Colonialism imposed on African communities a new legal system that was based on western values. This development undermined indigenous values and led to the marginalization, but not abolition, of the African systems of justice. As Ndima (2003) puts it, indigenous law was relegated to the margins. Even in the colonies or protectorates where African law was allowed to subsist, if not first subjected to the repugnancy test, it was distorted through the selective codification of customs. The codification of African customs particularly stripped African law of its *Ubuntu* character.

Colonialism thus created a dual system of law – a European legal system running alongside a European-made customary law. The latter was an official codified form of customary law, documented by Western anthropologists and academics who, as Roederer and Moellendorf (2004:449) observe, "lacked

nuanced understanding of many of the rules and practices they were recording." It has been further argued in *Bhe v. Magistrate Khayelitsha & Ors:*

> [T]his approach led in part to the fossilization and codification of customary law which in turn led to its marginalization. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances (CCT 49/03, 43).

This legal dualism, and particularly the alienation of codified customary law, had serious implications for the place and role of *Ubuntu* in the legal and constitutional jurisprudence of the colonial and post-colonial African state (Mamdani, 1996; Roederer & Moellendorf, 2004). In all unfairness, whether as an inadvertent or deliberate policy, colonialism treated customary law as primitive law and relegated it to native and traditional issues. The new dual system of law that rendered customary law inferior to Western law juxtaposed the individual and the group contrary to *Ubuntu* system of justice (Ebo, 1995:139). But the new legal system also juxtaposed the African community and civil society, tradition and rights, etc. (Mamdani, 1996).

The winds of change blowing across colonial Africa in the 1950s and 60s culminated in the attainment of independence in most African states. However, this independence did not lead to a reversal of the colonial legal system. The inferior role ascribed to customary law – the codified version of African law, devoid of *Ubuntu* – in the colonial state stifled its development into a formal legal discipline in the post-colonial state (Roederer & Moellendorf, 2004:450; Keely, 2009:28). The post-colonial constitutions and statutes not only retained oppressive colonial provisions, but they also failed to keep pace with changing social realities and to fully adopt *Ubuntu* values (*re Bhe,* 84, 86, 87 & 89). Little wonder then as Ndima (2003) observes, that despite the historical association with *Ubuntu*, the African legal system still bears vestiges of colonial domination.1.4 *Ubuntu* in Uganda's legal system

Uganda's legal system is based on the common law tradition adopted from English law and generally practiced throughout the British Commonwealth (Slapper & Kelly, 2016). Prior to British colonization of Uganda, there were a few kingdoms, a number of chiefdoms and decentralized tribal communities in the territory that was later amalgamated into one country. These entities operated traditional systems of justice based on *Ubuntu* – systems whose values were gradually undermined in favour of western values inherent in the British legal system (Dalgleish, 2005).

Uganda attained independence from Britain in 1962, but was soon after mired in political conflict that led to the abolition of kingdoms and other forms of traditional arrangements, and the introduction of a republican constitution in 1967 **(**Mutibwa, 1992; Ofcansky, 1996**)**. However, the declaration of a republic in 1966 did not change the western-oriented legal system.

In 1995, Uganda promulgated a new constitution that was more progressive in terms of human rights and civil liberties. Constitutions embody certain moral and ethical norms and values in the form of constitutional principles, which are sometimes explicitly stated and sometimes only derived through judicial interpretation (Helding, 2011). The legality and legitimacy of a constitution therefore depends on the principles it explicitly or implicitly advances. Thus the 1995 Constitution espouses some values which, though western, are associated with *Ubuntu*. These values are set out as constitutional principles in the Preamble to the Constitution and include unity, peace, equality, democracy, freedom, social justice and progress. Other *Ubuntu*-laden values are enumerated in the National Objectives and Directive Principles of State Policy (NODPSP), and include *inter alia*: national unity and stability (Objective III), protection of the aged (Objective VII), adoption and promotion of cultural and customary values (Objective XXIV), and fostering national unity, harmony and loyalty (Objective XXIX). Chapter 4 of the Constitution constitutes the Bill of Rights.

As already observed, the legal dualism created by colonialism had serious implications for *Ubuntu* in the legal and constitutional jurisprudence of the post-colonial African state. Not only did it render *Ubuntu* value system of justice inferior to the western constitutional system (Ebo, 1995) but it also juxtaposed indigenous traditions and human rights, vouching for the latter against the former (Mamdani, 1996). But this was a distortion, for *Ubuntu* and constitutionalism are convergent value systems. On this Mokgoro (1998:15) has observed:

> …the irony that the absence of the values of *Ubuntu* in society that people often lament about and attribute to the existence of the Constitution with its demands for respect for human rights when crime becomes rife, are the very same values that the Constitution in general and the Bill of Rights in particular aim to inculcate in our society.

This view on convergence is also held by Kroeze (2012:334) who explains: In the legal context the *Ubuntu* concept is used to give content to rights (as a constitutional value) and to limit rights (as part of the values of an open and democratic society). But in the process of

functioning within the rights discourse, the concept is also changed.

Both foregoing quotations suggest that there is more to gain from the complementarity than the juxtaposition of *Ubuntu* and western constitutional values.

Uganda is a multicultural country. As such, some aspects and values of *Ubuntu* are universally inherent to Uganda's multiple cultures. Indeed, the extant literature reveals a growing consensus that *Ubuntu* is a distinctively African value, inherently embodying deep notions of inclusivity and group solidarity. This makes *Ubuntu* an ideal overarching vehicle for the multicultural Uganda to express shared values; and in light of the western values that pervade its constitutional jurisprudence, it also places the country in a position to develop a genuinely plural legal culture – one that blends the values of western law with those from the different indigenous customs and traditions. For while *Ubuntu* is not synonymous with African Customary Law, as a fundamental value that informs the regulation of African interpersonal relations and dispute resolution, *Ubuntu* is nevertheless inherent to African Customary Law.

Despite its renown and the cherished African values, it embodies, *Ubuntu* is not always in consonance with the values of the national Constitution in general and the Bill of Rights in particular. Indeed, there are two major problems about *Ubuntu* as a constitutional value. The first is that *Ubuntu* values are not synchronized with the more pronounced western values in African national constitutions. The second, and more important, is the oft-contested legitimacy of *Ubuntu*. There is a corpus of literature that views *Ubuntu* as embodying some retrogressive and oppressive values (Keevy, 2009; Khumalo & Wieringa, 2005; Morgan & Wieringa, 2005), fostering "a deep-seated patriarchy that entrenches gender inequality and disregard for the dignity of African women" (Mokgoro, 1997:2; Arndt, 2002:138; Bhengu, 2006:129), and supporting some forms of inequality and discrimination such as homophobia (Nkabinde, 2008:131; Morgan & Wieringa, 2005:17).

Articles 37 and 129(1)(d) of the Ugandan Constitution imply that more than one system of laws are allowed to operate in the country. Read together with Objective XXIV of the NODPSP, however, these provisions also imply that the customary, religious, military and other laws may at times conflict with the democratic values of the Constitution. This can only be expected considering that the concept of *Ubuntu* is not a one-size-fit-all for all cultures, and certainly not easily blended with western values. Even after its classic

invocation in modern African constitutional jurisprudence in Re *Makwanyane*, the judgment demonstrates that the concept in its current form is riddled with deficiencies as a constitutional value (Bekker, 2006:335).

Thus, *Ubuntu* is well regarded as an important African value, but it lacks forceful provisioning within Uganda's constitutional framework. The Constitution makes no express mention of *Ubuntu* although it recognizes customary law under Article 37 and also provides in Article 129(1)(d) for Parliament to establish courts to apply customary and other custom-oriented laws. No such courts have been established, leaving such matters under the ambit of sections 10 and 11 of the Magistrates Courts Act (Cap 16) and section 15 of the Judicature Act (Cap13). On the whole, therefore, under the current constitutional dispensation, Ugandan courts are not *Ubuntu*-conscious and are thus not equipped to interpret constitutional values and entrenched rights in terms of the country's indigenous value systems. The constitutional values are based on the principles of unity, peace, equality, democracy, freedom, social justice and progress (Preamble, para
2) while rights are catalogued in Chapter 4.

In light of the silence on *Ubuntu* in Uganda's current constitutional dispensation, it is yet to be determined whether the values in the Constitution are at par with *Ubuntu* values, and whether they are elaborate enough to anchor *Ubuntu*- oriented legislative processes and judicial decisions. There is currently, to my knowledge, a paucity of empirical and doctrinal analyses of legislations and judicial decisions for *Ubuntu* content in Uganda, and whether any invocations of *Ubuntu* in judicial decisions are deliberate or otherwise. It could be that any reference to *Ubuntu* in judicial decisions is more out of judicial activism than constitutional sanction. Likewise, the all-embracing form of *Ubuntu* as it currently is cannot enable it to provide an effective, workable constitutional value. To effectively make *Ubuntu* and legal thinking part of the source of the constitutional values to be promoted, determining a possibility for a redefinition of the concept to link the value systems of both indigenous law and Western law with each other may be needed. Such an enormous project requires an understanding of what constitutes *Ubuntu* in Uganda, how the *Ubuntu* values are (or should be) engrained in the constitutional jurisprudence and invoked in judicial decisions, and what alignments can be made to take Uganda to an *Ubuntu*-oriented constitutional dispensation. Therefore, this book will examine the Ubuntu philosophy in light of the law in Uganda and how this creates a new dispensation for the law in Uganda.

This book will explore the meanings of *Ubuntu.* It will then focus on the constitutional provisions, and judicial decisions in Uganda for *Ubuntu* content. It will also interrogate the challenges to the application of *Ubuntu* in Uganda's Judicial system.

This book on *Ubuntu* and the constitutional and justice systems in Uganda is significant in a number of respects. It will make an original contribution to the existing body of knowledge on the subject of *Ubuntu* and contribute to the development of constitutional jurisprudence in Uganda. As such, the new *Ubuntu*-oriented constitutional dispensation will demand that Uganda requires courts to develop and interpret entrenched rights in terms of a cohesive set of African values, yet ideal to an open and democratic society. The book's interpretation of Uganda's indigenous value systems, which relate closely to the constitutional goals of a society based on dignity, freedom and equality. It therefore serves as a basis from which the interpretation of the Bill of Rights will proceed. The study therefore promotes the idea of *Ubuntu* as an over-arching and basic constitutional value, which could drive and assist the future jurisprudence of the Courts.

This book focuses on society and culture, society being the many ways in which two or more individuals connect; and culture being the ideas, beliefs, identity, and symbolic expressions of all kinds including language, art, entertainment, customs and rituals (McQuail, 2005). In all areas of discipline, individuals, families, communities, organizations, and intercultural, there is a dire need to communicate. This communication is done in many ways including the use of functioning and significant words (verbal), familiar signs and symbols, among others.

Ubuntu as a concept has gained scholarly attention especially in regard to its definition, role and impact. An over plus of literature touching on this subject exists across a broad section of disciplines including: Philosophy, Biology (Fabian 2001), Management, Theology, Community Development, Political Sciences, Linguistics, Literary criticism, Health care studies, Engineering to mention only a handful (Tutu, 2004; Tutu 2016). These works attempt to define the concept of *Ubuntu*, its role and impact. Surprisingly, there is a dearth of literature on *Ubuntu* within the context of international relations or development studies. In this section, I review existing literature on *Ubuntu*. It starts with different perceptions toward *Ubuntu* as a concept. It then goes ahead to show the practical applications of *Ubuntu*, in constitutional discourse and further shows the challenges that arise with *Ubuntu* philosophy.

1.5 Perceptions of *Ubuntu*

The term *Ubuntu* is portrayed differently by different sources: as a noun describing humanity or fellow feeling (Collins English Dictionary); as an activity characterized by sympathy, consideration for others, compassion or benevolence (Oxford Dictionary). On his part, Archbishop Desmond Tutu alive to the difficulty in rendering the term into a western language simplifies *Ubuntu* in personal terms thus: "*It has to do with what it means to be truly human, to know that you are bound up with others in the bundle of life" (Tutu 2016).*

Both highly personal and official legalistic approaches have been used to define *Ubuntu*. The former is visible in Archbishop Tutu's observation above suggesting that *Ubuntu* is the essence of humanity by espousing values such as being welcoming, hospitable, warm and generous, and willing to share (Tutu 2016). Similarly, the South African Government's 1996 White Paper on Welfare provides an understanding of *Ubuntu* as a principle of caring for each other's well-being, as well as providing mutual support to one another.

Scholars have described *Ubuntu* variously, for example, as: the backbone of many African societies (*id.*); an African way of viewing the world (Murithi 2006); and the total opposite of western communities that place the individual before the community (Dandala 1994). According to Mangaliso (2001), *Ubuntu* promotes genuine harmony and continuity in the wider human system. Scholars like Swartz (2006) seem to provide a limited understanding of *Ubuntu* by limiting it to South Africa where, he rightly observes, it has immensely contributed to shaping concepts of citizenship and morality since the end of apartheid. However, as it has been observed by Ramose (2016), *Ubuntu* is not limited to South Africa, let alone the Bantu speakers alone given its presence throughout sub-Saharan Africa including West Africa *Ubuntu* thus constitutes an underlying social philosophy in much of Africa (Nassbaum 2003).

Ubuntu is also commonly referred to as African humanism. As Gaylord (2004) points out that there is a history of humanistic thinking among African leaders commonly linked with the decolonialisation process and African socialism. This can be traced back through Kuanda's talk of "African humanism" in Zambia, Nyerere's introduction of "*ujamaa*" in Tanzania, and Nkrumah's concept of "conscientism" in the newly independent Ghana. These concepts all attempt to link spiritual and democratic values with the needs of economic development. However, African humanism should not just be seen through a Western philosophical lens, but as an indigenous process, even an art, related

to our humanity and the way our humanness is attained through our engagement with the wider community. It has also come to be associated with the idea of *Ubuntu* ethics which because of its emphasis on the individual and the community differs from the dominant western ethical paradigm that is rooted in the Cartesian dualism of mind and matter. *Ubuntu* also serves as the spiritual foundation of many African communities and cultures since it represents the core value of African ontology through ideas such as respect for human beings, for human dignity and human life, collectiveness hardness, obedience, humility, solidarity, caring, hospitality, interdependence, and communalism (Louw 2008).

1.6 Application of *Ubuntu* in constitutional discourse

Researchers are increasingly aware of the value of *Ubuntu* in facilitating practical developments in their area of study whether it be in community relations, healthcare, engineering or management. One of the more imaginative uses of *Ubuntu* as a way of analyzing a particular phenomenon was the way Fabian, as a cell biologist, used "cellular *Ubuntu*" as a way to describe some of the challenges facing his fellow cell biologists (Fabian 2001).

Through an analysis of the literature on *Ubuntu,* it is possible to identify five general areas where practical application is eminent. First to note, is the role in helping us value ourselves through our relationship with a particular community. Second to note, is *Ubuntu*'s role in community building, and third, its ability to encourage collective work and consensus building. Fourth, is *Ubuntu*'s potential role in conflict mediation and reconciliation, and fifth, its impact on organizational effectiveness and productivity.

Nussbaum (2003) suggests that *Ubuntu* is more appropriately described as "the capacity in African cultures" to express compassion, humanity and dignity. As such it has a critical role in building communities that are marked by equity, justice, mutual support and care. In this regard *Ubuntu* is therefore part of the process of promoting a community culture that emphasizes commonality and interdependence. It recognizes an individual's status as a human being who is entitled to respect, dignity and acceptance from other members of the community.

It can also be argued that *Ubuntu* has particular resonance with those concerned about building civil society, enhancing community relations and promoting social cohesion. In this context *Ubuntu*'s role in community development is about the "we" and our ability to accomplish things that we can

only do with others. It is about building "a network of delicate relationships of interdependence" These are networks that are marked by "affirmation and acceptance" of others. These relationships and networks are an organic and voluntary rather than the "associative instrumentalism" associated with many artificial or imposed community building initiatives found in many modern (western) societies (Battle 2000).

As such, *Ubuntu* is more than a philosophical construct. This can be seen when President Thabo Mbeki of South Africa regularly made calls to revive the values inherent in *Ubuntu* to assist in community and nation building, and help in creating a new South African identity. In a speech on Heritage Day 2005, President Mbeki claimed that "*Ubuntu* drives community members to act in solidarity with the weak and the poor and helps members of these communities to behave in particular ways for the common good". Following this call the National Heritage Council South Africa held annual meetings called "*Ubuntu* Imbizo" in different provinces. These involved across- section of the population and were intended to find ways to practice the values of *Ubuntu* and explore how it could be revived.

1.7 The downside of Ubuntu: challenges and criticisms

Most literature concerning *Ubuntu* takes a neutral to positive stance on its role and value in the contemporary world. However, it is important to note that there is a small but significant body of literature that has a more critical perspective on *Ubuntu* and its genesis, and which highlights some of the negative consequences of promoting *Ubuntu* and adopting its values. Thus, commentators like Louw (2008) talk about how *Ubuntu* reflects elements of totalitarian communalism which frowns upon elevating an individual above the community" and so can be overwhelming. He talks of the consequences in communities where tradition is venerated, continuity revered, change feared and difference shunned. Individualism is not tolerated. In a similar vein Themba Sono talks about the constrictive nature" or tyrannical custom of a derailed African culture which frowns upon one beyond the community (quoted in Louw, 2001).

This dark side of *Ubuntu* implicitly demands an oppressive conformity and group loyalty. Failure to conform can be met by harsh punitive measures. Archbishop Tutu himself opines that the strong group feeling has the weaknesses of all communalism in the way that it encourages conservatism and conformity (Battle, 2014). Marx (2002) was alarmed at way *Ubuntu* has been co-opted to serve the interests of a new cultural nationalism that

promotes conformity and stifles dissent. He argues it is an "invented tradition that appeals to the "idealised, a historical, pre-colonial Africa and which attempts to paper over "historical chasms and fractures". He sees as glorifying an imagined past and with its emphasis on community values it promotes an attitude of conformity.

Interestingly some of the most powerful critiques of the old order from which *Ubuntu* is derived can be found in recent South African literature. Es'kia Mphahlele and Phaswane Mpe are representatives of two generations of black South African writers, and in two of their best known books they both highlight the changing nature of indigenous societies in South Africa partly as a consequence of apartheid and partly because of increased urbanization.

Es'kia Mphahlele's novel *Down Second Avenue* (1959) tells of how an ordinary family tries to keep their family together and affirm basic decent human values, that is, *Ubuntu* values of caring, compassion, etc. It explores the dynamics of black urban life in 1950s where some vestiges of African humanism (or *Ubuntu*) manage to survive in the "collective memory". The novel explores evolving family relationships in the new black townships that grew through the 1950s and how the odds were stacked against them succeeding in creating a place and a community for themselves. Thus, by implication that the values associated with *Ubuntu* begun to be loss and could only be maintained in the subdued voices" of the family sitting together around the fireplace or in brief conversations around the communal water tap.

Phaswane Mpe's novel *Welcome to Hillbrow* (2001) develops this theme of the loss of *Ubuntu* through urban dislocation, and he challenges any easy invocation of *Ubuntu* or African humanism. The novel reveals the extent to which prejudice, intolerance and xenophobia are rife in communities in both rural and urban areas in contemporary South Africa. It lays bare the myth of rural innocence, and examines the suspicions, fear, prejudices and intolerance that are part of rural life and intolerance that manifests itself in its most extreme form in witchcraft accusations and killings. The story explores man's capacity for inhumanity and suggests that people in all kinds of societies (rural, urban, rich, poor, whatever) construct an opposition between self and others particularly those in the wider community and our immediate family or peers. The prejudices and intolerance explored in this book are a precursor to the tensions and xenophobic violence demonstrated in many South African townships in mid-2008 when local communities turned aggressively on new migrants from Zimbabwe and other African countries.

One of the tensions that runs through much of black literature is the tension

between the violence of society and the sense of communalism in many black communities. This resonates for those who directly experience the growing levels of violence and break down in the traditional social order in many different African communities. Even back in 1991 Archbishop Tutu was warning of the consequences of the losing the traditional values of Ubuntu. He was fearful that

"we in the black community have lost our sense of Ubuntu – our humanness, caring, hospitality, our sense of connectedness, our sense that my humanity is bound up in your humanity (Sunday Times 26/5/91)

Symptomatic of such concerns are the growing calls to revive the spirit of *Ubuntu*. For instance, the way that the National Heritage Council of South Africa (NHCSA) launched a campaign in August 2008 intended to revive awareness of *Ubuntu* in schools and other government institutions. They cited recent attacks on people from other countries as a symptom of a society that does not live up to *Ubuntu*. Those who know Africa well are concerned that the values *Ubuntu* embodies are in decline. One only has to look at the suffering in Zimbabwe, the Congo, the recent xenophobic violence in Johannesburg, and the rising levels of crime and violence throughout Southern Africa to understand their concerns. It is no consolation that such concerns come at a time when there is growing awareness of, and sympathy with, the principles of *Ubuntu* in western societies Finally some commentators such as Enslin and Horsthemke (2004), question the uniqueness of *Ubuntu*, and its value and efficiency as a practical guide to action and policy. Their study highlights some of the contradictions inherent in *Ubuntu* and explores how conflict between the principles and values implicit in *Ubuntuism* can be resolved if at all. This article is based on the premise that many of the elements of effective communities' democracy, citizenship and civil society are in fact universal. They are not culture specific and as a consequence one must not over-emphasize *Ubuntu's* role in community development or nation-building and that it has a cultural specificity that limits its wider application.

C H A P T E R T W O

2.0 Constitutional Origin of the Concept of Ubuntu

2.1 What is Ubuntu?

"***You might have much of the world's riches and hold a portion of authority but if you have no Ubuntu, you don't amount to much." Archbishop Desmond Tutu.***

From a linguistic perspective, the term Ubuntu comprises the "u" which is the abstract noun prefix "bound" and the noun "-ntu" meaning "a person", or "personhood" and "humanness" The word is common in the Nguni languages of Southern Africa, and other parts of Africa. (Hailey, 2008; Murithi; 2006 p.28). Examples include *botho* (Sesotho or Sotswana), *bumuntu* (Kisukama and Kihayi in Tanzania), *bomoto* (Bobangi in Cong), *gimuntu* (Kikongo and Gikwese in Angola), *Umundu* (Kikuyu in Kenya) *Umunti* (Uganda), *Umunthu* (Malawi), and *Vumuntu* (Shi Tsonga and Shi Twa in Mozambique). Therefore, it is prudent to note that *Ubuntu* has many meanings that are inexhaustible because this ethic or philosophy cannot be pinned down to have originated at a particular point in time in human history. But as the name suggests, it originated with African people (Bantu) as part and parcel of their cosmology and the implied individual ontology[1]. For instance, though in South Africa it is commonly known as *Ubuntu*, the same concept is found in different countries in Africa, holding similar, general purpose, among different African cultures, yet given different names. For instance, the Baganda in Uganda call it ***Obuntu bulamu (humannsess),*** in Northern Uganda, among the Acholi, it is called

Mato Oput, in Kenya, and the common slung used among Kenyans as a symbol of Unity is "***tuko pamojja****" (which means* ***we are together).***
Ubuntu is a Nguni word meaning the *quality of being human*. It's especially visible in human acts such as kindness in social, political and economic situations as well as family.[2] He further notes that *Ubuntu* is inherent and runs through our veins as Africans. ***Ubuntu ngu muntu ngabanye abantu****;* an African proverb meaning that a person is a person through other people. Therefore, we are all social beings who owe ourselves first to others then from them do we develop. "***No man is an island and one cannot pick up grains with one finger***." From the perspective of an observer, *Ubuntu* is evident through willing participation, warmth, openness, unquestioning co-operation and personal dignity.

Ubuntu additionally has a root word '***ntu***' meaning a person/ human being. The prefix '***ubu***' can be translated to mean humanity. Humanity therefore is not embedded in 'my person' solely but is co-substantively bestowed upon the other and me.[3] An extroverted community is the best definition of what *Ubuntu* is, openness and warmth with which strangers are welcomed and treated into the various homes.

The origin of *Ubuntu* can be traced as far back as 1846 where it first appeared in print in the book *I Testamente ensha*[4]. It was however not popularized in the

1 Ubuntu – Munyarandzi Felix Morove, University of KwaZulu Natal, South Africa, 2014

2 Buntu Mfenyana, a sociologist

3 Micheal Onyebuchi Eze, humanity is quality we owe to each other. We are because you are and since you are then definitely I am.

4 By HH Hare

West until the writings of Esmond Tutu *No Future without Forgiveness*[5] wherein he notes;
"***Ubuntu is very difficult to render into a Western language. It speaks to the very essence of being human. When we want to praise someone we say 'Yu unobunto'... 'Hey, so and so has Ubuntu.' It's also to say that my humanity is inextricably bound up in yours, we belong in a bundle of life."***[6]
Ubuntu has also been defined by various linguists, leaders and outstanding personnel. For instance, Leymah Gbowe[7] defines it as '*I am what I am because of who we all are.*' Bill Clinton[8] embraced the doctrine of *Ubuntu* in his charity organization by stating that the world, our vision and our time is too small and limited to waste any of it in fleeting victories at other people's expense. He continued to note that we have to find a way to triumph together.[9]

Nelson Mandela explains *Ubuntu* in an analogy; "*A traveller though a would*

stop at a village and didn't have to ask for food or water, because once he stopped, people would attend to him and offer him anything he needed. Ubuntu therefore isn't a question that people shouldn't enrich themselves but the question is rather, are you going to do so in order to enable the community around you to improve?"

The concept, *Ubuntu*, has over the years been used in a general sense to refer to an African philosophy of life.[10] It originates from the African idioms, '**Motho ke motho ka batho ba bangwe'** and '**Umuntu ngumuntu ngabantu'** which when loosely translated mean 'A person is a person through other persons', or, 'I am because we are; we are because I am'.[11] Research reveals that although the concept originates in pre-colonial African rural settings and is linked with indigenous

5 This was after he was appointed by Nelson Mandela to chair the Truth and Reconciliation Committee
that was to restore peace in South Africa after the apartheid.

6 Reconciliation: *The Ubuntu Theology of Desmond Tutu;* By Michael Battle.

7 A Liberian Peace activist.

8 Former US president

9 'If we are the most beautiful, intelligent and powerful and find that we are alone on the planet, it won't
amount to anything.' Bill Clinton's speech at the Labor Party Conference, UK 2006.

10 Mokgoro, J.Y. (2014) *Ubuntu and the Law in South Africa.* Paper presented at First Colloquium on Constitutional Law, Potchefstroom, South Africa,

11 Goduka, 2000; Ramose, 2016.

ways of knowing and being[12]; it is not easily definable because it tends to be thought of in diverse forms depending on the social context.[13] As a result various definitions and descriptions of ubuntu abound, these include:

- **An African philosophy of humanity and**
- **community'[14] An African cultural world-view'[15]**
- **A philosophy of becoming human[16]**

These definitions and descriptions depict the complex, elusive and multifaceted nature of the concept, *Ubuntu*, which in turn mirrors the multiple and shifting insights into African society and human relationships. Thus, confirming Mokgoro's (2014:3) argument that 'its social value will always depend on the approach and the purpose for which it is depended on'. It is clear that, while on one hand there seems to be a common understanding of ubuntu and what it stands for as a value system; on the hand, it can mutate and offer different meanings depending on the social context.[17]

However, despite these complexities, it is commonly understood that at the core of *Ubuntu* principles is the recognition of a value system that acknowledges

people as social and co-dependent beings. This is an ideal which expresses the need for a basic respect and compassion for others[18], promotes 'communalism and inter dependence'[19] and confirms that 'all human beings are connected not only by

12 Swanson, D.M. (2007) Ubuntu: an African contribution to (re)search for/with a 'humble togetherness', *Journal* of Contemporary Issues in Education, 2(2), 53-67.available at http://ejournals.library.ualberta.ca/index.php/JCIE/issue/view/56

13 Mokgoro, 2014; Anderson, 2003

14 Skelton A 2002 Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective *The British Journal of Criminology* 42:496-513 (2002)

15 Murithi.T, (2006), "Practical Peacemaking. Wisdom from Africa: Reflections on *Ubuntu*", Journal of Pan African Studies, Vol.1.4

16 Swanson, D.M. (2007) Ubuntu: an African contribution to (re)search for/with a 'humble togetherness', *Journal* of Contemporary Issues in Education, 2(2), 53-67. available at http://ejournals.library.ualberta.ca/index.php/JCIE/issue/view/56

17 Mokgoro JY (2016) The Protection of cultural identity and constitution at the creation of National Unity in South Africa: A contradiction in terms? *SMU Law Reviews*, 52, 1549-1562

18 Louw, D.J. (2003) *Ubuntu and the Challenges of Multiculturalism in Post-Apartheid South Africa.* Sovenga, South Africa: University of the North.

19 Mapadimeng, M.S. (2009).p.258 Culture versus religion: a theoretical analysis of the role of indigenous African culture of Ubuntu in social change and economic development in the post-apartheid South African society.

ties of kinship but also by the bond of reciprocity rooted in the interweaving and inter dependence of all humanity.'[20] *Ubuntu* espouses values that tend to be associated with societal wellbeing, including: consensus, agreement and reconciliation, compassion, human dignity, forgiveness, transcendence and healing.[21] Thus, it was expected that with the advent of the post-apartheid era in South Africa, ubuntu, as the only lived and commonly understood value system, should be extended to incorporate notions of nation building, transformation, reconstruction and transition into a democracy.[22]

Ubuntu principles underlie conceptions of the various sectors of the new democracy in South Africa and have played a major role in influencing the restructuring of various policies on governance in the government, public and economic sectors. Some of the government and the judiciary policies informed by *Ubuntu* values include:

- The Child Justice Bill of 2008 on juvenile justice reform which advocates the re-habilitation of children who violate the law and their reintegration into society on ubuntu principles[23]
- The abolition of the death penalty was adopted by the constitutional court as a ubuntu principle in 2012[24] and
- The TRC, under the leadership of Archbishop Desmond Tutu, incorporated the values of peacemaking as espoused in *Ubuntu* as part of a national drive to bring about a form of socio-political reconciliation in a

society divided along racial lines.[25]

It is clear that; the South African government espouses *Ubuntu* not only as a once off conflict resolution mechanism, but, more importantly, it looks to *Ubuntu* as a culture, that is, a way of life in the new democracy.

20 Goduka, 2000, p.70
21 Tutu, 2012; Mokgoro, 2016.
22 Mbigi 2012, Skelton 2002; Swanson 2007
23 Skelton A 2002 Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective *The British Journal of Criminology* 42:496-513 (2002)
24 Anderson, A.M. (2003) Restorative Justice, the African Philosophy of *Ubuntu* and the Diversion of Criminal Prosecution. Available at *http://www.isrcl.org/Papers/Anderson.pdf*
25 Mapadimeng, 2007; Murithi, 2006.

Ubuntu exemplifies how individuals, families, communities and societies should co-exist. Examples of such practices abind in many South African communities. For instance, in townships it is commonly accepted that neighbors should co- operate and support each other in various ways. The word 'neighbor' in North Sotho, one of the indigenous South African languages, is 'moagisane'. This word has a deeply ingrained meaning that demands that families, neighbors and communities should work together, cooperate and support each other as a unit. It is a common practice to expect a neighbor to ask for simple things such as salt, a cup of sugar, an onion or two potatoes. Neighbors understand the silent and unwritten code that 'I am able to support and help you today and that tomorrow or next week I might need your assistance and I know you will do the same for me'. This practice is also extended to various occasions such as weddings and funerals, where the silent and unwritten code is applied; without any formal invitation, neighbors can turn up at a wedding or funeral to assist the family with preparations and the cleaning up afterwards.

Growing up as a black female one of the more powerful practices I have come to admire and now also practice myself is instances where women group themselves, in what is referred to as 'societies', which provide a support for them in various ways, including financial and emotional support. Considering the harsh nature of the discriminatory, Apartheid laws, for instance, 'societies' offered a means for township women to provide for their children's education because they knew that they could rely on the support of other women in the community to assist them with school or university fees. However, I have to concede that these practices seem to be losing ground and in some instances are being frowned upon for various reasons. But, what is noteworthy is that pockets of these practices still exist and it seems the interest in such practices is being revived as communities realize the importance of *Ubuntu*: 'I am because we are; we are because I am'. Of interest is that the younger generation of women and men are

also becoming involved with this practice in particular, because they have come to realize the importance of co- existence in a community as a way of life that sustained their mothers and families.

2.2 Early Constitutional Written Sources on *Ubuntu*

Gabriel Setiloane has stated that the term '*Ubuntu*' was first used in South African writing in an address to a conference, which was held in Durban in 1960 and Tom Lodge has explained that *Ubuntu* was first given a systematic written exposition in the works of Jordan Kush Ngubane who, to my knowledge, did not use the term '*Ubuntu*' in writing before the 1960s[241]. Furthermore, Wim van Binsber- gen has explained that the first publication on *Ubuntu* known to him is the Samkanges' *Hunhuims or Ubuntuism: A*

237 Nkrumah 1964: 70
238 Nkrumah 1964: 69
239 Senghor 1962: 20
240 Ibid
241 See Lodge 2016: 99

Zimbabwe Indigenous Political Philosophy (1980).[242] Among the authors who have been writing about *ubuntu* during the last twenty years, I have not been able to find anyone who has mentioned that the term '*ubuntu*' appeared in writing prior to the second half of the twentieth century. Personally, I have discovered as many as 31 texts from before 1950, which contain the term '*Ubuntu*', the oldest of which is from 1846. I have located the texts with the help of Google Books, which allows one to search the entire contents of more than ten million texts.

My findings indicate that prior to 1980, *Ubuntu* was most commonly described as (and here I list the oldest descriptions first):

1. '*Human nature*' (Appleyard 1850: 106; Perrin 1855: 120; Colenso 1855: 7; Colenso 1861: 354; Roberts 1880: 107; Grout 1893: 290; Roberts 1895: 133; McLaren 1955: 25; Bryant 1963: 232; Callaway 1969: 22).

2. '*Humanity*' (Callaway 1926: 395; Wilson 1936: 555; Doke 1945: 60; Walker 1948: 220; Van Sembeek 1955: 42; McLaren 1955: 25; Malcolm 1960: 163; Doke *et al.* 1967: 54; Rodegem 1967: 129; Callaway 1969: 22; Thompson 1969: 129; Epstein 1967: 379; Pauw 1973: 89; Thompson & Butler 1975: 158 & 160; Clarke & Ngobese 1975: 34; Livingston 1979: 128).

3. '*Humanness*'(Egenbrecht 1962: 22; De Vries 1966: 121; Thompson & Butler 1975: 158; Samkange 1975: 96; Lissner 1976: 92; Ziervogel *et al.* 1976: 58; Krige *et al.* 1978: 152; Du Plessis 1978: 48).

In some texts from before 1980, *ubuntu* is also described as:

4. '*Manhood*' (Colenso 1861: 354; Wilson 1936: 555; Callaway 1969: 22).
5. '*Goodness of nature*' (Colenso 1861: 354).
6. '*Good moral disposition*' (Colenso 1861: 354).
7. '*Virtue*' (McLaren 1918: 332).
8. '*The sense of common humanity*' (Barnes 1935: 46).

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242 Van Binsbergen. 2001: 82

'True humanity' (Callaway *et al.* 1945: 11).
10. '*True good fellowship and sympathy in joy and in sorrow*'(Callaway *et al.* 1945: 11).
11. '*Reverence for human nature*' (Callaway *et al.* 1945: 29).
12. '*Essential humanity*' (Shepherd & Paver 1947: 41).
13. '*The kindly simple feeling for persons as persons*' (Brookes 1953: 20).
14. '*Manliness*' (Van Sembeek 1955: 42; Callaway 1969: 22).
15. '*Liberality*' (Kagame 1956: 53).
16. '*A person's own human nature*' (Read 1959: 149; Read 1968: 80).
17. '*Generosity*' (Kimenyi 1979: 75).
18. '*Human feeling*' (Jabavu 1960: 4).
19. '*Humaneness*' (Prideaux 1925: 269; Vilakazi 1962: 60; Nyembezi 1963: 47; Nyembezi 1970: 16).
20. '*Good disposition*' (Nyembezi 1963: 47).
21. '*Good moral nature*' (Nyembezi 1963: 47).
22. '*Personhood'* (Reader 1966: 175).
23. '*Politeness*' (Rodegem 1967: 129).
24. '*Kindness*' (Rodegem 1967: 129; Callaway 1969: 22).
25. '*Real humanity*' (Sabra Study Group of Fort Hare 1971: 121).
26. '*Humanity (benevolence)*' (South African Department of Bantu Education 1972a: 129).
27. '*Personality*' (South African Department of Bantu Education 1972b: 153).
28. '*Human kindness*' (Jordan 1973: 228).
29. '*The characteristic of being truly human*' (Pauw 1975: 117).
30. '*Greatness of soul*' (Thompson & Butler 1975: 213).
31. '*A feeling of human wellbeing*' (Clarke & Ngobese 1975: 61).
32. '*Capacity of social self-sacrifice on behalf of others*' (Hetherington 1978: 68).

In a number of texts from before 1980, the term 'quality' appears in descriptions of *Ubuntu* and in many texts, *Ubuntu* is evidently considered to

be a very positive quality. As shown above, *Ubuntu* has, for example, been described as 'goodness of nature', 'good moral disposition', and as 'greatness of soul'. Whilst some authors simply describe *Ubuntu* as a 'human quality'[243] others emphasize that *Ubuntu* is a quality connected to a specific group. More specifically, *Ubuntu* is described as an 'excellent African quality,'[244] a quality among 'the admirable qualities of the Bantu'[245] and 'an essentially Native quality'[246]. My results also include authors who state that *Ubuntu* is a quality that blacks possess and whites lack[247], and an author who explains that: 'Initiation is a ladder to humanity (*Ubuntu*) and respect'[248].

Prior to 1980, the level of disagreement about the nature of *Ubuntu* does not seem to have been as great as it is today: all of the descriptions cited above can be interpreted as descriptions of a human quality. Three things should be noted in this connection. Firstly, it should be noted that the descriptions which I have listed above are short, and that it is difficult to judge whether the authors identified *Ubuntu* as a human quality, or as something else. A term such as 'humanity' is, for instance, ambiguous: it might refer to a human quality, but it can also refer to the members of the human race in total.
Secondly, regardless whether all the authors identified *Ubuntu* as a human quality, exactly how they understood the relation between being human and having the quality of *Ubuntu* remains unclear. Did the different authors, for instance, believe that all humans possess the quality of *Ubuntu*? And did they believe that human beings may possess the quality of *Ubuntu* to different extents? Thirdly, should it be the case that the authors identify *Ubuntu* as a human quality, it is unclear whether they understand the quality of *Ubuntu* to be simple or complex. An author such as Godfrey Callaway, for example, provides a number of different descriptions of *Ubuntu*. Does this indicate that he understood *Ubuntu* to be a rather complex, multi-faceted quality?

243 Doke 1945: 36; Calpin *et al*. 1953: 56
244 Davis *et al*. 6142
245 Smith 1950: 18
246 Southern Rhodesian Department of Native Affairs 1950: 34
247 Jabavu 1960: 4; Thompson & Butler 1975: 158 248
Pauw 1973: 89

I have located three texts from the 1970s in which *Ubuntu* is identified as 'African humanism' (Africa Institute of South Africa 1975: 177; Brey-Tenbach 1975: 177; Ngubane 1979: 261). The texts do not explain what African humanism is, so it is possible that their authors understood African humanism as something different from a human quality. Furthermore, at one point in *An African Explains Apartheid* (1963), Jordan Kush Ngubane writes

that:

‘***Supreme virtue lay in being humane, in accepting the human being as a part of yourself, with a right to be denied nothing that you possessed. It was inhuman to drive the hungry stranger from your door, for your neighbour’s sorrow was yours. This code constituted a philosophy of life, and the great Sutu-nguni family (Bantu has political connotations that the Africans resent) called it, significantly, ubuntu or botho – pronounced butu – the practice of being humane (Ngubane 1963: 76)’.***[249]

In ***Conflicts of Minds*** **(1979), Jordan Kush Ngubane** also defines *Ubuntu* as ‘the philosophy which the African experience translates into action’[250], Newell Snow Booth explains: ‘The concept of *Ubuntu*, the recognition of a person as a person, is basic to the ethics of all the southern Bantu’ .[251] Furthermore, in *Black Villagers in an Industrial Society* (1980), Philip Mayer relates that: ‘the occurrence of the same ideas through the whole spectrum of Blacks from the least educated, leaves no doubt that the main source was in African philosophy, in the concept of *Ubuntu* which is associated with kindness, gentleness, humility, respect and love’.[252] The quotations above show that a few authors began using the terms ‘philosophy’ and ‘ethic’ to describe what *Ubuntu* is towards the end of the period 1846 to 1980. Still, the findings indicate that after the term ‘*Ubuntu*’ first appeared in writing in 1846, more than a century passed before the first authors began to associate *Ubuntu* with a philosophy or an ethic.

It is impossible, if not utterly futile, to define *Ubuntu* with any degree of conviction. This is due to a number of reasons, two of which follow. First,

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249 *An African Explains Apartheid* 1963

250 Ngubane 1979: 113). In *African Religions: A Symposium* (1977 251 Booth 1977: 15

252 Mayer 1980: 70

Ubuntu is a loan-word in the English language. Therefore, the term has no concrete meaning in the English language outside its vernacular context. Second, U*buntu* reflects an African world - view that is arguably too broad and expansive to fit into a definition in the western legal sense. For natives, *Ubuntu* is an idea of how to appropriately relate to fellow human beings.

Despite the lack of meaning, there have been various attempts to at least understand the normative content of the idea of *Ubuntu*. The most useful attempt comes from Mokgoro J who describes *Ubuntu* as:

[a] Philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is basically a humanistic orientation towards fellow beings.[253]

It should be cautioned that because *Ubuntu* represents a world - view, it should not be taken outside of the social context which underlies its social meaning and value. The idea envelops other broad values, such as 'group solidarity, conformity, human dignity, humanistic orientation and collective unity' Commentators have warned of a superficial, out-of-context perception of the idea of *Ubuntu*. A world - view cannot be neatly packed into a definition without the risk of oversimplification, and without watering down its more expansive, flexible and philosophically accommodating ideal nature.
Ubuntu is not a static concept; its social value evolves with its social context. According to Mokgoro J, *Ubuntu* has been invoked 'as a basis for a morality of co- operation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the

253 Mokgoro, J.Y. (2014) *Ubuntu and the Law in South Africa.* Paper presented at First Colloquium on Constitutional Law, Potchefstroom, South Africa, 31 October.

time emphasizing the virtues of that dignity in social relationships and practices'.[254]

The next part: consider how *Ubuntu* was introduced into South African law and how the concept has been understood by the courts in their jurisprudence. The purpose of the next part is to show that *Ubuntu* is now a constitutional value firmly rooted in our Constitution and understood as such in our case law.

2.3 Understanding the African Ubuntu Philosophy

I will now begin by addressing the issue of the nature of African philosophy and how an understanding of this relates to the recollection and re-imagination of African gnosis[26]. Second, I will attempt to expand from this discussion of gnosis and explore whether *Ubuntu* can be used as a justiciable principle. Third, to show how *Ubuntu* might be deployed, both as a founding legal ideal

and as a working legal principle, examine several cases such as the Mukwanyane case[27].Susan Kigula case[28] and Salvatori Abuki Case[29], and Mifumi Cases[30]. Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazzi,[31] R V. Amkeyo,[32] Mwenge v. Migadde[33] Uganda v Alai,[34] Kabali V. Kajubi[35] Salvatori Abuka and others v Attorney General,[36] Uganda Association of Women Lawyers and 5 others v Attorney General[37] Law Advocacy for women in Uganda v Attorney General,[38] Mifumi (U) Ltd & Anor v Attorney General,[39] Bestie Kemigisha v Mable Komuntale[40], Rev. Christopher Mtikila v Attorney General[41]

As already noted the word Ubuntu is derived from a Nguni (Zulu) aphorism: *Umuntu Ngumuntu Ngabantu*, which can be translated as "a person

26 VY Mudimbe in "The invention of Africa: Gnosis, philosophy, and the order of knowledge" (1988) 186. defines it: . . . means seeking to know, inquiry, methods of knowing, investigation, and even acquaintance with someone. Often the word is used in a more specialized sense, that of higher and esoteric knowledge, and thus it refers to a structured, common, and conventional knowledge, but one strictly under the control of specific procedures for its use as well as transmission.

27 *S v Makwanyane* 1995 3 SA 391 (CC)

28 A.G VS. Susan Kigula and 417 others Constitutional Appeal No. 03 of 2006

29 Salvatori Abuki AND Richard Abuga VS. A.G Constitutional Case No. 2 of 1997

30 Mifumi (U)Ltd AND Another VS. A.G AND Another Constitutional Case No. 12 of 2007, and also Constitutional Appeal No. 02 of 2014

31 Civil Suit No. 52 of 2006 32 (1917) KLR 14

33 (1933) ULR 97

34 [1967] EA 596

35 Where there was a challenge in the distribution of property after the death of Kajubi's father and yet he had left many children behind Kajubbi as the first born, and the heir, argued that the children born out of the official marriage (customary marriage), deserved no property completely, while the clan head argued contrary.

36 Constitutional Appeal No. 02 of 1997

37 Constitutional Petition No. 2 of 2002

38 Constitutional Petition No. 13/05 & 05/06 of

39 Constitutional Appeal No. 02 of 2014 40 [2015] UGSC 13

41 Civil Case No.5 of 1993

is a person because of or through others" **(Moloketi, 2009:243; Tutu, 2004:25-26).** *Ubuntu* can be described as the capacity in an African culture to express compassion, reciprocity, dignity, humanity and mutuality in the interests of building and maintaining communities with justice and mutual caring **(Khoza, 2006:6; Luhabe, 2002:103; Mandela, 2006: xxv; Tutu, 2016:34-35).**

The *Ubuntu* application is pervasive in almost all parts of the African continent. Hence, the *Ubuntu* philosophy is integrated into all aspects of day-to-day life throughout Africa and is a concept shared by all tribes in Southern, Central, West and East Africa amongst people of Bantu origin **(Rwelamila, Talukhaba & Ngowi, 2016:338).** Although the Bantu languages

have evolved since the concept was first formulated, the meanings and principles of *Ubuntu* are the same in all these languages. Examples of the derivatives of the term in the Bantu languages are summarized in Table 1, below.

Table 1: Derivatives of *'Ubuntu'* in Bantu languages

Ubuntu Derivative	Bantu Language	Source
Abantu,Obuntu-bulamu	Uganda	Broodryk (2005:235)
Botho or Motho	Sesotho	Broodryk (2005:235)
Bunhu	Xitsonga	Broodryk (2005:235)
Numunhu or Munhu	Shangaan	Broodryk (2005:236)
Ubuntu, Umtu or Umuntu	isiZulu and isiXhosa	Broodryk (2005:236)
Umunthu	Ngoni, Chewa, Nyanja and Bemba (Malawi, Zambia, Mozambique, and Zimbabwe)	Own observation
Utu	Swahili (Own: Tanzania, Kenya and Uganda)	Broodryk (2005:236) Own Observation
Vhuntu or Muntu	Tshivenda	Broodryk (2005:236)

Source: Adapted from Broodryk (2005:235-236) and own observation

The application of the *Ubuntu* philosophy optimizes the indigenous setting of an African organisation. The *Ubuntu* philosophy believes in group solidarity, which is central to the survival of African communities.[42] An African is not a rugged individual, but a person living within a community. In a hostile environment, it is only through such community solidarity that hunger, isolation, deprivation, poverty and any emerging challenges can be survived, because of the community's brotherly and sisterly concern, cooperation, care, and sharing.[43]

Nobel Prize winner and former president of the Republic of South Africa,

42 Dia, 1992; Mbigi & Maree, 2005:75.
43 Ibid

Nelson Mandela describes *Ubuntu* as a philosophy constituting a universal truth, a way of life, which underpins an open society **(Mandela, 2006)**. The *Ubuntu* philosophy does not mean that people should not address themselves to a problem, but it does imply that they should look at whether what they are doing will enable or empower the community around them and help it improve.[44]

The *Ubuntu* philosophy also implies that if people are treated well, they are

likely to perform better.[45]

Practising the *Ubuntu* philosophy unlocks the capacity of an African culture in which individuals express compassion, reciprocity, dignity, humanity and mutuality in the interests of building and maintaining communities with justice and communalities.[46] Respect and love amongst the community members play an important role in an African framework. The African view of personhood rejects the notion that a person can be identified in terms of physical and psychological features. *Ubuntu* is the basis of African communal cultural life.[47] It expresses the interconnectedness, common humanity and the responsibility of individuals to each other.[48]

The above descriptions of the *Ubuntu* philosophy bring to light that an African society is, in general, humanist, community-based and socialist in nature. The *Ubuntu* philosophy therefore underpins any grouping within an African society. Such groupings include formal organisations that operate within local communities. Thus, the African *Ubuntu* philosophy can play a significant role in corporate performance, as it influences the internal operations of an organisation that operates in an African environment.[49]

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44 Mandela.N, (1994), A Long Walk to Freedom, Little Brown, Boston
45 Ibid
46 Poovan, Du Toit & Engelbrecht, 2006:23-25.
47 Ibid
48 Koster, 1996:99-118; Nussbaum,2003:21-26.
49 Ibid

In dealing with this issue one ought to understand that the very question of what constitutes African philosophy cannot be separated from the brutal imposition of colonialism on the continent of Africa. I will attempt to analyze the complexity of epistemological legitimation. Who, in the last few centuries at least, has been given the right and credentials to write, describe, and produce opinions of what is African philosophy? In addressing this question about right and credentials, I must also grapple with the issue of how African gnosis, has inevitably and inextricably been bound up with the social scientific constructs of a Western episteme.[50] This definition of gnosis, at least, gives us a word that yields a form of knowledge that cannot be reduced to doxa, or opinion, or episteme understood as a scientific or social scientific construct associated with the so-called modern West Gnosis.[51]

It is often noted that *Ubuntu* resists easy definition.[52] It has been described variously as an age-old and traditional African world-view, a set of values or a philosophy of life which plays a strong and defining role in influencing social

conduct.[53] Swartz[54] says that *Ubuntu* offers a "unifying vision of community built upon compassionate, respectful, inter dependent relationships" and that it serves as "a rule of conduct, a social ethic, and the moral and spiritual foundation for African societies." Unsurprisingly, then, scholarly and philosophical debates concerning the proper ambit of *ubuntu* - what it does and does not refer to - are frequently complex and highly contested.

Some have argued that it cannot be given expression satisfactorily using non-African vocabulary. Former Constitutional Court Justice Yvonne Mokgoro writes[55]

'The concept ubuntu, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach is to defy the very essence of the African world - view and can also be particularly

50 Koster, 1996:99-118; Nussbaum,2003:21-
51 Ibid
52 See, for example, Mokgoro 1998 *PELJ* 2-3; Bennett 2011 *PELJ* 30-2; and Himonga 2013 *Journal of African Law*173.
53 Mokgoro 1998 *PELJ* 2.
54 Swartz 2006 *Journal of Moral Education* 560.
55 Mokgoro1998 *PELJ* 2-3.

elusive...Because the African world-view cannot be neatly categorized and defined, any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea'.

Ubuntu is a distinctively African value and, according to Keep and Midgley, it inherently embodies deep notions of inclusivity, making it an" ideal overarching vehicle for expressing shared values" and rendering it very well suited to spearheading the development of a genuinely plural legal culture.[56]

My chief aim is to understand the content given to *ubuntu* by the Uganda judiciary, how it has been implemented in application, and the purpose it is serving.

Kroeze explains that:

'In the legal context the ubuntu concept is used to give content to rights (as a constitutional value) and to limit rights (as part of the values of an open and democratic society). But in the process of functioning within the rights discourse, the concept is also changed'.[57]

Presumably this means that once the judiciary begins to interpret a concept within a particular legal setting, its content will inevitably become tied to these

interpretations. This might involve a level of change of conceptual content[58]

A remarkable feature of the treatment of *Ubuntu* in the jurisprudence thus far is the virtual absence of reference to historical and philosophical writings from Africans about the concept. Whilst not an extensive body of literature, it exists and is thoughtful, analytical and comparative insofar as intra-continental opinions and debates are canvassed.[59] Consequently, the near-total absence of

56 Keep and Midgley Emerging Role of *Ubuntu*-botho" 48.

57 Kroeze 2002 *Stell LR* 252-253.

58 No judgment has been more notable for its explication of *Ubuntu* as a legal concept than *S v Makwanyane*, in which the Constitutional Court decided, unanimously, that implementation of the death penalty was unconstitutional. Seventeen years later it is possible to trace the central strands of the subsequent development of the interpretation of *Ubuntu* back to the remarks made in this ruling. The remainder of this section highlights various dimensions of *Ubuntu* identified and explained by different members of the Constitutional Court bench in *Makwanyane*.

59 It is beyond the scope of this article to engage with that body of literature.

reference to such writing, especially in *Makwanyane*[60], is notable. Even more remarkable, thus, is the enduring value attached to the Constitutional Court's pronouncements on *ubuntu* in *Makwanyane*[61], since a reasonable inference is that these pronouncements were largely subjective and personal views about the concept. Uganda becomes therefore most fortunate to learn from such thoughtful, wise and open-minded Justices on the *Makwanyane*[62] bench.

This new constitutional dispensation would demand that Uganda requires courts to develop and interpret entrenched rights" in terms of a cohesive set of values, ideal to an open and democratic society this interpretation should be inclusive of Uganda's indigenous value systems, which relate closely to the constitutional goal of a society based on dignity, freedom and equality. While acknowledging that a function of the Constitutional Court is to protect the rights of vulnerable minorities. *Ubuntu* could serve as a basis from which interpretation of the Bill of Rights could proceed hence promoting the idea of *Ubuntu* as an over-arching and basic constitutional value, which could drive and assist the Court's future jurisprudence.

It became clear in *Makwanyane*[63] that the status of *ubuntu* as a constitutional value means that it is an inherently normative notion. Like many other ethically- loaded constitutional concepts - such as "**dignity**", "**freedom**", "**equality**", "**inhuman**", "**cruel**", and so on - definitional questions about *Ubuntu* are closely bound up with moral questions. In my view, the task is to strive towards a shared and accepted understanding of *Ubuntu* for the purposes

of communication about how to interpret the Bill of Rights and other aspects of a democratic society based on dignity, freedom and equality.

Ubuntu recognizes the humanity of each person and the entitlement of all people to unconditional respect, dignity, value and acceptance" from one's community.[64] Every person has a corresponding duty to show the same respect,

60 *S v Makwanyane* 1995 3 SA 391 (CC)
61 *S v Makwanyane* 1995 3 SA 391 (CC)
62 *S v Makwanyane* 1995 3 SA 391 (CC)
63 *S v Makwanyane* 1995 3 SA 391 (CC)
64 *S v Makwanyane* 1995 3 SA 391 (CC) para 224.

dignity, value and acceptance to each member of that community. Inherent to this communality are the ideas of mutual enjoyment of rights by all, sharing and co-responsibility. An "outstanding feature" of *Ubuntu* is the value it puts on life and human dignity. *Ubuntu* signifies emphatically that the life of another person is at least as valuable as one's own "and that respect for the dignity of every person is integral to this concept". Life and dignity are" like two sides of the same coin "and" the concept of *Ubuntu* embodies them both as envisaged by approval in the statement in the preamble of the *International Covenant on Civil and Political Rights* that "human rights derive from the inherent dignity of the human person.

My book provides a critical engagement with the evolution of the judicial reception of *Ubuntu* in the courts from the adoption of the 2012 *Constitution* until the present times. My contribution could have been synthesized and presented in several different ways.[65] I will adopt a different approach from those taken by Keep and Midgley and by Bennett.[66] Instead of following their pattern of discussing the material under the different areas of law, I have chosen to place emphasis on (a) chronology (historical trajectory) and (b) thematic development. I have two aims in making this choice.

First, after noting the importance of the role of *ubuntu* in the Constitutional Court's first case - *S v Makwanyane*[67], Susan Kigula Case[68], Salvatori Abuki Case[69], and the Mifumi(U)Ltd Cases[70] Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazi,[71]. R V. Amkeyo,[72] Mwenge v. Migade[73] Uganda v Alai,[74]

65 It bears mentioning that our approach differs considerably from that taken by Cornell and Muvangua *Ubuntu and the Law*, which consists of case extracts for two-thirds and a collection of essays for the rest of the book.
66 Bennett 2011 *PELJ* 30-2.
67 *S v Makwanyane* 1995 3 SA 391 (CC).
68 A.G VS. Susan Kigula and 417 others Constitutional Appeal No. 03 of 2006
69 Salvatori Abuki AND Richard Abuga VS. A.G Constitutional Case No. 2 of 1997

70 Mifumi(U)Ltd AND Another VS. A.G AND Another Constitutional Case No. 12 of 2007, and also Constitutional Appeal No. 02 of 2014
71 Civil Suit No. 52 of 2006 72 (1917) KLR 14
73 (1933) ULR 97
74 [1967] EA 596

Kabali V. Kajubi[75] Salvatori Abuka and others v Attorney General,[76] Uganda Association of Women Lawyers and 5 others v Attorney General[77] Law Advocacy for women in Uganda v Attorney General,[78] Mifumi (U) Ltd & Anor v Attorney General,[79] Best Kemigisha v Mable Komuntale[80], Rev. Christopher Mtikila v Attorney General[81]

I present a critical commentary that engages with scholarly contributions on the Court's approach in such cases. The analysis explains and responds to various criticisms. Thereafter, I emphasize a temporal division between the treatment given to *Ubuntu* by the courts before **any serious jurisprudence in Uganda and** I show that **several decisions now in Uganda have** led to a wave of *Ubuntu*- inspired judgments that heralded a new era. I also track chronological patterns in respect of particular themes, in particular the link between *Ubuntu* and restorative justice if any in Uganda and Charting, analyzing and understanding the development of *Ubuntu* in chronological terms, I will submit, a valuable end in itself and open up debate about notable temporal developments in the use of the concept of *Ubuntu*. These developments are not simply random but appear to have a pattern. I will attempt, therefore, to make some sense of this. This approach makes possible a picture of the historical trajectory of the use of *Ubuntu* in Uganda's jurisprudence.

Secondly, although *Ubuntu* can be applied to virtually any area of law and hence its development has not always followed a clear thematic path, I think there is scholarly value in emphasizing a particular thematic strand in the judicial application of the concept of *Ubuntu*, namely its link to restorative justice. This general theme has been a driving force behind the application of *Ubuntu* to several divergent areas of law, such as criminal law, defamation law and

75 Where there was a challenge in the distribution of property after the death of Kajubi's father and yet he had left many children behind Kajubbi as the first born, and the heir, argued that the children born out of the official marriage (customary marriage), deserved no property completely, while the clan head argued contrary.
76 Constitutional Appeal No. 02 of 1997
77 Constitutional Petition No. 2 of 2002
78 Constitutional Petition No. 13/05 & 05/06 of
79 Constitutional Appeal No. 02 of 2014 80 [2015] UGSC 13
81 Civil Case No.5 of 1993

eviction cases. While it is certainly useful to examine these cases in terms of these different areas of law - something will also do - believe it is important to analyze the cases within the broader theme of restorative justice. This enables me to highlight the deep connection between these different cases despite their differing areas of law.

In sum, this thesis argues that *Ubuntu*, whether as a value or a legal norm, is not a technocratic concept. Efforts to pin it down and to contain it within overly strict boundaries or definitions are misguided. Proper understanding of this concept calls for wisdom and open-mindedness. This does not, however, mean that *Ubuntu* has a mercurial nature that changes according to its context. Rather, it is more like humanity in its diversity, and serves to remind us that our diversity should not cover up our humanity, lest we forget.

2.4 Ubuntu: a diversity of definitions

There is clearly a diversity of ways of understanding the meaning of the term *Ubuntu*. This is well reflected in the contrasting definitions offered by different dictionaries. The Collins English Dictionary suggests that it is a noun describing humanity or fellow feeling, while the Oxford Dictionary portrays it as an activity that is characterized by sympathy, consideration for others, compassion or benevolence. The specifics of trying to define or translate the term *Ubuntu* are formidable. **Archbishop Desmond Tutu (2016)** noted that *Ubuntu* is very difficult to render into a western language other than to say it is "my humanity is caught up, is inextricably bound up, in what is yours".

Different approaches to defining *Ubuntu* range from the official legalistic approaches as found in government documents to the highly personal. The latter is reflected in **Archbishop Tutu's (2016)** comment that "you know when *Ubuntu* is there, and it is obvious when it is absent. It has to do with what it means to be truly human, to know that you are bound up with others in the bundle of life". He sees *Ubuntu* as "the essence of being human and that it is part of the gift that Africa will give the world". His approach to ubuntu suggests that his (or my) humanity is caught up and is inextricably bound up in yours. "I am human because I belong. It speaks about wholeness. It speaks about compassion".[82] He sees a person with *Ubuntu* as someone who is welcoming, hospitable, warm and generous, and willing to share. Such people are open, affirming and available to others. They are willing to be vulnerable, do not feel threatened that others are able and good for they have a proper self-assurance that comes from knowing that they belong to a greater whole.[83]

Such a highly personal commentary can be compared with the more formal approach adopted in the South African Government's 1996 White Paper on Welfare that identified *Ubuntu* as "the principle of caring for each other's wellbeing…. and a spirit of mutual support.[84] Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through recognition of the individual's humanity. *Ubuntu* means that people are people through other people. It also acknowledges both the rights and responsibilities of every citizen in promoting individual and societal wellbeing".[85] This definition, while couched in the formal language of a government document, still manages to capture the same spirit of ubuntu that Archbishop Tutu espouses.

From a linguistic perspective the term *Ubuntu* comprises the pre-prefix u-, the abstract noun prefix buand, the noun stem –ntu, meaning person, which translates as personhood or humanness.[86] The term "*Ubuntu*" as commonly found in the Nguni languages of southern Africa, and words with a similar meaning are found throughout sub-Saharan Africa. For example: both (Sesotho or Setswana), bumuntu (Kisukuma and Kihayi in Tanzania), bomoto (Bobangi in Congo) and gimuntu (Kikongo and Gikwese in Angola), umundu (Kikuyu in Kenya), umuntu (Uganda), umunthu (Malawi),

82 Tutu.D, (2004), God Has a Dream: A Vision of Hope for our Time, Doubleday, New York
83 Ibid
84 Tutu.D, (2004), God Has a Dream: A Vision of Hope for our Time, Doubleday, New York
85 Ibid
86 Kamwangamalu.N, (2016), "Ubuntu in South Africa: A Sociolingistic Perspective to a Pan-African Concept", Critical Arts, Vol.13.2

vumuntu (Shitsonga and Shitswa in Mozambique).[87]

2.5 Ubuntu: The Philosophical and Moral Underpinning

Commentaries on ubuntu either see it in terms of a set of common characteristics or behaviours (valuing others, kindness, compassion, etc) or as representative of a wider value system or paradigm. It is increasingly used as a "catch-all" term used to characterize the norms and values that are inherent in many traditional African societies, and used to illustrate the way individuals in these communities relate to others, and the quality and character of their relationship. This section explores some of the different perspectives that have shaped the philosophical and theological underpinning of *Ubuntu* as a concept or paradigm.

2.6 Ubuntu: Philosophical Perspectives

One increasingly important perspective is that *Ubuntu* represents a wider worldview or belief system rather than just a set of discernible characteristics. **Nyathu (2004),** for example, has written that *Ubuntu's* importance as a value system is seen in the way that it has "been the backbone of many African society" and it is "the fountain from which many actions and attitudes flow".[88] **(Nyathu 2004)**.

He sees it as a statement of being that encapsulates the fundamental elements that qualify any person to be human[89].

Murithi (2006) talks of *Ubuntu* as an African way of viewing the world. It is a worldview that tries to capture the essence of what it means to be human.[90] Even more ambitiously **Dandala (1994)** suggests that ubuntu is a "cosmology" that defines the "harmonic intelligence" that is an intrinsic part of local cultures in Southern Africa, and is at odds with the western ideas

87 Kamwangamalu.N, (2016), "*Ubuntu* in South Africa: A Sociolingistic Perspective to a Pan-African Concept", Critical Arts, Vol.13.2

88 Nyathu.N, (2005), The Ubuntu Dialogue: Decolonising Discourse and Dualism in Organisation Studies, Masters Dissertation

89 Ibid

90 Murithi.T, (2006), "Practical Peacemaking. Wisdom from Africa: Reflections on Ubuntu", Journal of Pan African Studies, Vol.1.4

of communities that appear increasingly geared to individuality and competition. In this regard *Ubuntu* can be defined as our humaneness.[91] A persuasive spirit of caring and community, harmony and hospitality, respect and responsiveness that individuals display to one another. It is able to promote genuine harmony and continuity throughout the wider human system.[92]

Ramose (2016) suggests that "African philosophy has long been established in and through *Ubuntu* … there is a family atmosphere, that is, a kind of philosophical affinity and kinship among and between the indigenous people of Africa". He notes that the philosophy is not merely restricted to Bantu speakers but is found throughout sub-Saharan Africa including West Africa; For example, in Senegal the concept of "Teranga" reflects a similar spirit of collective hospitality and responsibility.[93] More specifically **Swartz (2006)** calls *Ubuntu* a "pervasive African philosophy" that has been part of the process of shaping concepts of citizenship and morality in post- apartheid South Africa.[94]

Ubuntu can be seen as the underlying social philosophy in much of Africa. However, as **Nussbaum (2003)** points out there is much misunderstanding in the West as to the nature such an indigenous African construct. She suggests

that this partly the product of the oral nature of traditional culture in Africa and the lack of written commentaries on ubuntu. But also because of the negative portrayal of African society in the western media.

There is a general agreement among writers on *Ubuntu* that it represents an alternative voice to the European and North American philosophical and theological discourses that dominate so much of our thinking. It is not grounded in the dominant Cartesian epistemology that informs so much of our

91 Dandala.H, (1996), "Cows never die: embracing African cosmology in the process of economic growth", in Lessem.R & Nussbaum.B (eds.), Sawabona Africa, Zebra, Johannesburg
92 Mangaliso 2001
93 Ramose.M.B, (2016), African Philosophy through Ubuntu, Mond Books, Harare
94 Swartz.S, (2006), "A long-walk to citizenship: morality, justice and faith in the aftermath of aparthied", Journal of Moral Education, Vol.35.1
95 Nussbaum (2003)

conceptualizing and understanding in the West, and to some extent been quashed by the dominant techno-rationalist mindset that pervaded so much of our thinking in the 20th Century.

2.7 Ubuntu as African Humanism

Ubuntu is also commonly referred to as African humanism. As Gaylord (2004) points out there is a history of humanistic thinking among African leaders commonly linked with the decolonialisation process and African socialism.[96] This can be traced back through Kuanda's talk of "African humanism" in Zambia, Nyerere's introduction of "ujamaa" in Tanzania, and Nkrumah's concept of "conscientism" in the newly independent Ghana. These concepts all attempt to link spiritual and democratic values with the needs of economic development.[97]

African humanism should not just be seen through a Western philosophical lens, but as an indigenous process, even an art, related to our humanity and the way our humanness is attained through our engagement with the wider community. It has also come to be associated with the idea of ubuntu ethics which because of its emphasis on the individual and the community differs from the dominant western ethical paradigm that is rooted in the Cartesian dualism of mind and matter.[98]

Ubuntu serves as the spiritual foundation of many African communities and cultures **(Louw 2008).** It is a multidimensional concept that represents the core value of African ontology's such as respect for human beings, for human dignity and human life, collective sharedness, obedience, humility, solidarity, caring, hospitality, interdependence, and communalism.[99] While

these are all values that are valued in the west they are not emphasized to the same extent. In the west we might talk of "I think therefore I am" whereas

96 Gaylord.R, (2004), "African humanism, ubuntu and black South African writing", Journal of Literary Studies, Vol.20.3-4
97 Ibid
98 Gaylord.R, (2004), "African humanism, ubuntu and black South African writing", Journal of Literary Studies, Vol.20.3-4
99 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to 20th World Congress of Philosophy, Boston

the *Ubuntu* version would be translated as "I am human because I belong". Thus, *Ubuntu* can be seen as a radical reflection of our humanity, yet also has the universal appeal of traditional community values.

In conclusion, it is clear that *Ubuntu* is not a concept that is easily distilled. It permeates the life and thinking of many in Africa. It seeks to honour our humanity and the key role of relationships in all forms of social, communal or corporate activity. But as **Louw (2008)** suggests it also has a spiritual dimension that should not be underestimated and has been the source of inspiration to theologians and clergy alike.[101]

2.8 Ubuntu: Moral Perspectives

While *Ubuntu* has been seen by some writers as African humanism or a cosmology, for others it is "resiliently religious" **(Prinsloo, 2012)**, and expresses the "religiousity or religousness of the religious other" **(Louw 2001).**

It is apparent that there is a natural synergy between Christian values and *Ubuntu*. Archbishop Tutu, who is rooted in a strong Christian tradition and the broader Anglican Fellowship, has regularly preached about the closeness of this relationship. His work and that of other theologians in South Africa has given rise to the idea of "ubuntu theology" – where ethical responsibility comes with a shared identity **(Louw 2008, Battle 2000, Tutu 2004).**[102] Thus if someone is hungry, the ubuntu response is that we are all collectively responsible for their hunger and have a shared obligation to alleviate his or her suffering. Tutu's political contribution must also be seen in the context of his theology of ubuntu. He would see this as a form of relational spirituality that connotes the basic connectedness of human beings as distinct from some form of godless system that emphasizes either social instrumentality or individual competitiveness and selfishness **(Battle 2000).**[103]

100 Ibid
101 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to
102 20th World Congress of Philosophy, Boston
103 Louw 2008, Battle 2000, Tutu 2004
104 Battle.M, (2000), "Atheology of community: the *Ubuntu* theology of Desmond Tutu,

Battle (2014) sees Tutu as an "instrumental" theologian, not a passive or an academic theologian, but an active theologian who encourages discourse between African and Western voices through a liberation spirituality that emphasizes mutual identity.[104] This characteristic has become one of the hallmarks of ubuntu theology. Battle sees ubuntu as a traditional African concept that Tutu appropriated for his own purposes. His concept of ubuntu is one nourished by worship, and which clearly has a spiritual dimension. In biblical terms it begins with creation with its message our human identity is shaped in the image of God.[105]

Tutu sees *Ubuntu* as a theological concept in which human beings are called to be persons because they are made in the image of God. *Ubuntu* rests on the knowledge that human existence is inextricably bound up with God's creation and that a solitary human being is a contradiction in terms. This can be seen in the way that Tutu interprets the Adam & Eve story. He suggests that it wasn't good for man to live alone and that the creation of Eve was necessary to make man whole. In other words that we need each other, and that "you and I are made for interdependency" **(Battle 2000).**[106] Of the four vectors of Tutu's *Ubuntu* theology Battle suggests that the first is interdependence, and the way *Ubuntu* theology builds interdependent communities in which we can only discover who we are through others. Second, it recognizes individuals as having distinctive identities, and that we should rejoice that God had created people differently. Third, it has combined the best of African and Western cultures to produce a new and distinctive theology. And fourth, it was strong enough to address the issues raised by apartheid.[107]

Tutu's theological model is highly inclusive (2004). Relationships are central to his theology in helping us acquire our humanity. Ubuntu in this context

105 Battle.M, (2014), Reconciliation: The Ubuntu Theology of Desmond Tutu, Pilgrim Press, Cleveland
106 Battle.M, (2014), Reconciliation: The Ubuntu Theology of Desmond Tutu, Pilgrim Press, Cleveland
107 Battle.M, (2000), "A theology of community: the *Ubuntu* theology of Desmond Tutu,
108 Battle.M, (2000), "A theology of community: the *Ubuntu* theology of Desmond Tutu,

represents the claim that human identities are uniquely made to be more co-operative than competitive.[108] This is reflected in the African concept of "seriti" which identifies the life force by which a community of persons are connected to each other. Tutu's *Ubuntu* theology stresses that human means must be consistent with human ends. In practice this includes seeking to restore the oppressor's humanity by enabling the oppressed to see their oppressors as "peers under God". This sentiment is reflected in one of his favourite biblical

texts "For Jesus himself is our peace who has made the two, one, and has destroyed the barrier, the dividing wall of hostility, by abolishing in his flesh the law with his commandments and regulations"

2.9 Ubuntu as a Transformative Theology

The ethos of ubuntu has an influential transformational power that resonates across time and around the world. As a consequence, theologians have begun to explore how the elements of Ubuntu relate with the theology of others whose thinking has been shaped by extreme suffering and oppression. For instance, how the theology of Dietrch Bonhoeffer (a German theologian, pastor and member of the Germanresistance against the Nazis who was hung in ***Flossenburg in April 1945)*** *evolved in the face of Nazi persecution and seemed to reflect characteristics commonly found in Ubuntu theology. Such analysis has highlighted the challenge of how to re- awaken the vision and practice of ubuntu in deprived and dysfunctional communities in Southern Africa*[110].

The spiritual dimension that is inherent in much of our thinking about *Ubuntu* has been shaped by the plurality of faiths and beliefs that can be found throughout Southern Africa. These draw on the long chain of human experience, both indigenous and colonial, which connects the present with both the past and the future.[111] A common thread that runs all these is the *Ubuntu* and Christian ethos of treating others as we would like to be treated, and how the fortunate should lend a helping hand to the unfortunate.

109 Tutu, D. (2004). God Has a Dream: A Vision of Hope for Our Time, NY: Doubleday
110 Ephesians 2.14
111 Barrett.P, (2008), "The quest for ubuntu is a coming-age South Africa: Questions arising from Dietrich Bonhoeffer's latter ideas", Religion and Theology, Vol.15.1
112 Battle.M, (2000), "A theology of community: the *Ubuntu* theology of Desmond Tutu

2.10 Ubuntu: Its Practical Application

Researchers are increasingly aware of the value of ubuntu in facilitating practical developments in their area of study whether it be in community relations, health care, engineering or management. One of the more imaginative uses of *Ubuntu* as a way of analyzing a particular phenomena was the way Fabian, as a cell biologist, used "*cellular ubuntu*" as a way to describe some of the challenges facing his fellow cell biologists.[112]

In an analysis of the literature on *Ubuntu* it is possible to identify five general areas where has practical application. First, its role in helping us value ourselves through our relationship with a particular community. Second, is *Ubuntu's* role in community building, and third, its ability to encourage

collective work and consensus building. Fourth, is *Ubuntu's* potential role in conflict mediation and reconciliation, and fifth, its impact on organisational effectiveness and productivity. The following review of the practical role and application of *Ubuntu* demonstrates that it is more than a philosophical construct but is of practical value and benefit.

2.11 Ubuntu: Valuing Individual Identity and the Community

One of the most commonly cited attributes of *Ubuntu* is the way that it helps individuals value their own identity through their relationship with the community. *Ubuntu* is about developing your "fullness of being" through your relatedness and relationship with others.[113] It identifies human beings as "beings with others" and prescribes what "*being with others*" should be all about **(Louw 2008).** Or what **Shutte (1993)** calls a web of reciprocal relationships in which subject and object become indistinguishable, and in which the western aphorism "I think, therefore I am" is substituted for "I participate, therefore I am".[114]

113 Fabian.B, (2001)," Cellular ubuntu and other problems for cell biologists in the new millenium", Cell Biology International, Vol.25.1

114 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to 20th World Congress of Philosophy, Boston

115 Shutte, Augustine. 1993. Philosophy for Africa. Rondebosch, South Africa: UCT Press. ISBN 0799214876ISBN 9780799214871

Bill Clinton on Ubuntu

One of the more memorable attempts to explain this rather complex, contradictory and ambiguous construct was during a speech at the British Labour Party's Annual Conference in 2006 when Bill Clinton used the concept of ubuntu to emphasize the need for co-operation and community spirit. He argued that "society was important because of Ubuntu", and that any individual, whatever their race or gender, needs others to become fulfilled. That being the most intelligent or beautiful human alone on the planet would "not amount to a hill of beans" if there was no one else there to appreciate you. He argued that we need to relate to, and engage with, others in the community if we are to thrive and feel positive about ourselves and the way we lead our lives.

While the connectedness of all human beings beyond such differences as race, ethnicity, gender, or religion is central to the application of *Ubuntu* in practice, it also acknowledges the importance of their individuality and independent identity.[115] This is not in the Cartesian or modernist sense of the atomistic

self which seem to exaggerate solitary aspects of the human existence to the detriment of communal aspects. But more in terms of the multiplicity of relationships that any individual may have or the way they relate to others.[116] This can be seen either in terms of personal behaviours (such as respect or compassion) or as a broader "rule of conduct or social ethic" that guides individual behaviour. Whatever way it is described there is a general acceptance that ubuntu is characterized by a preference for co- operation, group work or "shosholoza", rather than individual competitiveness. It favours solidarity over solitary activities**.**[117]

2.12 Ubuntu in Metaphors and Proverbs

Ramose (2016) *notes that the term "ubukhosi" which is*

116 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to |20th World Congress of Philosophy, Boston

117 Ibid

118 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to 20th World Congress of Philosophy, Boston

commonly used in Zimbabwe also metaphorically mirrors the statement "umuntu ngumuntu ngabantu" which some translate as "aipersoniis aipersonni through other persons".[118] *Nussbaum i(2003) suggests that such connectivity is also portrayed in such indigenous aphorisms and proverbs as: "Your pain is My pain, My wealth is Your wealth. Your salvation is My salvation", or the Sotho saying "It is through others that one attains selfhood", or through the slogan "an injury to one is an injury to all".*[119]

She argues that these metaphorically capture our interconnectedness, our common humanity, and our shared responsibilities. In other words, it is the community rather than the self that is the essential part of our personhood.[120]

Such a greetings (or acknowledgements of identity) have a particular significance in South Africa where perceptions of "self" (the individual, the person, the human) were so diminished during the brutality and oppression of the colonial and apartheidyears.

Such proverbs are not merely restricted to southern Africa, and cites examples from West Africa, including "I feel the other, I dance the other, and therefore I am" or that "a tree cannot make a forest" (a Bini saying from Edo State in Nigeria).[121] *Both of which illustrate the importance of community connectivity and harmony. But the real value of all these maxims, greetings or proverbs to how they illustrate a central tenet of*

Ubuntu – that the human community is vital for the individuals' acquisition of personhood.[122]

Another commonly cited way of explaining this phenomenon is through the way that we greet each other. **Nyathu (2001)** emphasizes that such greetings are an important affirmation of identity. Thus, for instance, people may greet each other with terms like "sawabana" or "muse atse", both which mean "I see you"

119 Ramose.M.B, (2016), African Philosophy through Ubuntu, Mond Books, Harare

120 Nussbaum,B. (2003), Ubuntu: Reflections of a South African on our common humanity", Reflections, Massachusetts Institute of Technology, Vol.4.4,

121 Ibid

122 Nussbaum,B. (2003), Ubuntu: Reflections of a South African on our common humanity", Reflections, Massachusetts Institute of Technology, Vol.4.4,

123 Ibid

Rather than a mere "hi" or "hello". Or in the Shona greeting: "Mangwani, marari sei? (Good morning, did you sleep well?), and the response "Ndarara, kana mararawo" (I slept well, if you slept well). Such greetings reflect the importance placed on being acknowledged by another, as well as acknowledging someone else's presence. Such a greeting is not about demonstrating how sociable we are, but about how human we are. Our affirmation of others thus validates ourselves.[123]

If you want to give high praise to someone we say "Yu, u Nobuntu" in other words he or she has ubuntu. This means they are generous, hospitable, friendly, caring and compassionate. A person with *Ubuntu* is open and available to others, affirming of others, does not feel threatened that others are better at something or more successful.[124] They have the self-assurance of knowing they are part of the wider whole.[125]

Ubuntu as an expression captures in one word the unifying vision of the world - view that is enshrined in the much quoted Zulu maxim "umuntu ngumuntu ngabanye abantu" (a person is a person through other persons). While this proverb lays down the principles and values of human interaction in Africa it has a particular African interpretation in that it captures both the singular and the plural, which the rather banal English translation does not really convey.[126] More literally this phrase should read "a human being is a human being through human beings" or alternatively "the being human of a human being is noticed through his or her being human through other human beings".[127] **Louw (2008)** suggests one could also interpret it as "to be human is to affirm one's humanity by recognizing the humanity of others in its infinite variety of content and form". Such different interpretations emphasize respect

for the particularities of the beliefs and practices of others, and in the case of South Africa valuing all the different cultures and beliefs that make

124 Nyathu.N, (2005), The *Ubuntu* Dialogue: Decolonizing Discourse and Dualism in Organisation Studies, Masters Dissertation

125 Murithi.T, (2006), "Practical Peacemaking. Wisdom from Africa: Reflections on Ubuntu", Journal of Pan African Studies, Vol.1.4

126 Ibid

127 Sanders.M, (2016), "Reading Lessons", Diacritics, Vol.29.3

128 Ibid

up South African society.[128] In other words this phrase has a more complex interpretation than is normally portrayed.

Such interpretations attempt to capture the evolving relationship between individuals with their community, and how, by exposing themselves to others, enables individuals to discover and enrich their own humanity. For some this is a purely secular relationship which emphasizes how our identity and "personhood" is defined by our role and relationship with a particular community. Whereas for others, such as Archbishop Tutu, while recognizing *Ubuntu's* role in defining our identity through others also believes that such relationships are based on God's will and are consequently of a very different quality.[129] But whether coming from a secular or spiritual position there is general belief in much of the literature that ubuntu articulates a basic respect and compassion for others which is commonly reflected in the way we show respect, consideration, kindness, and are sensitive to the needs of others.[130]

However, it is important not to overlook the negative consequences of this synergistic relationship between an individual and the community, and in turn how easy it is for community tensions to lead to violence. Communities with a strong, cohesive identity may result in individual members of a particular community or ethnic group supporting and sympathizing with those that espouse evil acts. This is a grim reminder of the negative consequences of community cohesion, and how easy it is for different communities to be mobilized by evil. In recent years this dark side of African civil society has played itself out across Africa in Rwanda, the Congo, Liberia, Northern Uganda, Sierre Leone, the Sudan, and Zimbabwe. It is a sad fact of life that all too often these events are rarely reported in the West. It is only recently that we have any real knowledge of the millions who have died as a consequence of communal conflict in the Congo. It was also striking how little media coverage there was of the hundreds who were killed in communal

129 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to 20th World Congress of Philosophy, Boston

130 Battle.M, (2000),"A theology of community: the ubuntu theology of Desmond Tutu

131 Ibid

violence in Nigeria.[131]

These examples from Africa, the home of *Ubuntu,* are a salutary reminder that strong cohesive communities may result in individual values being subsumed by community prejudice or hate. It is just because of this that there is an imperative to promote philosophies or world - views, such as ubuntu, that espouses values that are antithetical to violence, prejudice and hate.

2.13 Ubuntu's Role in Community Building

Nussbaum (2003) suggests that ubuntu is more appropriately described as **"the capacity in African cultures"** to express compassion, humanity and dignity. As such it has a critical role in building communities that are marked by equity, justice, mutual support and care. In this regard ubuntu is therefore part of the process of promoting a community culture that emphasizes commonality and interdependence. It recognizes an individual's status as a human being who is entitled to respect, dignity and acceptance from other members of the community.[132]

It is a concept that has particular resonance with those concerned about building civil society, enhancing community relations and promoting social cohesion. In this context *Ubuntu's* role in community develop is about the "we" and our ability to accomplish things that we can only do with others. It is about building "a network of delicate relationships of interdependence".[133] These are networks that are marked by "affirmation and acceptance" of others. These relationships and networks are an organic and voluntary rather than the "associative instrumentalism" associated with many artificial or imposed community building initiatives found in many modern (western) societies.[134]

132 Battle.M, (2000),"A theology of community: the Ubuntu theology of Desmond Tutu

133 Nussbaum,B. (2003), Ubuntu: Reflections of a South African on our common humanity", Reflections, Massachusetts Institute of Technology, Vol.4.4

134 Ibid

135 Battle.M, (2000), "A theology of community: the *Ubuntu* theology of Desmond Tutu

Ubuntu in Health Care

In the area of community health care, there have been a number of studies that explore the role and impact of ubuntu on how medical professionals engage with local communities and individual patients. Researchers have explored the way ubuntu could be used to help

promote a culturally appropriate approach to mental health promotion.[135] ***Beuster and Schwar*** *(2002) emphasized the importance of culturally congruent health care in community health care and the need to use culturally appropriate methodologies when assessing the health needs of communities.*[136] *Their analysis concluded that culturally-congruent care in the South African context must incorporate the spirit of Ubuntu - particularly the elements of Ubuntu that encourages greater sensitivity to the needs and wants of others.*[137]

Ubuntu has an "extreme emphasis on community".[138] The caring, sharing ethic that it promotes has enabled South Africa to cope with the difficult transition from apartheid years and has served a cohesive set of moral values in the face of adversity.[139] It is significant that despite the loss of dignity and the suffering experienced by many in South Africa there was no lust for retribution. It is against this background that **Archbishop Tutu (2016)** talks of social harmony being the greatest good, and that anything that subverts such harmony is to be avoided. He notes that anger, resentment, lust for revenge, even aggressive competitiveness are corrosive and threaten social harmony.[140]

According to African scholarship, African epistemology begins with community and moves to individuality, whereas Western epistemology moves from individuality to community.[141] (Battle 2000). As a result, *Ubuntu* has been put forward by a number of commentators as a mechanism to

136 Edwards.S, Makunga.M, Ngcobo.S & Dhlomo,M (2004), "Ubuntu, A cultural method of mental health promotion", International Journal of Mental Health Promotion, Vol.6.1

137 Beuster.J and Schwar.G, (2002), "South African Traditional Belief Scale as an instrument to aid culturally-congruent health care", Journal of Community and Applied Social Psychology,Vol.12.4

138 Ibid

139 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to 20th World Congress of Philosophy, Boston

140 Ibid

141 Tutu.D, (2016), No Future Without Foregiveness, Rider Random House,

142 Battle.M, (2000),"A theology of community: the ubuntu theology of Desmond Tutu

minimize self-interest, help community transformation and attain a degree of in connectedness at a community level. Most commentators emphasize the collective nature of ubuntu and the way that ubuntuism acts as a counter-weight to dominant ideas of individualism.

But, others such as **Khoza (1994)** point out that *Ubuntu* should not simply be equated with a collectivism that merely stresses the role of the social unit to the point that it depersonalizes the individual and their own humanity.[142]

Bell (2002) also usefully warns us against the easy adoption of clichés about how all Western values are driven by individualism and African values are driven by communalism.[143] He points out that on the spectrum between individualism and communalism there are many different cultural types that are complex and multivaried.[144]

Other studies into the working of *Ubuntu* at a community level have pointed out the different cultural dimensions, and the crucial role of culturally-appropriate leadership styles in determining the success of community initiatives. **Nussbaum's (2003)** commentary on the role of *Ubuntu* in communities concluded that successful "*Ubuntu* communities" depended on sensitive and listening leaders.[145] Thus we need develop community leaders that listens to all view points, facilitates discussions, is able to summarize the different points of view and makes a decision that is both just and reflects the group consensus. However, for this to work in practice we need a considerable investment of time and energy to reach such consensual agreements. Similar findings are found in **Kirk and Shutte's (2004)** critique of a particular community capacity building approach with socially excluded communities in South Africa. It is apparent that *Ubuntu* has a clear role in building community cohesion, but that it can only be successfully implemented if its presence is acknowledged and local leaders

143 Khoza.R (1994), "The need for an Afrocentric approach to management", in Christie.P, Lessem.R & Mbigi.L (eds.), African Management: Philosophies, Concepts and Application, KnowledgeResources, Randburg

144 Bell,R, (2002), Understanding African Philosophy, Routledge, New York

145 Ibid

146 Nussbaum,B. (2003), Ubuntu: Reflections of a South African on our common humanity", Reflections, Massachusetts Institute of Technology, Vol.4.4

are sensitive to the way it is implemented.[146]

Recent analysis has also highlighted ubuntu's role in nation building and thus **Swartz (2006)** places ubuntu alongside a range of post-apartheid initiatives such the Truth and Reconciliation Commission and the Moral Regeneration Movement in her analysis of efforts to reform and recover the concept of citizenship and morality in contemporary South Africa.[147]

Thabo Mbeki on Ubuntu

President Thabo Mbeki regularly made calls to revive the values inherent in ubuntu to assist in community and nation building and help in creating a new South African identity. In a speech on Heritage Day 2005 President Mbeki claimed that "Ubuntu drives community members to act in solidarity with the weak and the poor and helps members of these communities to behave in particular ways for the common good".

Following this call the National Heritage Council South Africa held annual meetings called "Ubuntu Imbizo" in different provinces. These involved a cross- section of the population and were intended to find ways to practice the values of Ubuntu and explore ways how it could berevived.[148]

In conclusion, one cannot but recognize that the values and attributes inherent in *Ubuntu* can play a valuable role in both helping individuals but also in a range of community development and nation building initiatives.

2.14 Ubuntu: Promoting Collective Work and Consensus

A third practical application of the spirit of ubuntu has been the way that has encouraged people to work together and build a consensus. **Poovan et al (2006)**, in a wide-ranging review of the influence of the social values inherent in *Ubuntu*, began their analysis by suggesting that *Ubuntu* has been essential component in determining the survival of different

147 Kirk.P & Shutte.A, (2004), Community Development Leadership, Community Development Journal, Vol.39.3

148 Swartz.S, (2006), "A long-walk to citizenship: morality, justice and faith in the aftermath of aparthied", Journal of Moral Education, Vol.35.1

149 Africa News 27/8/08

African communities.[149] Their analysis suggests that Africans have learnt to survive through collective action, mutual care and support, not by individual self-reliance. In order for this degree of mutuality to thrive they have developed a collective psyche which allows them to pool resources and communities to work together collectively.[150] That personal interests are less important than community needs is a lesson learnt from an early age. This *Ubuntu* spirit of solidarity is something that permeates every aspect of African life. As one of their respondents commented "ubuntu is not having a brother but being part of the bigger picture of the community", or as another suggested "it is basic neighbourliness… that's one of the biggest things about *Ubuntu*".[151]

Ubuntu: The Collective Finger Theory

*The work of **Mbigi (2012, 2014**) has emphasized Ubuntu's role in facilitating consensus building and promoting collective working. He refers to this as the "collective finger's theory" which is best explained by the African proverb "a thumb, although it is strong, cannot kill aphids on its own. It needs the collective help and co-operation of the other fingers on the hand". The lessons of this proverb are, first, that the fingers are individuals who need to work together to achieve a collective goal, and, second, the fingers*

represent core values that are interdependent and synergetic and need to come together to build and maintain the collective culture.

African cultures appear to have an infinite capacity of consensus and reconciliation. This is exemplified in the way that in traditional African societies every person at a meeting or gathering gets an equal chance to speak until some kind of an agreement or consensus is reached. This is expressed by words like "simunye" - we are one or unity is strength.[153] *Ubuntu* is also about building a collective understanding through the sharing of ideas between community members. This builds on the perception that ideas

150 Poovan.M, du Toit.M, Engelbrecht.A, (2006), "The Effect of the social values of ubuntu on teameffectiveness", South African Journal of Business Management, Vol.37.3

151 Ibid

152 Poovan.M, du Toit.M, Engelbrecht.A, (2006), "The Effect of the social values of ubuntu on teameffectiveness", South African Journal of Business Management, Vol.37.3

153 Mbjigi.L & Maree.J, (2012), Ubuntu: The Spirit of African Transformation Management, Knowledge Resources, Randburg

154 Louw.D, (2008), Ubuntu, An African Assessment of the Religious Other, Paper to 20th World Congress of Philosophy, Boston

are not property that can be owned by individuals but are instead a common resource that should be shared willingly.

Traditionally, the interconnectedness in African communities that is commonly associated with *Ubuntu* was nurtured by acts of compassion and care. However, there is some concern that ubuntuism has lost some of its influence as a guiding force in modern society – particularly when its ethos is subsumed or lost during times of political strife or communal violence.[154]

Despite such concerns politicians commonly called on the ethos of ubuntu in their attempts to encourage a new national identity or a wider humanitarian ethics. President Mandela commonly drew on the concept of *Ubuntu* in his efforts to build a new consensus in post-apartheid South Africa.

Creating consensus also implies a degree of reciprocity and shared values. In all types of organisations ubuntu is helpful because of the way it emphasizes that reciprocal relationships are important, that people contribute more to the common good if they are valued, and that goals are more likely to be met when consensus is achieved.[155] This is well reflected in the success of the many different "stokvels" in South Africa. It is estimated that there are nearly a million of these informal joint enterprises or co- operatives (including burial societies and savings clubs).[156] Many of which draw on ubuntu inspired values and communal relationships, and play an important role servicing the needs of

local communities. They have been described as capitalism with "siza" (i.e. with humanness), and while geared to making a profit only do so if it does not involve the exploitation of others.[157]

2.15 Ubuntu: Its Potential Role in Conflict Mediation and Reconciliation.

There are plenty of advocates for the role of *Ubuntu* in conflict mediation, community reconciliation and peacekeeping. While some of this is concerned with its role in helping mediate immediate problems, much is about its longer-term role in resolving conflicts.[158] Significantly President Mandela's assessment was that you could only transform a society or community by encouraging reconciliation, and promoting understanding, even love, between all the different constituents.[159] He highlighted the connectedness and inter-dependence of all the different people in any community whether they be good or bad, the alienated or the oppressed. Most memorably he wrote that "the oppressor must be liberated just as surely as the oppressed …. When I walked out of prison, that was my mission to liberate the oppressed and the oppressor both…. For to be free is not merely to cast off one's chains, but to live in a way that respects and enhances the freedom of others".[160]

This sentiment is echoed in the words of Archbishop Tutu that those in power are "diminished when others are humiliated, diminished when others are oppressed, diminished when others are treated as if they were less than who they are." More importantly in the context of this survey he goes on to suggest that "the quality of ubuntu gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanse them".[161] Archbishop Tutu writes that "true reconciliation is a deeply personal matter. It can happen only between persons who assert their own personhood and who acknowledge and respect that of others". After his time as the Chair of the Truth and Reconciliation Commission (TRC) he argued that ubuntu had an important role in promoting social harmony and encouraging forgiveness and reconciliation - "to forgive is not just to be altruistic. It is the best form of self-interest. What dehumanises you, inexorably dehumanises me. Forgiveness

155 Poovan.M, du Toit.M, Engelbrecht.A, (2006), "The Effect of the social values of ubuntu on teameffectiveness", South African Journal of Business Management, Vol.37.3

156 Mangalismo.M, (2001), "Building competitive advantage from ubuntu: Management lessons from South Africa", Academy of Management Executive, Vol. 15.3

157 Ibid

158 Louw.D, (2001), "The Idea of Ubuntu Philosophy", paper presented at Seminar on African Renaissance and *Ubuntu* Philosophy,

gives people resilience".[162]

To help our understanding of the processes involved in this difficult process he talks about the three different orders of truth that must be understood

159 Mandela.N, (1994), p. 554 A Long Walk to Freedom, Little Brown, Boston
160 Ibid
161 Mandela.N, (1994), p. 554 A Long Walk to Freedom, Little Brown, Boston
162 Tutu.D,2004), God Has a Dream: A Vision of Hope for our Time, Doubleday, New York
163 Tutu, D. (2016) *No future without forgiveness*. NY: Doubleday

in any exploration of the practice of mediation and reconciliation.[163] These are: first, forensic factual truth (that which is verifiable and documentable); second, social truth (that is established through interaction and debate); third, personal truth (that which is highly personal and private - what Judge Mahomed of the TRC called the truth of "wounded memories"). He concludes by suggesting that any form of reconciliation process needs to Factor in these different types of truth and their impact on the way people see their environment and the people they live with in their local communities.[164]

Battle's (2000) analysis of Tutu's thinking emphasizes that forgiveness is better than retributive justice. He highlights Tutu's atonement theory that assumes that all can be helped and the way he is sensitive to even a flickering ember of remorse (as in the confrontation with Winnie Mandela during the TRC).[165] Tutu's role as national confessor was important in helping the country develop ways to come to terms with the past so that abuses of human rights are not concealed and a vulnerable new democracy is not threatened.[166] At a personal level he marveled at the magnanimity of those victims who appeared before the Truth and Reconciliation Commission, and that "after so much suffering instead of lusting for revenge they had this extraordinary willingness to forgive".[167]

Tutu on ubuntu (Revenge), Forgiveness and Rehabilitation

Tutu also states that ubuntu is something you say when someone has wronged you. You don't want revenge but a healing of relationships instead. The refusal to see or acknowledge related identities is Tutu's definition of sin, which is the converse of ubuntu. Sin thus affects the wayan individual sees themselves to be and their relationship with creation.[168]

In Tutu's eyes ubuntu means that in a real sense even the supporters of apartheid were victims of the vicious system which they implemented and supported. The lesson for

164 Ibid

165 Tutu, D. (2016) *No future without forgiveness*. NY: Doubleday

166 Battle.M, (2000), "A theology of community: the ubuntu theology of Desmond Tutu

167 Ibid

168 Tutu, D. (2016) p.56. *No future without forgiveness*. NY: Doubleday

169 Ibid

those concerned about building community cohesion is that the spirit of ubuntu has a role in healing of breaches, redressing imbalances and restoring broken relations. It helps communities avoid destroying themselves in their search for retribution and punishment of the perpetrators. He sees such activities as a social and personal dead-end that need to be avoided. He argues that the emphasis should be on rehabilitation of both the victim and perpetrator and their speedy reintegration into the Community.[169]

It is notable that in the wider body of African literature on ubuntu there much emphasis on reconciliation and encouraging people to move beyond their immediate grievances. **Ali Mazrui (quoted in Nussbaum, 2003)** described this as being a characteristic of many African communities which seem to have a "short memory of hate". He suggests this is a consequence of the way African children were traditionally taught to reconcile their differences and let go of hatred, and that this was a necessary survival tactic in any isolated community.

Ubuntu should therefore be seen as part of the process of community healing, reconciliation and bridge building. **Murithi (2006)** goes further by suggesting that *Ubuntu* is integral to the notion of peacemaking through the principles of reciprocity, inclusivity and a sense of shared destiny between peoples and communities. He points out that it provides a value system for giving and receiving forgiveness. It provides a rationale for sacrificing or letting go of the desire for revenge for past wrongs or engaging in petty vendettas. It is a way of culturally re-informing our efforts to promote reconciliation and facilitate the work of peacekeepers.[171] He concludes by suggesting that a community in which there is no trust is ultimately not viable and gradually begins to tear itself apart–unfortunately this is something that peacekeepers around the world are all too aware of.[172]

170 Tutu, D. (2016) p.56. *No future without forgiveness*. NY: Doubleday

171 Nussbaum,B. (2003), Ubuntu: Reflections of a South African on our common humanity", Reflections, Massachusetts Institute of Technology, Vol.4.4

172 Murithi.T, (2006), "Practical Peacemaking. Wisdom from Africa: Reflections on Ubuntu", Journal of Pan African Studies, Vol.1.4

173 Ibid

2.16 Ubuntu's International Application: Turkey and Armenia

In the field of peacekeeping and reconciliation the concept of ubuntu has taken on rather iconic status and commentators have attempted to apply it in the most unlikely circumstances. For example, a recent article in the Turkish ***Daily News (13/12/07)*** *explored the possibility of using ubuntu-based reconciliation processes to try to heal the bitter divisions that still divide the Armenian and Turkish populations. These divisions were caused by the appalling loss of life of Armenians at the hands of the Turks early in the last century and continue today in the long-standing campaign by Armenians to discredit Turkey.*

To this day there is still deep bitterness around this issue and there is a renewed effort to penalize Turkey for what are seen as acts of genocide. As a consequence there is some urgency to addressing this matter. It is proposed that the concept of Ubuntu with its focus on forgiveness and reconciliation has a potential role to play in promoting a rapprochement between these two deeply divided peoples. The article suggests that if ubuntu was incorporated in some culturally appropriate processes, such as the Armenian tradition of tamadas whereby prominent men come together round a table, eat and drink, they could begin to open themselves to the process of mediation and reconciliation.[173]

Most analysis suggests that *Ubuntu* encourages consensus-based mediation (as seen, for example, in the indigenous processes found in indabas or imbizos of South Africa) as distinct from the more confrontational litigious processes commonly found in the American legal system. The logic of ubuntu suggests that each member of a community is in some way linked to each other – in other words to other disputants in the community. If everyone is willing to acknowledge this (i.e. accept the principles of ubuntu) then people may feel a sense of having been wronged, or a sense of responsibility for the wrong they may have committed. There is a link between the victim and perpetrator that exists, which is tangible, and which can be built on and developed. This process is not just about individuals but also includes their wider family and kinship groups. It is clearly not an easy process but one that, if worked at, can succeed.

174 Turkish Daily News (13/12/07)

2.17 Ubuntu: Supporting Organisational Effectiveness and Productivity

One of the sources of the growing awareness of the significance of ubuntu has been the way it has been publicized as a new management concept in the popular management literature in South Africa.[174] It has also attracted the attention of internationally respected management researchers. For example in Peter Senge's seminal work on **Organisational Learning (1990)** it is clear that ubuntu-based work practices are present in his description of the key characteristics of an effective learning organisation.[175]

While **Jackson (2004)** in his overview of African management practices concluded that *Ubuntu* is a key element of a culturally-appropriate humanistic management style that is common throughout Africa in which employees are seen not just as a strategic asset but are valued in their own right.[176] Such management commentators base their analysis on the way that ubuntu has the potential to shape the relationship between individuals and the wider whole (whether it be at a team or an organisation level) and promote a shared vision. Most also recognize that *Ubuntu* has an ethical dimension and strong moral overtones. The general conclusion is that organisations that reflect *Ubuntu* principles are marked by their humanity and team spirit. This in turn can give a business its competitive advantage in the way that it helps promote effective team working, helps the transfer of information and the adoption of new ideas. It influences the way we communicate and converse amongst each other and the way this helps establish and reinforce effective working relationships. In such organisations unity and understanding is valued more than the overly-structured systems common in Taylorist or Fordist organisations.[177] Linked to this is an appreciation that ubuntu has some degree of cultural specificity and as such cannot be translated into a commodifiable management tool.[178]

The work of **Mbjigi and Maree (2012, 2014)** has been influential in bring

175 See Mbigi & Maree, 2012; Mbigi, 2014; Swartz & Davies, 2014; Karsten & Illa, 2005; Poovan, 2006).

176 Seminer work on Organisational Learning (1990)

177 Jackson.T, (2004), Management and Change in Africa: A Cross-Cultural Perspective, Routledge,London.

178 Poovan.M, du Toit.M, Engelbrecht.A, (2006), "The Effect of the social values of ubuntu on teameffectiveness", South African Journal of Business Management, Vol.37.3

179 Ibid

theconcept of ubuntu to the attention of management researchers. Their central thesis is that organisations in Africa must draw on indigenous cultural

practices in order to improve their management, effect transformation and make themselves more competitive. In this context they define ubuntu as the sense of solidarity or brotherhood which arises among people and is a collective shared experience.[179]The principles of Ubuntu that impacts on management effectiveness include: the spirit of unconditional African collective contribution, solidarity, acceptance, dignity stewardship, compassion and care, hospitality and legitimacy.[180]

Karsten & Illa (2005) see *Ubuntu* somewhat differently. They see it as an instrumental concept that has been introduced into the management vernacular to revitalize business, improve co-ordination, and help the transfer of ideas and information.[181] In their judgement *Ubuntu* offers a philosophical basis for a more consensual management style. In practice it has led to the development of a hybrid management system that incorporates a variety of management styles that has been adopted by such diverse companies as South African Airways or Durban Metrorail.[182] However, they see it is more than just a programme for employee participation. It covers the way employees interact and share experiences or knowledge. It has some similarity with Japanese management practices with their emphasis on empowerment, service and shared leadership.[183] It does not depend on coercive power, and is instead is built on a process of consensus building, dialogue, discussion, conversation, and even storytelling.

Karsten & Illa's (2005) analysis suggests that *Ubuntu* organisations place greater emphasis on informal or conversational communication as compared to more formal bureaucratic approaches. In other words *Ubuntu* favours a more participative interaction between management and staff in which

180 Mbjigi.L & Maree.J, (2012), Ubuntu: The Spirit of African Transformation Management, Knowledge Resources, Randburg

181 Ibid

182 Karsten.L & Illa.H, (2005), "Ubuntu as a key African management concept: contextual background and practical insights for knowledge application",

183 Ibid

184 Karsten.L & Illa.H, (2005), "Ubuntu as a key African management concept: contextual background and practical insights for knowledge application",

inventive ways of resolving conflict can occur. But fundamentally they see the way managers use *Ubuntu* as part of the discourse that management has developed to persuade people to work together more productively. In other words that it has become merely an "instrument to improve productivity".[184]

2.18 The Impact of Ubuntu on Productivity and Management Practices

It is argued that those organisations and firms that adopt *Ubuntu* practices will reap the benefits in terms of, first, increased competitive advantage and greater efficiency. Second, improved productivity through better management practices; and third, quality of leadership. Others have identified the lack of *Ubuntu* at a management level being a major constraint and we need to see better implemented at an organisational level.[185]

Rwelamila et al (2002) identified the major blocks to the successful completion of major public building projects in Southern Africa and the particular problems caused by the dysfunctional relationship between different project stakeholders.

The authors concluded that one of the major causes of failure was the lack of *"Ubuntu"* between key project stakeholders – particularly in the area of procurement which lead to misunderstandings, delays and cost- over runs.[186] They argue that developing the spirit of *Ubuntu* is essential for promoting real cooperation, and as such is a prerequisite for all major public building projects in Southern Africa.

2.19 Implementing Ubuntu: Some Practical Guidelines

Mangaliso (2001) *has identified some practical guidelines when implementing Ubuntu. These include; Treat others with dignity and respect (this is a central element of ubuntu and its role in creating the appropriate environment). Be willing to negotiate in good faith (taking time to listen when negotiating because listening is essential in*

185 Ibid

186 Karsten.L & Illa.H, (2005), "Ubuntu as a key African management concept: contextual background and practical insights for knowledge application",

187

the process of acknowledgement – which in turn can then lead to real trust and co-operation) Provide opportunities for self-expression (honour achievements, affirm values etc) Understand the beliefs and practices (different cultural perspectives, understand different belief systems, also be careful not to suppress a specific culture in favour of the dominant culture) Honour seniority – especially in leadership choices (age, experience, etc) Promote equity (ensure that recruitment decisions are clear and fair) Be flexible and accommodative (acknowledge the organic nature of ubuntu which itself is a balanced blend of different approaches and ideas etc.[187]

Poovan et al (2006) have taken this analysis further by highlighting the role of *Ubuntu* in team effectiveness and also as providing an alternative management ethos. They explore the way *Ubuntu* values can lead to greater team effectiveness and increased productivity, their impact on the way leaders motivate staff, and how they motivate teams so that they can be more effective and innovative.[188]

The values inherent in *Ubuntu* have the capacity to create bonds between team members and encourage a shift in thinking from "I can" to "we can". This collective spirit is reflected in the way teams sit together, focus attention on each other, show signs of mutual affection and display coordinated patterns of behaviour. But team members not only value working with each other they also trust each other.[189] Trust in this context can be seen as a positive expectation that another will not through words, actions, decisions act opportunistically to the detriment or upset of another team member.

There is also a growing awareness of the relationship between leadership and the values inherent in ubuntuism. There is talk of ubuntu or value-based leadership. This is similar to Hailey's concept of catalytic leadership which incorporates a strategic, value-driven, change-oriented and developmental

188 Mangalismo.M, (2001), "Building competitive advantage from ubuntu: Management lessons from South Africa", Academy of Management Executive, Vol. 15.

189 Poovan.M, du Toit.M, Engelbrecht.A, (2006), "The Effect of the social values of ubuntu on teameffectiveness", South African Journal of Business Management, Vol.37.3

190 Ibid

191 Poovan.M, du Toit.M, Engelbrecht.A, (2006), "The Effect of the social values of ubuntu on teameffectiveness", South African Journal of Business Management, Vol.37.3

style of leadership. This can be distinguished from authoritarian, paternalistic, or charismatic leadership styles, and is more akin to South Asian models of "empowered leadership". The relationship between leadership and *Ubuntu* was well exemplified at a recent British Council sponsored Leadership Conference in Livingstone, Zambia which was which intended to bring together African leaders in the spirit of *Ubuntu*. **The Times of Zambia** quoted the conference convenor saying that: "the spirit of *Ubuntu* is so strong that there is no such thing as a self-made man in Africa for everyone who has ascended to great heights has done so with the help of others in the community".[191]

2.20 Ubuntu & Management Practices: A Critique

There is some concern that *Ubuntu's* use in the management literature has been somewhat reduced to the status of a management fad in other words reducing its significance to "flavour of the month status". **Karsten & Illa**

(2005) feel that this undervalues its true worth. *Ubuntu* should be seen more than merely an economic process to promote productivity it has a deeper more significant role at a personal and community level.[206]

Swartz and Davies (2014) question whether the application of *Ubuntu* leads to greater productivity and efficiencies. They are concerned that many authors "idealise *Ubuntu* without being aware of the potentially negative

192 Sunday Times 26/5/91

193 Enslin and Horsthemke (2004)

194 Ibid

195 Karsten.L & Illa.H, (2005), "Ubuntu as a key African management concept: contextual background and practical insights for knowledge application", Journal of Managerial Psychology,Vol.20.7

aspects of the process". They highlight the negative consequences of when an individual employee forsakes personal needs for the good of the wider group or some imposed change process.[207] They talk of the "shadow side of *Ubuntu*" particularly where an individual has to give up personal needs to fit the role expected of them.[208]

One consequence of this is that resentment festers and inappropriate behaviours, while suppressed, appear in different guises. The dominant group starts to use shaming as a control mechanism which inhibits an individual's potential, constrains innovation, and may lead to dysfunctional group dynamics. There is also concern at the punitive nature of group control processes and the negative consequences of the blame/shame culture that it creates.[209]

Such "psychosocial control mechanisms" are inherently dysfunctional and can lead to a range of negative consequences and behaviours that begin to shape the informal dimensions of an organisations culture and the fuel shadow side of organisational life.[210] There are also questions about the impact of such *Ubuntu*- based controls on attitudes to innovation and individual entrepreneurship, as well as on incentives designed to promote productivity and organisational excellence. Such analysis provides a useful counterbalance to the analysis of the dominant voice of advocates of ubuntuism and useful warns about some of the consequences, problems and potential contradictions associated with its use as a management tool.[211]

There is therefore a strand of thinking that should not be discounted that *Ubuntu* is anti-modernist, represents out - dated values and stands in the way of efficiency. Whereas others suggest it is a pastiche of the original idea, and we now only see "the remnants of *Ubuntu*". Although a common response to criticism is that what has survived are the best elements of

196 Swartz.E & Davies.R, (2014), "Ubuntu – the spirit of African transformation management – a review", Leadership and Development Journal, Vol.18.9
197 Swartz.E & Davies.R, (2014), "Ubuntu – the spirit of African transformation management – a review", Leadership and Development Journal, Vol.18.9
198 Ibid
199 Swartz.E & Davies.R, (2014), "Ubuntu – the spirit of African transformation management – a review", Leadership and Development Journal, Vol.18.9
200 Ibid

ubuntuism the fundamentals that are worth keeping alive.

2.21 Ubuntu on Community Governance and Community Violence

Recent research in South Africa into the recent xenophobic violence in South African cities has highlighted the central role of community leadership in either provoking or containing the levels of violence on foreign nationals. The interim findings of an ongoing study being currently undertaken by the Forced Migration Studies Programme of Wits University in Johannesburg suggest that the violence against foreign nationals was community inspired. It was perpetrated in communities where formal institutions were weak or considered illegitimate. These official structures were either pushed away of hijacked by informal groups that in turn became the legitimate representatives of the community.

These preliminary findings echo similar findings in the UK and should feed into the Tutu Foundation's strategic thinking. They suggest that there is a need for government and other community agencies to focus on developing effective, responsive and accountable governance structures at a community level. Linked to this is recognition of the need to mobilize links and promote Collaboration between all the different organisations working at a community level. Whether they be local government, voluntary community- based organisations, faith-based organisations, or local chapters of national bodies (Scouts and Guides, Lions and Rotary, or different sporting bodies, etc). As the Foundation has already proposed the *Ubuntu* framework could be used to assess the attitudes and behaviours that affect relations between such actors and frontline community institutions.

2.22 Ubuntu on Bridge Building & Community Cohesion

A review of some of the recent literature on community development and contemporary debates about building effective community relations has highlighted some important findings that could feed into the Tutu Foundation's strategic thinking.[212] This literature highlights such issues

as building trust, developing effective local leadership, provision of

201 Young.P,(2008), Bridge Building: A Literature Review, draft for IVAR, London

relevant information, and the creation of safe - spaces where dialogue and understanding can begin to be nurtured **(Young, 2008).** There is clearly a role for the principles inherent in *Ubuntu* to help shape such processes, and the Foundation should not be scared of using the spiritual dimensions of ubuntu to help inform dialogue between peoples of different faiths or beliefs.[213]

Running through much of the literature was a concern that the more diverse a community the less likely it is that the different groups in the community feel that they can trust each other.[214] In the UK the concern is that multiculturalism has led to greater fragmentation and segregation at a community level.[215] This is reflected in a degree of "economic ghettoisation" and the growth in mono-ethnic schools which in turn has led to greater separation between community groups.[216]

There is much talk in the literature of the need to promote interaction between community groups and need to work proactively towards "community cohesion". This was defined in a 2002 Home Office Report as being "a shared sense of belong, based on common goals and core social values, respect for differences, and acceptance of the reciprocal rights and obligations of community members working together for the common good" **(Denham, 2002).** This definition clearly echoes the salient features of ubuntism and suggests that the concept of *Ubuntu* has a role in developing new community cohesion strategies in the United Kingdom geared to mediating conflicts, reduce prejudices and misunderstandings and helping eliminate discrimination of all kinds.[217]

2.23 Ubuntu and the 2006 White Paper "Strong and Prosperous Communities" (DCLG 2006) suggested that there were eight guiding principles for building community cohesion which included, amongst other things, the

202 Ibid

203 Young.P,(2008), Bridge Building: A Literature Review, draft for IVAR, London

204 Young.P,(2008), Bridge Building: A Literature Review, draft for IVAR, London

205 Ibid

206 Denham, J. (2002). Building Cohesive Communities: A Report of the Ministerial Group on Public Order and Community Cohesion, Home Office, London.

need to: ensure strong leadership and engagement at a community level; the

development of shared values across different communities; the identification of local "flash points" and the development of contingency plans to deal with public unrest; the inclusion of young people in social cohesion and bridge building activities; and the involvement of faith groups and the importance of interfaith activities.[218] There is potential role here for the Tutu Foundation in trying to facilitate the practical implementation of some of these principles in efforts across the United Kingdom to promote community cohesion.[219]

The Foundation also has a potential role helping transform the perception of diversity from a "social bad", to a strength, a "social good" that is valued across the community. The provision of appropriate information and development of local channels of communication that is helpful in breaking down barriers and stereotypes, overcoming long-held prejudices, and helping change the relational dynamics in entrenched conflict systems. Also, because of the spiritual and inter-faith dimension of the Foundation's mission it has the potential to engage with faith based organisations and associations in promoting community values.[220] There is a growing body of opinion that faith communities and faith based organisations can, and should, play a more direct role in promoting community cohesion and building social capital.[221]

There is a general recognition that moves to promoting social cohesion and encouraging bridge building initiatives are an important element in efforts to develop a healthy civil society. This is particularly so if one sees civil society as a space within which people can freely associate and communicate with one another and where a web of associations can flourish.[222] It is a space in which conflict and opposition within society can be peacefully accommodated. Although one must manage expectations as to how effective such interventions can be.[223] The evidence from Northern Ireland is that

207 DCLG 2006
208 Ibid
209 DCLG 2006
210 Holden 2006, Dinham 2007, Jochum 2007.
211 Ibid
212 Holden 2006, Dinham 2007, Jochum 2007

while there is a critical role for community development processes mediating conflict that were there are entrenched patterns of segregation that at best such processes can help facilitate dialogue and "massage the interfaces" but not overcome years of deeply held prejudice and suspicion **(Gilchrist 2004, Acheson 2006, Thomas 2007)**. In this context, it should be noted that

intergroup hostility is the flipside of strong local networks and the strong associative spirit that one finds in elements of a vibrant civil society.[224]

In practical terms *Ubuntu* represents a particular worldview, an ethos, a philosophy that draws on crucial community values and ideals. These seem to have a universal appeal and resonate with peoples of all cultures at a very deep level. But it is also clear that *Ubuntu* is not something that can be imposed but is a set of values that has to be nurtured through an evolving organic process.

Ubuntu is clearly a living ethos. It is not just to be found in academic commentaries and policy reviews. Moreover because of the Archbishop's espousal of *Ubuntu* and *Ubuntu* theology the ideas and principles that are inherent in ubuntuism must inform the work of the Foundation. As such promoting the values inherent in ubuntu must be one of the core activities of the Foundation. It is therefore both an asset and a philosophy that lies at the heart of the Foundation's work.

The term '*Ubuntu*' has frequently appeared in writing since at least 1846. An analysis on the changes in how *Ubuntu* has been defined in written sources in the period 1846 to 2012 shows that in written sources published prior to 1950, it appears that *Ubuntu* is always defined as a human quality.[225] At different stages during the second half of the twentieth century, some authors began to define *Ubuntu* more broadly: definitions included *Ubuntu* as African humanism, a philosophy, an ethic, and as a worldview. Furthermore, my findings indicate that it was during the 1990s that the Nguni proverb '*umuntu ngumuntu ngabantu*' (often translated as 'a person is a person through other persons') was used

213 Gilchrist 2004, Acheson 2006, Thomas 2007
214 Vervliet 2009:20

for the first time to describe what *Ubuntu* is.[226] Many authors today refer to the proverb when describing *Ubuntu*, irrespective of whether they consider *Ubuntu* to be a human quality, African humanism, a philosophy, an ethic, or a worldview.[227]
Ubuntu is therefore African humanism philosophy, an ethic, or a worldview; it first emerged in written sources during the second half of the twentieth century. Furthermore, the analysis shows that *Ubuntu* became an object of particular interest and consideration during the political periods of transition from white minority rule to black majority rule in Zimbabwe and South Africa.[228]

Chris Vervliet has written that '*Ubuntu* is rooted in a search towards African dignity' (Vervliet 2009: 20). Of course, the search for African dignity in postcolonial Africa did not begin with the literature on *Ubuntu* which was published during the periods of transition to black majority rule in Zimbabwe and South Africa.[229] Prior to these transition periods, the search for African dignity was, for instance, reflected in the political thinking of such postcolonial African leaders as Kwame Nkrumah, Léopold Senghor, Julius Nyerere, Obafemi Awolowo, Kenneth Kaunda, and Ahmed Sékou Touré; all of whom made a call for Africanization and attempted to formulate a foundation of politics that consists of traditional African humanist or socialist values. Some of the narratives that were told to restore African dignity in the former colonies, which gained their independence in the late 1950s and 1960s, can be characterized as *narratives of return*, since they contain the idea that a *return* to something African (for instance traditional African socialism or humanism) is necessary in order for society to prosper.[230] I will argue that some of the narratives that have developed in relation to *Ubuntu* are also narratives of return, and that they share a number of characteristics with the narratives of return told during the early years of decolonization.

215 Ibid
216 Vervliet 2009:20
217 Ibid
218 Vervliet 2009: 20
219 Vervliet 2009: 20

In a paper about social philosophy in postcolonial Africa, Kwasi Wiredu explains that: 'The leaders in question [Kwame Nkrumah, Léopold Senghor, Julius Nyerere, Obafemi Awolowo, Kenneth Kaunda, and Ahmed Sékou Touré] had an equally strong sense of the importance of cultural self- identity. Colonialism had in varying degrees scored African culture. Now after independence they needed to reassert their own culture, and not just cosmetically. National reconstruction is a cultural enterprise of the highest kind. At independence the easy option was to stick by the systems in which the colonial powers left us. These were copies, imperfect copies, to be sure, of what were in place in the colonialist countries. These leaders did not go for that easy option. They understood that the colonial systems needed to be reviewed from an African standpoint' (Wiredu 2008: 332).

To contextualize the literature on *Ubuntu*, this section illustrates narrative of return in postcolonial Africa. Afterwards, it explores the historical development of the written discourses on *Ubuntu* and reflect on the discursive shifts that are identified in the literature.

2.24 Narratives of Return in Postcolonial Africa[231]

This section will primarily use Julius Nyerere's ideas about *ujamaa* as an example of a narrative of return, before turning to *ujamaa*, there are two general observations about these narratives. The first observation is that narratives of return have often been told and discussed in the context of *social transformations* where political leaders, academics, and others have attempted to identify past values that they believed should inspire politics and life in general in the future society.[232] The second observation is that African postcolonial narratives of return have typically contained the idea that in order to create a good future, society needs to *return to something African* which does not stem from the previous period of colonial oppression but which is rather rooted in pre-colonial times.

220 In African Philosophy and the Quest for Autonomy: A Philosophical Investigation (2000), Leonhard Praeg provides – among other things – a very interesting account of narratives of return, politics of return, and ethnophilosophy. My usage of the phrase 'narratives of return' is inspired by Praeg 2000,

221 Ibid

Broadly speaking, the postcolonial African narratives of return thus tend to divide history into three phases: ***first***, the pre-colonial phase which, often but not always, is perceived as a 'golden age' characterized by harmony; ***second***, a period of decline, which is understood to have been brought about by intruders who attempted to deprive the Africans of their resources, dignity, and culture; and ***third,*** a phase of recovery, where Africans, after having gained sufficient political power, attempt to restore their dignity and culture by returning to (what are claimed to be) traditional, humanist, or socialist values. It should be noted that in recent years, the attempt to recover African dignity has often been connected with the idea of an African Renaissance.[233]

To explore the example of *ujamaa*; Julius Nyerere was sworn in as the president of the newly independent Republic of Tanganyika in December 1962. In April 1964, he became president of the new United Republic of Tanganyika and Zanzibar, which was renamed the United Republic of Tanzania in October 1964. He continued as president until his retirement in 1985. In the introduction to *Freedom and Socialism* (1968), he explained that throughout nearly the whole of Africa, 'the first and most vocal demand of the people after independence was for Africanization' **(Nyerere 1968: 27).** Julius Nyerere supported the call for Africanization and argued that in Tanganyika, and later also in Tanzania, Africanization should take the form of a *return* to *ujamaa*, which he described as a traditional African form of

socialism. In the introduction to *Freedom and Unity* (1966), he explained why he thought that Africanization was necessary:[234]

'Years of Arab slave raiding, and later years of European domination, had caused our people to have grave doubt about their own abilities. This was no accident; any dominating group seeks to destroy the confidence of those they dominate because this helps them to maintain their position, and the oppressors in Tanganyika were no exception (Nyerere 1966: 3)'.

222 A Philosophical Investigation (2000),
223 Nyerere 1968: 27

Julius Nyerere was convinced that after independence a new historical phase of recovery had begun in Tanganyika. He described this phase of recovery as a revolution: 'It is a revolution with a purpose, and that purpose is the extension to all African citizens of the requirements on human dignity'[235]. Furthermore, he argued that the revolution could fulfil its purpose if society *returned* to its traditional socialism. This traditional socialism was to be re-invented as *ujamaa* which, for Julius Nyerere, represented a unique African kind of socialism that differed significantly from the European version:

'***European socialism was born of the Agrarian Revolution and the Industrial Revolution which followed it. The former created the 'landed' and the 'landless' classes in society; the later produced the modern capitalist and the industrial proletariat. These two revolutions planted the seeds of conflict within society, and not only was European socialism born of that conflict, but its apostles sanctified the conflict itself into a philosophy. Civil war was no longer looked upon as something evil, or something unfortunate, but as something good and necessary. As prayer is to Christianity or to Islam, so civil war (which they called 'class war') is to the European version of socialism – a means inseparable from the end (Nyerere 1966: 169)'***.

According to Julius Nyerere, the true African socialist does not consider one class of men as his brethren and another as his enemies. He or she does not form an alliance with the 'brethren' for the extermination of the 'non-brethren', but rather regards all human beings as members of an extended family.[236] The African socialism of *ujamaa* is therefore not founded on class struggle, but on the harmony of the extended family. He has explained that:

'Ujamaa', then, or 'familyhood', describes our socialism ['ujamaa' is a Swahili word meaning 'familyhood']. It is opposed to capital- ism, which

seeks to build a happy society on the basis of the exploitation of man by man; and it is equally opposed to doctrinaire socialism which seeks to build its happy society on a philosophy of inevitable conflict between man and man. We,

224 Nyerere 1966: 22
236 Nyerere 1966: 169

in Africa, have no more need of being 'converted' to socialism than we have of being 'taught' democracy. Both are rooted in our own past – in the traditional society which produced us (Nyerere 1966: 170).

Narratives of return have also developed in other African countries which became independent in the late 1950s and 1960s. After independence in Ghana in 1957, President Kwame Nkrumah argued that politics should be inspired by the philosophy of *consciencism,* which he held to be in harmony with the original humanist principle of Africa.[237] He believed that the previous colonial administrators of Ghana, and their African employees who 'became infected with European ideals'[238] had abandoned these humanist principles. Another example is postcolonial Senegal, where President Léopold Senghor argued that Senegalese socialism should be inspired by *négritude*, which he identified as the totality of traditional civilizing values of the Negro world.[239] There are therefore many variations on the narratives of return, but I will not include further examples here. My purpose has simply been to prepare the way for the argument that the present, primarily South African, call for a return to *Ubuntu* displays some of the characteristics of earlier postcolonial narratives of return. I will come back to this argument later on. Presently, I will move on to explore the historical development of the written discourses on *Ubuntu*.[240]

2.25 Ubuntu in South African Law

The idea of *Ubuntu* existed in general public discourse in South Africa as far back as the 1920s. However, *Ubuntu* did not enter the legal discourse until 1993, when it was introduced by the post-script of the Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution). The post-script, headed 'National Unity and Reconciliation', declared that 'these [struggles of the past] 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.' *Ubuntu* made a fervent debut in the jurisprudence of the Constitutional Court in *S v Makwanyane.*[255] The *Makwanyane* court gave a detailed exposition of the content of *Ubuntu* and sealed its place as a constitutional value. Mokgoro J.

held as follows:

'Metaphorically, [ubuntu] expresses itself in umuntu ngumuntu ngabantu, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, humandignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity, marking a shift from confrontation to conciliation'

254 Ibid

255 S v Makwanyane and Another (CCT3/94) [2012] ZACC 3; 2012 (6) BCLR 665; 2012 (3) SA

Langa J. held further that:

'[Ubuntu] recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community [that] such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights byall.'

Unfortunately, *Ubuntu was* not expressly included among the values in the founding provisions of the final Constitution. It has been argued that the exclusion of *Ubuntu from* the Constitution effectively de-Africanized the Constitution and the law in general. However, despite its exclusion, the constitutional status of *Ubuntu* as a value has been reaffirmed by the Constitutional Court, the Supreme Court of Appeal (SCA) and the High Court.

Before going on to consider whether the constitutional value of *Ubuntu* introduces a requirement of fairness and equity into private contractual relations, it is necessary to first understand the *status quo*. The next part surveys how the common law treats injustice in private contractual arrangements. I also consider how the common law position was changed by the Constitution, if at all. While the section is headed 'good faith', the phrase should be understood to mean 'private justice', which includes fairness and equity between private contracting parties.

The 1996 Constitution on the other hand enjoins courts to promote values that underlie an open and democratic society based on human dignity,

equality and freedom in its preamble it provides as one of its objectives the establishment of a society based on democratic values, social justice and fundamental human rights Democratic values underpin individual freedom as understood in western democracies whereas social justice implies the community's sense of justice which is characterized by the exercise of rights in the context of a group.

The emphasis in the preamble to the establishment of a society based on democratic values, social justice and fundamental rights on the one hand and promotion of values that underlie an open and democratic society based on human dignity, equality and freedom on the other bring about tension between these values that need to be reconciled by the courts. It will be argued with reference to this tension that although the 1996 Constitution, unlike the 1993 Constitution which refers to *Ubuntu* in its postamble, does not make any reference to *Ubuntu* which transcends a distinction between intra and extra-textual interpretation, its frequent reference to human dignity is impliedly a reference to *Ubuntu.* Furthermore, an argument will be forwarded that as the fundamental underpinnings of the Constitution is the harmonization of liberty and equality, courts should harmonize these two concepts within the particular African context of *Ubuntu.*

Firstly, *Ubuntu* will be discussed in detail and the manner in which it fits into the wider constitutional picture. It is examined with a view to link it with other constitutional values and how it can be used as an extra-textual aid to interpretation. Secondly *Ubuntu* will be linked to African jurisprudence in general and other constitutional values which are unique to Africa and may be used during constitutional interpretation. In conclusion, an argument will be advanced that the African value system should be applied as an extra-textual aid in constitutional interpretation.

Ubuntu is examined and proposals on how it fits into the wider constitutional picture as well as how it can be used as an extra- textual aid to interpretation is discussed. Since the advent of the 1993 Constitution, ubuntu has become a focus of attention and ongoing discussions on the subject continue unabated. These discussions have been given impetus by its inclusion in the postamble of the 1993 Constitution and its detailed discussion in the l a n d m a r k case of S v Makwanyane in which the death penalty was declared unconstitutional. The postamble of the 1993 Constitution provides as follows:

'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 human rights, the transgression of humanitarian principles in the 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 revenge, a need for Ubuntu but not for victimisation'.

In order to put ubuntu in its proper perspective, I will briefly discuss its sources, what it is and link it to some of the constitutional values which underlie our constitution.

2.25 Ratio Decidendi Behind Ubuntu

Ubuntu refers to an African way of life that accords respect to human dignity and equality to any person irrespective of status in a communitarian sense. Thus, an individual has an inborn corresponding duty to accord respect to other members of the community. Its literal translation is humaness. Its roots can be traced back to rural communities. It is derived from community practices and inheritance from the past. It is like an inborn concept where every member of a community does not have to be reminded that the most outstanding feature in life in interaction with other members of the community, is respect for human dignity.

Children at an early age are taught to respect one another and share any delicacies that they may receive. They are furthermore taught to respect any person who is their parents' peer in the manner that they would respect their own parents. The importance of one's worth as a human being is always regarded as important as another person's worth. In this way, human beings treat each other in a spirit of brotherhood and sisterhood. The culture of non-revenge when hurt is always deeply ingrained in the minds of children.

2.26 Idioms as a Source of Ubuntu In African Jurisprudence

The main source of *Ubuntu* is idioms which set down norms which every member of the community is expected to conform to. Well known amongst them is *Umuntu ngumuntu ngabantu.* Literally translated it means a person is a person because of what other members of the community have done for him. In short, *Ubuntu* signifies the centrality and the importance of an individual's interdependence with other members of the community.

Another idiom which is a cornerstone of respect for human dignity is *Umuntu akalahlwa* which means that a person cannot be thrown away this idiom underscores the need for respect for human life and dignity whatever the

circumstances. No matter what wrong an individual has done to the community that individual remains a human being worthy of humane and equal treatment? A person's right to human dignity is not in any way lessened by that person's transgressions. One glaring example is the punishment which was usually meted out to a person accused of practising witchcraft which results in death, *ubuntu* required that such a person be ordered to leave the boundaries of the community concerned. To show that members of community still regarded that person as a human being worthy of dignity, they would even assist that person's carry belongings away.

Traditional communities exist under the leadership of traditional leaders. In other words, political power is wielded by the traditional leader and his councilors. The idiom which underscores political power is *inkosi yi nkosi nga bantu bayo.* This means that a traditional leader is what he or she is because of the people and owes allegiance to them. Thus, *Ubuntu* would require that decisions of a traditional leader are all transparent and a reflection of the legal convictions of that leader's community. In traditional gatherings, everybody is allowed to speak, which is a reflection of freedom of speech. In traditional courts, the accused has the right to cross examine witnesses. Representation is understood in a different sense. Everybody has the right to address the court in favour of or against the accused. Therefore, representation in a communitarian sense means everybody is free to advance arguments in favour of or against the accused.

Where an accused has been found guilty, that accused may be fined a goat which may be slaughtered in the traditional leader's kraal.[82]

To show that the accused is not ostracised by the community, that accused person would be invited to share in the meat. This is an indication that such person will always be one of their peers and therefore deserves to be treated equally and with dignity.

2.27 Ubuntu and Human Dignity

Ubuntu was expressly referred to in the 1993 Constitution, but not the1996 Constitution. It is submitted that *Ubuntu is* impliedly included in the 1996 Constitution by its frequent reference to human dignity and forms part of the emerging South African and African jurisprudence. Three reasons are advanced for this argument. First, the 1996 Constitution is drafted in a conciliatory manner reminiscent of the post amble of the 1993 Constitution in that it lays strong emphasis on the importance of national reconciliation and is permeated by respect for human dignity. Secondly, strong emphasis on human dignity is an obvious reaction to the pre 27 April 1994 constitutional era which

was characterized by human rights violations, and therefore respect for human dignity must form a bridge between the past and future. Thirdly, respect for human dignity fortifies and underpins certain elements of other rights entrenched in the Bill of Rights.

2.28 Core Values of Ubuntu and Justice System

Generally speaking, the axis around which the 1996 Constitution revolves is respect for human dignity. The concept of *Ubuntu* requires the treatment of any person with dignity irrespective of that person's status. Thus, a human being deserves dignity from cradle to grave. Even after burial of a person, members of the community of which that person is a member would for some days refrain from engaging in serious work as a sign of respect to that person's dignity. In short what can be learnt from *Ubuntu* in this regard is that respect for human dignity is unconditional and everlasting. Even the most social outcasts who behave like animals would always be regarded as members of the community worthy of humane treatment.

Criminal conduct does not in any way make a human being sub-human. In this regard it is interesting to note that the Constitution provides in 83 section 37 that the right to human dignity is non- derogable. This right is a core value whose application underlies the spirit of tolerance. Even if a person is an outcast now, that person may at a later stage be depended upon.

Traditional courts (which are communal in character) place more emphasis on reconciliation than punishing the offender. In traditional communities justice is as follows: according to Krige, realized.

[l)f reconciliation ensues, the court not only rejoices but watches from afar, vicariously participating in, the return of the prodigal son, the wrongdoer, with the beer he has brewed and brought to become reconciled with his father, the aggrieved part Y'.

Common amongst the crimes in traditional communities was alleged practicing of witchcraft which caused lightning, serious illness or death. It is interesting to note that the majority of blacks believe in witchcraft. These people were often 'sniffed' out by witch doctors. Alleged practicing of witchcraft has always been regarded as a serious offence by traditional communities. Those who were found guilty of practising so-called witchcraft were not usually put to death. The usual punishment was to expel them from the borders of the community within which they lived. Even under such circumstances those persons would be allowed to go to another traditional leader for permission to settle in that traditional leader's community. Their application must be transparent. When

they leave the former community they were treated with dignity. *Ubuntu* would require that a human being despite the allegations of wrongdoing that human being is facing be treated with dignity.
Thus, equality and respect for human dignity are unconditional. What can be learnt from ubuntu in this regard is that equality with other members of the community and respect for human dignity is not only for the law-abiding citizens but the social outcasts as well. These are constitutional values which must be promoted by the courts. The feeling of interdependence is always experienced when an offender has sent a socially acceptable person to the victim express regret to the latter.

This was done as soon as possible after wrongdoing. The purpose of sending someone to express regret as soon as possible is to avoid the building up of anger on the part of the victim. The end result would be the payment of a small fee or even no compensation at all.

This value has direct link with the procedure adopted by the Truth and Reconciliation Commission. One of the requirements of the granting of amnesty in terms of the Act which established the Commission is full disclosure. This also supports the argument that it is not always necessary to resort to ordinary courts to resolve conflicts. With regards the granting of amnesty Mohamed DP had the following to say:

It is available only where there is full disclosure of all facts to the Amnesty Committee in accordance with ubuntu full disclosure is one basis for forgiveness and tolerance. Confession is an embedded theological principle among the Nguni, Sotho, Venda and Tsonga. Therefore, full disclosure or public confession is used for reconciling people who are in conflict as long as a person socially acceptable to both parties is present to facilitate such reconciliation. At times the offender would send somebody with a form of compensation on the basis that one day the victim may be an offender who may require pardon ***Ubuntu* in** *Makwanyane.*

In her erudite judgement in *Makwanyane* Mokgoro J. highlighted the key values of group solidarity, compassion, respect for human dignity, conformity to basic norms and collective unity which are enveloped by the concept of *ubuntu* She went on further to emphasize that the right to life and human dignity were supported by the spirit of *Ubuntu.* The emphasis on human dignity in this judgement reaffirms that respect for human dignity is always inherent in *Ubuntu.* The inviolability of human dignity is the basis for guaranteeing other values in the Constitution.

Chaskalson P. after referring to the postamble which called for the need for reparation but not for retaliation emphasized that our society should not kill criminals simply to get even with them. He acknowledged the need to be consistent with *Ubuntu. Ubuntu* does not call for 'an eye for an eye.' It acknowledges that as long as society exists criminals who are part of society will also be in existence. Only a humane way of dealing with them will accord with *Ubuntu*

In his judgment Langa J also emphasized the value *ubuntu* puts on life and human dignity. He identified the importance of another person's life as one's own.

This reasoning also accords with the idiom *umuntu ngumuntu nga bantu.* It encompasses the importance of a person's life in society. A person is a member of society irrespective of that person's transgressions; thus, the life of a law-abiding citizen is as important as the life of one who has taken the life of another. In his judgement, Madala J. dealt with the manner in which *Ubuntu* corresponds with rehabilitation. His judgement mainly focused on the possibility of reforming the offender. The possibility of reformation is always inherent in *Ubuntu*, which acknowledges that a human being despite transgressions capable of reform and at a later stage should be allowed to resume a normal role in society.

To summarize: the judgements in Makwanyane stress the need for application of *Ubuntu* as an extra-textual aid to constitutional interpretation. The emphasis on unconditional respect for human dignity corresponds with one of the founding values of the 1996 Constitution which is respect for human dignity.

2.30 Advancement and Empowerment of Ubuntu

Although *Ubuntu* requires the equal and dignified treatment of all persons irrespective of circumstances, the poorest of the poor members of the community receive more generously from traditional leaders in the spirit of *Ubuntu* than those considered well to do. Members of a community can collectively plough the fields of these unfortunate members of the community. Furthermore, these less fortunate members can be allowed to stay at the kraal of the traditional leader under the latter's care. The understanding is that for the poor of the poorest to be equal with other members of the community, measures must be taken to make them equal with others in the true sense of the word. This is not seen as punishing the well to do for the social ills of the

poor. For example, a fully grown young man who cannot afford payment of lobolo, can have it paid for him by a traditional leader or his relatives. The reason is to make him substantively equal with his peers.

This can be linked to the present affirmative action contemplated in section 9(2) of the 1996 Constitution which allows for the advancement of persons previously disadvantaged by unfair discrimination. The purpose of *Ubuntu* in advancing certain members of the community is not because these members were necessarily previously disadvantaged but to make them equal with others not only in a formal sense, but substantially as well. This form of *Ubuntu* is done with the spirit of sharing since it is considered inhuman not to share.

2.31 Transparency and Reconciliation of Ubuntu

Another feature of *Ubuntu* which fits into the wider constitutional picture is decisions affecting people. The essence of this concept is that decisions are not taken on the basis of majority vote but consensus. In this regard the main aim is to accommodate the views of the minority.

Furthermore, decisions by governing bodies have to be transparent. This can be linked to the right of access to information held by the state and the right to administrative justice contemplated in sections 32 and 33 of the 1996 Constitution. These two values constitute a foundation of open and transparent governance.

One of the features of *Ubuntu* is the avoidance of confrontation or revenge. It focuses more on tolerance. As stated earlier on, children at an early age are taught not to seek revenge when hurt. This value of non-revenge has found its way into the 1993 Constitution and item 22 of schedule 6 of the 1996 Constitution, and has further been enhanced by the amnesty process of the Truth and Reconciliation Commission. The value of non-revenge is further complemented by the spirit of *Ubuntu*, which puts more emphasis on rehabilitation and tolerance of criminals.

2.32 Freedom of Speech as Form of Ubuntu

Freedom of speech is another feature of *Ubuntu* which fits into the wider constitutional picture. Freedom of speech in the spirit of *Ubuntu* is recognized in various forms including artistic creativity and imparting information or ideas. In traditional communities this value featured prominently in songs criticizing governing institutions. It was common to find villagers ploughing a field of a traditional leader singing about their complaints regarding certain aspects of governance.

Criticism of governing institutions was more acceptable than criticizing an individual. In this regard Schapera observes:

'The Chief himself is not above the law. Should his action run counter to accepted standards of what is right and proper, he is severely criticized by his councilors and the people at large. This form of freedom of expression helps to strengthen good governance'.

It is clear that the application of extra-textual aids has far-reaching implications. The concept of *Ubuntu* which has succeeded in sustaining generations of the past is not foreign to the values the Constitution seeks to promote, because those values contain elements of respect for human dignity. The picture that I envisage for *Ubuntu* in constitutional interpretation is that courts should apply it where the question of human dignity has to be considered. This view finds support in the fact that *Ubuntu* gives respect for human dignity its fullest meaning.

2.33 Ubuntu and African Jurisprudence as a Form of Constitutional Interpretation.

In what follows, the link between *Ubuntu* and African jurisprudence (as well as other constitutional values that may be used during constitutional interpretation) are discussed. Like the uniqueness of values which any other Constitution may seek to promote, *Ubuntu* as a constitutional value has its own unique characteristics.

If one were to greet a Sotho-speaking person and say *0Kae* or in Zulu *Ku njani?* (How are you?) The answers would respectively be *Re teng* and *Si khona* (We are fine). An African always describes himself not as an individual but as a member of a clan or group. This signifies that person owes existence to a larger group. The feeling of belonging to a group is part of Africans' languages, ritual ceremonies and culture which forms part of *Ubuntu.*

2.34 Individual Rights and the Group

The African Charter on Human and People's Rights which is also a source of Mrican jurisprudence has its own features. It draws heavily on the OAU Charter which provides that freedom, equality, justice and dignity are essential objectives of the achievement of the legitimate expectations of the African peoples· It provides for the protection of people's rights which allows for an individual to exercise rights within the context of a group. It also imposes duties on an individual towards family, society and the state, as well as the strengthening of cultural values in the spirit of tolerance. This is

in no doubt a reflection of the African culture of human rights where an individual cannot exercise rights in isolation, but with due regard to the collective rights of the community.

It is part of *Ubuntu* that individual rights are exercised within the context of the group. This is an interesting link with the German sozial rechsstaat which balances communitarian socio- economic rights and liberal political and civil rights Obligations imposed by the Charter on an individual towards family, society and the state and those imposed by *ubuntu*, both acknowledge individual rights within the context of a group.

Amongst the Venda payment of lumalo or lobolo is never made in full.
The reason for this is that the relationship between two family groups never comes to an end. Since marriage is regarded as a matter between family groups, and not individuals, there will always be an obligation between the two families to mutually support each other in case of need. Furthermore, the African Charter emphasizes that an individual has an inborn duty to serve the community without reward, because the essence of
African governance is characterized by enhancement of collective solidarity, trust and compassion.

2.35 Reconciliation in African Jurisprudence

One of the distinct features of the African Charter is that unlike the American Convention on Human Rights and Fundamental Freedoms which provides for the establishment of a human rights court to review cases brought before it, it does not make provision for such a court.

This is attributed to the fact that African jurisprudence prefers the settlement of disputes through conciliation rather than courts of law. This is a feature of *Ubuntu*. More emphasis is on reconciliation of members who belong to the same group. Taking a matter to court that can be settled through conciliation without first attempting conciliation is foreign to African jurisprudence.

2.36 Communitarianism in Ubuntu

In Africa life centres around the group, not the individual, the exercise of an individual right is understood in the context of a group. Although the term 'Peoples' is not defined in the Charter, it is submitted that this involves this involves peoples linked by shared common values. Individualism in the strict sense of the word is foreign to Africa and as such a communitarian approach

to constitutional interpretation would always be appropriate in Africa. In this context the idiom Umuntu ngumuntu ngabantu (which signifies the centrality of mutual support and sharing of resources) becomes more appropriate. The real and lasting duty imposed on an individual in the exercise of human rights is to balance individual rights against the rights of others. As a result the African approach to human rights favours the common good of society. The overall rights of the community often prevail over individual rights and freedom.

2.37 The Question of Indigenous Values Debate

The viewpoint that our legal system should reflect indigenous values rooted in history has been strengthened by a call for the application of value judgements, which also involves the determination of their content. In this regard **Heyns** says:

The viewpoint that our legal system should reflect indigenous values rooted in history has been strengthened by a call for the application of value judgements, which also involves the determination of their content. Our Constitution must be trendy legitimate, it must reflect the soul of our nation, it must be an expression of our history and our deepest values because on them will it have the spontaneous support of our people;

This was a call that the Constitution should be deeply rooted in African soil and thus reflect indigenous values which the people had a part in developing In other words, the values that our Constitution seeks to promote must be part of our history and form part of the nation's pride and culture.

Thus Sachs J. had the following to say

'***We are a new Court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights'***.

Such an approach clearly goes beyond the text of the Constitution, since it acknowledges the intention of the framers of the Constitution to frame it

as they did and give content to the values which the framers had in mind when framing it.
Furthermore, it must reflect the core values of society. *Mhlungu* not only paved the way for the application of indigenous values, but also posed a challenge to subsequent decisions to reflect the soul of the nation. In this way we will take pride in what is indigenously ours.

Even before *Mhlungu a* view was held that certain values should prevail in a community. A former Chief Justice had the following to say in this regard:

'A community has certain common values and norms. These are in part a heritage from the past. To some extent too they are the product of the influence of other communities; of the interaction that takes place between peoples in all spheres of human activity; of the sayings and writings of the philosophers, the thinkers, the leaders, which have universal human appeal; ..... the judge must become 'the living voice of the people' he must ... interpret society to itself'

Courts should accept overall responsibility for giving content to the values which the Constitution seeks to promote. The emphasis placed on human dignity and social justice in the Constitution pre-supposes that these values must be given an indigenous perspective. In **Makwanyane Mokgoro. J** placed particular importance on the importance of indigenous south African value Sachs J agreed that traditional believes and values of all sectors of society must be taken into account. He went on further to say that values peculiar to African society should have been placed before the court during the debate about the death penalty. In a view, this is a challenge to the courts to utilize expert evidence of those members of our community who are knowledgeable in African jurisprudence and for legal academics to include it in their curricula as responsibility to promote our values cannot be left to the judiciary alone.

2.38 Constitutional Link

The 1996 Constitution recognizes the imposition of duties and responsibilities of citizenship in section 3. The imposition of duties and responsibilities pre-supposes that a person's right is exercised with due regard to the rights of others.
In this context it is worth noting that individualism is foreign to African jurisprudence, The real and lasting effect of the duty imposed on an individual is that such individual is expected to perform certain duties: not for reward, but rather to help and support the community of which the individual is a member. At all times there is always a feeling of

reciprocity between an individual and the community. Thus, Mahomed **J in Makwanyane** emphasized reciprocity in interaction with the collective Humanity when he said:

'The need for Ubuntu" expresses the ethos of an irutinctive capacity for and enjoyment of love towards our fellowmen and women, the joy and thefu1fdment involved in recognizing their innate humanity, the reciprocity this generates and interaction within the collective community; the richness of the creative emotions which it engenders the moral energies which releases both in givers and the society which they serve and are served by'.

The African value system which allows for imposition of duties on a citizen to exercise rights with due regard to the rights of the community can be applied as an extra- textual aid to interpretation. This will be in accordance with the spirit of the Constitution which is based on the will of the people. Again, this approach reflects the importance of the group. In adjudicating on the exercise of individual rights courts should appreciate the importance of striking a balance between individual and community rights.

2.39 Conciliation and Rehabilitation

As pointed out earlier, the 1996 Constitution is drafted in a conciliatory manner. This is to be found in the requirement for the establishment of a state based on democratic values, social justice and fundamental human rights. All courts, forums and tribunals, are joined by section 39 to promote these values, and it may be argued that the framers also had courts and tribunals known to the African people in mind. Traditional courts, which also apply *Ubuntu* in resolving disputes, are also called upon to promote these values.

Another feature of African jurisprudence is that the possibility of rehabilitation is recognized more often than not. In *Makwanyane Madala J* thus emphasized the need to recognize the possibility of rehabilitation. As an individual is part and parcel of the community, it is always felt that at some stage that individual will be reconciled with the community through rehabilitation. Punishment must reflect the community's morals that a human being capable of rehabilitation through reconciliation with the community. This underscores the tolerance and forgiveness inherent in *Ubuntu* and our courts can promote this value through taking into account the possibility of reconciliation of an offender with the community through rehabilitation.

Like any other society no rights are absolute. *Ubuntu* recognizes the exercises

of rights within limits. Individual rights are exercised within the limits prescribed by society. The nexus between limits imposed by *Ubuntu* in the exercise of rights and constitutional limits is that both acknowledge that no right is absolute.

One argument that can be advanced from what has been sketched above is that South Africans are united in their diversity and *Ubuntu* as a constitutional value should be applied in constitutional interpretation and thereby form part of the emerging South African jurisprudence. Our legal system should promote this indigenous value which international jurisprudence may well emulate in future. In this piece the challenge and role of courts in applying extra-textual aids in constitutional interpretation with specific reference to *Ubuntu* is analyzed and discussed. Itis trite that South African courts adopt a value-orientated approach in constitutional interpretation. The 1993 Constitution specifically enjoined courts to promote values which underlie a democratic society based on freedom and equality? Furthermore, it referred to South Africa as a constitutional state (rechtsstaat)? The concept of rechtsstaat embodies western liberal values which embody a balance between individual and communitarian values.4 Equality on the other hand is particularly a communitarian concept.

2.40 *Ubuntu* and the Creation of Zimbabwe

The first book to be written specifically on *Ubuntu* is, to my knowledge, *Hunhuism or Ubuntuism: A Zimbabwe Indigenous Political Philosophy* **(Samkange & Samkange 1980)**. '*Hunhu*' is a term from the Shona languages which, according to the Samkanges, has the same meaning as the term '*ubuntu*' from the Nguni languages. The Samkanges explain that: 'the attention one human being gives to another: the kindness, courtesy, consideration and friendliness in the relationship between people; a code of behaviour, an attitude to other people and to life, is embodied in *hunhu* or *Ubuntu*'.[256] Furthermore, the Samkanges argued that *ubuntu* is something that is connected to a political philosophy or ideology, and they explicitly put this idea forward with- in the social context of the transition from white minority rule to black majority rule in the new Zimbabwe. They write:

'This month (February 1980), Rhodesians are called upon to choose men and women of a political party that will lead them into a new era: the era of one man, one vote; black majority rule – and Zimbabwe. This is a great moment in the history of the country. The question is: What political philosophy or ideology should inspire the new Zimbabweans in this new era? Should the solution to the country's problems be based on capitalist, socialist, fascist, communist – Marxist,

Leninist or Maoist – thinking? Is there a philosophy or ideology indigenous to the country that can serve its people just as well, if not better than, foreign ideologies?'[257]

With regard to this question, they explain:

'It is the thesis of this book that Zimbabwe has an indigenous political philosophy which can best guide and inspire thinking in this new era of Zimbabwe. This philosophy or ideology, the authors endeavour to show, exists and can best be described as Hunhuism or Ubuntuism.[258]

The Samkanges present the notion that there exists a philosophy or ideology indigenous to Zimbabwe as a *hypothesis*, implying that this is not self-evident to everyone. Samkange even related that:

256 Samkange & Samkange 1980: 39
257 Ibid
258 Samkange & Samkange 1980

during the abortive Geneva Constitutional Talks, I [Mr. Samkange] found myself one day talking to some very opinionated London- based perennial 'O' Level students (…) When I said I am a 'Hunhuist' the sneers and smiles of derision that carved their faces could have turned fresh milk sour. 'What is that?' they scornfully asked (…) 'Whose fault is it', I asked, 'if no one knows about the philosophy of your grandfather and mine? Is it not your fault and mine? We are the intellectuals of Zimbabwe. It is our business to distil this philosophy and set it out for the whole world to see'.[259]

The Samkanges appear to identify Hunhuism or Ubuntuism as a philoso- phy or ideology about how the new Zimbabwe should be influenced by *Ubuntu* (understood as a positive human quality). Furthermore, they first and foremost described Hunhuism or Ubuntuism as a *political philosophy* or *ideology*, which is reflected in the fact that 11 of the book's 17 chapters (chapters 6-16) are dedicated to a description of how policy should be for- mulated in the new Zimbabwe in order to be consistent with Hunhuism or Ubuntuism.[260] I will summarize some of the political implications that the Samkanges extracted from Hunhuism or Ubuntuism:

Hunhuism or Ubuntuism dictates that there should be a Government of National Unity in the new Zimbabwe (see page 45). According to Hunhuism or Ubuntuism, the new Zimbabweans ought to live amicably with their neighboring states (see page 50).

The consistent with Hunhuism or Ubuntuism, the new Zimbabwean government should use the inhabitants' fear of *ngozi* (aggrieved spirits) to

prevent murder (see page 54 Hunhuism or Ubuntuism does not allow that the African idea of communal land ownership be eroded by Western ideas of private land ownership (see page 59).
According to Hunhuism or Ubuntuism, there should be state, communal and individual property (see page 64).

By identifying *Ubuntu* as something connected to the *political* philosophy of Hunhuism or Ubuntuism, the Samkanges attached political connotations to the term '*Ubuntu*'. Despite this politicizing interpretation, however, Hunhuism or

259 Ibid : 9
260 Samkange & Samkange 1980

Ubuntuism did not have a marked influence on politics in the new Zimbabwe. For example, I have been unable to find any Zimbabwean legal documents that mention Hunhuism or Ubuntuism, and a search for this philosophy on the website of the Zimbabwean government failed to produce any references. It should be noted that some have celebrated Robert Mugabe for displaying *Ubuntu* politically[261], and that Robert Mugabe has used the term '*Ubuntu*' himself. In a newspaper article entitled *Zimbabwe Celebrates Peace Days*, which was published in the *Zimbabwe Telegraph* on 24 June 2009, it was reported that:

Zimbabwean President Robert Mugabe has last week proclaimed Friday, Saturday and Sunday as peace days during which Zimbabweans from different political persuasions are expected to encourage and promote national healing and reconciliation. Mugabe said the three days set aside for national healing offered Zimbabweans a choice to either consolidate their identity or expose themselves as a disintegrated nation. 'We should realize that the desire for peace, harmony and stability is a desire for progress, national identity, prosperity and Hunhu, Ubuntu', he said

2.41 Conclusion

I have argued that there is a telling challenge to all courts, tribunals and other forums to promote indigenous values in constitutional interpretation as well. Coupled to the promotion of these values is the legitimacy question. An in-depth reading of the 1996 Constitution reveals that values which the Constitution seeks to promote are both African and Western. As pointed out earlier, the Constitutional Court should accept overall responsibility for addressing the legitimacy question of the judiciary. It is submitted that the promotion of societal values will go a long way in addressing this question of

legitimacy.
It needs to be emphasized that there are valuable lessons to be learnt from the African value system. It is characterized by unconditional respect for human dignity. Furthermore, it recognizes that a person's worth as a human being can only be expressed fully through interaction with others. An individual is obliged to exercise rights with due regard to community rights which at times may prevail over individual rights.46 As South Africa has a wealth of diverse cultures, only values which reflect the will, demands, biases and legal convictions of those who

261 Tutu 2016: 36; Bhengu 1996: 29

are affected by them should prevail. The spirit and the soul of the South Mrican nation, does not necessarily reflect an anti- Western bias. Only 'home-brewed' values can stand the test of time. However, the promotion of these values cannot be left to courts alone.

It will be recalled that the historic 1994 elections were preceded by voter education unparalleled in this country since all sectors of the community were involved. At this moment the retentionists are shouting for the return of the death penalty. The majority of South Africans are not aware that ubuntu which permeates their daily life, is one of the reasons why the death penalty has been found to be unconstitutional in *Makwanyane*. Perhaps this is an opportune moment for the government to launch a campaign aimed at teaching the 'people' that the Constitution they voted for in 1994 calls for inter alia the promotion of African values permeated by respect for human dignity. The promotion of African values calls for a tremendous effort on the part of the courts, government, media and legal academics to promote a new approach to understanding our values.

This will undoubtedly enhance our Constitution and the role of the judiciary. As individual rights may conflict with the exercise of rights within the context of a group, the solution lies in reconciling them in such a manner that accords with society's hopes and aspirations. Arguably the exercise of individual rights (as understood in Western democracies) and the exercise of rights within the context of a group can be used to complement each other in a conciliatory manner.

Lastly courts have an ever-lasting duty to pursue the accomplishment of the core purpose the Constitution set the nation to achieve: the promotion and enhancement of human rights in the spirit of human dignity. It is hoped that

courts will interpret the Constitution in a manner that will reconcile the exercise of individual rights with the exercise of rights within the context of a group by applying *Ubuntu* as an extra-textual aid and thereby create a conciliatory bridge between these two categories of rights.

C H A P T E R T H R E E

3.0 Application of Obuntu-bulamu in Uganda

3.1 Introduction

The new constitutional dispensation, like the idea of freedom in Uganda, is also not free of skepticism. Many a time when crime and criminal activity are rife, skeptics would lament the absence of *Ubuntu* in society and attribute this absence to what they view as the permissiveness which is said to have been brought about by the Constitution with its entrenched Bill of Rights.

In this, there is a patriotic obligation on all of us not to allow our Constitution and the idea of respect for human rights and dignity to slide into such disrepute.

Firstly, the attempt to demonstrate the irony that the absence of the values of *Ubuntu* in society that people often lament about and attribute to the existence of the Constitution with its demands for respect for human rights when crime becomes rife, are the very same values that the Constitution in general and the Bill of Rights in particular aim to inculcate in our society.

Secondly, against the background of the call for an African renaissance that has now become topical globally, to demonstrate the potential traditional African values of *Ubuntu* have for influenced the development of a new Ugandan law and jurisprudence. This presentation contributes to the early debates on the revival of African jurisprudence as part of the total or broader process of the African renaissance[262].

3.2 The Concept of Ubuntu and the Social Values It Represents

The concept *Ubuntu*, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach to defy the very essence of the African world - view and can also be particularly elusive. Therefore, not in the least attempt to define the concept with precision; that would in any case be unattainable. In

one's own experience, *Ubuntu* it seems is one of those things that you recognize when you see it. Therefore, only put forward some views which relate to the concept itself and like many who wrote on the subject, can never claim the last word.

It has also been described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources, where the fundamental belief is that ***motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu*** which, literally translated, means a person can only be a person through others. In other words the individual's whole existence is relative to that of the group: this is manifested in anti-individualistic conduct towards the survival of the group if the individual is to survive. It is a basically humanistic orientation towards fellow beings[263].

Such potential, he states can fluctuate from the lowest to the highest level during one's life- time, where there is constant harmony between the physicality and spirituality of life. That harmony is achieved through close and sympathetic social relations within the group thus the notion ***umuntu ngumuntu ngabantu/ motho ke motho ka batho ba bangwe***, which also implies that during one's life- time, one is constantly challenged by others, practically, to achieve self-fulfillment

262 Paper delivered at the first Colloquium Constitution and Law held at Potchefstroom on 31 October 1997. This paper was first published by the Konrad-Adenauer-Stiftung in their Seminar Report of the Colloquium (Johannesburg 2008).

263 UNISA, 1997

through a set of collective social ideals. Because the African worldview cannot be neatly categorized and defined, any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea.

The meaning of the concept however, becomes much clearer when its social value is highlighted. Group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity have, among others been defined as key social values of *Ubuntu*. Because of the expansive nature of the concept, its social value will always depend on the approach and the purpose for which it is depended on. Thus its value has also been viewed as a basis for a morality of co-operation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the time emphasizing the virtues of that dignity in social relationships and practices.

For purposes of an ordered society, *Ubuntu* was a prized value, an ideal to which age-old traditional African societies found no particular difficulty in striving for. This is so because these societies had their own traditional institutions which functioned on well-suited principles and practices. Of course in view of the influence and effect that various social forces had on African societies throughout their historical development, today, the well-suitedness of those original principles and practices is often questioned and in my view correctly so. Indeed, as Ali Mazrui observes,

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

3.3 Ubuntu and the Ugandan law

Much as Uganda is a multicultural society, indigenous law has not featured in the mainstream of Ugandan jurisprudence. Without a doubt, some aspects or values of *Ubuntu* are universally inherent to Uganda's multi cultures. It would be anomalous if dignity, humaneness, conformity, respect, etc. foreign to any of Uganda's cultural systems. It is however, in respect of methods, approaches, emphasis, attitude etc. of those and other uncommon aspects and values of *Ubuntu* that the concept is unique to African culture. It is thus in respect of those unique aspects that there has now arisen a need to harness them carefully, consciously, creatively, strategically and with ingenuity so that age-old African social innovations and historical cultural experiences are aligned with present day legal notions and techniques if the intention is to create a legitimate system of law for all Ugandans.

Such inclusivity is important for enhancing the legitimacy of a jurisprudence which is required to manage the challenges that constitutionalism poses for us. There is therefore much room for law reform by careful prioritization of current socio-legal problems and through appropriate research methods, find pragmatic and integrated solutions, as part of a new law management strategy.

3.4 Ubuntu and the Constitution

The Constitution[264] clearly set the tone for socio-political transformation in Uganda. That constitution itself created,

... a historic bridge between the past of a deeply divided society, characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of peaceful co-existence
... for all Ugandans[265].

In order to realise that peaceful co-existence, the Interim Constitution recognized that despite the injustices of the past, there is need for understanding, not vengeance. A need for reparation not retaliation. In addition, that constitution recognized the need for ubuntu and not victimisation.

Thus, in its preamble the Constitution declared:
Whereas there is a need to create a new order in which all Ugandans will be entitled to a common Ugandan Citizenship ... where there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedom.

The Constitution therefore established a new restructured socio-political order of national unity, with a common citizenship; a new constitutional order where

264 The Constitution of Uganda 1995

265 Provision on National Unity and Reconciliation termed the postscript of the Constitution of Uganda.

the Constitution reigns supreme, where all and not only some shall enjoy and exercise their fundamental rights and freedoms. However, at times when violent crime is rife, distraught members of society decry not only the loss of ubuntu, but particularly the permissiveness of constitutionalism and the idea of rights protection as is demonstrated by this expression of intense anger:

In Africa we respect the dead. That is why we believe in badimo. [However] our [new] Constitution, with all its good intent, allows people to disrespect funerals
... [And] if, as it seems, our constitution does not have any mechanism to arrest cancerous barbarism and restore moral values then it is a worthless piece of paper which is set to do more harm to us as a people than even the devil-inspired apartheid[266].

The Constitution, however, did not establish a new free-for-all anarchist society where rights and freedoms are exercised freely with total disregard. The basic values of the Constitution as a whole, the clearly identifiable values in the preamble and the postscript create a value system in terms of which rights and freedoms are to be claimed and exercised. Finally, aware of the potential for disorder that the guarantee of rights and freedoms may have after decades of oppression and repression, these guiding values aim to set the tone for peaceful co-existence. The preamble specifically required the need for ubuntu but not victimisation. The values of ubuntu are therefore an integral part of that value system which had been established by the Interim

Constitution. Where it concerns the exercise and enjoyment of individual human rights and freedoms the Interim Constitution also did not establish a system where these rights and freedoms are exercised and claimed willy-nilly despite the claims and existence of concomitant rights of others. The limitations……

The founding values of the democracy established by this Constitution, viz. human dignity, equality, promotion of human rights and freedoms and multi-party democracy to ensure accountability, responsiveness and openness and the rule of law, arguably coincide with some key values of ubuntu(ism), e.g. human

266 Mogale C "We are Breeding a Generation of Scum" City Press 25 October 1997 3 saying further "Few things are as hurtful and embarrassing as thuggery ... at funerals, where gun-toting yahoos ... turn clause which was a rights

dignity itself, respect, inclusivity, compassion, concern for others, honesty and conformity. At the same time the ubuntu values of collective unity and group solidarity can translate into the spirit of national unity demanded of the new Ugandan society.

The collective unity, group solidarity and conformity tendencies of ubuntu can surely be harnessed to promote a new patriotism and personal stewardship so crucial (for a number of reasons) in the development of a young democracy. A number of similar survival issues in the law itself brought about by the challenges of constitutionalism, are easily identifiable. It is around these that law reform can harness the spirit of ubuntu(ism) to achieve appropriate responses to the demands of constitutionalism.

Whether it is for purposes of promoting the values of the Constitution by translating them into more familiar ubuntu values and tendencies, or whether it is for purposes of harnessing some unique ubuntu value, tendency, approach and/or strategy, or further whether it is for purposes of promoting and/or aligning these aspects of ubuntu with core constitutional demands ubuntu(-ism), it seems, can play an important role in the creation of responsive legal institutions for the advancement of constitutionalism and a culture of rights in Uganda.

3.5 Ubuntu and Indigenous Law

For the first time in the history of its recognition in Uganda, indigenous law and its application now has what can be viewed as constitutional status[267]. The Constitution recognizes the indigenous law institution of traditional leaders and the systems of indigenous law that they observed. Courts are specifically

enjoined to apply this law where it is applicable and do so subject to the Constitution and applicable legislation.

The Constitution therefore seeks to bring an end to the marginal development of customary law principles. It also promotes the need to address the application of those outdated and distorted customary law institutions by requiring that they be brought in line with the values of the Constitution.

Indigenous law which is the formally recognized positive law, is replete with

267 The Constitution of the Republic of Uganda 1995

institutions which deserve to be discarded or re-aligned and developed. *Ubuntu* (- ism), which is central to age-old African custom and tradition however, abounds with values and ideas which have the potential of shaping not only current indigenous law institutions, but Ugandan jurisprudence as a whole. Examples that come to mind are:

- *the original conception of law perceived not as a tool for personal defence, but as an opportunity given to all to survive under the protection of the order of the communal entity;*
- *communalism which emphasizes group solidarity and interests generally, and all rules which sustain it, as opposed to individual interests, with its likely utility in building a sense of national unity among Ugandans;*
- *the conciliatory character of the adjudication process which aims to restore peace and harmony between members rather than the adversarial approach which emphasizes retribution and seems repressive. The lawsuit is viewed as a quarrel between community members and not as a conflict; the importance of group solidarity requires restoration of peace between them;*
- *the importance of public ritual and ceremony in the communication of information within the group;*
- *the idea that law, experienced by an individual within the group, is bound to individual duty as opposed to individual rights or entitlement. Closely related is the notion of sacrifice for group interests and group solidarity so central to ubuntu(ism);*
- *the importance of sacrifice for every advantage or benefit, which has significant implicants for reciprocity and caring within the communal entity.*

The shared values of ubuntu(-ism) and the Constitution and in addition, the significant and effective approaches, methods, techniques and strategies of the former are likely also to become central in shaping and formulating a new indigenous law and jurisprudence that meet the demands and challenges of constitutionalism for indigenous law. How exactly these values can be utilized

to inform jurisprudential responses to the current challenges brought about by competing demands in a complex and rapidly changing Uganda, will require close examination of current shortcomings of existing institutions, their mechanisms and strategies.

The Constitution provides that in the interpretation of the Bill of Rights any legislation, courts have a specific injunction to develop indigenous law taking into account the spirit, purport and object of the Bill of Rights. Since the values of the Constitution and at least the key values of Ubuntu (-ism) do seem to converge, indigenous law may need to be aligned with these converging values. It is however, not only the system of indigenous law which need this re-alignment. Ugandan law as a whole is constantly placed under the scrutiny of the constitution. The values of *Ubuntu* can therefore provide it with the necessary indigenous impetus.

When Chief Justice Katurebe addressed the Jurist, he summed up the significance of African values:

... the ageless emotional and cultural maturity of Africa is less dramatic but not less significant or potentially powerful in influencing, in shaping and in formulating the constitutional ethos which must inform and define judicial responses to jurisprudential challenges arising from competing demands in a complex and rapidly changing society. That maturity expresses itself through a collectivist [emotion] of communal caring and humanism, and of reciprocity and caring.

These African values which manifest themselves in *Ubuntu*/botho are in consonance with the values of the Constitution generally and those of the Bill of Rights in particular. The human rights violations and indignities of the past have not served legitimacy and respect for Ugandan law well.

The advent of constitutionalism has seen unconstitutional laws and actions invalidated and set aside. Institutions of democracy which had been created by the Constitution to advance a culture of democracy and human rights have also swung into much action. Constitutionalism has however not and could not have achieved the necessary popular understanding and appreciation for the varied implications of constitutionalism for Uganda. Nor did it and could it have restored fully the dignity of our legal system. And, in the true spirit of *Ubuntu*/batho, no one, not the least lawyers from all walks of life can afford to sit back and watch our new-found constitutionalism slide into disrepute. Quite obviously, the complete dignification of Ugandan law and jurisprudence would require considerable re- alignment of the present state of

our value systems. We will thus have to be ingenious in finding and or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to such unprecedented change.

The values of *Ubuntu* are believed, if consciously harnessed can become central to a process of harmonizing all existing legal values and practices with the Constitution. *Ubuntu* can therefore become central to a new Ugandan jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance.

3.6 The rise and fall of Ubuntu in Uganda

3.7 The Demise of Ubuntu in Uganda; Through the Introduction of the Repugnancy Clause.

'*Just as with an English oak, so with the English common law, You cannot transplant it … and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. In These far off lands the people must have a law which they understand and which they respect'*. Per **Lord Denning in Nyali Ltd v. Attorney General (1956) 1 QB 1, at pp. 16-17.**

In light of the above statement, It's necessary to explain how the challenges revolving around the concept of 'conflict of laws' were addressed during reception of common law in Uganda and in view, of the above try and show that the colonial masters did not follow the advice above hence the final demise of *Ubuntu*.

The colonial era transformed economic, political and socio-cultural relations in Uganda with multifarious consequences. One of these consequences manifested itself in the impact that the colonial transformation had on the notion of rights as traditionally understood by the Ugandan people and embodied in traditional values. The colonialists introduced new values, which were often in conflict with the traditional norms, this usually resulted in the subjugation of the traditional beliefs and consequently, the breakdown of the social fabric of the indigenous Ugandan societies.

An essential tool in shaping and precipitating the changes introduced by the colonial order were the colonial laws, with the 1902 order –in-council (O.I.C) forming the bedrock[268]. This 1902 O.I.C introduced the repugnancy doctrine to Uganda, which had a significant impact on the traditional concept of human rights in the colonial era. The repugnancy doctrine played an instrumental role in the substitution of the traditional notion of rights with the Euro-centric concept.

This essay discusses the effect and implication of the repugnancy doctrine on the traditional concept of rights. It commences by explaining the notion of rights as understood in traditional African /Uganda vis-à-vis the European conceptualization. It then proceeds to illustrate how the repugnancy doctrine affected the traditional notion, replacing it with the western concept. However, before proceedings with this analysis it is necessary to define some key words and concepts, which feature in the essay.

Traditional Africa was defined by Khiddu Makubuya in his Article 'The concept of Human Rights in Traditional Africa' as meaning, Africa as it originally was before the invasion by or contact with European or other foreign influence[269]."
The present author adopts this definition and reference to the traditions of

268 The 1902 O.I.C marked the formal inception of colonial rule.it provided a comprehensive framework within which the protective power would administer the protectorate as a whole P.g 19 Morris and Read.
269 Ibid pg.5

Uganda in the essay is made within this context i.e. tradition as they stood before external European Influence. Custom and customary law[270] were defined by Thorndike and Barnhart in the world Book Dictionary as "the accepted way of acting in a community or a group "and law which is derived by immemorial custom from ancient times" respectively. These definitions are also adopted by the present author. The definition and meaning of the traditional African and European concepts of human rights are dealt with quite extensively in the following section.

3.8 Traditional rights in Uganda vis-à-vis Euro –Centric rights.
3.9 Collectivism Vis-à-vis Individualism.
In order to understand the implications of the repugnancy doctrine on the traditional concept of rights, it is necessary to grasp the meaning of rights in the customary context, the African conceptualization differed from the Euro-centric concept; whereas the latter focused on the individual the former focused on the community.

The phrase human right ordinarily refers to the rights on an individual[271]"·a perusal of contemporary human rights instruments supports this notion; they are primarily concerned with the individual .However this is the euro centric concept. Traditional Africa had its own peculiar concept of human rights"[272] which centred on the community rather than the individual communalism

formed the very essence of the traditional African conceptualization of rights. This was well illustrated by Makibuya he observed that outstanding amongst the factors that affect the concept of rights in traditional Africa is the collectivist/communal nature of traditional African societies. He continued to say that the collectivist/communal nature of traditional Africa tended to militate against individualization of human rights He asserted that Africa, did not glorify the individual qua individual[273] this individual was viewed within the context of the community.

270 it should be noted that the term native law was used synonymously with the term customary law' during the colonial period
271 Makubuya pg.7
272 Makubuya pg 6
273 pg 45

As far as the individual was concerned, the traditional focus was on the duties owed by the individual to the family /community /age sects and so on. In this respect, Makubuya talked of a concept of human duties rather than human rights he explained that,

Traditional Africa did recognize the necessity for each individual to bear responsibility to the society …indeed it is easier to identify a code of duties in traditional Africa…. Than a character of rights[274]

However, this is not to say that an individual had no rights and was in effect a robot or a slave to the community, Obligations to a society are not necessarily incompatible with the individual wellbeing. In fact it has been argued that in traditional Africa, the fulfillment of duties enhanced the individuals well beings. After all, a declaration of rights is by reciprocity a declaration of duties also. The difference however was the focus at the heart of the traditional concept was the community while with the euro centric approach the centre is the individual.

The duty-based conception of rights is reflected in contemporary African human rights instruments, which embody African value. The preamble of the African charter on human and people's rights takes into consideration the fact that the enjoyment of rights implies the performance of duties similarly the charter on the Rights and Welfare of the African Child makes specific references to the duties of children.

All in all, it can be said that whilst the notion of rights in traditional Africa rotated around the duties of the individual and the rights of the community /family /age sect and so on, to which /whom these duties were owed the

western concept centred on the individual.

274

3.8 The Repugnancy Doctrine and the Freeing of the Individual
3.9 The separation of the individual from the communal.

Background to the doctrine

The British professed a willingness to respect Ugandan customs, which invariably included respect for the traditional concept of rights contained therein. Rubin and cotran in Readings in African Law stated that the basic policy of the colonizing powers was to introduce their own law but also retain customary law The 1902
O.I.C provided for the operation of native law in all cases in which natives were party (S.20) and enjoined the commissioners to respect existing native laws and customs in the process of making laws.(S.12) According to Professor Kakooza ,this enabled the Ugandan administration in the colonial days to assimilate native custom and laws with the received law.[426].Similarly, Morris and Read in Uganda –The Development of its Laws and constitution, argued that although the establishment of a protectorate over Uganda introduced foreign law it did not entail the suppression of customary law because it provided for native courts that would enforce native law.

However, the apparent respect for custom was subject to one major qualification the repugnancy doctrine. In the words of madman in his book Citizen and subject, everywhere the central state set limits to the customary in the form of the repugnancy clause under this doctrine; customary law was respected only in so far it was not repugnant to justice and morality or inconsistent with colonial laws. The repugnancy test can be traced back to the 1900 Buganda Agreement which subjected sentences made by the native courts to the test of humane principles.

The rationale for the repugnancy doctrine was ties in with European notions of rights and wrong and civilization as well economic considerations. The colonialists following closely on the heels of the missionaries claimed to be on a quest to civilize the dark continent and …bring light to a continent where it saw life as nasty, brutish and short[275]

The colonial power claimed to be the custodians of general humanitarian notions of rights and wrong[276] thus sought to eliminate customs that were opposed to these notions through the vehicle of the repugnancy test. In so doing they claimed to promote the rights and status of individual s that were

oppressed by

275 Mamdani pg 109
276 Mamdani pg 115

evil, immoral and unjust customs. However, underlying this motive was a desire to remove customs that would impede the economic exploitation of the colonies. Both these motives express themselves in the separation of the individual from the community hence the subjugation of the traditional notion of rights. The ensuing discussion illustrates how the repugnancy doctrine was used to promote the individual above the communal compromising the traditional notion of rights .it shows how the apparent motivation was the protection of individual human rights but often actually promoted colonial economic exploitation.

3.10 The Community Is More Important Than an Individual under the Ubuntu Philosophy

The *Ubuntu* philosophy represents an African conception of human beings and their relationship with the community that embodies the ethics defining Africans and their social behaviours **(Van de Bunt, 2006:48).** Africans are social beings that are in constant communion with one another in an environment where a human being is regarded as a human being only through his or her relationships to other human beings (Tutu in Battle, 2014:39-43). Therefore, the survival of a human being is dependent on other people – the community and society.

There are several basic management principles derived from African tribal communities that embody this philosophy, including trust, interdependence and spiritualism.[277] In the African management system context, the African *Ubuntu* philosophy represents humanness, a pervasive spirit of caring within the community in which the individuals in the community love one another. This *Ubuntu* approach plays a pivotal role in determining the success of any African organization.[278] *Ubuntu* transcends the narrow confines of the nuclear family to include the extended kinship network that is omnipresent in many African communities. As a philosophy, *Ubuntu* is an orientation to life that stands in contrast to rampant individualism, insensitive

277 Mbigi & Maree, 2005
278 Mangaliso, 2001:32

competitiveness, and unilateral decision-making.[279] The *Ubuntu* teachings are pervasive at all ages, in families, organisations and communities living in Africa.

The *Ubuntu* optimizes the African philosophy of respect and human dignity that is fundamental to being able to transcend ethnic divisions by working together and respecting each other.[280] People who truly practise *Ubuntu* are always open and make themselves available to others, they are affirming of others and do not feel threatened that others are able and good. With *Ubuntu*, one has a proper assurance that comes with the fundamental recognition that each individual belongs to a greater community.[281]

From the above literature review, it seems that, in an African framework, the community frame of reference is what an individual is defined and associated with. In Africa, the definition of an individual is community- based and not individualist. Anybody who does not identify him- or herself with the community is regarded as an outcast, which is contrary to Western ideologies. Thus, an African organisation must run its activities on the premise that community cares, and that the care of its members is paramount.

3.11 The Repugnancy Clauses.

Section 20 of the 1902 O.I.C provided that,

In all cases, civil or criminal in which natives are party every court.

a) Shall be guided by native law in so far as it is not repugnant to justice and morality or inconsistent with any order in council or ordinance"

b) Section 12 empowered the Commissioner to make ordinances and other laws but in exercise of this legislative power he was to respect existing law and custom in so far as they favouring of the individual over the community.

The implications of the Repugnancy clauses on the Traditional notion of rights. The application of the repugnancy doctrine by the courts in Uganda

279 Ibid

280 English, 2002:196-197; Poovan *et al*., 2006:22-25; Tutu, 2016:34-35

281 English, 2002:196-197; Poovan *et al*., 2006:22-25; Tutu, 2016:34-35

and in other East African countries which had binding or persuasive authority in Uganda often resulted in the favouring of the individual over the community.

An illustration of the freeing of the individual through the vehicle of the repugnancy clause concerned the status of women. Mamdani remarked that the beginning of colonial rule was marked by a combination of forces predisposed towards improving the position of women[282]. As Makubuya noted it could be argued that traditional African was really a man's world and women had a secondary position[283] the colonialists believed that many cultural practices and values undermined the status of women.

The most often cited example was the practice of polygamy and bride price

which was interpreted as equating women with chattel and involving them in many humiliating consequences[284]Another like practice was noted by Roscoe in his studies of the Buganda, he observed that the fine for murder included cows, goats and women.[285]

The colonialists thus sought to promote the rights of these individuals (i.e. women) who were oppresses by communal values and practices and an instrumental tool in this respect was the repugnance test.

The use of the repugnancy test to rid women of such customs is aptly illustrated in the infamous case of **RV Amkeyo**[286] where the issue was whether a woman married under customary law could properly be regarded as a wife for purposes of giving evidence against her husband. Hamilton C.J holding that she could not be regarded as a wife condemned bride price as wife purchase, and discredited customary marriage because they were potentially polygamous. He further argued that under customary marriage there was no consent because the women did not participate in the marriage arrangements which were essentially

282 pg 121
283 pg 47-48
284 Reading in African law Vol 2 pg 146.schaperas Handbook on Tswana law and custom.
285 Makubuya pg 48
286

conducted by relatives.

This was a clear instance of the repugnancy doctrine being used to favour the rights of the individual (in this instance the woman) over the community. This was particularly evident in the fact that the elements highlighted by the judge to discredit customary marriages (i.e. bride price, polygamy and participation of relatives) were indeed communal aspects which involved community participation.

However, questions arise as to whether concern or women's individual rights was the driving motivation of the colonialists and whether custom totally disregarded women as individuals. As regards the latter many writers have argued that the colonialists painted too gloomy a picture of the life of African women Eliot asserted that a woman s life in most tribes was not depressed or slavish. Furthermore, many scholars of African customs such as Seymour Shapere, Rattray and Elias to mention but a few, have thwarted the notion that bride price was wife purchase with Seymour saying that this notion was the opinion of too casual or unanalytic observers. ·Nsereko in The Nature and

function of Marriage Gifts in customary Marriage, discussing bride price with specific reference to Uganda denied that it had any connotions of purchase. He argued that such connotions were due to the English names ascribed to the practice such as bride price.

All these writers discussed the true value of bride price, it was a s a bond uniting the families of the husband and wife, it serves as an incentive to both the husband and wife to perform their obligations and was also a way of thanking the wife's parents. In fact, some African vernaculars the word for bride price means thanksgiving.
These observations coupled with the fact that Victorian England was itself the epitome of patriarchy casts doubt on the noble intentions of the British as regards women's individual rights. Indeed, there were some Ugandan cases during the colonial era that recognized bride price as validating customary marriage despite the professed concern from women rights.

Some writers have argued that the British had ulterior economic motives disguised as concern for women's rights. For instance, Mamdan asserts that the settlers were convinced that polygamy allowed the native male to live in sloth and idleness and was at the root of their labour problems. This argument holds weight when one considers that payments in consideration of marriage was known to British society, Nsereko noted that marriage settlement and gifts in contemplation of marriage are a known feature of many English marriages.
Another illustration of the function of the repugnancy doctrine in the promotion of the individual as opposed to the communal is seen in the judicial reaction to the notion of collective responsibility. Collective responsibility was part and parcel of the communal conceptualization of rights. As was observed by T.O. Elias in The Nature of African customary law; arising out of the idea that the individual is merged in his group is the theory that the latter is collectively responsible for his offences against outsiders.

The idea of collective responsibility meant that the group paid all compensation for the individual s private wrongs and answered for his public offences. A correlative of this was parental responsibility whereby if an accused son was found guilty of an offence and was ordered to pay damages his father could be called upon to pay.

Collective responsibility was often viewed by the colonialists as repugnant to justice morality and good conscience. This was the position taken in the case of Gwoa bin Kilimo V Kisunda Bin Ifuti.[287] · A judgment creditor in expedition of the decree had attached cattle belonging to the judgment debtor's father. It

was argued that there was a custom by which debts could be satisfied by attaching property belonging to the debtor's family. This brought into issue the notion of collective responsibility. Wilson J held interalia that such custom was repugnant in terms of S.24 of the Tanganyika Order –in –Council (the equivalent of S.20 of the 1902 Ugandan O.I.C) on the groups that it was against good conscience that an individual does not bear responsibility for his own acts and wrongs. Once again we see the separation of the individual from the community through the
medium of the repugnancy clause.

287 (1938) 1 TLR 405

Certain consequences /elements of collective responsibility were a clear affront to European notions of rights and wrongs, for instance Elias pointed out that a result of collective responsibility was revenge killings whereby the murder of a member of one group (A) by a member of another group (B) could be revenged by the killing of any member of group B. This was viewed by the Europeans as a violation of the rights of the individual killed for a crime he did not commit. Furthermore, one major Order Brown who was quoted by Makubuya doubted the justice and soundness of group responsibility. He argued that the income of a young man who goes to town to work, will be drained away in paying debts of clans' men left behind.[288]

However, the apparent concern for the rights of the individual is yet again open to question. As regards Major Order Browns assertion, his concerns can be traced more to economic interests than to concern for the rights of the young man; the colonial cash economy created the conditions that made young people go to town in search of wages and it was in the colonial interests that these people conserved their income for taxes rather than spend it on their clans men. Furthermore, as Elias noted, the collective responsibility was of the family /extended family not all the hundreds of tenuous blood relations of the wrong doer[289] as was implied by Order Brown. Further still the concept of one person being responsible for the wrongs of another was not a totally alien concept in western society. Elias noted that collective responsibility was comparable to vicarious liability under British law where a master is liable for the acts of his servant[290].He continued to consider the criminal law concept of parties to a crime all of whom are equally punishable regardless of who is the guilty.

He observed that paradoxically enough only the one considered most guilty among the escaping criminals is normally punished in the African situation.[291]

288 pg 31

289 Readings in African law Vol 2 pg 7
290 Readings in African law Vol 2 pg 8
291 Ibid

The final illustration of the separation of the individual from the communal is seen as regards land. Makubuya observed that in the area of land ownership the African concept of the right to property Parts Company with the western concepts.[292] The African concept was imbedded in the communal conceptualization of rights. Makubuya stated that as regards land, traditional Africa did not recognize that an individual could be the owner of land in the English sense where the owner had an absolute right to land. He quoted Ellias who observed that African Customary tenure had no concept of land holding comparable to the English idea of a simple absolute possession however he did note that there were areas where ownership of land neither rested with the individual nor the community but in the paramount chief or kings where the people owned the land community and where the king owned the land and the people were his tenants. Buganda was an example of the latter whilst Lango was an example of the former.

The British however imposed their individual notion of the right to land on Uganda with the repugnancy serving as a useful tool. This was evidenced in the case of Mwenge V Migadde where the repugnancy doctrine affirmed the destruction of customary land tenure in Buganda the plaintiff had challenged the competence of the defendant to sell a piece of land on the basis that it was communal Bataka land thus could not be disposed of by an individual. This argument was rejected by the court on the grounds that as a result of the Buganda Agreement Bataka tenure no longer existed. The judge stated that if the provisions of any law are repugnant to the continued existed. The judge stated that if the provisions of any law are repugnant to the continued existence of any custom…the custom must be treated as destroyed in this instance we see the repugnancy test being used to promote the individual not on the basis of justice and morality as in the preceding cases but on the grounds that the custom in issue was repugnant to existing law.

However, as with the case discussed above, economic considerations greatly influenced this concern with the individual`s rights to property. In traditional

292 Mukubuya pg 12-13

Africa while individuals had rights to land, this did not amount to ownership in the western sense. Communal tenure did not affect these rights. For instance, it was observed that among the Lango. The`… *system of cultivation by groups of*

*men in no way affects the individual`s right* communal.[293] Makubuya asserted that the denial of individual ownership was not a negation of the individual`s rights especially when one considers that what was important in the traditional Africa was access to land for growing crops and grazing animals. So long as this was protected there was no need for ownership.[294] However, the individualization of the land tenure, which began with the Buganda Agreement, was essential to economic exploitation of the colonies by the colonialists.

Hence, the need to destroy communal tenure, this was well summed up by **Mandani** who stated that `*economic individualization and jural individuation went hand in hand*, all in all, as the above instances have illustrated, the repugnancy doctrine was used to replace the traditional concepts of rights with the individualized western concept. As the above instances have also shown, the promotion of the individual was not necessarily as a result of genuine concern for the human rights of the native. As was observed by **Oloka**, `the very fact of colonialism negated the notion of rights as understood in the bourgeois sense. The lack of genuine concern for individual rights was well illustrated in the Uganda case of ***R V Yowasi pailo***[295]. Whilst this case was not strictly within the scope of the repugnancy doctrine, it is important because it illustrated colonial disregard for individual rights. In this case the accused had been charged with the publication of seditious statements against the Kabaka. The custom was for the complainant to personally bring his complaint but since the Kabaka could not be expected to appear before his own court. This infringed the rights of the accused for the judge is supposed to be impartial but was permitted in the interest of justice `without delay`. Here, no mention was made of the individual`s human rights.

In conclusion, during the colonial era, the repugnancy doctrine had a significant

293 Makubuya pg 12-13
294 Makubuya pg 13 295
(1919-1920) ULR98

impact on the traditional notion of rights in Uganda and Africa at large. This doctrine attacked the communal aspect of African values, which formed the very essence of the traditional conceptualization, of rights replacing it instead with the western individualized notion.

Before the coming of the British colonialists in the 19th century, the communities in Uganda where politically, socially and economically organized. The population was dominated by bantu and Nilotic speaking people who were organized in form of kingdoms for example Buganda,

Ankole, Tooro, Bunyoro and chiefdoms like Acholi and the Iteso, whose leadership was hereditary, based on wealth and king was the supreme judge of the land and their decisions where binding, the king had a council of elders that advised him on decision making and thus following the basis on which customary law was based, on which the communities were governed[296].

An article appeared in the London gazette on **19th of June 1894 declaring Uganda as a British protectorate,** hence bring Uganda under the jurisdiction of the **1889 African order in council.**[297] In addition, the British government had signed several agreements which included **1900 Buganda agreement, 1901 Tooro and 1901 Ankole agreement** with the native leaders Setting a path to the introduction of statutes of general application, common law and doctrines of equity. Common law was the law that was common in the whole of England and wales. It originated in the 12th century created by the decisions of the English judges and their decisions were written down as precedents hence binding to other courts[298]. Later an order in council was promulgated to increase the crowns jurisdiction into the protectorate. Uganda officially received common law and doctrines equity under the 1902 order in council, under article 15 (1) a high court called Her majesty's court was introduced and empowered to apply common law and equity and have full criminal and civil jurisdiction over all Ugandans. Article 15(2) her majesty's court was to apply the common law, statutes of general application and doctrines of equity as per the **reception date of 11 August 1902**[299]

296 The forging of an African Nation by G.S.K Ibingira pages 4-7

297 Article by John Tamukedde Mugambwa on the legal aspects of the 1900 Buganda agreement revisited page 243.

298 Learning the law by Glanville Williams page 22.

299 1902 order in council.

Conflict of laws is that branch of jurisprudence arising from the diversity of laws of different nations in this application to rights and remedies. Which reconciles the inconsistency or decides which law or systems is governing in this particular case or settle the degree of foreign country. The rights or acts in question having arisen under either where domestic law is silent or not exactly applicable in the case in point[300]which arose in Uganda were customary law and the foreign laws conflicted. The case in point is in 1905 where the British commissioner Galt was killed by the local Munyakole man at Ibanda the suspect was also murdered by another local. So the two natives were charged under the local courts that hard obtained their jurisdiction from Article 6 of the **1901 Ankole agreement**, giving authority to the courts to try and handle the cases among natives. In the case of **Katosi v Kahizi**[301], Katosi was not

satisfied with the judgment from the local courts and so decided to appeal to the high court and the issue brought forward to the two newly appointed judges Cater and Ennis was whether the high court had jurisdiction to try cases that were between natives. In Cater's judgment he brought it out that the high court had no authority to turn down the article 6 of the agreement hence its jurisdiction would be ultra-virus. This was later turned down after the case of **R v Besweri Kiwanuka**[302] that had a similar issue as Katosi (supra),whether the high court introduced under the order in council would have jurisdiction over the cases among natives and the judge ruled that the order in council would not take over the powers the Kabaka's court had obtain in the 1900 agreement, when the issue was referred to the secretary for state of colonies, he made a decree that where the order in council conflicted with the agreements the order in council was superior.

In the case where customary law conflicted with written law, a repugnancy clause under article 20 of the 1902 order in council was to the effect that where native laws were inconsistent with the written laws were considered void was applied and this is vividly seen in the case of Mwenge v Migadde[303]where Migadde wanted to sell the Butaka land and Mwenge contended that the land was owned under customary and so it would not be sold since it was not a personal property.

300 Blackslaw dictionary 5th edition.
301 (1907)
302 HC CrimAppl .No. 38/37 (1937)
303 (1933)ULR 98

The high court held that the Butaka land tenure system no longer existed this was against the native custom that availed land to ever member of the community as a tool of production. A similar issue arose in **R v Amkeyo**[304]where the issue was if a woman married under customary law was a wife and the judge held it that a wife acquired under the custom of bride purchase was not a wife according to English common law, the judge's decision was based on what the white man thought was the right definition of a wife and marriage not what the African understanding of wife was henceforth in the white man's ears the African culture was considered evil , however this decision was turned in the case of Alai v Uganda[305] where the Alai committed adultery with a woman married under customary marriage ,he claimed that the woman was not married according to the law , it was held that by 1964 a law that was recognizing customary marriage had been passed hence rejecting the western ideal on marriage and upholding the African custom of marriage.

Over time a lot of water has passed under bridge. Court in **Uganda Motors Limited v Wavah Holdings Limited** held that statutes of general application were no longer applicable in Uganda and that the applied law shall be common law and doctrine of equity that would apply as long as the circumstances in Uganda and of its people permitted. This was later codified in Section13 (2) (b)

(i) of the Judicature Act[306].

In reference to the conflict above, the colonial masters didn't follow the advice. They still thought that the common law would still be held in Uganda as it held in England. A case in point is in **Mwenge v Migadde (*supra*)** where Migade wanted to sell land that was owned under Butaka tenure system. The judge held that the Butaka system of land ownership no longer existed, thus giving Migadde the right to sell land as a personal property. All this was decided based on how land was owned in England under common law, but the judge didn't take time to study the reason to why in Uganda land was a communal property since it was a medium of production to the community in general.

304 (1914) KLR 14
305 (1966) EA
306 CAP 13

A similar question also arises in the case of **R v Amkeyo**[307].where the issue was whether a woman married under customary marriage would be a legal wife. The judge held that a wife obtained under what court called wife purchase would not be considered a wife. Since she would have been acquired by the husband without her consent. His line of argument was that the woman is not involved in the negations of the bride price and thus the woman was married off to the husband without free consent and that this form of marriage was not to the standards of what marriage is defined as in the civilized societies. In my opinion it was an injustice against the African culture. Since the justice that monogamy conferred to the white man in England, was the same justice that polygamy conferred to the African man who was married under customary marriage. There far common law would not be transplanted to other jurisdiction like Uganda and it's expected to maintain the same strong character.

3.13 The Playing Out of Ubuntu in Uganda

As already noted, the notion of *Ubuntu* can be found in many languages across Africa. The word *Ubuntu* is derived from a Nguni aphorism, ***"Umuntu Ngumuntu Ngabantu"*** translated as "*a person is a person because of or through other people."*[308] The *Ubuntu* application is pervasive in almost all parts of the African concept. In East Africa the concept is also shared[309], The

Ubuntu derivative in Uganda is "Abantu"[310]

Ubuntu is the capacity in African countries to express compassion, reciprocity, dignity, harmony and humanity in the interest of building and maintaining community with justice and mutual caring.[311] In ***Salvatori Abuki V Attorney General***.[312]A case of State V.Makwanyane an M. Mchunu case No . CCT/3/94

307 [1914] KLR 14

308 (Moloketi ,2009:243, Tutu,2004 :25-26)

309 In Salvatori Abuki V AG it was stated thatIt will be recalled that the word "Ubuntu" though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda

310 Chapter 4, The African Ubuntu Philosophy pg. 128

311 An essay by Martha Nussbaum (2003) (Khoza, 2006;6, Luhabe, 2003:103, Mandela, 2006: XXV, Tutu,1999:34-35)

312 (Constitutional case No.2 of 1997)) [1997] UGCC 5 (13 June 1997)

was cited which stated that the African concept embodies within itself humaneness, social justice and fairness, and permeates fundamental human rights. Langa J.in the same case expressed same ideas when he concluded that the concept carries with it the idea of human dignity and true humanity.

The term *Ubuntu* has for many years come to be known as *the philosophy of sharing.* ***"I am because we are, since we are, therefore I am."***[313]In addition *Ubuntu* is defined by various thinkers and researchers as an African philosophy of becoming human[314] the African philosophy of humanity and community.[315]

Further, in a hostile environment it is only through such community solidarity that hunger isolation, deprivation, poverty and any emerging challenges can be survived, because of the community's brotherly and sister concern, co-operation concern and care.[316]

Ubuntu is a philosophy that promotes the common good of society and includes humanness as an essential element of human growth. Under *Ubuntu,* all sectors belong as partners, all are stakeholders and in so doing, all succeed, not incrementally but exponentially. The Ubuntu notion is a truth famously associated with South African Desmond Tutu through his quote, *"I am because you are and since you are, therefore I am."*

The notion of *Ubuntu* is an eternal African philosophy of oneness; an understanding of inter connectedness of all life. *Ubuntu* focuses on connecting all life from lowest creature to the highest through showing love, peace, happiness, eternal optimism, inner goodness as a kind of goodness inherent within eachbeing.

From the beginning of time, the divine principles of *Ubuntu* have guided African societies, Uganda inclusive. This is why on analysis of the provisions

of the Constitution of the Republic of Uganda 2012, it is right to assert that they are grounded in the principles of *Ubuntu*. For example, **it is unconstitutional to**

313 By Mbitii John, African religion and philosophy
314 (Swanson 2008)
315 (Skelton 2002)
316 Chapter 4, The African philosophy page 129

have any customary practices that do not benefit all people in that given society. This may apply to mostly land where in some customs; land is for men thereby leaving out women and disabled people. Even where land was customary acquired by a man, on marrying a woman, the woman is also entitled to that land.[317] In so doing, *Ubuntu* principles of oneness are being upheld.

Article 126 (1) of the Constitution of Republic of Uganda I995 provides that judicial power shall be exercised in conformity with values, norms and aspirations of the people. In **Kabandize and 20 others v KCCA**[318] it was the appeal against the judgement of Hon. Justice V. F. Musoke Kibuuka of The High Court of Uganda, where he dismissed a suit because appellants failed to prove that they had served the respondents with a statutory notice of intention to sue as required by the **Civil Procedure and Limitations (Miscellaneous Provisions) Act Cap 72.**[319] Justices of the Court of Appeal in this case of **Kabandize and 20 others v KCCA**[320] were in agreement with the decision of the **Constitutional Court** in the case of **Dr. Rwanyarare V Attorney General**[321]considering that the Constitution of Republic of Uganda, 2012 **puts emphasis on the people.** This reasoning was also based on **Article 126 of The Constitution of Republic of Uganda 2012**.

In the case of Mifumi (U) ltd and Anor V Attorney General and Anor[322], Mifumi and twelve others petitioned court to declare the marriage custom and practice demanding bride price and its refund incase marriage failed unconstitutional. They sought this declaration by virtue of Articles 2(1), (*2), 137(3) 93(a) and (d) of the Constitution of Republic of Uganda 2012 and Rule 3 of the Constitutional Court (Petitions and References). Supreme Court held that **refund of pride price promotes inequality in marriages as it was one of the causes of domestic violence in marriages**. Hon. Dr. Kisaakye observed that voluntary exchange of gifts at marriage is not unconstitutional because it's a way

317 Section 34 of the Land Act cap. 227
318 Civil Appeal No. 28 of 2011
319 Sec 2(1)(b)
320 Supra

321 (2003)2 E.A 664
322 Constitutional Appeal No. 02 of 2014
of sharing, togetherness and it is a traditional practice of many tribes in Uganda. This shows that *Ubuntu* practices have for long been embedded in the practices of the people.

In the case of Salvatori Abuki and Anor v Attorney General, court held that banishing the witches from the village even after they had served their punishment was against the right of life as provided for under article 22 of the Constitution of Republic of Uganda 2012. This is because they did not have means of livelihood. By court rebuking the act of banishing these criminals from the village portrays African societies as those that are customarily inclusive. It shows how we ought to forgive and not discriminate against those that have done wrong.

The case of Susan Kigula and 416 others v Attorney General was a petition against the death penalty. They argued that the death penalty was against the provisions of Articles 44 that provides for non derogable rights and the period spent on the death row was **inhumane, torturous and degrading. The existence of Article 44 of the Constitution of Republic of Uganda that provides for non derogable rights despite someone being criminal confirms the existence of the notion of Ubuntu.** *Ubuntu* teaches and emphasizes avoiding gaps despite crimes, that even when people are criminals, let the punishments not go overboard as that would be against humanness which is an indispensable component of human growth under *Ubuntu*.

In the case of Attorney General V Osotraco ltd[323]**,** in which Osotraco ltd sought an action for an order of eviction of the defendants from their suit premises. Osotraco ltd. Claimed to be the registered proprietor of plot 69 Mbuya Hill that was being occupied by Ministry of Information and Broadcasting. It too was challenged considering the applicability of Section 15(b), now Section 14 (b) of the Government Proceeding Act Cap 77 that prohibits issuance of an eviction order against the government. In this case, **Justice Engonda Ntende held that unjustified discrimination between the state and the person is no longer justifiable under the Constitution of Republic of Uganda 2012.** This can be interpreted as effort to bring harmony between the state and the people. **Without *Ubuntu*, the state would be enveloped by greed, selfishness, and**

323 Civil Appeal No. 32 of 2002

exploitation of common people so courts of law come in to ensure that such does not take place.

The notion of *Ubuntu* is further seen in the case of Uganda Association of Women Lawyers and others v Attorney General[324], which petition was brought seeking court to declare sections 4(1), 4(2), 5, 21, 22, 23 and 24 of the Divorce Act cap 249 unconstitutional. While hearing that case, Hon. Justice Mulenga JSC stated **that any constitutional case ought to be attended to expeditiously once it has been filed.** This is because counsel for respondents, Ms. Carol Mayanja raised a preliminary objection that the petition was time barred and therefore unsustainable. Supreme Court also **put into consideration the preamble, "We the people of Uganda…" to show that there shouldn't be any law; in that case an Act of Parliament that threatens or contravenes the rights and freedoms and existence of the people and the future generations**. Through this, *Ubuntu* is clearly brought out in such a way that the principle of continuity (providing for future generations) was emphasized. Court by considering the wellbeing of the people regardless of the law that might say otherwise is applying the notion or belief of *Ubuntu*.

In Cehurd v Attorney General,[325]where one of the reasons for the petitions was that the petitioners and the public were affected by non-provisions of basic indispensable health material commodities in Government health facilities and the imprudent and unethical behavior of workers towards expectant mothers were unconstitutional. Even when the petition was struck out due to court finding it a Political Question Doctrine, the move by petitioners to raise issues of concern display the notion of *Ubuntu* in such a way that people are concerned about what happens to others. Relating it to the African saying, "It takes a whole village to raise a child," citizens ought to take a similar approach country wide because it takes a shared community effort to meet shared community challenges. This is because a person is a person through other persons.

In Rtd Chief Justice Samuel Wako Wambuzi V Editor In Chief Red Pepper Publications Ltd,[326]the plaintiff filed this suit against the defendants who in his plaint, the plaintiff contends that in relation to him, the defendants

324 Constitutional Petition No 2 of 2003
325 Constitutional Petition 16 0f 2011
326 Civil Suit No 305 of 2015

published a false sensational and defamatory article under the title, "Exposed". The plaintiff contended that the article gravely damaged his reputation and standing in community. Court sided with the plaintiff and his counsel and the

defendants were held liable for the tort of defamation. With this, we realize that we are responsible for one another's growth and what we say about them before other members in society really matters a lot. We therefore have a duty of ensuring that we contribute to people's growth through positive impact and that's basically *Ubuntu*.

Needless to point out that the concept of *Ubuntu* forms the value of the 2012 Constitution of the Republic of Uganda, particularly taken up in the **preamble** and recognized in **Chapter Four** of our Constitution which deals with the protection and promotion of fundamental and other human rights and freedoms**. Article 20**(2) of the Constitution provides that the rights and freedoms of the individual and groups enshrined in chapter four shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.

The Constitutional court in Uganda, established under Article 137 of the Constitution is given power to enforce the fundamental human rights and freedoms of the people. **Article 137(3)** provides that a person who alleges that an Act of Parliament or any other law or any act done by any person or authority is inconsistent with a provision of the Constitution may petition the constitutional court for a declaration to that effect and for redress where appropriate. **Article 50** of the Constitution is also given power and is to the effect that any person who claims that a fundamental right or freedom guaranteed under the Constitution has been infringed is entitled to apply to a competent court for redress which maybe include compensation and also gives any person or organization power to bring an action against the violation of another's person's or group's human rights.

Article 21(1) of the Constitution provides all persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

The Article can be given more light in the case of **Kabandize and Others v KCCA**[327] following the termination of the appellants work by the respondents, Court delivered judgement in favor of the respondents because of failure of the appellants to prove that they had served the respondents with a Statutory notice of intention to sue that is required by **Section 2 of the Civil Procedure and Limitations (Miscellaneous Provisions) Act Cap 72.** On appeal, court held that failure to serve a statutory notice of intention to sue is no longer a mandatory requirement as it gives undue advantage to the state whereas the

Constitution provides that all persons are equal before the law. Court also noted that Section 2 of the above law is no longer good law since it is discriminatory in nature yet the 2012 Constitution was ushered in to cater for equality amongst individuals as in Article 21 of the Constitution.

Similarly, in the case of Uganda Women Lawyer's (FIDA) and 5 Others v AG[328] wherein the case, Section 4 of the Divorce Act which sets out separate grounds for divorce for men and women was declared unconstitutional by the constitutional court since it is discriminatory where a man could prove only one ground for divorce while a woman could prove more than one ground yet the Constitution aims at promoting equality between the individuals in essence restating the *Ubuntu* principle of prohibition of discrimination to promote humanness. **Article 22** of the Constitution deals with protection of right to life and is to the effect that no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by court of competent jurisdiction in respect of a criminal offence under the laws of Uganda.

In the case of Salvatori Abuki v AG[329] the petitioner having been convicted of practicing witchcraft under the Witchcraft Act, Cap 108, imprisoned for 22 years and subjected to an exclusion order under Section 7 of the Act where he was banned from access to his home for 10 years which run on completing his sentence. Court noted that this could be seen as deprivation of the petitioner's right to life because it deprives of the convict, food and

327 Civil Appeal No. 28 of 2011.
328 Constitutional Petition No. 2 of 2003
329 Constitutional Petition No. 2 of 1997.

shelter which are essential to life which could make him starve to death yet relating the Constitutional provision in Article 22 with *Ubuntu* concept, they prohibit derogation of one's life making the principle operative. The fact that the same provision provides for execution, it is undeniably time for Uganda to revolutionize its laws to match the *Ubuntu* principle and abolish death penalty.

The constitutional provision in Article 24 reflects the notion of *Ubuntu* in Uganda. It prohibits any form of torture or cruel, inhuman degrading treatment or punishment. Article 44(a) of the Constitution also prohibits torture and cruel, inhuman or degrading treatment or punishment. In the case of **Salvatori Abuki v AG, Section 7** of the Witchcraft Act was declared inconsistent with Articles 24 and 44 of the Constitution as court held that the Constitution does not allow anyone to be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment which is noteworthy that the phraseology is

couched in the same terms as in the Universal Declaration of Human Rights. Court also noted that imprisonment and exclusion order are two different things, for instance; in prison, the state provides food, shelter, clothing and some social amenities which is not so with an exclusion order. In relation, *Ubuntu* is based on African values, need for understanding but not vengeance, need for reparation but not retaliation and victimization which calls on people to embrace themselves, among all Ugandan communities with the concept which in turn promotes humanness. It could be wise of the country to scrap off such laws from the codification of laws of Uganda so as to promote the common good of *Ubuntu*.

Article 33 of the Constitution represents rights of women and as by virtue of Article 33(1), it provides that women shall be accorded full and equal dignity of the person with men and Article 33(4), it is to the effect that women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities. In the case of **Mifumi Ltd and 12 others v AG**[330] the petitioners are a nongovernmental and women's agency with an aim to protect women, challenged successfully the constitutionality of the customary practice of demand for and payment of bride

330 Constitutional Petition No. 12 of 2007.

price as a condition precedent to dissolution of marriages and it was declared unconstitutional because it violates all constitutional provisions which were enacted to give protection to women including **Article 21, 24, 31, 32(2) and 33.** Court noted that the practice no longer serves any useful purpose but rather been commercialized, highly exploitative and humiliating to women and portrays a woman as an article in a market for sale which degrades their dignity. Court also noted that in order to promote *Ubuntu* it could emerge as a practice whereby during or after the wedding of couples, the groom with help of parents, relatives and friends gives to the parents of the bride whatever ex-gratia payment they may wish to give to them as appreciation for bringing up the bride. It then becomes voluntary, and not demanded, no haggling, does not humiliate the bride and it is never refunded when the marriage breaks down. This promotes usefulness of *Ubuntu* in the society. It is high time the custom be abolished and women set free.

Article 43 of the Constitution deals with limitation on fundamental and other human rights and freedoms. It means that the rights provided in the Constitution can be limited as a form of making *Ubuntu* principle respected. However, in the case of **Tinyefunza v AG**[331] where court agreed that in

construing the constitution of the country especially as regards the protection and enforcement of the entrenched fundamental rights and freedoms, court must construe the constitution so as to give the individual full benefits of the rights and freedoms so protected. Court further noted that the limitations to the fundamental rights and freedoms are to be construed in such a manner that affords the individual to retain as much of the right or freedom in question as its permissible without doing violence to the language used. Generally, limitations are to be approached restrictively so as to maintain humanity.

To a **smaller** extent, despite the fact that the supreme norm guarantees the notion of *Ubuntu*, it has to a certain degree been criticized by both private and public agencies as in my analysis and explanation below;

Death Penalty is against the *Ubuntu* African philosophy. It should be noted that death penalty not only contravenes the God given right to life but also grossly dispels the *Ubuntu* African philosophy. After watching a lot of crime TV channels and seeing real life experiences of wrongful executions that have been happening for hundreds of years worldwide, I remain troubled by those societies that still remain troubled by those societies that still retain the death penalty as part of their law books despite the fact that its common knowledge no criminal justice system is perfect. The imperfections have become apparent when someone is innocent victim of death penalty. Seeing a country like Uganda which still embraces the death penalty in its law books, it erodes away the humanness principle the fact that it promotes inhuman, cruel, archaic, notwithstanding the fact that it is subject to irreversible life taking human errors.

Similarly, the constitutional provision in Article 24 and 44 which promotes *Ubuntu* was eroded away in the case of **Suzan Kigula and 416 others v A.G**[332] which petition was brought under Article 137(3) of the Constitution challenging the death penalty and alleged that the imposition of death sentence on them was unconstitutional. The petitioners were able to challenge the death sentence whereby previously, the court's hands were tied in that anyone who took one's life, the punishment could be death sentence but now, court's hands are not tied. However, the long delay between the pronouncement and carrying out of death sentence constitutes a cruel, inhuman and degrading treatment prohibited by **Articles 24 and 44** of the Constitution. The contended that cells are very cold at night yet without night clothes, overcrowded cells, at times prisoners on death row get sick yet without hospital facilities claiming that the fact they are going to be hanged, they don't have to waste drugs on them, no toilets which forces them to urinate and defecate in chambers and others. This no doubt exposes them to poor living conditions which is prohibited by *Ubuntu*. The fact that the death penalty is still provided for in the laws of

Uganda, there is no way *Ubuntu* is going to be practice which erodes away the concept.

The existence of torture prisons in Uganda, such as Nalufenya police station in Jinja is a perfect example of disrespect of *Ubuntu* concept by some government agencies. Uganda's police has long been accused of torturing suspects to illicit confessions and its current evidence of defendants charged in murder of police commander AIGP Andrew Kaweesi who have attended court with visible injuries. They have complained in court of being beaten at the police station. For instance, photos leaked of hospitalized mayor of Kamwenge who had horrific injuries including gaping wounds on his knees and ankles which he said resulted from beatings by police who were investigating the same murder. The Human Rights watch has interviewed hundreds of Ugandans who say they were tortured by police but still the brutality repeats itself over and over again such as Operation Wembley in Clement Hall, then violent crimes Crack Unit and Rapid Response Unit in Kireka, Special Investigations Division at times assisted by the Flying Squad from Nalufenya. Scores of victims across Uganda have described nearly incidental treatment during interrogations, including beatings on the joints with batons over several days at times while handcuffed in stress positions with their hands under their legs and to make matters worse, all these units have defied laws regulating arrest and detention with no consequences. The actions of police have eroded away the *Ubuntu* principle by torturing and oppressing people and the have been left free with no punishment imposed against them.

Article 128 of the Constitution of Uganda provides for independence of the judiciary. The fact that the courts of law enforce the fundamental rights and freedoms of the country, they need to be independent which could be an aspect in promotion of *Ubuntu* but its common in Uganda that courts work under influence of other state organs. This can be evidenced in the case of **Uganda Law Society v A.G**[333] wherein the case Dr. Kizza Besigye and 22 others were on remand on indictment for treason, were granted bail but before the accused could be released from custody, a group of heavily armed security agents interrupted the processing of bail applications and as a result, the accused were returned to prison. Such acts of security agents of preventing implementation of court bail contravened Articles 23(1) and 128(1) (2) (3) of the Constitution. In this, there is no way courts are going to enforce rights and freedoms of people which keeps the spirit of *Ubuntu* moving if they work under other forces which threatens their work.

Interestingly *Ubuntu* principle can be applied in Uganda through the civil

333 Constitutional Petition No. 18 of 2005.

society group's advocating for people's rights especially those who cannot afford legal fees, it can also be done through probono services and public interest litigation.

Public interest litigation is the use of the law to advance human rights and equality or raise issues of broad public concern .it helps advance the cause of minority or disadvantaged groups or individuals. And may raise from both public and private law matters.[334] In ***Rev Christopher Mttikila V Attorney General***[335], public interest litigation was defined as a litigation which is instituted with a desire that court would be able to give effective relief to the whole or a section of society. Further public interest litigation are legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it.[336]

In Uganda the legal basis for public interest litigation is ***Article 50(2)*** [337], which is to the effect that any person or organization may bring an action against the violation of another person or groups human rights. In addition ***Article 17 (b) & (c)***[338], is to the effect that it is the duty of the citizen to respect the rights and freedoms of others and to protect children and vulnerable people and children against any form of abuse harassment or ill treatment.[339]Further under ***Section 17***[340], it is to the effect that any person may obtain a restoration order against any person who is harmed, is harming or reasonably likely to harm the environment.

The aspect of public interest litigation in relation to the notion of *Ubuntu* is seen in these various aspects as unveiled in the essay below.

Public Interest Litigation seeks to benefit the vulnerable people. In ***BATU***

334 http://www.pilsni.org>about-public-interest-litigation

335 HCCS No.5/1993

336 Phillip Karugaba, Public Interest litigation in Uganda: Practice and procedure, shipwrecks and seamarks,11-13 september2005

337 Constitution of the republic of Uganda 1995

338 Constitution of the Republic of Uganda 1995

339 In addition to the legal provisions of public interest litigation in Uganda we see **OBJECTIVE XXIX(g)** of the National Objectives and Directive Principles of the state policy of the Constitution of the Republic of Uganda 1995 which is to the effect that it is the duty of the citizen to acquaint himself or herself with the constitution and to uphold and defend the constitution and the law which is re stated in **Article 3(4**) of the Constitution of the Republic of Uganda

340 National Environment Act CAP 153

V TEAN (The Environmental Action Network[341]**,** vulnerable people are defined as groups of people who because of incapability or inability engendered by say ignorance, poverty, illiteracy and many other reasons cannot sue or be sued or defend a suit for simple reasons that apart from being indigent, they cannot even identify their right or their violations. And thus, need services of public interest litigation. Therefore, the mere fact that the civil society organizations come in to help these vulnerable people fight for their rights since they cannot identify their rights for themselves which shows the aspect of loving and caring for each other which is clearly *Ubuntu* thus applicable in Uganda.

The applicability of the notion of *Ubuntu* is also seen in in the civil society groups advocating for people's rights especially for those who cannot afford fees and are not aware of their rights. And this is seen in the various cases where these civil society groups stand out as discussed in **Law and Advocacy for Women in Uganda V Attorney General**[342] the petitioners are an association that advocates for women rights in Uganda which is clear that it cares about the rights of other women in Uganda thus *Ubuntu*. The petition challenged the constitutionality of sections of the Penal Code and the Succession Act that they were in contravention of Articles 20,21,24,26,31,33 and 44 of the Constitution.

The second issue, whether the impugned sections of the succession Act are contrary to the provisions of the constitution. It was submitted that Section 2(h) (i)(ii) of the succession Act where the words 'legal heir' are defined, a male heir is preferred to a female one, it was contended that the preference is discriminatory. Then Section 27 which governs distribution of property in that there was no provision of female intestate. This issue was answered in affirmative just as the first issue as per section 154 of the Penal Code Act CAP 120. In relation to *Ubuntu*, both male and female now enjoy equal rights concerning equal distribution of property were a person dies intestate. The association represented the disadvantaged women for their rights which evidence of caring for others.

As per equal distribution of property due to the act of *Ubuntu* carried out by the association, there is evidence in current cases as per females getting their share of property in case of death of a person intestate.

341 Civil Appeal No.27 of 2003

342 Constitutional Petition No.13 /05 & 05/06 [2007] UGCC 1 (5 April 2007)

In ***Best Kemigisha V Mable Komuntale***, where Best Kemigisha won a high court case in which she had filed a plaint seeking an order for annulment of a caveat that was placed on her late husbands' estate by Mable. Since it was a

custom not to give a lady letters for administration of the deceased husbands'' estate. It was ruled that she was entitled to administer the estate of her late husband.[343]

In Mifumi (U) Ltd & Others V Attorney General[344], Mifumi (U) Ltd petitioned the constitutional court asking the constitutional court to declare the marriage custom and practice of demanding bride price and its refunds in case of marriage break down unconstitutional.
In relation to the manifest of the notion of *Ubuntu* of loving and caring, Ground 8 & 9 which is whether the learned justices of the constitutional court erred in law when they held that it was not essential to declare the practice of demand for refund of bride price unconstitutional.

Many ladies as per this ground were brought encountering the same challenge for example Nakirya Stella from Palisa, who deponed that her husband mistreated her and chased her out and is demanding refund of bride price. In Palisa Chief Magistrate Court the court ordered her brother to refund the cows. It was declared in the Mifumi case that the custom and practice of demand for refund of bride price after break down of marriage unconstitutional as it violates Article 31(1) (b). It should accordingly be prohibited under Article 32(2) of constitution. So as per *Ubuntu* we see that such ladies as Stella were catered for because of the act of Mifumi of challenging the constitutionality of the custom of return of bride price.

In addition to the *Ubuntu* notion, the Supreme court decision was to the effect that bride price should not be a pre requisite for one to marry someone but it can be given as a thank you message to the parents of the girl as we see bride price was basically purchasing a woman as seen in ***Rex V Amkeyo***[345] where it was stated that "I know no word that correctly describes it [customary marriage],'wife

343 Admin." Today in history: Toro queen mother wins land case "New Vision 26th April 2016
344 Constitutional Appeal No.2 of 2014
345 7 E.A.L.R (1917)

purchase' is not altogether satisfactory, but it comes much nearer to the idea than that of marriage as generally understood among civilized people" Therefore this also changed the view of bride price for other customs to protect the women which is an aspect of loving and caring thus *Ubuntu*.

Mifumi comes in to fight for feminism for other women's right encountering the same challenge besides the appellants which portrays love for other women thus *Ubuntu*.

Therefore, Mifumi (U) Ltd a non -governmental organization and a women's right agency operating in eastern Uganda. Petitioning the constitutional court challenging the constitutionality of the marriage custom which shows *Ubuntu* in that the company was not directly affected but it stood for the affected which showed the aspect of love and caring for others thus *Ubuntu*.

In Salvatori Abuki V Attorney General[346] the petitioner brought this petition challenging their conviction under the witchcraft Act in that the conviction, sentence and exclusion order are inconsistent with Articles 21(1), (2), 28(1), (12) ,24 and 44,26,29(1) b-c and 29 (2) of the Constitution 2012.

Judge Tabaro in his judgment stated that it's in his opinion that punishments that imperil judgments life have no place in civilized penal institution but rather his of the opinion of rehabilitation of offenders. Further that an exclusion order endangers the life of a convicted person thus inconsistent with Article 24 of the constitution thus cannot be enforced, null and void. Judge Tabaro goes ahead to explain to that imprisonment is generally different as the state provides for the maintenance and rehabilitation of the offender, the article cannot be invoked to justify a cruel, inhuman, degrading or punishment. As per depriving of one freedom of movement it must be complied with Article 24 of the Constitution in that any court order shall not amount to torture, inhuman, cruel or degrading treatment. In relation to *Ubuntu*, the aspect of humanity is emphasized which is portrayed in this judgment that a court order shall not amount to inhumane, cruel or degrading treatment.

346 (constitutional case No 2 of 1997) [1997] UGCC 5 (13 June 1997)

Okello J, in respect to the issue of as per Article 28(12) of the Constitution in relation to Section 3(3) of the witchcraft Act. It was declared that Sections 2 and 3 (3) of the Witchcraft Act are vague. They do not meet the requirements of Article 28 (12) of the Constitution. In that Section 3 (3) of Witchcraft Act does not specify what conduct constitutes witchcraft. Further the ingredients of the offence could not be properly determined because the conduct constituting witchcraft is not known. Therefore, the mere fact that the provisions of the witch craft Act were declared vague it means that one cannot be convicted of an offence which is not defined that's protecting people from malicious convictions which shows that people are cared for and the aspect of humanity shown.

In conclusion, Salvatori Abuki challenging the constitutionality of the banishment for ten years for allegedly having committed witchcraft helped

other people who fall in the same category and encounter the same punishment.

In Uganda Women Lawyers Association & 5 Others V Attorney General[347] The issue was whether the impugned provisions of the Divorce Act are in contravention of the constitution as alleged. All the judges answered the petition in affirmative, Twinomujuni JA who wrote the lead judgment as page 24 said, "It is in my view, glaring impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between sexes enshrined in the 2012 constitution have no doubt in my mind that the impugned sections are derogation to articles 21, 31 and 33 of the constitution." Okello JA on his part at page 17 went ahead to state that evidence reveals that sections 4(1), (2), 5,21,23,24 and 26 of the Divorce Act discriminate on the basis of sex which is a ground for nullification since it's in contravention of the constitution.

Admittedly, Twinomujuni JA and Okello JA in their respective judgments stated that all grounds of divorce mentioned in section 4(1) and (2) are available to both parties and provisions of the Act relating to the naming of a co-respondent, compensation, damages and alimony apply to both women and men who are parties to the marriage even though it was a minority position.

347 Constitutional petition No.2 of 2003

In relation to the presence of the *Ubuntu* principle, first we see that FIDA a non- governmental organization, standing out for women which shows there care for the women who are unfairly treated as compared to the women .Secondly the case puts both the male and female at the same level in that both have to prove the same grounds as per the judgment of Twinomujuni JA and Okello JA.This is a clear elaboration of *Ubuntu* because *Ubuntu* also emphasizes expression of dignity, harmony and humanity in the interest of building and maintaining community with justice and mutual caring.

3.14 Instances Where the Validity of the Ubuntu Notion Has Been Under Utilized

However much the notion of *Ubuntu* has been applied, its validity has also been underutilized.

Public Interest Litigation; Various debates have come up as per whether an action should be brought under Article 50 or Article 137 of the constitution. ***Attorney General V David Tineyefuza***[348]**,** Wambuzi CJ (as he then was) concluded on the matter when he stated that unless the question before the constitutional court depends for its determination on the interpretation or

construction of the constitution. Therefore, if a person alleges violation of human rights and freedoms the appropriate forum is the High court. However, there are instances where the constitutional will entertain matters that fall under Article 50 as long as the process of constitutional interpretation is followed.[349] Thus the rules of standing are not liberal, they are rigid.

The procedure for maintaining an action in public interest litigation is rigid in that procedure for filling a suit is too formal. An action must be brought by way of plaint or petition which is unrealistic in that it distances people away from courts. This rigidity makes it difficult for civil society organizations to carry out their duty of representing the disadvantaged people thus undermining the notion of *Ubuntu* of loving and caring.

348 Constitutional Appeal No.1 of 1997

349 See Joyce Nakacwa V Attorney General Constitutional Petition No.2 of 2001 where it was held that constitutional court has jurisdiction to entertain matters which fall under Article 50 if done in the process of constitutional interpretation.

Capitalism:

This is an economic system and an ideology based on private ownership of production and their operation for profit.[350] This definitely promotes competition[351] and this competition leads to creation of a gap between the poor and the rich. Capitalism has made governments abandon their social contracts and now concentrate on enabling individuals grow their personal assets. In Uganda, capitalism has enabled few individuals to prosper through trading foreign made goods. The result is a Uganda that imports majority of things yet 80% of its labor is unemployed. This has denied a million people a right to achieve an adequate and dignified living.[352] Further it has made resources inaccessible for people to develop their potential yet Uganda potential lies in Agriculture which requires resources. Yet the resources required are in the hands of individuals. Therefore, Uganda embracing a capitalistic economy has not only impoverished the society but has dehumanized the society. Many people have shamelessly ravaged the lives of their own akin so that they become wealthy.

In relation to the underutilization of the notion of *Ubuntu*, Capitalism dehumanizes the society by denying people access to resources contrary to the notion of *Ubuntu* which promotes humanity. Further capitalism vis a viz communism, communism encourages sharing property food and many more which shows *Ubuntu* common among some traditions contrary to capitalism which encourages private ownership.

Greed

This is evident in various ways as per power greed and people being rigid to

share work with others. In terms of Power greed in Uganda, people who are in power want to take long in power and besides that people in power are not caring out their duties to take care of their people through

350 Rosser, Mariana V; Rosser, J Barkerly (23 July 2003). Comparative Economics in a transforming World Economy. "In capitalist economies, land and produced means of production (the capital stock) are owned by the private individuals or groups of private individuals organized by firms.

351 Capitalism is a natural phenomenon characterized by the insatiable quest for gain, the accumulation and concentration of wealth and unhealthy competition between individuals for resources. ***Daily Monitor Friday May 17 2013. Capitalism has impoverished our society by Ivan byamukama***

352 Ivan Byamukama. Daily Monitor. Capitalism has impoverished our society.17 May 2013

various ways like corruption in that people in power are embezzling funds. In ***Asiimwe V Uganda***[353], it was held that she abused the facilities of the country to promote her parties activities this is because Mandela Stadium is a national facility and the use of those facilities needs to be paid for as part of revenue generation by stadium.

In addition to greed, we see the aspect of conflict of interest .Conflict of Interest is a really seemingly incompatibility between ones private interest and one's public interest or fiduciary duties.[354]In ***Uganda V Ojangole***[355] we see that the accused has retained the firm of her employer as her advocates which causes a conflict of interest and the firm was disqualified because M/S Logo Marc & Co advocates cannot ethically represent the accused in the case without falling into the danger of conflict of interest.

In addition, ***Uganda V Odoch Ensio***[356]**,** it was stated that the respondent corruptly received a sum of shs 1,000,000 from Walakira on the day in question as an inducement to suppress a criminal case against Walakira. In other words, the respondent received a bribe of shs 1, 000,000 in order to destroy the case against Walakira.

In relation to underutilizing the notion of Ubuntu, the mere fact that people in offices are greedy and are not ready to take care of their people by providing them with resources as promised in their campaigns shows that they are not loving and caring and are inhumane.

It can be argued that the **preamble of our 2012 constitution** emphasizes the *Ubuntu* principle of oneness in community and teamwork. The use of '*We the People*' signifies a coalition and willingness of all the people of Uganda to come together and consent to one thing. As a community, we recall our history clothed in tyranny and violence and recognize that we struggled. Therefore, as a people, '*We*' commit to build a better future for ourselves through

establishment of a constitution that will ensure unity, equality, peace and democracy, freedom, social justice and progress. This

353 (HCT-OO-AC-CN-0036-2015)[2016]UGHC ACD 1 (6 Jan 2016)
354 Black's Law dictionary 8th Edition
355 (Criminal Case No.1 of 2014) [2014] UGHCACD 3(13 FEB 2014)
356 (High Court Criminal Appeal Case No.28 of 2004) [2008] UGHC 14(16 December 2008)

depicts a clear picture that a community of Uganda, the people chose to work together to create a better safer and more democratic republic for the generations to come which lies under the *Ubuntu* principle of ensuring that there's harmony and interdependence for the betterment of the community.

The history of tyranny can effectively be seen in the case of ***Frederick Ssempebwa vs AG***[357] where the decree No.1 1986 stated that the government will not be held liable for any acts done by the army in the course of getting the government into power thus this subjected many citizens such as the petitioner to false imprisonment and deprivation of their property through thefts and unlawful taking by the military.[358]

3.15 The Ubuntu principles enshrined in our constitution are further seen in the National Objectives and Directive Principles of State policy.

The Government under objective II (i) vows to encourage the participation of all citizens in the affairs of their governance. Under objective III (i) the state is to ensure peace, unity and stability. That is harmony among all persons in the country. The State is also to protect the fundamental rights of all citizens in the country including their freedom under objective V. Objective XIII vies for the protection of the environment such as the land, water, wastelands, fauna and flora which is a principle under *Ubuntu* to **conserve the environment** because from it we get sustenance.[359] *Ubuntu* is also enshrined in the duties the citizen owes to both the nation, environment and fellow citizens under objective XXIX (b), (c) and article 17. Chapter Four if the constitution further accentuates the principles of humanity and conservation of the human life through the **protection and promotion of fundamental human rights and freedoms** of persons inclusive of women[360], children[361] and persons with disabilities[362]. Article 59 also includes the participation of citizens in the democracy of their state.

357 Constitutional petition no. 1/1986
358 Tyranny was also evidenced in the period 1971 during Amin's regime where there was absolutely no rule of law or separation of powers which completely watered down the human rights as Amin was the Supreme law.
359 Objective XVII provides for the protection of the environment.

360 Article 21, 33 of the constitution Ibid.
361 Article 34 Ibid.
362 Article 21, 35 Ibid.

3.16 Perfect example of ubuntu (Mato Oput) in Uganda: The Joseph Konyi case

In Uganda, the *Ubuntu* philosophy was applied among th**e Acholi** reconciling the former rebels of Lord's Resistance Army under the leadership o**f Joseph Konyi,** who had committed a lot of atrocities to the people, but finally they had decided to surrender, and to return to the community. Something that was not easy, but the Acholi Community applied the Philosophy of ***Mato Oput*** to create reconciliation between the former rebels and the victims in society.[363] Therefore, from the above analysis, the concept of *Ubuntu* has been widely applied Uganda, among cultures, and even in the judicial system, especially in the area of settling disputes in the Communities. And also among clans, cultures and traditions, in the raising and grooming of children, and also generally, among people in the general sense of living together in harmony as a community[364]. Even Theologians all over Africa have preached a lot on the relevance of *Ubuntu*. For example, Desmond Tutu of South Africa, **Benezet Bujjo[364], Emmanuel Katogole**

Therefore, the act of reconciliation is based on African understanding of politics and law as they unfold in real life. As already noted, umuntu is the maker of politics, religion and law. In the philosophical sense, *Ubuntu* is the basis of law and politics. This is because it is the Umuntu who makes the laws that govern politics, business, medicine, and other fields of life. Hence in the *Ubuntu* philosophy, all people are equal before the law, and all power belongs to the people. These Principles are also enshrined in the Constitution of the

363 The Liu institute for Global Issues and the Gulu District NGO Forum point out that, the Mato Oput Ceremony itself has various forms across different clans. However, the common characteristics include; the slaughtering of a sheep (provided by the offender) and a goat (provided by the victim's relatives), the two animals are cut into halves and then exchanged by the two clans and the drinking of the bitter herb Oput by both clans to wash away bitterness takes place. The drinking of the bitter herb means that the two conflicting parties accept "the bitterness of the past and promise never to taste such bitterness again." The payment of compensation follows the ceremony. The victim or his family is compensated for the harm done for example, in the form of cows or cash. It is believed by many Acholi that Mato Oput can bring true healing in a way that formal system cannot.
364 African Theology, 2003, Nairobi, Paulines Publications Africa
365 African Theology Today, 2002 Scranton USA The University of Scranton Press, Linden & Monroe

Republic of Uganda, 2012 (2015 as Amended), under **Article 21[366], Article1[367]** of the same. **Article 126** of the same Constitution provides that *judicial power is derived and shall be exercised by the Courts established under this Constitution*

in the name of the people and in conformity with law and with the values, norms and aspirations of the people. All these provisions clearly portray that the government should always rue in consideration and in the interest of the people. The constitution also provides for the concept of public interest litigation, as provided for under **Article 50(2)**, of the Constitution[368] where an individual can sue on behalf of others. This is clearly an aspect of *Ubuntu*, where an individual is expected to be concerned about his society and the society as well hence the humanness in society.

It is imperative to note that the philosophy of *Ubuntu* contradicts the Western system of Justice that was inherited by the African states upon colonialism. For example, *Ubuntu* looks as justice being dispensed to the whole community, forgiveness other than punishing the offender, holding a family or society accountable for the mistakes of an individual, while this almost the opposite of the western System of Justice. That is to say, this system looks at dispensing justice for the individual, not entirely the whole community, punishing the law breakers (hence the Penal Code CAP 120), and holding individuals liable for the individuals and not the entire community. And finally, the offender does not have to seek for forgiveness from society as a way of reconciling back to society.

These contradictions can be traced in the earlier cases that were presided over by the white judges and other foreign judges that never understood the application of the principles of *Ubuntu* in the African context setting a bad precedence as analyzed below.
In the case of **R V. Amkeyo,**[369] where Amkeyo had been charged of possession of stolen property and the main witness against him was a woman whom he

366 All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.
367 All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution.
368 Any person or organization may bring an action against the violation of another person's or group's human rights.
369 (1917) KLR 14

claimed to have married according to native custom. On the basis of law of evidence, the testimony of this woman should not have been admitted given the desire to protect marital confidentiality. The issue was whether a woman married under native custom was a wife in a strict sense of the word and in effect that the relationship between Amkeyo and the woman could be construed as a marriage.

Chief Justice Hamilton viewed the feature of the relationship as; the woman was not a free contracting person in the relationship. The woman was treated more in the form of a chattel and the relationship was potentially polygamous. Chief Justice concluded that the relationship was one of wife purchase and did not fit in with the idea of marriage as generally understood among the civilized peoples and therefore, the alleged custom was implicitly repugnant to good conscience, justice and morality. This decision, revised in the African eye, would be so inhuman, because it sought to demean customary marriage; it is not *Ubuntu* to hold that women married under customary marriage are not considered as married.

In the case of Mwenge v. Migadde[370], where the plaintiff challenged the right of the defendant to sell his land which the plaintiff claimed was part of Bataka land that was inalienable. **Judge Grey** in his judgment, considered provisions of the 1900 Buganda Agreement and legislation passed by the Buganda government (1908 Land law) to hold that the practice showed that Butaka tenure no longer existed and the alleged custom was repugnant and that the custom be abrogated. This decision can be criticized for having gone ultra vires the pre –existing principles of *Ubuntu*, where land in Buganda was communally held, by kings and elders on behalf of the people. However, the 1900 Buganda Agreement affected this whole system of land ownership; as the white man introduced individual ownership of land hence encouraging individualism, other than communalism.
Such decisions were made basing on the 1902 Orders in Council Repugnance clause[371] It is prudent to note that the repugnance clause was a subjective test to our customary laws based on good conscience, natural justice and morality. As

370 (1933) ULR 97
371 Article 20 of the 1902 Orders in Council

a result of this subjectivity, many native laws which were fundamental to the social fabric of the native communities were rendered inapplicable at the stroke of the English man's pen.

However, the test became more objective in the legal framework of Uganda as manifested in the 2012 Constitution, relevance Laws and Acts and the judicial system, hence creating good law, that also enshrines principles of Customary law which is a bedrock of *Ubuntu*, also basing on the fact that the 2012 Constitution was made with the Consent of the People [372] (***Abantu)*** therefore it had to reflect the *Ubuntu* principles as analyzed below, unlike the 1902 Orders in Council[373]. It is also paramount to note that *Ubuntu* is inseparable from

customary law, or as it may be called, people's Customs. However, the 2012 Constitution becomes the test of customs, and only those cultures that have Ubuntuism (humanness) qualify to be practiced in Uganda.

Article 2 (1) of the 2012 Constitution[374] provides that the constitution is the supreme law of Uganda. Article 2(2) states that if any other law or custom is inconsistent with any of the provisions of this constitution, the constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency be void. **Objective No. 24**[375], provides that cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the constitution may be developed and applied in Uganda.

Furthermore, Section 15 (1) of the Judicature Act,[376] empowers the High Court of Uganda with the jurisdiction to observe and apply, as long as it is not contrary to Article 2 of the 2012 Constitution or not repugnant to natural justice equity and good conscience and not incompatible either directly or by necessary implication with any written law. S**ection 10 (1) of the Magistrates Court Act**,[377]emphasizes on the right to observe, enforce the observance

372 Benjamin Odoki, the Such for National Consensus.
373 That was a white man's law imposed on the Africans as analyzed by G.W. Kanyeihamba in his book, Political and Constitutional History of Uganda, 2010 Edition.
374 1995 Constitution of the Republic of Uganda
375 National Objectives and Directive Principles of State Policy read together with Article 8(A) of the 1995 Constitution.
376 Judicature Act Cap 13 of 2007
377 Magistrates Court Act No. 16 of

and not to deprive any person of the benefit of any civil customary law which may be applicable, that is not repugnant to justice, equity or good conscience. Finally, **Section 24 of the Local Council Court Act**[378]also indicates that in exercising their duty to see that justice prevails, they shall be guided by the rule of natural justice and apply the customary law.

The Female Genital Mutilation Act[379] criminalizes the practices of female genital mutilation as a custom among the Sebei, Subiny and Pokot tribes because of the inhumanness of the Act, being degrading, contrary to **Article 24** of the 2012 Constitution. **Sections 4** to **Section 8** provide for the different penalties for carrying out the practices of female genital mutilation or an attempt to do so or procuring, aiding or abetting or even participating in the event leading to female genital mutilation. By so criminalizing the custom indicates that it is repugnant to natural justice, good conscience and morality.

Hence because such a practice is inhuman, it does not pass the test of *Ubuntu*, as reflected under **Article 2 (1)** of the 2012 Constitution, it was declared null and void in Uganda.

In the case of Uganda v Alai,[380] the accused was charge with Adultery. And in his argument, while relying on the decision of **Chief Justice Hamilton**, in the famous case of **R V. Amkeyo,**[381] he stated that a woman married under customary law, is not a wife, hence not being held liable for adultery. **Udo Udoma CJ** (as he then was), held that marriage under the laws of Uganda included customary marriage under customary law. Hence Ali was convicted for committing adultery. The decision of Court reflects *Ubuntu* (humanism) application of law. That is say, it would be inhuman to hold that customary marriage is unlawful it's what majority of the Africans would afford. The reason would be that if the decision was in negative, it would encourage people to commit adultery, which act is not *Ubuntu* in Africa.

378 Local Council Courts Act No. 13 of 2006
379 Female genital Mutilation Act No. 5 of 2010
380 [1967] EA 596
381 (1917) KLR 14

In East African Court of Appeal, in the case of Kabali V. Kajubi[382] Court held that the decision of the High Court in Uganda was not in consideration of the African culture, basing on the fact that in the African contest, even the children born out of the Customary marriage, are considered children in the family. Therefore, they too deserved to be given a share of the property. Hence the East African Court of Appeal applied the principles of African humanness to render such a decision.

In the case of Salvatori Abuka and others v Attorney General,[383] Salvatori Abuki and Richard were convicted with the offence of witchcraft, under the witchcraft Act. That is to say, **Sections 2, 3 and Sections 7** of the same. However, applicants appealed to the Constitutional Court to declare that the punishment of banishment from their land for 10 years, pursuant to Section 7 of the Witchcraft Act, was unconstitutional as it contravened with their right to livelihood pursuant under **Article 22** of the 2012 Constitution. The issue before the Constitutional Court was to whether the banishment of a person from their land violated the right to life provided for under Article 22, court ruled in favor of Abuki, basing on the human fact that if you denied a person, there only source of survival, then you would be literary affected their right to life, hence Section 7 of the Witchcraft Act was declared null and void. This decision reflected *Ubuntu* in Society.

In the case of Uganda Association of Women Lawyers and 5 others v Attorney General[384] the petitioner petitioned in the constitutional court challenging the provision in, **Section 4(1), (2) (3) (5) and (21) of** the **Divorce Act** which pointed out that adultery was a satisfactory reason for a man to divorce his wife favorably in the matter of divorce meanwhile for a woman to prove adultery, she had to prove that her husband committed dissertation rape, bigamy or sodomy in order to divorce her husband. That the Act establishes grounds for

382 Where there was a challenge in the distribution of property after the death of Kajubi's father and yet he had left many children behind Kajubbi as the first born, and the heir, argued that the children born out of the official marriage (customary marriage), deserved no property completely, while the clan head argued contrary.

383 Constitutional Appeal No. 02 of 1997

384 Constitutional Petition No. 2 of 2002

men to divorce their women and to the woman is discriminatory. The issue was whether the impugned sections of the divorce Act are inconsistence with the Constitution. Justice G.M. Okello allowed the petition and pronounced that the impugned section of the Divorce Act was inconsistent with **Article 32 (1)** the Constitution and therefore, void. This case also emphasizes equality of both men and women under the law, which is an aspect of *Ubuntu.*

In the case of Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazi,[385], Ivan Serunkuma and Juliet Namazzi were both of the *Ndigga Clan* however, they wanted to get married. This would be completely in contravention with the *Kiganda Customary law*, which does not allow people of the same clan to get married to each other. According to the *Kiganda Customs*, such an act is totally against *obuntu bulamu.* It is completely inhuman, an abomination, an evil in Buganda, and therefore unacceptable. And it carries with it a lot of negative consequences not just to the individual, but to society as a whole. Therefore, Court ruled in favor of Bruno Kiwuwa. This case also reflected a decision of Court based on *Ubuntu* enshrined under customary law.

In the case of Law Advocacy for women in Uganda vAttorney General,[386] the petitioner filed a petition challenging the Constitutionality of **Section 154** of the Penal Code which provides that it was an offence for a married woman to have sex with any man whether married or not but the same law exonerated a married man's conduct who had sex with an unmarried woman and this treated woman derogatorily contrary to **Article 24** of the 2012 Constitution, it was held that, section 154 of the Penal Act was inconsistence with **Article 21** of the same Constitution. Hence it's inhuman, degrading the women in society. And

this fits exactly in the view of *Ubuntu* because according to *Ubuntu*, all people deserve to be treated equally.

In the case of **Mifumi (U) Ltd & Anor v Attorney General**,[387] the petitioners petitioned the Constitutional Court to declare that payment of bride price as consideration for marriage was unconstitutional, as it was contrary to

385 Civil Suit No. 52 of 2006
386 Constitutional Petition No. 13/05 & 05/06 of
387 Constitutional Appeal No. 02 of 2014

Articles 31, 32, 33, 24, of the 2012 Constitution. And since this Custom does not pass the test laid under **Article 2** of the same, it must be declared null and void. This was because this custom would subject women to inhuman treatment by men, and also, it would defeat the provision under **Article 31** which states that marriage shall be entered into with free consent of a man and a woman. Court ruled that payment of bride price shall be given at free will. Hence making a decision that is human, unlike before.

The case of Bestie Kemigisha v Mable Komuntale[388], the plaintiff, a widow petitioned that Toro customary practice of not allowing the women to inherit property of their late husband was inconsistence with **article 31 (2), Article 33 of the 2012 Constitution.** Court held that Toro custom was repugnant to natural justice and good conscience according to Judicature Acts **Section 15(1), Article 31(2)** and **Article 33**. Hence it would be declared null and void pursuant to **Article 2** of the 2012 Constitution. Therefore, women are to be accorded full and equal dignity with men. And this decision carries with it the human perspective that women deserve to be treated equally with men in society. That is to say, it is not *Ubuntu* to deny a woman the right to inherit property, yet from that property she would be to earn a living, hence being able to survive.

Therefore, In Uganda, the decisions of Court in the different decided cases reflect that Court also apply the principles of *Ubuntu* will rendering decisions. And especially under matters that require the application of customary law. However, as analyzed above, the application of *Ubuntu* is limited, that is to say, especially under customary law, the customs, practices, must pass the test laid out under **Article 2 of the Constitution of the Republic of Uganda, 2012 (2015 as amended).** It is equally prudent to not that any act that tends to limit the rights of a person, whether man, woman or even a child, without a lawful justifiable cause is in Uganda unlawful, null and void, and amounts to violation of *Ubuntu*.

However, since there is a contradiction in the application of *Ubuntu* and the

Western system of Administering Justice, that Uganda adapted[389] as analyzed above, I would highly **recommend** the application of *Ubuntu* that looks at justice as deserving to the whole community, which aims at reconciliation, forgiveness and restoration of individuals, peace and harmony in the community, than the western system of justice that does not so much focus on the community but rather the individual in society.

388 [2015] UGSC 13

389 Because of colonization, and the fact that Uganda adapted the British laws under the receptionist clause (Article 15) of the 1902 Orders in Council.

In Uganda, the 2012 constitution of the republic of Uganda as amended makes provision and recognizes the same; this is embedded in Article 2[390]. The provision in article 2(2) makes recognition for customs which aren't not inconsistent with the constitution this is a clear indication of the *Ubuntu* principle in the Ugandan municipal law. Article 1 of the 2012 constitution provides for the sovereignty of the people implying that all practices and traditions of the people that are not inconsistent with the constitution are in line with the intent of the framers of the constitution.

This notion of *Ubuntu* has been reflected in a number of our legislation, case in point the penal code Act[391] under section 188, this provision illegalizes unlawful cause of death of another, and this is in line with the *Ubuntu* principle of one self for a greater good for the entire society. As life is construed as a gift that should not be deprived from an individual without justifiable cause. Also in the same spirit ss1421,142, code illegalize abortion, this from the *Ubuntu* perspective was seen as murder and unacceptable as it is believed that life starts at fertilization, in this spirit it can be said that our legislation has tried to strike a balance between municipal law and *Ubuntu*.

Judges as the custodians of the constitution and interpreting of other legislation have breathed life into *Ubuntu*, this is evident in the different decided case, in Attorney general v Salvatori Aboki[392] constitutional case no 2 of 2012 this case involved the constitutionality of the witchcraft Act, the defendants had been charged under the Act for practicing witchcraft and possessing articles purporting to be those used in the practice of the same in his judgment by **J.P.M Tabora,** he stressed that the traditional understanding of *Ubuntu* as *one* that

390 1995 constitution of the republic of Uganda as amended

391 Penal code Act cap 120

392 Attorney general v Salvatori Aboki constitutional case no 2 of 1995

African values are based on "need for understanding but not for vengeance, and need for reparation but not retaliation, a need for *Ubuntu* but not for victimization" in this, his lordship meant that there is a desire by the African societies to harmonize, keep the spirit of togetherness and by reparation he meant the need for renewal or restoration rather than destruction of those that were condemned in society. Also citing **state v mukwayane**[393] in this case the learned justices of the supreme court of south Africa discussed the constitutionality of the death penalty and in reaching his judgment **justice Mohammad** had this to say ***"The need for Ubuntu" expresses the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfillment 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,*** his lordship elaborates the desire to incorporate the native understanding of social justice with legislation, in his judgment, he advances the African understanding of the death penalty as one which is barbaric, and which tends to do away with the spirit of oneness, and that for a greater good, its paramount from the above background to assert that all Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. **Madala J.** spoke of *Ubuntu* as a "concept that permeates the Constitution generally and more particularly chapter three which embodies the entrenched fundamental human rights." This is a significant claim, attributing fundamental importance to *Ubuntu* in the context of constitutional reasoning. **Mokgoro J.** made a similar pronouncement about *Ubuntu's* legal status, placing it at the forefront of constitutional interpretation. She noted first that, in contrast to the apartheid legal order, in which parliamentary sovereignty

393 State v Mukwayane Case No. CCT/3/94

demanded conservative and literal statutory interpretation by the judiciary, the post-apartheid order of constitutionalism requires courts to develop and interpret entrenched rights "in terms of a cohesive set of values, ideal to an open and democratic society". In her view, this interpretation should be

inclusive of South Africa's indigenous value systems, which relate closely to the constitutional goal of a society based on dignity, freedom and equality. While acknowledging that a function of the Constitutional Court is to protect the rights of vulnerable minorities, in this the learned justice of the supreme court contends that in the interpretation of the constitution mostly in respect to the chapter that makes provision for the fundamental human rights, these rights must be interpreted in light with the values and the norms of the citizenry to the give effect to what the people believe in. **Attorney General v Susan Kigula**[394] the supreme court was faced with the constitutionality of the death penalty and the mode of its execution which is by hanging, his lordship **Ejonda Entenda observed** the traditional norms and traditions of the people of Uganda 'Whether you call hanging cruel, inhuman, degrading, sadistic, barbaric, primitive, outmoded, etc., as long as the people of Uganda still think that it is the only suitable treatment or punishment to carry out a death sentence, their values norms and aspirations must be respected by the courts. This is a clear manifestation that the courts give considerable attention to the cultural norms and practices of the people in arriving at judicial decisions thereby giving effect to the *Ubuntu.*

Ubuntu as aforesaid invokes the principle of equity both men and women, this was adjudged in **Mifuumi and others v the Attorney General**[395]and it was settled that the practice of the husband demanding a refund of the bride price in the event of dissolution of the marriage demeans and undermines the dignity of a woman and is in violation of **Article 33(6)**[396] of the Constitution. Moreover, the demand of a refund violates a woman's entitlement to equal rights with the man in marriage, during marriage, and at its dissolution **(See Art. 31(1))** the learned justice of the court of appeal reasoned that equal treat of the two parties contracting marriage should be observed as is envisaged under the aforementioned provisions of the constitution. Also section 15 of the judicature

394 Attorney general v Susan kigula constitutional appeal L NO. 03 OF 2006
395 Mifuumi and others v the Attorney general Constitutional petition NO. 12 OF 2007
396 1995 constitution of the republic of Uganda

Act provides for the repugnancy test in so far as customary practices and norms herein as *Ubuntu* is to be adjudicated in light with the constitution. The 2012 constitution under **chapter 4** makes provision for the different human rights and the fundamental human rights, **Article 21** of the constitution provides for equality and freedom from decimation, it's to the effect that all people are equal before the law and enjoy equal protection of the law

irrespective of their social, political and economic background, from this background it can be argued that its in effect in line with the *Ubuntu* principle of equality and fair treatment of the individual, **article 24** provides that no individual shall be subjected to cruel, inhuman and any form of degrading treatment, this can be said to be in line with the principle of one self for the entire society, **Article 25**[397] provides for protection from slavery, servitude, and forced labor this is in line with the customary practices of communal work and from to engage in work voluntarily, it is paramount to note that in the African traditional setting slavery was highly condemned. **Article 26** provides for protection from deprivation of property as everyone has a right to own property. this is in line with the principle embedded in *Ubuntu* of fairness, as one who is fair can't deprive another of their property. **Article 27**[398] provides for a right to privacy, home, and property, this is clearly in line with the principle of family in the customary setting and the repute attribute to the protection of family. Therefore, it can be said that the Entire **notion** of *Ubuntu*.

3.17 Ubuntu and Contract Law

Ubuntu and the law relating to contract law has been adjudicated in a number of cases in **Ever fresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd**[399]**, 206** the Constitutional Court reflected on when it should intervene to develop contract law in the light of the spirit, purport and objects of the Bill of Rights, as required by section 39(2)[400] of the Constitution. The reader will recall the earlier remark about the reluctance of Private Law to consider itself in the light of the Constitution in this case, whether contract law should require

397 1995 constitution of the republic of Uganda
398 1995 constitution of the republic of Uganda
399 Ever fresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 206 constitutional petition
400 Constitution of the republic of south Africa

good faith negotiations rather than permit reneging for commercial reasons was under consideration. An option to renew a lease was found to be invalid on technical grounds. The Court differed in its view of the substantive claim: the majority refused leave to appeal to the Court but accepted the argument that the concept of *Ubuntu* has "been recognized as informing public policy in a contractual context undoubtedly a reference to **Barkhuizen v Napier.**[401] The role of *Ubuntu* in shaping the development of the common law including contract law - was accepted: ''had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *Ubuntu*, which inspire much of our constitutional compact.…Were a court to entertain Ever fresh's

argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of *Ubuntu,* which inspires much of our constitutional compact, may tilt the argument in its favor. Contracting parties certainly need to relate to each other in good faith the minority opinion meanwhile stated that contract law could no longer confine itself to colonial legal traditions, which shaped and developed the common law before the advent of post-apartheid democracy. In its view, the notion that people could back-pedal from undertakings to negotiate for commercial reasons "certainly implicates *Ubuntu*" therefore from the above background it can be said that *Ubuntu* has been given effect in respect to commercial transactions.

In the case of **Bruno Kiwuwa v Ivan Serunkuma and Juliet Namazi**[402] where the plaintiff challenged the celebration of marriage between the first and second defendant on the ground that they belong to the same clan *Ndiga* and according to the custom of Buganda this type of marriage is prohibited since it is an abomination, immoral and illegal. The issue was whether the defendants being Buganda by tribe and of the same clan can contract against their custom. In the holding Kasule stated that the marriage was repugnant to Kiganda customary law and to the marriage Act. The judgment was based on the test which upheld the

401 Barkhuizen v Napier
402 Civil Suit No.52 of 2006

customary law hence the notion of *Ubuntu* and its constitutionality had been upheld and applied by the courts in Uganda.

Ubuntu has also been underutilized in aspects of land ownership. This is evidenced were the rich use their position to evict the poor from their land; this act is inhumane and thus unconstitutional. Every person has a right to own property and that no person shall compulsorily deprived of property[403], however this article has been abused here and there as evidenced in the case of **Hon. Ocula Michael and others v Amuru District Land Board**[404]where the applicants sought a declaration that the allocation of the customary land to the respondents is null and void reason that it had been given out without their consent. Court held that the applicants had failed to adduce evidence showing that this was land owned customary and the respondents proved ownership of that land. Therefore, this is clear that the notion of *Ubuntu* had been undermined since customary ownership of land had not been upheld by court as provided for in Article 237(4) (a) of the Constitution of Republic of Uganda.

In ***Susan Kigula & 417 ors vs AG***[405]the principle of preservation of the

sanctity of human life through the declaration of the unconstitutionality of the mandatory death penalty was largely discussed. Herein, the court didn't absolutely abolish the death penalty but made a ruling concerning the mandatory death sentence.[406] Okello JA and other justices made a ruling that **all laws that provided for the mandatory death sentence were unconstitutional**.[407]

The Supreme Court in 2009 further made a ruling that no convict would be on death row beyond 3 years in order to reduce the rates of emotional and mental distress caused when someone is waiting for their death for many years.[408]

403 Article 26 of the Constitution of Republic of Uganda, as Amended 404 HCT-02-CV-MA-N0 126 OF 2008

405 Constitutional Appeal No. 3 2006.

406 The procedure of section 98 of the Trial on Indictments Act Cap. 23 provided that court ought to make inquiries into what sentence is applicable for the offence committed following the sentencing guidelines however, the mandatory death punishment obstructed this procedure as it provided no other remedy for a person accused of murder.

407 As they were inconsistent with articles 21, 22 (1), 24, 28, 44 (a) and 44 (c).

408 Therefore, someone on death row beyond 3 years, the sentence would be converted to life imprisonment.

This was a land mark case because the long debated 'death penalty', which was seen as a deprivation of ones sanctity of life and also a judgmental basis basing on the principle of *an eye for an eye* where the people prosecuting also had flaws and faults, was lightened and removed the mandatory killings.[409] The death penalty is clearly against the principles of *Ubuntu* as it doesn't honor the humanity of another's life. Those who condemn others to the death penalty are self-proclaimed superhuman beings and should possibly be exonerated form life on planet earth. This is because its inhumane, cruel and archaic to use the *eye for an eye* principle because then we'd have to repay rapist by raping them and robbers by robbing them. The death penalty is therefore a premeditated, carefully thought out ceremonial killing. Though Uganda has adopted the 'no mandatory' death punishment and 3 years on death row, it's not enough if we are to live and satisfy the principles of *Ubuntu* and preservation of human life by the community.

The major aim of *Ubuntu* is to **reconcile and remedy the accused**. It's not to punish. This is because community has a role to play in rising up and building persons therefore if a person is wrong, the whole community is wrong and therefore should be punished according to *Ubuntu*. However, the sole aim of punishing is to ensure reform in behavior. Restorative punishment rather than retributive punishment is more valuable[410]. Therefore, the failure to declare the death punishment unconstitutional and contrary to article 22 by the courts **violates the Ubuntu principle** of reform rather than condemned, also the 'no

vengeance'. The problem is that most of the Ugandan laws have been imported from jurisdictions that don't even fit our status and way of life. As Lord Denning said in ***Nyali Ltd vs AG*** that an oak tree cannot be uprooted straight from England and be expected to grow and flourish as well on Ugandan soil. So are the laws

409 It should be noted that no prosecution by hanging has yet been made thus the land mark case is seen to have achieved a level of [protection of human life especially the innocent.

410 This is also to protect against instances where an innocent person has been accused and convicted. This was sufficiently seen with Zizinga who had been accused, convicted and sentenced to the death penalty and was on death row for years for allegedly killing his wife. She was seen walking on the street freely while he was still awaiting his sentence. Luckily he was released. However, others haven't been able to escape this profound injustice. Therefore, it's important to sentence of to life imprisonment for reform rather than the death penalty.

that were adopted into the Ugandan system by the reception clause.[411] Therefore, Uganda needs to revolutionaries its laws and get laws that match the *Ubuntu* principles and completely abolish the death penalty and vie for more reformative punishments such as life imprisonment.

Susan Kigula's desire to **advocate for the rights of the underprivileged in the judicial system was inspirational** and caused the then Commissioner general of Prisons 2013, Johnson Byabashaija to desire to **transform prisons from being punitive centers to correctional centers**. This is what is expected of a community and society that upholds the *Ubuntu* principles of humanity, oneness, ethics and values. Therefore, to a certain extent, the applicability of *Ubuntu* has been witnessed through the case, however, more ought to be done before Uganda can be satisfactorily noted to follow these set guidelines of a community.

Additionally, the case of ***Mifumi (U) Ltd & 12 others v Attorney General, Kenneth Kakuru***[412] the principle of Ubuntu that seeks to uphold the dignity and values on humanity was expounded. The issue was whether the customary practice among the Langi, Japhadhola and Banyankole of payment of bride price demand for repayment upon the dissolution of marriage be deemed unconstitutional.[413] Court didn't make a ruling on the validity of payment of bride price as there was no solid evidence to prove the notoriety of the custom and it also noted that many aspects led to domestic violence and not only bride price. However, on the issue concerning repayment of the bride price on dissolution, court held that it was repugnant, archaic and unconstitutional.[414] This is because this practice doesn't take into consideration the unique role played by a wife in the marriage that goes beyond the money ad bride price paid. It also contravened a woman's right to entitlement and equal treatment with men in

marriage.

This case is significant because it enunciates women's dignity and status in patriarchal societies and in customs that demean the dignity of women.

411 Article 15 of the 1900 Orders in Council.
412 Constitutional Petition No.12 Of 2007) [2010] UGCC 2 (26 March 2010
413 As it's contrary to article 32 (3) where marriage is entered freely with the consent of two adults who aren't coerced.
414 Contravening article 33 (3) and 31(1) of the constitution.

Ubuntu is inextricably **linked to the values of which places a high premium on dignity and respect for the humanity of another**. Article 21 propagates for the equal treatment of all immaterial of the sex or status. Article 33 specially propagates for the rights of women to be protected by the state. Therefore, any form of conduct that seeks to demean the dignity and status of a women or any other person is contrary to the principles of *Ubuntu* and the constitution.[415] Therefore it's very important to uphold the rights and humanity of others.

Additionally, in ***Law Advocacy for Women in Uganda Vs AG***[416] where the petitioners sought a declaration that section 154[417] was inconsistent with the constitution as it punished women for adultery as long as they had intercourse with any man but men were not charged with adultery if they didn't have intercourse with an unmarried woman. Court held that this provision is inconsistent to the provisions of equality in treatment between men and women in the constitution[418] and inconsistent to morality and good justice as was any form of intercourse whether with a married or unmarried person ought to be punished for adultery. This was also applied in ***Uganda Association of Women Lawyers v AG***[419] Twinomujuni JA agreed with the petitioners claim that section 4(1) of the Divorce Act[420] was inconsistent with articles 21(1), (2) of the constitution and 33 (1). He held that these provisions were irreconcilable with the provisions of the constitution as to the equality of sexes and discrimination thus repugnant to good morals and natural justice.

Therefore, in the field of upholding the dignity of other persons according to *Ubuntu* and their humanity too, Uganda has effectively applied these principles seen in the laws and case law cited. Also in reference to defamation of the reputation of others, the courts have substantially held and awarded damages for such actions as was seen in the case of ***William Wako Wambuzi vs Editor in chief of Red Pepper publications*** where the retired chief justice was awarded

415 Which under article 2 is the Supreme law of the land therefore any law that is inconsistent or conduct is null and void to the extent of its inconsistency.
416 Constitutional petition No. 5/
417 Penal Code Act Cap. 120
418 Article 21, 33.
419 Constitutional petition No.2/ 2002.
420 Cap. 249

money for the publications false and inaccurate comment on his businesses. Therefore, this principle has been sufficiently applied.

With reference to ***Salvaturi Abuki vs AG***[421]*Ubuntu* was applied as the livelihood of the petitioners was at stake, therefore the constitutional court held that section 3 of the witch craft Act was inconsistent to article 22 of the constitution as by banishing the applicants, the courts would be depriving them of their right to life as was defined in ***Tallis vs Bombay Municipal Council*** where right to life entailed a right to livelihood also. Therefore, in the banishment of the petitioners, they wouldn't have access to their farms or income thus their chance of survival would be very minimal. However, this was quashed by Manyindo DCJ on Appeal. This is because he noted that written law, though inconsistent provided for the offence therefore, the punishment had to be applied. Therefore, the section wasn't repugnant to moral justice and good conscience. This would ultimately deprive them of their right to livelihood as was stated by the constitutional court. This is in violation of upholding and preserving the sanctity of human life.

This has been subsequently seen in the **land issues of compulsory acquisition by the government on personal land**. Article 26 of the constitution provides for prompt, prior and timely compensation for the value of the land before acquisition of individual land as was also enunciated in ***Uganda National Roads Authority vs Irumba Asumani***[422] where failure by government to compensate the complainants prior to the acquisition for their land as stated by article 26 (2) (b), was deemed inconsistent and void. This uphold the principle of ensuring that a person isn't deprived of their land and livelihood without prior compensation. However, the 2017 tabled Land Amendment Bill seeks to reverse this and award compensation after the land has been acquired on the pretext of delay of government projects. This is however an absurdity as government has a bad history in the awarding of compensation even with the law present or it either under compensates for the valuation as was seen in ***Uganda Petroleum Company Ltd. vs Kampala City Council*** [423]**.** Therefore, the 2017 Land amendment Bill if passed will be contrary to the principles of *Ubuntu* and preservation of humanity's right to livelihood on land owned.

421 Constitutional petition No. 2/1997.

422 Uganda Civil Suit 2014

423 Civil Suit No. 250/2005 where the defendants under valuated the compensation agreed upon in the M.O.U with the plaintiff.

Therefore, the principles have been abused in regard to this and the State has fallen short on upholding this.

The principle of *Ubuntu* with reference to the above cases has been applied to a certain extent but underutilized and abused as shown with each case. Additionally, these principles have been underutilized/abused with **reference to the Presidential Age limit Bill 2017** that was recently voted into Parliament and is waiting presidential assent before becoming an Act. This is under the principle of harmony, democracy and common justice. The preamble states that the people were involved in the governance decisions of their country especially as concerns the constitution. However, **article 1** which provides that **power belongs to the people** is grossly abuse by this provision as it means that only one person who has been in power since 1986 will remain in power. This is evidenced with each election that prima facie shows is free and fair but is covered with irregularities. The most outstanding one being the deployment of the military on the streets especially on the day pre and post the elections. This creates intimidation in the eyes of the citizens who ought to have a free will of choice and decision making.

In the Supreme Court election case of Amama Mbabazi vs Yoweri Museveni & Electoral Commission: some of these irregularities were brought out however the courts stated that there was no substantial evidence to show that these irregularities would have changed the outcome of the results. This has also gone to show that the independence of the judiciary which is exercised on behalf of the people under article 126 of the constitution has been compromised. Therefore, this shows that the *Ubuntu* principle of unity and democracy has been subtly violated and covered up by those in authority through enacting laws that are contrary to this and therefore should be checked. Conclusively, in recommendations of how best *Ubuntu* can be applied in Uganda, its material to note the principles that govern *Ubuntu* as were laid out

agreement be adhered to.

above. Elizabeth Frawley Bagley[424] stated that in light with the foreign policy of the US, she notes;

"***In understanding the responsibilities that come with our interconnectedness, we must rely on each other to lift our world from where it is now to where we want it to be in our life time, while casting aside our own misconceptions***."

She birthed the principle of ***Ubuntu*** **diplomacy** which seeks to bring people together across regions and sectors to work together on issues of common interest. '*It takes a village to raise a child… in the same way, it takes a shared global response to meet the global challenges we face.'* This in Uganda, can be achieved through **emphasizing the participation in regional bodies** such as COMESA, African Union and the East African federation. This will ultimately lead to common development among all African States, not leaving any country lagging behind as was Kwame Nkrumah's dream of a United Africa. This will ensure that Uganda adopts the principle of harmony and togetherness for a better generation at large, not limited to only locally within but Africa and Globally. This will also ensure that there are no conflicts, wars or misunderstandings among people. Therefore, Uganda has to work in harmony with other countries.

Additionally, Ubuntu has been seen applied in the African Rural University (ARU) of Uganda located in rural Kagadi in Kibaale District; Western Uganda established and launched by the Ugandan Rural Development and Training Program (URDT). One of the core values of the ARU is 'When you work for the happiness of your village, you help yourself and when you help yourself, you work for the happiness of your village. The students in the university work together with members of the village by passing on what they learn to the community to enable them fulfill the visions for a better life. This enables them to be empowered to create prosperity and wellbeing for all. The **curriculum of the University is also built and is co-designed by the students** who have a say on what is taught and how it's taught. Therefore, this prevents the adoption of curriculums from countries and institutions that do not provide for the consideration of education for the benefit of the community.

424 Her swearing in remarks as US Department Secretary of State Special Relationship for Global Partnerships, June 2009.

Further lessons can be picked from this into our education system that follows **theoretical syllabi that aren't applicable to the Ubuntu principle of ensuring the development** of the community as a whole. The current education system encourages individualism as the elite consider themselves more important than the illiterate. Instead of using the accumulated knowledge to encourage and ensure that those who weren't able to attend school because of financial incapacity, they use the acquired wisdom to attain self-wealth which is

contrary to the principle of *Ubuntu* that propagates for the development and progress of all. Therefore, Uganda can better apply these principles by **ensuring that the syllabus of different institutions provide for the development of and prosperity the community as a whole**.[425]

Additionally, unfortunately not much emphasis has been placed on the **mediation and conciliation**. This would have ensured the *Ubuntu* notion of shifting from confrontation and retributive punishment. Though provided for under the Judicature Act,[426] The Civil Procedure Act Cap. 71 under order 11 and 12 which provide that there should be a scheduling conference that offers a hearing before court where parties settle their points of agreement or disagreement which should be done within 21 days[427] and, the Arbitration and Conciliation Act Cap. 4 which regulates the operations and administration procedures and the conduct of the arbitrator.[428] This reconciliation will tends to ensure that parties reach an agreement outside court system that would create disputes and enmity between the parties. This factor was well stated by courts in ***East African Development Bank vs Ziwa Horticultural Exporters Ltd***. that there has to be a negotiation between the parties before and arbitration failure of which will not lead to any arbitration. This is to ensure that there's no conflict by the time the parties reach to hear their cases. The procedure was laid out by Tsekoko S.C.J in ***Shell (U) Ltd. vs Agip (U) Ltd.*** Therefore, by ensuring reconciliation and arbitration; this

425 This will also lead to an increment of production as the illiterate will also have knowledge of how best to invest and use their skills to earn an income. It will also reduce on the high dependence rates on the literate.

426 Cap. 13 under section 26-32 where the High Court can empower officials or arbitrators to decide on some case especially those of civil nature.

427 Judicature Mediation Rules Statutory Instrument No.10, 2013.

428 It also provides for the establishment of Centre for Arbitration and Dispute Resolution (CADER) which provides for an alternative distribution provider.

in intent is geared at promoting *Ubuntu* and the desire to prevent conflict and confrontation thus ensuring peace and harmony among people.

The intention of *Ubuntu* is to propagate the use of face to face encounters distance with the difference being resolved in addition to **civilized dialogues premised on mutual tolerance.** Uganda has in the past tried to apply the use of these dialogues especially during the peace talks with Joseph Kony. This greatly assist in reaching an agreement and bargain especially for state criminals that are highly wanted. This method also greatly worked between the peace talks of the conflict and violence in South Sudan. More of this should be encouraged in order to ensure effective administration of peace and dispute resolution.

Important to note therefore, Barack Obama (former US President) on Mandela's Memorial stated;

> "…. ***There needs to be recognition that we are all bound together in ways that are invisible to the eye; there's oneness in humanity that we achieve ourselves by sharing ourselves with others and caring for those around us***."

Therefore, I am because we are and since we are therefore I am. Uganda can only attain progress and development if it realizes the need to uphold the principles that govern *Ubuntu* and oneness, without which, we are nothing.

3.18 The rebirth of Ubuntu Jurisprudence in Susan Kugula: A Giffen Paradox, losing by winning.

Perhaps the most perfect case in effect that emphasizes the *Ubuntu* principle was The Constitutional Court sat as a panel of 5 Justices of Appeal. In the **Susan Kigula case** following the High Court judgements on 11 November 2011, in which Susan Kigula and Patience Nansamba's death sentences were replaced with prison sentences of 20 and 16 years respectively the judgement came over nine years after SusanKigula, and Patience Nansambaa her accomplice, were sentenced to death in September 2002 for the murder of Kigula's live-in partner Constantino Sseremba. At the time the law in Uganda prescribed the death penalty as them andatory punishment for all cases of murder. In this Constitutional Petition No.6 of 2003, between Susan Kigula and 416 and the Attorney General.

The petition was brought under article 137 (3) of the Constitution of the Republic of Uganda challenging the constitutional validity of the death sentence. The 417 petitioners were, at the time of filing the petition, on the death row, having been convicted of offences under the laws of Uganda and were sentenced to death, the sentence provided for under the laws of Uganda.

The argument of the petitioners was that the imposition of the death sentence on them was unconstitutional because it is inconsistent with articles 24 and 44 of the Constitution which prohibit cruel, inhuman or degrading punishment or treatment. Indeed according to the petitioners the various provisions of the laws of Uganda which provide for mandatory death sentence are inconsistent with articles 20, 21, 22,24, 28 and 44 since the Constitution guarantees protection of the rights and freedoms such as equal treatment, rights to fair hearing but provisions for mandatory death sentence contravene those provisions.

The petitioners argued also that a long delay between pronouncement of the death sentence and the carrying out of the sentence, allows for a death row

syndrome to set in. The petitioners in the third alternative contend that section 99 (1) of the Trial on Indictments Act (cap 23 Laws of Uganda) which provides for hanging as a legal mode of carrying out death sentence, was cruel, inhuman and degrading as it contravenes articles 24 and 44 of the Constitution. The petitioners asked for the following redresses

That the death sentences imposed on them be set aside,
That the cases be remitted to the High Court which will determine appropriate sentences under article 137 (4) of the Constitution.
Any other relief the court feels appropriate.

The issues agreed upon by the parties at the scheduling conference for determination in the court were:

- whether the death penalty prescribed by various laws of Uganda constitutes inhuman or degrading treatment or punishment, contrary to article 24 of the Constitution.
- whether the various laws of Uganda that prescribe the death penalty upon conviction are inconsistent with or in contravention of articles 24 and 44 (a) or any other provisions of the Constitution.
- whether the various laws of Uganda that prescribe mandatory sentences of death upon conviction are inconsistent with or in contravention of articles 21, 22, 24, 44 or any other provisions of the Constitution.
- whether section 99 (1) of the Trial on Indictments Act which prescribes hanging as the legal penalty is inconsistent with and in contravention of articles 24 and 44 and any other provisions of the Constitution.
- whether the execution of the petitioners who have been on death row for a long period of time is inconsistent with and in contravention of articles 24 and 44, or any other provisions of the constitution.
- whether the petitioners are entitled to the remedies prayed for.

The learned Justice of Appeal (Okello J.A) first pointed out the principles of constitutional interpretation which are:

- the widest construction possible to be given according to ordinary meaning of words used,
- the constitution to be read together as an integrated whole
- all provisions bearing on a particular issue to be considered together,
- a Constitution and in particular that part of it which protects and entrenches Fundamental Rights and Freedoms to be given a generous

and purposive interpretation to realize the full benefit of the right guaranteed,

- in determining constitutionality both purpose and effect are relevant,
- Article 126 (1) of the Constitution enjoins courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people.

The learned Judge considered issues 1 and 2 together. After referring to the various arguments from both parties, he emphasized that the point for determination by the court is the constitutionality of the death penalty in Uganda and the constitutionality of the various provisions of the laws of Uganda which prescribe the death penalty. He referred to articles 24, 22 (1) and 44 of the Constitution. He said that the Uganda Supreme Court in Abuki's case meant that the words in article 24 must be interpreted in the context of the Constitution in which they are used, but not in the abstract, when the supreme court said that the words in article 24 must be given their ordinary and plain meaning. He went on to argue that article 22 (1) recognizes the death penalty in execution of a sentence passed in a fair trial. This section is an exception to the enjoyment of the right to life. Therefore, he said, the death penalty is constitutional. He referred to Makwanyane's case and Mbushuu's case when considering whether article 24 which outlaws any form of torture, cruel, inhuman and degrading treatment or punishment also outlaws article 22 (1). He stated that in Makwanyane's case the Constitutional Court of South Africa found the death penalty to be inherently, cruel, inhuman or degrading and therefore unconstitutional and that under the Constitution of South Africa, the right to life is unqualified. As for Mbushuu's case, the court of Appeal of Tanzania also found the death penalty inherently cruel, inhuman or degrading but still constitutional because it is saved by article 30 (2) of the Tanzania Constitution and that the right to life under the Tanzania Constitution is qualified just like under the Uganda Constitution. He referred further to Catholic Commission for Justice and Peace, a case of the supreme Court of Zimbabwe which held the death penalty constitutional. In Kalu vs the State[10] articles 22 (1) and 24 of the Uganda Constitution are in pari materia with the Nigerian section 30 (1) and 31(1) of the Nigerian Constitution.

The learned Judge endorsed the approach adopted in Kalu's case where it was held that the death penalty was constitutional and that if the legislature had intended to take away by section 31(1)(a) the right recognized in section 30)1) of the Nigerian constitution, it would have done so by clear terms and not by implication. He then came to the conclusion that in Uganda, the various

provisions of the laws of Uganda which prescribe the death sentence are not inconsistent with or in contravention of articles 24 and 44 or any provisions of the Constitution. Therefore, he answered issues 1 and 2 in the negative.

With regard to issue No.3, after hearing counsels for both sides the learned Judge said that Article 28 of the Uganda constitution did not exhaustively list all the elements for a fair hearing. Notably absent from the list is the right of the convict to be heard in mitigation before sentence is passed. Also the right of the court to make inquiries to inform itself before passing the sentence to determine the appropriateness of the sentence to pass is conspicuously absent from article 28 as well.

He argued further that in other jurisdictions mandatory death sentence has been held to be unconstitutional because it does not provide a fair hearing because it does not permit the convict to be heard in mitigation before sentence and it violates the principle of separation of power, as it does not give the court opportunity to exercise its discretion to determine the appropriateness of the sentence to pass. The court passes the sentence because the law compels it to do so.

He referred to Mithu vs State of Punjab[11] where the supreme court of India observed thus:

> ***"it is a travesty of justice not only to sentence a person to death, but to tell him that he shall not be heard why he should not be sentenced to death."***

He referred to section 98 of the Trial on Indictments Act in Uganda which provides the procedure to be followed by court after entering a conviction and before sentence. The section reads:

> ***"The court, before passing sentence other than a sentence of death, may make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed and may inquire into the characters and antecedents of the accused person…."***

Furthermore, the learned judge referred to article 22 (1) which requires that both conviction and sentence of death be confirmed by the highest appellate court. The learned judge concluded that the various provisions of the laws of Uganda which prescribe mandatory death sentence are unconstitutional as they are inconsistent with articles 21, 22 (1), 24, 28, 44(9) and 44 (c) of the Uganda Constitution.

On issue no. 4, he referred to various arguments. He cited the Jamaican case of Earl Pratt and Another vs Attorney General for Jamaica and Another which

shows that sections 14(1) and 17 (1) of the constitution of Jamaica which the court considered in this case are in pari materia with Uganda articles 22 (1) and 24. These sections make the right to life under the two Constitutions the same - both qualified. But the Uganda Constitution does not contain the equivalent of section 17(2) of the Jamaican Constitution which provides thus:

> ***"Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day."***

In the Jamaican case Lord Griffith in the Privy Council held that hanging which was a lawful method of execution in Jamaica before Independence was saved by section 17(2) of the Constitution and it could not be held to be an inhuman mode of punishment for murder.

The learned judge concluded that notwithstanding the absence of an article equivalent to section 17(2) in the Uganda Constitution, execution by hanging may be cruel, but articles 24 and 44 (a) were not intended to apply to death sentence permitted by article 22(1). Therefore, carrying out the death penalty by hanging cannot be held to be cruel, inhuman and degrading. Punishment by its nature must inflict some pain and unpleasantness, physically or mentally to achieve its objective.

Section 99 of the Trial on Indictments Act is Constitutional as it operationalizes articles 22 (1), and not inconsistent with articles 24 and 44 (a), he concluded. He answered issue No.4 in the negative.

Next for consideration was issue No. 5. After hearing arguments for and against in this issue and after examining various cases such as Catholic Commission for Justice and Peace in Zimbabwe vs Attorney General and others and Earl Pratt & Morgan vs Attorney General of Jamaica and others (case No.27 Vol.3) No. 210 of 1986 and 225 of 1987, he went on to put the imposing question that arises from the arguments of counsel of both parties which is:

> ***"Do condemned prisoners have any fundamental rights and freedoms left to be protected before they are executed?"***

He said that the Catholic Commission for Justice and Peace case answered it in the affirmative. The learned judge agreed with that stand and expounded that condemned prisoners did not lose all their constitutional rights and freedoms, except those rights and freedoms that have inevitably been removed from them

by law either expressly or impliedly. He said further that condemned prisoners are still entitled to the protection of articles 24 and 44 (a). He however cautioned that the burden to prove violation of fundamental rights and freedom is on the petitioners. He referred to the "death row phenomenon' which is brought about by long delay on the death row, coupled with harsh and difficult conditions, which renders the carrying out of the death sentence cruel and inhuman or a degrading punishment prohibited by articles 24 and 44(a).

He considered the effect of delay on the death row on condemned prisoners which is referred to as "death row syndrome" in the Zimbabwe and Jamaican cases. He considered also what is unreasonable delay before the President signs the death warrant or gives an amnesty. He found a delay beyond three years after a condemned prisoner's sentence has been confirmed by the highest appellate court to be unreasonable delay.

He therefore answered issue no.5 in the affirmative and allowed the appeal in part.

He declared as follows: the various provisions of the laws of Uganda that prescribe mandatory death sentences are inconsistent with Articles 21, 22 (1), 28, 44(a) and 44(c) of the constitution:

- Section 132 of the Trial on Indictments Act that restricts the rights of appeal against sentence where mandatory sentences are imposed is inconsistent with articles 21, 22(1), 24, 28, 44(a) and 44(c) of the Constitution.
- That inordinate delay in carrying out the death sentence after it has been confirmed by the highest appellate court is inconsistent with Articles 24 and 44(a) of the constitution. A delay beyond 3 years after the highest appellate court has confirmed the sentence is considered inordinate.

The orders made were:

- For petitioners whose sentences have been confirmed by the Supreme Court, they will await 2 years to enable the Executive to exercise its discretion under article 121. They may return to court for redress after the 2 years.
- For those with pending appeals;
  - They shall be afforded a hearing in mitigation on sentence.
  - The court shall exercise discretion whether or not to confirm the sentence,
  - For those whose sentence of death will be confirmed, the discretion under article 121 should be exercised within three years.

Although the Kigula case did not lead to full abolition of the death penalty by the courts, it led to two main outcomes; mandatory death penalty and a delay of 3 or more years in carrying out the execution following confirmation of the sentence by the Supreme Court were held unconstitutional. As an outcome, all prisoners who had spent above 3 years on death row after confirmation of their sentence by the highest appellate courts had the sentence commuted to life imprisonment without parole. Those whose sentences arose from mandatory sentence provisions and were still pending before appellate courts had their cases remitted to the High Court for them to be heard only on mitigation of sentence and new sentences passed.

This led to a drastic decline in the death row population arising mainly from mitigation hearings, which saw most of the death sentences quashed. Since the ruling, 13 formerly condemned women have been released, while 18 are serving long-term sentences. On the part of men, 48 are serving 20 years without remission, 264 are through with mitigation, 19 are pending mitigation, 8 were released from court after the mitigation hearings, 15 were given terms of imprisonment and they served and were released, 21 were sentenced to life in prison, 119 were given determinate sentences (5 to 50 years), 20 had their death sentences confirmed, 2 were sent to mental hospital, 2 are pending Minister's Order and 2 were pardoned. The death sentence is still being handed down. 4 new admissions were received in 2015. Overall, there are 75 new admissions since the Kigula ruling and the general death row population is 208 (197 men and 11 women).

3.8. Recent Developments.

Although Uganda has not carried out any executions since I999 (for civilian) and 2005 (for military), it is still categorized as a retentionist instead of abolitionist de facto country because it rejected all recommendations to abolish the death penalty at its last Universal Periodic Review before the U.N. Human Rights Council and signed four *Notes Verbales* denouncing the U.N. General Assembly's Resolution to impose a global moratorium on the use of capital punishment. It is however worth noting that during the vote in 2014, for the first time Uganda abstained from voting instead of its previous vote against.

Uganda attracted international scrutiny from 2009, when a Private members' Bill was introduced to Parliament, which would have mandated the death penalty for aggravated homosexuality. The Bill was ultimately passed by the Parliament in December 2013 and signed into law by the president in February

2014, but the capital punishment provision was eliminated and substituted with life imprisonment. The Constitutional Court however ruled the Anti-Homosexuality Act invalid in August 2014 on procedural grounds, as it was not passed with the required quorum.

After the Kigula ruling, some judges who are proponents of the death penalty resorted to issuing sentences beyond 50 years because the ruling was to the effect that those who stay on death row beyond 3 years will have their sentences commuted to life imprisonment which according to the Prisons' Act is construed to mean 20 years. In April 2013, former Chief Justice Benjamin Odoki issued the "Sentencing Guidelines for Courts of Judicature", aimed at strengthening humane, predictable and consistent sentencing. These Guidelines do not address the issue of the death penalty, but stress the importance of taking into account aggravating or mitigating circumstances and the necessity to introduce further transparency and uniformity in the sentencing process. They define a long-term sentence to mean a custodial sentence ranging from 30 to 45 years.

Whereas both the Constitutional and the Supreme Courts held that mandatory death penalties are unconstitutional in 2005 and 2009 respectively, with the exception of the Anti - Terrorism Act 2002 which during amendment in 2015 had mandatory death penalty replaced with discretionary, to date, the laws have not been revised to remove the inconsistency. Upon this premise, a private members' Bill titled the Law Revision (Penalties in Criminal Matters) Miscellaneous Amendment Bill, 2015 was presented before Parliament. The Bill further aims at restricting the death penalty to the most serious crimes in accordance with international standards. The Bill received its first reading and was sent before the Legal and Parliamentary affairs committee for consideration. Early this year, the committee received positions and reports from various stakeholders and is in the process of preparing its report. This among other factors has kept the debate on the viability of the death penalty alive in Uganda.

In a remarkable move, convicted terrorists of the 2010 Kampala twin bombings resulting into death of 76 people and leaving many injured were on 26th May 2016 not sentenced to the maximum penalty of death. This depicted the great progress made by the campaign for the abolition of the death penalty. In his ruling, the judge stated that;

> **"*Grave crimes of terrorism and murder must correspondingly attract severe punishment. I however, do not believe that the death***

sentence would really assuage the victims and give them closure to the indelible pain that the society has suffered on account of terrorism and murderous acts…"

3.19 Ubuntu as an Alternative to Death Penalty

One of the key questions received by campaigners for abolition of the death penalty is the alternative proposed. This is because the public opinion believes that abolition of the death penalty may lead to impunity because of the general perception that without the death penalty offenders will be unleashed to the public. The biggest population in Uganda supports life without parole as the suitable alternative. Punishment is majorly looked at in the lens of retribution vis a vis reformation. The lacuna in the laws of Uganda further prevents a challenge. Life imprisonment is not defined by the Laws of Uganda. The only reference to what life imprisonment may mean is contained in section 86(3) of the Prison Act, 2006 which provides that:

"For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years imprisonment."

This is often cited as the authority for the proposition that life imprisonment in Uganda means twenty years imprisonment. However, on 10th May 2011, the Supreme Court ruled in *Tigo Stephen vs. Uganda* that section 86(3) of the Prisons Act, 2006 was insufficient authority for the definition of life imprisonment. The Court ruled that life imprisonment or imprisonment for life means imprisonment for the natural life of the person. This has however, not been reflected in any law. The Bill before Parliament also seeks to define life imprisonment or imprisonment for life to mean 'imprisonment for the natural life of a person' because this is the generally acceptable alternative.[28] For retentionist states like Uganda, the middle ground for now is to achieve abolition and later have a second debate on penalties.

3.20 Ubuntu a Forgotten Value for Life

In Uganda there is generally low appreciation of the right to life as a fundamental human right. Several studies have found that that the right to life is the most violated human right in Uganda. This is evidenced from several arbitrary or unlawful killings of citizens by government or its agents, killings by non-state actors and politically motivated disappearances especially of political opponents. Disrespect for human life is also exhibited

through disrespect for other related rights for example use of excessive force and torture during arrests and other law enforcement operations resulting in casualties; arbitrarily arrests and detention of people, long periods of pretrial custody, life threatening prison conditions like overcrowding and inadequate food; corruption leading to lack of access to services like hospitals for the poor, ritual killings of children, general abuse of children and women's rights and a general disrespect of human rights. A society that disrespects rights of the most innocent – the children cannot appreciate that capital offenders have rights and that keeping them alive is important. When hospitals have no medicine, it gets hard to argue that capital offenders should be given life imprisonment at the cost of the state.

3.21 Ubuntu as A mitigation Strategy

Civil society has played a crucial role in the abolition of the death penalty worldwide. The same is true for Uganda. FHRI as an advocate of *Ubuntu* has, since 1993, led the campaign for the abolition of the death penalty in Uganda. A lot has been done towards the advancement of this cause including; producing feature articles, regular talk shows and press interviews, training workshops, meetings, seminars and trainings, and submission of memoranda to the Constitutional Review Commissions and other international bodies, legal representation to capital offenders, petitioning constitutional and supreme courts on the validity of the death penalty and development of a private members' Bill.

It further led the formation of the Civil Society Coalition against the death penalty in Uganda in 2005 with seven members; Amnesty International, Friends of Hope for condemned prisoners, Human Rights Network (HURINET-U), Public Defenders Association (PDAU), Uganda Association of Women Lawyers (FIDA-U) and Uganda Joint Christian Council (UJCC). Over time, other civil society organisations and individuals have come on board. These civil society organisations have gained the abolition campaign many advances and can build on this using various strategies as outlined below to mitigate obstacles to the abolition of the death penalty and adoption of the protocol both in Uganda and the rest of Africa.

Whereas campaigns for the abolition of the death penalty have achieved fast results in some states, in others especially those facing democratic challenges like Uganda, it is a slow process that requires a lot of engagements. The strides so far made however point to a future where the death penalty will be no more. The adoption of an African Protocol on the abolition of the death penalty will play a crucial role in changing perceptions of African

Union Member States from death penalty abolition being an European imposition by making them develop a sense of ownership of the abolitionist movement as well as strengthening the continental dimension of the abolition of the deathpenalty.

CHAPTER FOUR

THE DISPENSATION OF OBUNTU-BULAMU

4.1 Introduction

Ubuntu is an African worldview that interrogates what it means to be human. *Ubuntu* Connotes humanness, a spirit of caring and community, harmony and hospitality, respect and responsiveness, that individuals and groups display for one another. It is thus the foundation for basic values that manifest themselves in the manner in which African people think and relate to one another. Hence it is often said that ***umuntu ngumntu ngananye*** *(a person is person through others).* [429]*Ubuntu* as an ideology existed in Africa in different forms, even before colonization. This was vivid in the way Africans lived altogether, as a community, not as individuals. And therefore, resources were to be shared as a community. There was a structure of leadership (elders) or Kings (but still assisted by elders), that ensured that there was order in society. If an individual committed a wrong, the whole community would be affected, and the reverse was true once something good has done in the community.

From a linguistic perspective, the term *Ubuntu* comprises the "u" the abstract

429 Ubuntu – Munyarandzi Felix Morove, University of KwaZulu Natal, South Africa, 2014

noun prefix "bound" and the noun "-ntu" meaning "a person", or "personhood" and "humanness" The word is common in the Nguni languages of Southern Africa, and other parts of Africa (Hailey, 2008; Murithi; 2006 p.28). Examples include *botho* (Sesotho or Sotswana), *bumuntu* (Kisukama and Kihayi in Tanzania), *bomoto* (Bobangi in Cong), *gimuntu* (Kikongo and Gikwese in Angola), *Umundu* (Kikuyu in Kenya) *Umunti* (Uganda), *Umunthu*

(Malawi), and *Vumuntu* (Shi Tsonga and Shi Twa in Mozambique). Therefore, it is prudent to note that *Ubuntu* has many meanings that are inexhaustible because this ethic or philosophy cannot be pinned down to have originated at a particular point in time in human history. But as the name suggests, it originated with African people (Bantu) as part and parcel of their cosmology and the implied individual ontology[430]. For instance, though in South Africa it is commonly known as *Ubuntu*, the same concept is found in different countries in Africa, holding similar, general purpose, among different African cultures, yet given different names. For instance, the Baganda in Uganda call it ***Obuntu bulamu (humannsess),*** in Northern Uganda, among the Acholi, it is called ***Mato Oput,*** in Kenya, the common slung used among Kenyans as a symbol of Unity is "***tuko pamojja****" (which means* ***we are together).***

Africa's quest for sustainable peace needs to be built on reconciliation and co-existence based on human rights, and social, economic, and political justice, all to which lie at the heart of *Ubuntu* (Murithi, 2006, p 14)5. In this context, the overriding goal of *Ubuntu* is to strengthen societies' capacity to promote positive peace for social solidarity to once again begin to conceive of one another of *Ubuntu*, individual security, safety, and wellbeing dependent on ensuring such for others in the community. This indigenous peace making process has also been used to address all manner of issues, ranging from family and marriage disputes, to theft, damage of property, murder, and war.

Ubuntu is people oriented as against the modern socio-political order that promotes elitism or individualism. The concept of *Ubuntu* conveys the sense that whatever happens to the individual happens to the entire group, and whatsoever happens to the entire group happens to the individual. Thus, the life of the

430 *Ubuntu* – Munyarandzi Felix Morove, University of KwaZulu Natal, South Africa, 2014

individual is subsumed in that of the community, based on the understanding that the community produces the individual. The individual can only say ***I am because we are and because we are, therefore, I am***. *Ubuntu's* understanding of the indivisibility of humanity creates great capacity for forgiveness and reconciliation.[431]

It is imperative to note that societies that are governed by the principles of *Ubuntu* promote reconciliation to redress injustices, heal past wrongs, and maintain social cohesion, and harmony, hence maintaining law and order in society. In other words, the sole purpose of *Ubuntu* is to reconcile antagonistic

parties, restore people, through forgiveness, for the common good of the whole society, which is contrary with the western system of justice. That is to say, before colonization happened in Africa, the societies in Africa would view justice as a concern of the whole community and justice had to be dispensed for the benefit of the whole community. And it must be remarkable noted that many African societies and many African leaders, including our African judicial systems, have tried to maintain this system of justice. For example, by incorporating the customary laws which are the heart of *Ubuntu*, into the western system of laws that we adapted to for example, in Uganda, the Courts are allowed to be guided by customary laws in certain instances, **Section 15(1)** of the Judicature Act, and **Section 10** of the Magistrates Courts Act; as was seen in the case of Bruno ***Kiwuuwa V. Serunkuma and Namazzi***. The Constitution of Uganda also establishes the institutions of traditional or cultural leaders[432] who play a great role in upholding cultural values of communities.

431 Ramose (1999) concurs that African philosophy has long been woven around Ubuntu, which creates a family atmosphere. It creates philosophical empathy and kinship among and between Africa's indigenous communities. He notes that Ubuntu is not restricted to Bantu speakers but it is also found in **Sub-Saharan Africa**. For example, in **Senegal**, the concept of "***Teranga***" reflects a similar spirit of collective hospitality and responsibility. Ubuntu is based on the notion that your pain is my pain; my wealth is your wealth. Your salvation is my salvation, or the Sotho saying, "*it is through others that one attains selfhood",* as well as the slogan, an injury to one is an injury to all (Nussbaum 2003).

432 Article 246 of the Constitution of the Republic of Uganda, 1996(2015 as amended)

433 Although Ubuntu is conceived as a cultural ideology, it can be applied in politics, business, management and corporate governance. Thus, according to Idoniboye-Obu and Whetho (2013), Ubuntu is a value system expressed to form human behavior in the context of the treatment of others, especially the treatment of the governed by the political leaders. (P. 830).

Different African leaders have also commented on the application of *Ubuntu* in societies, as positive remedy to conflicts. Therefore, *Ubuntu* philosophy is widely used in Africa. For instance, the former president of South Africa **Jacob Zuma** in 2012 stated thus.

> ***"If we build a society without these two…we are building a society of hooligans…if we do not agree as people, let us agree with respect and not by violence, saying whatever we like to people. That does not build a nation…South Africans are not hooligans. We are a nation of very proud Respectful people who stand up for their rights but do so Without losing dignity and Ubuntu."(SAPA 2012)***

Desmond Tutu commented;

> **"*You know when Ubuntu is there, and it is obvious, when it is absent.***
> ***It has to do with what it means to be truly human, to know that you are bound up with others in the bundle of life"***

South Africa's former president **Thabo Mbeki** commented thus;

> **"*Ubuntu inspires Community members to act in solidarity With the Vulnerable, the weak and poor, and helps them to behave in specific ways for the common good."***

The South African Government's 1996 white paper on welfare described Ubuntu as;

> **"*The principle of caring for each other's wellbeing…and a spirit of mutual support. Each individual's humanity is ideally expressed through his or her relationship with others and theirs in turn through other people. It also acknowledges both the rights and responsibilities of every citizen in promoting individual and Societal well- being."***

In **South Africa**, in post apartheid period, the South African government employed *Ubuntu* to redress the injustice, intolerance, hope, human rights abuse, and in humanity that characterized the apartheid regime. No wonder the establishment of National Unity, and Reconciliation Act, 2012. The Act provided that the major goal "of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and demines of the past."

Ubuntu was also used in **Rwanda** as an alternative to the Western conflict resolution built on the modern judicial system. Approximately 120,000 people were allegedly, responsible for exterminating a million people in the 1996 genocide (Wilson, 2011). Wilson projects, that, it would take about 120 years to conclude using the Western judicial system. The Rwandan government however acknowledged this situation and instead adopted a traditional method known as ***Gacaca*** developed from Communal law. This version of *Ubuntu* was employed to resolve village or family discord. A side from prompt trial, it facilitated peace- building and accelerated healing. The peace process was not punitive but was founded on the notion of forgiveness and reconciliation. This was finally achieved.

4.2. Application of ubuntu in other jurisdiction: Interculture and Ubuntu

In efforts to analyze and define interculture, I will begin with what culture represents. I resorted to **Ron and Suzanne Scollon's (2012)** book intercultural Communications. They discuss the word culture 'that creates more difficulties than it gives answers. It refers to a large number of people and their familiarities, and their history, language, or geographical position. Of course, when referring to culture 'we are being specific about a group of people which is inaccurate especially in the discussion of discourse in intercultural communication.[434]
Thus, to give an account of a considerable size or 'super ordinate' culture categorically, that share similar characteristics, culture is not exactly applicable. Thus, we see that culture is not the individuals who make up the groups, cultures do not converse but individuals do converse. Conversation is among individuals that are interpersonal communicating, thus classified as intercultural communications.[435]

434 Scollon & Scollon, 2012
435 Ibid

The subject that I am most concerned about at this point is the intercultural aspect of communications between individuals belonging to different cultures. My experience deliberated exactly by what Nadeau and Barlow's (2003) experience in France. In France, individuals work thirty-five hour weeks and have seven weeks of vacation a year. Let us not forget, their hour and a half lunches, consuming the richest food on the planet but will live the longest. They do not pick up after their dogs and hate to donate to charity and pay their extreme taxes and assume the Government is responsible for everything. Never-the-less, regardless of high taxes, a bloated civil service, an enormous national debt, an over-regulated economy, over-the-top red tape, double digit unemployment, and low incentives for entrepreneurs[436] France in 2003, was Europe's powerhouse.

Taking into consideration the above facts and zooming closer to the individual, we enjoy an evening with Nadeau and Barlow and the French. The social activity involved about fifty individuals half English and the other French. The English culture introduced and discussed their presence in France. The French culture did not expect introductions and disagreement seemed to reign. It was all about scoring points and proving themselves in conversation. Hence, people that night spoke over the top of others, interrupted each other, veered off onto new angles without warning, argued, sought confrontation, and disagreed. At the end, names and a minimum of personal information exchanged expressed the

hope of seeing each other again **(Nadeau & Barlow's, 2003).**

A lot further down than the South of France in Nigeria, journalists **Michel and Beuret (2009)** authors of Howthe Chinese found their Wild West‖ in their book China Safari state that intercultural activity is not foreseen by the Chinese in Nigeria.[437]

Their efforts in Africa are totally business related, and they do not intend to enforce their cultural presence as the colonists did in the past. Amy Wood's husband (the first Chinese person from communist China to work in Nigeria) proudly conveyed, Chinai's using Africa to get where the United States is now,

436 Nadeau & Barlow, 2003
437 Michel & Beuret, 2009, pp.29.

and to surpass it.[438]

Further, in the book after a party given for the Nigerian president at the Millennium Hotel owned by Wood, Amy escorts the journalists in a police car to their hotel. Before arriving, she announces that they were passing through the red-light district; they view prostitutes disappearing from the sidewalks as the police car appears. Then interestingly they view an accident where a Chinese man opens his car door and flings a delicately looking Black Nigerian man, his wife, and daughter off a motorcycle taxi *(Okada)*. An argument ensues, the Nigerian wants money for his daughter to be examined at the local hospital, and the Chinese man protests that he was been taken advantage of by a rich foreigner. The Black man, already bruised, was about to be struck by the Chinese man, once more. The journalists intervene and try to calm the situation down, eventually they find the Chinese abuser who left the scene a lot earlier, in a casino eating noodles. They extract fifty dollars from him and smooth out the intercultural argument.

When the journalists and Amy are back in the police car, Michel and Beuret ask Amy, what do all these Chinese workers in Nigeria do for girls? He informs them that there are a few Chinese prostitutes, but not enough to go around. They wait to see their wives in China once a year. They do not go to African women. Never! Not for sex. Nor marriage. I hardly know any mixed couples. Why not? Simple. We do not like them. The Nigerian taxi driver, called Monday, turns around at this point, and the journalist flinches but asks, would you marry a Chinese woman? Not likely. As we say here:
Monkey no fine, but eem mama like am. Er, what do you mean? I mean nobody go see eem mama whose soup no sweet. Best woman come from your village,

who work hard and cook good.[439]

In both these instances, the vast cultural differences were obvious. Obviously, the intercultural individuals communicating demonstrate no *Ubuntu*. Humanness, respect, or dignity, was not given nor received. Regardless of what they learned in their cultures, they lacked the ability to communicate. One could argue that

438 Michel & Beuret, 2009
439 Ibid

better attitudes, a necessity of communication theory may present more desirable, interpersonal conversation among these humans or individuals it did not. In every case, the universal spirit of Ubuntu could make a difference; because it embraces hospitality, caring about others, being willing to go the extra mile for the sake of another,[440] not just family or community members but every person communicated with every day.

As discussed in earlier inferences urbanization, globalization, and Western ethics destroy *Ubuntu*. As I further studied and researched, I found that most cultures have a form of *Ubuntu* maybe not exactly as universal as *Ubuntu* but small efforts to maintain better relationships within cultures, are viewed in the following Table 1A.

TABLE 1A: FORMS OF SOME UBUNTU IN DIFFERENT CULTURES
MALAGASY (MADAGASCAR) 'Fihavanana': We are all one blood and that how we treat others will eventually be reflected back to us; and that we should be proactive about goodwill for the good of the world. It is not limited to present but also to the relationship with the spiritual world.
KENYA - 'HARAMBEE' We must all pull together. Some Christians in Kenya oppose the use of the world 'harambee' because it is an expression of praise used by Hindu deity called Ambee Mata (a reincarnation of Durga riding a tiger). Railway workers carried loads of iron rails and sleeper blocks chanted har, har ambee!" (praise, praise to Ambee mother) in their physical effort.

Tutu, 2016

JERUSALEM -'HILLEL'

Hillel represents an Elder in the land of Israel. He is popularly known as the author of these sayings: If I am not for myself, who will be for me? And when I am for myself, what am I?" And if not now, when? On the ethic of reciprocity or the Golden Rule: That which is hateful to you, do not do to your fellow."

TAIPEI - REN (CONFUCIANISM)

It is difficult to translate this term but could mean 'complete virtue'. It is comprised of two beings, e.g., self and other and how they treat each other. As does *Ubuntu* it is focused on humanness and the essence of being human. Inclusive meaning is if you love a thing it means you want it to live. In a nutshell, it means human love and interaction is the source of humaneness, the source of the human self. Exemplary humaneness between self and the family is crucial because it is the root of self.

HAWAIIAN - OHANA

The word in Hawaiian culture means family whether extended, blood-related, adopted or intentional and emphasizes family is united and each individual must be cooperative and considerate. The word is derived from 'oha' and alludes to the root of the 'kalo' or taro plant which is their staple diet.

INDIA - SARVODAYA

The word means 'universal uplift' or 'progress of all' and is actually the translation of John Ruskin's book "Unto this Last." Mohandas Gandhi translated this book in 1908 and these ideals have progressed beyond his desire of Indian independence (swaraj). This Sarvodaya movement and philosophy has been described as a fuller and richer concept of people's democracy than any we have yet known" and is the Gandhian approach to peace and non-violence.

TANZANIA – UJAMAA

A word used for extended family and means that a person becomes a person through the people or community."

LATIN - NON NOBIS SOLUM

This means that people should contribute to the general greater good of humanity, apart from their own interests." Cicero wrote the longer version to stress, we are not born, we do not live for ourselves alone; our country, our friends, have a share in us" (Cicero de offices, 1:22).

Observing these countries' expressions, a possibly relation to *Ubuntu* meant a greater good in the individual and the community. Somehow, a vein flows interculturally as communication becomes an effort. Each individual and culture contributes unique values and beliefs to the intercultural relationship that broadens both mind and spirit. But it is estimated, the closer each individual is to humanness (*Ubuntu*) the more understanding is available, and allows a deeper understanding and relationship, especially in the global aspect of communication whether online or offline.

The following Tables 1 - 11 will exhibit countries who maintain and manage some form of *Ubuntu* a gift to humankind. These tables portray interesting values, beliefs, and forms of communication (verbal and non-verbal) that have been part of cultures for many years and even centuries.

Observations communicated via the many forms of media contain the condition of the world today, and it is very noticeable, that with all of the cultural beliefs and values and centuries of communication theory, always on hand, man seems to have fallen short in efforts to basically communicate.

The following synopsis of the basic values, beliefs, and communication between individuals as seen in the following tables have existed over time, for individuals to strengthen family, improve society, and extend this solidarity, nationally and internationally. Never before has there been a greater need for global communication, but yet a dire need for local, basic, and individual communication to improve, before a process can begin with intercultural communication a world scale.

TABLE 1 – HONG KONG

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Hong Kong's values and beliefs based on the Confucius teaching system of behaviors and ethics. It stresses human obligations toward others and their relationships.	In Hong Kong, they communicate with sophistication and in a cosmopolitan manner.
Some of these values and beliefs are duty, loyalty, honor, filial piety, respect for age and seniority and sincerity.	Verbal communication: English, Cantonese & Mandarin. Dialects: Shanghanese & Chiu-Chow.
Their respect in hierarchal relationships is imperative.	Hong Kong Chinese lower their eyes as a sig of respect particularly when meeting with Westerners. Especially in business, long eye contact is avoided
Confucius teachings include the manner in which people must act to respect hierarchy.	In large groups, introducing oneself is necessary. In small groups, the guest waits for an introduction by the host.
	When addressing people they honor them by title and surname, e.g. Judge Jones. The foreigner will advise if the Hong Kong person wants to be friendly, want to use a familiar name.
	Non-verbal language Burping during meal times is Complimentary. Not refusing a second helping indicates gluttony.
	The HK Chinese will not always forgive intercultural misbehavior.
	They will not tolerate you losing your temper. They lose respect for you and you lose face'
	An astrologer may be present when signing a contract because it is necessary to determine an accurate date. Use auspicious color, e.g., gold, on any form of card thus making it more acceptable to them.

TABLE 2 – INDIA

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Hindus practice the tradition of the caste system that establishes hierarchical relationships. Society is very conscious of social order and status relative to others, e.g., family, friends, strangers.	Verbal Communication: Hindi is the official language of India and its states.
Gurus: The teachers are a source of all knowledge. The Father is the patriarch and considered the leader of family. The Boss is ultimately responsible in the business organization.	Legitimate languages are recognized by the central government of the different states: East India languages are, (1) Hindi, (2) Urdu, (3) and Bengali.
There is hierarchal order in all and each relationship	Sikkim has four languages but only Bengali is recognized by the central government.
An Indian individual will stress a group they belong to rather than their status as an individual.	There is a constant struggle with the central government to have other languages recognized.
They are affiliated to a specific state, region, city, family, career, path, religion, etc.	The Indians will never say_no – verbally or non-Verbally
They maintain close family and extended family ties. There are hundreds of inter-relationship rules and structures for extended family. With these obligations, there is a deep-rooted trust among them.	They will answer the way they think the questioner desires. It is not dishonest because they do think that it is rude not to give a person something they ask for.
Religion: Consists of Hindu 81.3%; Muslim 12%; Christian 2. %; Sikh 1,9%, Buddhist, Jain, Parsi 2.5% (2000).	The Indians will never say _no – verbally or non-Verbally
Ethnic make-up is comprised of Indo-Aryan 72%; Dravidian 25%. Mongoloid and other 3% (2000).	They may give an affirmative answer but be deliberately vague about anything specific.
Religion, education, and social class denote the kind of greeting in India. Greet the oldest person first. Men and Women do not shake hands. Indian names refer to religion, social class, and region of the country.	Table etiquette includes eating with fingers; guests must wait to be seated. Guest served first, then the men; and then the children. Women serve the food and eat later. Wash your hands before you eat, use right hand to eat. Leave some food on your plate, otherwise you can be given more.

TABLE 3 – CHINA

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Religions: Daoist (Taoist), Buddhist, Muslim 1-2%, Christian 3-4%.	Language: Silence speaks in structured meetings. Rather than cause disagreements a person withdraws and both parties save face.
The Chinese ethnic groups are comprised of Han Chinese 91.9% and other nationalities, Zhuang, Uygur, Hui, Yi, Tibetan, Miao, Manchu, Mongol, Buyi, and Korean make up the balance.	The Chinese' Non-verbal communication speaks fathoms. Thus, facial expression, tone of voice and posture will relay someone's feelings. An impassive face is shown instead of a frown. It is disrespectful to stare into another's eyes. In a crowd, the Chinese avoid eye contact to give themselves privacy''.
Face is an important aspect of values and represents honor, a good reputation, or respect. Disgrace is the opposite of face when one's misdeeds are exposed. Face gives respect. Avoiding mistakes and showing wisdom in action is Face. Face shows when complementing an associate. It is a critical issue to lose face.	Non-verbal etiquette is expected by the Chinese in public places, as well as in their homes. It is a great honor to be invited to their home. Justification of refusing an invite is necessary. Be punctual, remove shoes, bring a small gift, use chopsticks, and wait to be seated. The guest of honor sits facing the door. Host eats first, attempt all food offered, never eat the last morsel, observe other person's needs, no bones on plates, hold rice bowl close to mouth, and absolutely ignore Chinese slurping and belching sounds.
Confucianism is a system of behaviors and ethics in relationships. The five tenets of relationships are (1) ruler & subject; (2) husband & wife; (3) parents & children; (4) brothers & sisters; (5) and friend and friend.	Patience is required in developing Chinese relationships in business. Foreigners are seen as representatives of the country and organizations rather than as individuals. They prefer to meet face to face rather than by social media. Chinese meal times are not for business discussions, are a social event.
Sincerity, duty, loyalty, honor, filial piety, respect for age & seniority. Maintain a harmonious society relation and become stable.	
They are a collective society requiring group affiliation in family, school, business, country and behave with decorum and not embarrass another and are sensitive to the feelings of the group.	

TABLE 4- THAILAND

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Religions: Buddhism 95%; Muslim 3.8%; Christian 0.5%; Hinduism 0.1%; other 0.6% (1991).	There are many regional dialects but the Thai language, of the Tai family, in the most important language.
Ethnicity: Thai 75%, Chinese 14%, other11%	It is made up of 44 consonants, 32 vowels, and five tones in Thai pronunciations, and a script of Indian origins.
Government: is a constitutional monarchy. The Buddhists believe that the sum of a person's actions in this and previous states of existence are viewed as affecting their future fate – good or bad luck that is seen as a result of one's own actions.	Other Languages: Chinese, Lao, Malay, and Mon Khmer, and English, used in government and commerce. In secondary schools and universities, English is a second language.
Buddhists also believes that selfishness and craving end in suffering and compassion and love brings about happiness and well- being. The true way to peace is to rid one of desire (nirvana). In this unequal state of the freedom of desire, suffering, or further rebirth, the person becomes one with his environment.	The Wai – is a common greeting with strict rules of protocol. The standard form is to raise hands and palms that join the fingers pointing upwards as in prayer and lightly touching the body between the chest and the forehead.
Thais respect hierarchical social relationships where one individual is superior to another. Thus, parents are superior to their children, teachers to their students, and bosses to their subordinates.	The Wai – is a sign of respect and courtesy as demonstrated by the height the hands are and how low the head comes down to meet the thumbs of both hands.
As a stranger, a Thai will immediately seek status for this individual so that they can work out how they should treat the stranger.	The Wai – carried out by sitting, walking, or standing.
Thai s will ask questions Westerners may find very personal to work out the individual's status. They determine this status by appearance, age, job, education, family name, and social connections.	The Wai – The younger person and the older person returns the greeting with their hands by their chest. The junior person will bow low when using the Wai to a senior person who is sitting.
The cornerstone of society is the Thai family and is very closely knit. The family are hierarchically arranged, with parents on the top, and children honor their parents.	Social distance prevents the Wai from returning. Many of their communication etiquette is based on their Buddhist religion. No confrontations and lack of face is a disgrace, so they try to avoid violence or offences.

TABLE 5 – THE SEYCHELLES

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
These plain islanders are very hospitable and 90% of these mixed nationalities live on the main island of Mahé and the balance of the people live on the smaller surrounding islands.	Creole is the most spoken language in the Indian Ocean islands. Creole is the spoken language in government and media. English is officially the business and government form of communication. In the tourism environment, they speak English.
It is believed this island has no native population origin, and that Polynesian and Arab explorers were on the island during the third century but they did not stay. The French eventually colonized Seychelles who brought East African slaves with them.	Creole is a combination of French consisting of some traditional African and Asian languages used by slaves. The basis of Creole is French spoken during the 1700s and is quite different to modern French.
Because of the very varied population, many different religions and customs developed and are still present today. The mixture of French and African beliefs produced a mixture of superstition and religion.	The three islands of Reunion, Mauritius and Seychelles have their own Creole dialects but they are able to understand each other.
Most of the 81,000 Seychellois are Creole French, settlers, and African and southeast Asian slave descendants of Arab and Chinese immigrants from the 19th Century.	The Creole Institute in Victoria promotes the Creole culture, language, and literature. In the islands of Mauritius and Reunion, the spoken word is very rarely written. The modern French taught in schools, is the formal communication language.
Moutia is a vigorous cultural dance with African and Malagasy rhythms.	

TABLE 6 – SOUTH AFRICA

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Ethnicity: Black 75.2%, White 13.6%, Colored 8.6%, Indian 2.6%.	English is spoken country wide and the other official languages are Afrikaans, Ndebele, Northern Sotho, Southern Sotho, Swazi, Tsongo, Tswana, Venda, Xhosa and Zulu.
Religion: Christian 68% (includes most Whites and Coloreds, about 60% Blacks and approximately 40% Indians), Muslim 2%, Hindu 1.5% (60% Indians), indigenous beliefs and animist 28.5%.	South Africans are transactional and it is not essential to have a long relationship to organize business. However, for a long-term business to be successful networking and building of relations is important.
This includes the indigenous Black people of South Africa, White Europeans, Indians, Indo- Malays, Chinese, and many other immigrants, and colonialists, to create an extreme diverse culture.	All cultures viewed as egalitarian. Senior executives, and businessmen who have worked hard, are highly respected.
Many family beliefs and values are falling away because of more individuals seeking work in urban areas. Just as the White family nucleus is important so is the tribal and family units that are being threatened by the economic reorganization of South Africa.	There are several major communication styles, but most times South African desires tranquil relationships so they prevent confrontations.
The Afrikaner farmers live in the rural areas and are mostly descendants of the Calvinist religion and have a narrow view of life. The city dwellers are fast moving. Johannesburgers, view their city life as superior to the less sophisticated rural farmers.	Analogy and metaphors used constantly to prove a point.
Black villages and communities are traditional but the Black urban communities mix their roots with the urban environment and the globalization effects.	All these cultures prefer face-to- face meetings to emails, letters, or telephone conversations. A woman is condescended in a masculine environment. Do not interrupt South Africans when they are speaking, they find this rude. They work toward a consensus for the benefit of both parties. They do not like to barter.

TABLE 7 – SPAIN

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Ethnicity: Composite of Mediterranean and Nordic types. Religion: Roman Catholic 94%, other 6%. Government: parliamentary monarchy.	Language: Over 72% of population speaks Spanish/Castilian. In Galician and Basque region the people speak Euskadi. On the islands of Catalonia and Balearic, the Catalan language is spoken close to Valencian in the Valencia region. All these languages have official status in their area but for minor languages such as Aragonese and Asturian.
The nuclear family and extended family sometimes provide both a social and a financial support network Machismo is male dominance and has died with older generations. Men shake hands and place their left hand on the right forearm of the other person. Female friends kiss each other on both cheeks beginning with the left cheek. Newly formed relationships greet in the above friendly way.	Dinner etiquette requires you sit down only when invited to do so. Keep your hands on the table at all times and do not begin eating before the hostess begins. Everything eaten with knives and forks. When meal is not complete, cross knife and fork on the plate, with the fork over the knife. When meal done lay knife and fork parallel on plate, tines up, and handles facing to the right and do not get up until the guest of honor does.
Family business comes first and then general things such as university. Families vary in size, they live longer, have less children, and many do not live with extended families. Because of different values, the networks are less tight. Relations are affected be different values between men and woman, parents and children. Spain has become an egalitarian society. It has the lowest birth rate and women prefer to attend university and work.	Spaniards prefer to deal with those they know so sufficient time needed to get to know each other. You are the person they deal with, and you do not represent the business.
Roman Catholics are inclined to accept other religions. In the past Muslims, Jews, and Christians lived together. They participate in a procession wearing peaked, black hats as a sign of penitence, walk barefoot, and carry a burden‘. Traditions are sometimes recognized as a cultural event.	They prefer face-to-face communication; how you present yourself is very important; and to be more modest when describing achievements and accomplishments.
Religion plays a big part in Spanish history and seen in small villages where grand church buildings stand. In a city, the huge cathedrals are virtual museums.	Communication is formal and protocol must follow. They also do not like to acknowledge they are incorrect and avoid confrontations.

TABLE 8 - FRENCH

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Ethnicity: Celtic and Latin with Teutonic, Slavic, North African, Indochinese, Basque minorities	88% of the language spoken is French. 3% speak German dialects in eastern provinces of Alsace- Lorraine and Moselle. Flemish is spoken by approximately 90 000 people in the northeast. 1.7% speaks Italian who lives close to the Italian border. Catalan dialects are used in French Pyrenees by .4% and the Celtic language (Breton) is spoken by 1.2% in the NW of France these languages are not acknowledged as official.
Religion: Roman Catholic 83%-88%, Protestant 2%, Jewish 1%, Muslim 5%-10%, unaffiliated 4%.	In the South of France more than 7 million Occitan dialects are spoken but not accepted as official, including Corsica's Corusu and Tuscan. Arabic spoken by 1.7%. There are other languages from former French colonies, i.e., Kabyle and Antillean Creole.
The family is close knit and is the strength of the country. Every family has certain duties and responsibilities. Extended families give emotional and financial support.	Kissing once on the left cheek and once on the right cheek demonstrates friendship. First names reserved for family and close friends.
French romanticism is a myth because they have a practical approach to marriage. Parents have fewer children but take this responsibility very serious.	When entering a store an official good morning or evening is used. Always greet neighbors when entering apartment buildings.
The French are private and have rules of behavior in social circles and those who are not. The French are polite but are only relaxed with close friends and family members. Friendship means you have a set of roles and responsibilities including being available when needed. Daily contact secures a friendship.	When the host communicates bon appétit e a t i n g begins. Hands should be visible at the dinner table but do not rest elbows on table. Do not cut salad with a knife and fork fold the lettuce onto the fork, peel and slice fruit before eating and leave wineglass half-full if no more is wanted.
Do not: give flowers in even numbers and never 13 that are unlucky. Only the best quality of wine is appreciated and when gifts are given, they are opened immediately.	The French are courteous and formality. Expected trust and respect, in all communication. Creating circles of friendship is important. Apologizing for not speaking French, aids a friendly relationship. They are direct and will ask probing questions if necessary. Written communication is formal. Secretaries in business do the communicating.

TABLE 9 – PORTUGAL

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Ethnicity: Homogeneous Mediterranean stock; citizens of black African descent who immigrated to mainland during decolonization are less than 100,000; since 1990 East Europeans have entered Portugal. Religion: Roman Catholic 94%	The Portuguese Romance language is derived from Vulgar Latin and spoken by about 10-million people. Galician and Mirandese is spoken in the North along the Spanish border.
Initial greetings among strangers are reserved, polite, and gracious. The appropriate greeting of the time of day is necessary and direct eye contact with a handshake. When friends greet, they hug and handshake and women hug and kiss each other on cheek beginning with right side.	The Portuguese like to feel comfortable with those they have to deal with. Mutual contacts in business are beneficial and a lot of time is required for relationship development.
Title is important especially in introductions. Anyone with a university degree pronounced as doctor with or without surname. The formal name used until otherwise suggested.	They prefer face-to-face contact and relationships built with people rather than a company or business. Never embarrass a Portuguese and try to be respectful. Do not interrupt someone who is speaking wait for the opportunity to speak. The Portuguese are honest, but they will not volunteer information and will be silent if it is in their best interest.
They are traditional and conservative. Inclined to be formal with others and treat them with extreme politeness. Very fashion-conscious culture clothes indicate status. Good fabric and design, worn with pride.	They are not emotive speakers and do not use hand gestures unless in a very friendly environment. Too many gestures viewed as overtly demonstrative.
They respect hierarchy and society and business are highly stratified and vertically structured. Hierarchy ripples throughout the Catholic Church and family. Hence, rank is respected. There is an authoritarian approach to decision-making, and problem solving.	They are not emotive speakers and do not use hand gestures unless in a very friendly environment. Too many gestures viewed as overtly demonstrative.
Power and authority placed on the individual making decisions, without consensus from subordinates in family and business.	This hierarchical culture respects age and position but do not be surprised when colleagues or friends do not follow through on promises. They have a relaxed time attitude and deadlines are not crucial and do not appreciate direct criticism even if it is justified.

TABLE 10 – THE NETHERLANDS

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL& NON-VERBAL
Ethnicity: Dutch 83%, other 17% (of which 9% non-Western origin mainly Turks, Moroccans, Antilleans, Surinamese and Indonesians) (2016 est.)	The Dutch language spoken by 90%, Frisian by 2.2%, Turkish and Arabic are spoken by more than .6% of the population.
Religions: Roman Catholic 31%, Protestant 21%, Muslim 4.4%, other 3.6%, unaffiliated 40%	When communicating with others the Dutch are reserved and formal but hospitable toward family. They consider self-control a virtue and do not display emotions or possessions.
Small families are the foundation of society and few women work outside of the home on a full- time basis and allow more time for their children.	The Dutch do not ask personal questions but if you are foolish enough to ask a personal question, they will not respond on the intrusion. Their personal life is apart from their business.
They detail oriented; appearance is important, disciplined, and conservative. High value placed on cleanliness and neatness.	Camaraderie developed at work into personal life is not considered in the work environment.
They do not like to display wealth as it is contrary to their egalitarian beliefs. They do not boast about their accomplishments or their possessions.	No communications of personal matters discussed with friends. Very close friends greet by air kissing close to the cheek three times from the left cheek. A firm, swift handshake, a smile, and repetition of the person‘s name greeted accompany greetings.
Because of their egalitarian beliefs, they are highly tolerant of diverse individuals, and their children brought up without gender bias.	Most Dutch use first names with close family relations. Wait until invited to do so by the Dutch person.
Apparently, no poverty is evident in the country because of the social programs. These social programs cost taxpayers heavily.	Eating with the Dutch requires formal etiquette. Continental fork held in left hand and knife is the right hand while eating. Men remain standing until all women seated.
All opinions heard at home and in the workplace. The boss concludes but general input expected from workers.	It is offensive to waste food in the Netherlands so finish all the food on the plate.
Everyone is valued and shown respect.	They do not touch one another and appropriate distances from others appreciated. They are extremely direct in communication. They do not use hyperbole and desire clear yes or no answers. Your word is your bond and if proven untrue you will be branded as unreliable.

TABLE 11 – TURKEY

VALUES AND BELIEFS	FORMS OF COMMUNICATION, e.g., VERBAL & NON-VERBAL
Ethnicity: Turkish 80%, Kurdish 20% (estimated) Religion: Muslim 99.8% (mostly Sunni), other 0.2% (mostly Christians and Jews)	Of the 63 million Turks 90%, speak Turkish. Minor languages include Kurdish (6%); Arabic (1.2%); most are bilingual in Arabic and Turkish. Other minor languages include Circassian (.09%), Greek, Armenian, Judezmo, a Romance language spoken by Jews.

doubt the future will communicate online via chat, instant messaging, UseNet, blogs, My Space and Face book, Second Life, and much more. Hundreds of platforms are constantly advertised, e.g., workstations, laptops, mobile telephones for interactive relationships and communication. Hence, speeding ahead is the electronic, technological large brain expecting the human being to evolve more and develop to adjust and adapt. In all of this quick, shuffle in the shortest time human beings require relationships and, as always, a desire to belong, hence social groups online, and offline. These relationships are the human need ‘, most important to the human condition, and as Desmond Tutu argues, The solitary human being is a contradiction in terms.

New and future social media is the force in rich interactivity and certainly leaves behind it all previous dominating social structures. Humans consist of many connected parts and different characteristics both in private and in the social context. Each human being, where able, participates in social media that enables each personality to express self-online as Csikszenthihalyi‘s theory argues it resembles ”mood and nature and the current influences in our lives.

Aristotle argued that the need for social activity would create group affiliation and interaction and hence our involvement in civic life. Could we extend this idea further, create cultural affiliation and interaction in political, economical, and human relations, and align it with Ubuntu?

Furthermore, the American Constitution ‘s author, Jefferson, advocated the small group would build a great nation. Robin Dunbar researched the inherent features of social groups in several species, and his idea of brain cortical size and the actual size of the primate species, suggests that the brain has become much larger. As we use the various social media tools of communication, the stimulation allows the dendrite

Phillips & Young, 2009

The Quran and the Sunnah (prophet's actions) are religious fundamentals. Islam religion practiced by most Turks and emanated from Saudi Arabia. They believe prophet Muhammad to be the last of God's representatives, and similar to Jesus, Moses, Abraham, etc. Moses brought the Torah, Jesus the Bible, Muhammad the last book—the Quran.	Shaking hands is not customary and practiced occasionally. One or two kisses on cheeks of friends and relations. Older people are respectfully kissed on their right hand and then placing the forehead onto the hand. When walking into a room greet most elderly person first. Another form of respect is kissing the right hand, and then putting the forehead onto the hand of the elder person.
Muslims are to pray five times a day- at dawn, noon, afternoon, sunset, and evening. Friday is their holy day and prayer times listed in local newspapers each day. This holy day not practiced in Turkey. Most males will prayer in the afternoon congregational prayer.	Greet people with either the Islamic greeting 'Asalamu alaykum' (peace be upon you) or 'Nasilsiniz' (How are you? pronounced na-sul-su-nuz). Other useful phrases are 'Gunaydin' (Good Morning, pronounced goon-y-dun), 'iyi gunler' (Good Day, pronounced ee-yee gun-ler) or 'Memnun Oldum' (pleased to meet you).
In the holy month of Ramazan, all Muslims must fast from dawn to dusk. Fasting includes no eating, drinking, cigarette smoking, or gum chewing	Turks deal with those they know, respect, and spend time with to establish a relationship. Most places used to foster relationships. Courtesy is an ultimate etiquette. Standing close is no problem with this culture while conversing and if you stand back, it may be understood as being unfriendly.
Turkish men love football (soccer) and support one of three teams: Galatasaray, Beþiktaþ or Fenerbahçe. Questioning them about latest team's results will produce a lively and animate response.	Discussion begins slowly with a lot of irrelevant questions do not ask them to get to the point-they will. Questions about their children or family are a pleasure to them, and not considered prying.
	They will also communicate willingly about culture, history, and politics.
	Eye-to-eye contact is essential while speaking withTurks because they understand this as being a sign of sincerity.

In a frenzy-grabbing for social media is today's answer to all questions of communications. Social media has its pros and cons; it respects the desire to express individuality freely. Each human being desires group life that

continues online and in the various communicating chats, messaging, blogs, Facebook, telephones, etc. Tests have proven these social activities develop the brain making it larger. The larger the brain more production with social media and the help of computers is expected. As we are steamrolled, further and further into technology, and less into the ability to communicate humanely, some human aspects are expected. A small example is in all activities online, trust is a vital aspect worth considering on the world-wide-web, can we afford to selectively be human?

Further statistics in media indicate marriage is declining and hence society will not foster the positive influences of strength in groups Hofstede's measure of the collective society. The institution of marriage has proved in the past, to strengthen communities and countries. Society is deteriorating in the marriage sense but each year domestic violence statistics are raising nationally and globally. A good look at *Ubuntu* and its use in society is worth a try and has been proven in other situations, to work and in more drastic situations than in the USA, and has fulfilled the needs of human beings' need to communicate.

The future looks dim and frail as we stretch ourselves from communication theories in various disciplines and attempt to communicate effectively as humans in a technological society. Humans communicating is about relationships and the nature of relationships between people, groups, and organizations.[441]

441 Phillips & Young, 2009

No branches in the brain to grow.

Again, tests prove the communication process of 150 men in a group, functions best. Examples throughout history is the size of village tribes, Roman legion's first cohort contained five centuries of 120 men, military units, size, organizational teams, the state, businesses, all comply with the 150 people convention, to produce maximum.

Now, if, the individual 'self ' is part of a group of 150, with the help of social media, he can fly by plane further, drive by car faster, calculate accurately and quicker, and hopefully communicate more closer with friends and family to develop stronger and better relationships. In some cases, this has been accomplished, but in most others not. Societal groups evolve to accommodate the physical, intellectual, and emotional needs of the individual, and more so, communicate and relate with others, locally and interculturally.[443]

Moreover, communication theory is ongoing as each theory is researched the challenge to further the idea is always suggested. Continuous research on communication theory of patterns that are consistently changing is left open ended for further research. In addition to ongoing research, a look at an example of trust in online communication is noted.[444] Online communication and relationships expect trust where no human face, voice or mannerisms are present. A year or two ago Face book experienced serious identity theft. They are considering a biometric iris scanning security system that allows many selves but only one self (**Phillips & Young, 2009**). Again, is this what society needs? Taking all considerations in this paper into account, and the current model of social society, including communication theory, especially that of symbolic interaction theory, social exchange theory, and cognitive dissonance theory, in the direction of humanism, to focus on *Ubuntu*, we could arrive at what we may need as a society.[445]

442 Ibid
443 Phillips & Young, 2009
444 Ibid
445 Phillips & Young, 2009

With social media and the Internet, one would think that communications (face to face) and application of the studies of communication theory would have effectively kicked in among a group of students, professors, and scholars on board a ship going around the world. Theoretically, world travel experience, and the application of communication theory, was a disillusion. Learning about *Ubuntu*, after travels around the world as a tourist, and a student, is exactly what was amiss interculturally. Intercultural communication theory applied was ineffective when we travelled on board a ship for 25,000 miles, with fifty different cultures, and field study in 15 different countries. Perhaps it was too many cultures in too short a time, and the tension and friction became quite frightening. If Ubuntu develops relations among humans for the betterment of all, how much better the journey would have been. The moments of pleasure and enjoyment apart from the group was possible, but when we had to work, study, share, and improve relations it was a disaster.[446] *Ubuntu* could be a far more effective tool in this kind of situation, and far better and lasting relationships achieved. Thus, these relationships could have included human dignity, respect, and sincere affection. This lack of affection among individuals especially in marriage promises disaster and a downfall of society as communicating human beings *Ubuntu* and its essence of being human, embracing hospitality, caring about others, willing to go the extra mile for the sake of another would certainly have made a difference. It would have provoked thought among students if we believed Tutu's *Ubuntu* that a person is a person

through other persons or that humanity is caught up, bound up, inextricably, with yours. When I dehumanize you, I inexorably dehumanize myself. Yes, as **Lindner (2010**) argues there is a worldwide need for love or, rather a new paradigm of love, and a new way of putting love to work can be this force.[447]

Where marriage relationships have existed in the past communicating with dignity, respect and love they have survived the worst challenges and strengthened. Thus, in David Hammond Tooke's book the roots of black South Africa‖ he argues the centrality of marriage in African society in a more positive vein:

Marriage locks the institution around the complete social structure. It is likened
to the keystone of an arch, holding biology in tension with society. Its primary

446 Ibid
447 Lindner (2010)

biological function is to produce children. These new members of society, human needs of sexuality, intimacy, psychological, and physical comforts meet in marriage. The complementary of the sexes (the most fundamental example of the division of labor) provides its basis, for this fact is so important, that all societies reinforce this mutual interdependence by allocating certain tasks specifically on the basis of gender. In a very definite sense, some tasks are only performed by women and others by men, hence it is incumbent on people to marry. From the social viewpoint, marriage lies at the very basis of society.[448]

Scott Taylor wrote an article in the Deseret News on Wednesday, December 8, 2010, and reported that in the nation's capital on Monday a document bore twenty-six signatures of religious leaders who represented major religions in the USA regarding marriage. It read:

> **Marriage is the permanent and faithful union of one man and one woman. As such, marriage is the natural basis of the family. . . Marriage thus defined is good in itself, and it serves the good of others and society in innumerable ways. The preservation of the unique meaning of marriage is not a special or limited interest but serves the good of all. Therefore, we invite and encourage all people, both within and beyond our faith communities, to stand with us in promoting and protecting marriage as the union of one man and one woman.[449]**

Furthermore, individuals devoted to one another become a family that strengthens communities and the nation. Thus, from indigenous tribes to a

city in the USA, proof of the most desirous form of relationship is obvious. Although individuals are unique though complex, and married, their challenges strengthen relationships. Always the sensitivity of the fragile institution of the family is threatened and discussed more each day in the media under subjects, such as, the effects of pornography, incest, rape, and other abuse. The other aspect is striving to keep family together for parents are indeed a challenge. Also, hundreds of errands, with not enough time, many bills, little money, and ongoing tasks with so little help is all part of family life.

448 Hammond-Tooke, 1993
449 Taylor, Scott, 2010

Family life has always and will always have the good and the bad with self, partners, parents, children, and siblings, it is only human. The human uniqueness of self creates adversity naturally and could be overcome and controlled. John Adams argued that the foundation of national morality and all of its criticisms derives from the family. To emphasize his point, he asked the question; what other relationship is available that is superior to the family? Further social science indicates that keeping families healthy and intact is compelling. Therefore, we understand that a strong family reinforces its members against addiction, crime, ignorance, poverty, morality, and responsible parenting stabilizes society (Deseret News, Sunday, November 28, 2010). Alternatively, when either partner does not fully support the marriage as can be seen in the Social Exchange Theory the relationship is unrewarded and the family is threatened leaving another vacancy in society.

Taking this form of relationship further Platt, Barton, and Freyd (2009) argue in their article A betrayal trauma perspective on domestic violence that approximately one in five women world-wide and one in four women in the United States" in their lifetime‖ suffer severe domestic violence and abuse.

These astounding statistics make one wonder why social and communication theories have been ineffective. However, domestic violence includes a betrayal of trust that incites deep feelings of shame and anxiety to the victim. Thus, theoretically, it is easy to give attention to the abused by hearing about their experiences, but it is not so easy to encourage the victim to speak more about their problems, and then step forward and help and participate in their struggle for survival. Hence, *Ubuntu* expects one to help those who struggle, pursues the path to uplift, encouragement for all in the village. *Ubuntu* requires that all of its inhabitants, especially married couples to share and overcome differences.

Not only are individuals and marriages threatened in today's society, but a

recent headline in the U.S. News online and on YouTube expressed The madness of a lost society Sott (2010) portrays November 26, 2010 Black Friday as Americans gone mad. He sees government officials and bankers planning the US economy and the destruction of American society and at the same time millions of shoppers squabble and tramp one another in efforts to buy unimportant consumer items made by virtual slave workers in far off lands.[450] Indeed, we need to revert to basics that worked and perhaps to an ancient philosophy guaranteed to work such as *Ubuntu*.

Therefore, statistics in a developed country, such as the USA, where we are classified as civilized in comparison to tribal, and indigenous, black people, who live in Africa, are surprising. We could find fault with communication and related discipline theories, but it ultimately boils down to respect, dignity, and love that can begin and end with *Ubuntu*, among fellow human beings. The definition and discussion of *Ubuntu* fully explains the possibility and hope for relationships in all cultures to the benefit of individuals, marriage relationships, friendships, communities, organizations, and business on a national and global scale, to produce harmony on a distressed globe.

The Death Penalty has been a mode of punishment since time immemorial. The arguments for and against have not changed much over the years. Crimes as well as the mode of punishment correlate to the culture and form of civilization from which they emerge· Christ was crucified on the cross by Jews for what was believed to be a crime of blasphemy.

Capital punishment is mentioned in the **Holy Bible** many times. In the book of **Leviticus 24: 17-21**, it is said, "He who kills a man shall be put to death." the "eye for an eye" principle applies here. Genesis 9:6 states, "Whoever sheds the blood of man, by man shall his blood be shed." **Exodus 21:12-14** states: "whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee. But if a man willfully attacks another to kill him treacherously, you shall take him from my altar that he may die." **Numbers 35:30-31** reads: "If anyone kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of one witness. Moreover, you will accept no ransom for the life of a murderer, who is guilty of murder, but he shall be put to

450 Sott, 2010

death". **Mathew 26:52** reads: "Then Jesus said to him, 'put your sword back into its place; for all who take the sword will perish by the sword'. Finally, in

Revelation 13:10 it is provided, "If anyone is to be taken captive, to captivity he goes; if anyone slays with the sword, with the sword must he be slain".

The following cases discuss the concepts of 'human dignity' and "right to life" and the justification or otherwise of the death penalty. There is first the case of **Republic v Mbushuu and another**[2][451] **which was decided by the High Court of Tanzania** and went on appeal to the Court of Appeal of Tanzania. In that case Mwalusanya J. held thus:

> Death penalty offends the right to dignity of a person in the way the sentence is executed and therefore it offends article 13(6) (d) of the Constitution of the United Republic of Tanzania Death penalty is inherently cruel, inhuman and a degrading punishment and the process of execution by hanging is particularly gruesome, generally sordid, debasing and generally brutalizing, and it offends article 13(6) (e) of the Constitution of the United Republic of Tanzania.
>
> Both the right to life and the right to protection of one's life by society is subject to the claw-back clause and is therefore not absolute according to Article 14 of the Constitution of the United Republic of Tanzania.
>
> For a law to be lawful it should meet the proportionality test and it should not be arbitrary.
>
> The provisions of the Penal Code on the death penalty do not have adequate safeguards against arbitrary decisions and do not provide effective control against abuse of power by those in authority when using the law.
>
> Death penalty is contrary to article 13(6) (a) of the Constitution of the United Republic of Tanzania because there is no appeal against the decision of the President not to commute the sentence even if it is unreasonable or discriminatory.
>
> In construction of provisions of the Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms, a generous and purposive method should be applied

450 1994 TLR 146 and 1995 TLR 97

The learned Judge found the death penalty in its present form to be unconstitutional. He went on to sentence the accused to life imprisonment.

The Court of Appeal on appeal by the Republic against sentence of life imprisonment instead of the mandatory death penalty discusses the grounds of appeal at great length. The Court stated that the international instruments

declare the inherent and universal right to life, demand that right be protected by law and prohibit the arbitrary deprivation of that right. The Court said that it meant that the right can be denied by due process of law.

The court went on to state that the six domestic constitutions which the court examined such as the Constitution of the Republic of Ghana, the Indian Constitution, Uganda Draft Constitution, and the Constitution of the People's Republic of Bangladesh, presume the existence of the inherent and universal right to life and its protection by law. The constitutions deal with when a person can be deprived of his life.

Article 14 of the Constitution of the United Republic of Tanzania lies in between the two sets, the court noted. The article declares the inherent and universal right and its protection by the society but then subjects both the right and its protection to law, the court observes. That means there can be instances in which the due process of law will deny a person his right to life or its protection. The right to life under article 14 is not absolute but qualified, the court concluded.

The issue which the Court of Appeal had to determine was whether the death penalty is one of such instances where the due process will deny a person his right to life and its protection.

4.3 Challenges in Applying The Ubuntu Philosophy

Despite President Mbeki's call, many jurists, philosophers, political theorists, civil society activists and human rights advocates in South Africa reject the invocation of *Ubuntu*, tending to invoke three sorts of complaints.

First, and most often, people complain that talk of *Ubuntu* in Nguni languages (and cognate terms such as *botho* in Sotho-Tswana and *hunhu* in Shona) is vague. Although the word literally means human- ness, it does not admit of the precision required in order to render a publicly-justifiable rationale for making a particular decision. For example, one influential South African commentator suggests that what *Ubuntu* means in a legal context depends on

what a judge had for breakfast', and that it's a terribly opaque notion not fit as a normative moral principle that can guide our actions, let alone be a transparent and substantive basis for legal adjudication'.[452] This concern has not exactly been allayed by a South African Constitutional Court justice who has invoked *Ubuntu* in her decisions, insofar as she writes that it can be grasped only on a 'know it when I see it basis, its essence not admitting

of any precise definition.[453]

A second common criticism of *Ubuntu* is its apparent collectivist orientation, with many suspecting that it requires some kind of group - think, uncompromising major it arian is more extreme ssacrifice for society, which is incompatible with the value of individual freedom that is among the most promising ideals inthe liberal tradition. Here, again, self-described adherents to *Ubuntu* have done little to dispel such concerns, for example, an author of an important account of how to apply *Ubuntu* to public policy remarks that it entails the supreme value of society, the primary importance of social or communal interests, obligations and duties over and above the rights of the individual'.[454]

A third ground of skepticism about the relevance of *Ubuntu* for public morality

451 E McKaiser public morality: Is there sense in looking for a unique definition of ubuntu? Business Day2 November 2009.

452 Y Mokgoro 'Ubuntu and the law in South Africa (1998)1 Potchefstroom Electronic Law Journal 2.

453 GM Nkondo 'Ubuntu as a public policy in South Africa (2007)2 International Journal of African Renissance studies 90

is that it is inappropriate for the new South Africa because of its traditional origin. Ideas associated with *Ubuntu* grew out of small-scale, pastoral societiesthe pre-colonialera whose worldviews were based on thickly spiritual notions such as relationships with ancestors (the 'living-dead'). If certain values had their source there, then it is reason- able to doubt that they are fit for a large- scale, industrialized, modern society with a plurality of cultures, many of which are secular.

Call these three objections to an *Ubuntu*-oriented public morality those regarding 'vagueness', 'collectivism' and 'anachronism'. It would be incoherent to hold all three objections at the same time; after all, the more one claims that *Ubuntu* is vague and admits of any interpretation, the less one can contend that it is inherently collectivist. Even so, the three objections are characteristic of discourse among professionals, elites, intellectuals and educated citizens in general and hence are worth groupingtogether.

4.4. The African Ubuntu Philosophy is Based on Unrecorded Practice

One major challenge of African indigenous knowledge is that it is not written down and that it is mostly transmitted from one generation to the next through storytelling (An Afro-centric Alliance, 2001). Successive generations learn about *Ubuntu* through direct interaction within local communities.

Unlike the Western and Eastern ideologies, which are well documented, African philosophy does not have an ancient written tradition, which makes it very difficult for the younger generations to practise the African *Ubuntu* philosophy fully.

However, recently, a range of studies have been conducted in order to help people to understand and appreciate the *Ubuntu* philosophy **(An Afro-centric Alliance, 2001; Broodryk, 2005; Mangaliso, 2001; Mbigi& Maree, 2005)**. Such studies will help to improve the documentation of African socio-cultural frameworks, enabling future generations to apply these ideas within organisational management systems. However, thus far there is little or no sensitization and dissemination of information about the *Ubuntu* philosophy to the affected organisations in Africa.

4.5 There is Insufficient Information Dissemination and Sensitization about the Ubuntu Philosophy

Although the *Ubuntu* philosophy is associated with positive attributes, it is not well disseminated to people within African societies. Consequently, some people do not know anything, or know very little about its foundational concepts. This is even more pronounced in towns and suburbs in urban centres where different people with different socio-cultural backgrounds and without extensive and ancient family ties live together.

Western and Eastern cultures have documented their philosophies and have disseminated them into educational systems, but in business schools, for example, training is still based on foreign ideologies, and African theories are not taught. Thus, big business in Africa is still dominated by theories that were created within and for individualist cultures that do not match the communal culture of an African society.[455] Consequently, most people running an organisation in Africa fail if they do practise what they are taught in schools, especially at tertiary level (Western business theory), and are ill-equipped to practice anything else.

Therefore, it is high time that all stakeholders get involved in the dissemination of information about and sensitization of people to *Ubuntu* philosophy. Such stakeholders would include educational systems, employers, media houses, government and the community. Cognisance should be taken of the fact that some of African traditional practices, customs and rituals are becoming obsolete in a changing modern environment.

4.6 The Ubuntu Philosophy is Negatively Associated With Some Obsolete African Traditional Rituals, Customs And Practices.

Some African traditions have outlived their usefulness in the modern environment, but may persist nevertheless. Practices such as witchcraft

455 Lutz, 2009:317

are still prevalent amongst African societies, and organisations need to take cognisance of this.

Other challenges in the African context include envy, where traditional practices tend to discourage individual initiatives **(An Afro-centric Alliance, 2001:60-61),** as Africans rate social achievement above personal achievement **(Van den Heuvel *et al.*, 2006:48)**. Anybody who aspires to excel above the expectations of the community would be looked down upon as an alien. To counter this, ***envy*** has been characterised as an enemy to our common humanity in the Malawi national anthem's first stanza it is described as one of the predominant enemies to personal and national development endeavours, apart from the other enemies that include hunger and disease.[456]

O God bless our land of Malawi, Keep it a land of peace. Put down each and every enemy, *Hunger, disease,* ***envy.*** (My emphasis) Witchcraft, envy and corruption, which are rooted in negative personal behaviours, deprive the very same community and its members endowed with the *Ubuntu* philosophy of their livelihood.

In the presence of the HIV and AIDS pandemic, some African traditional rituals and practices should be considered irresponsible and outdated. These practices are found across Africa, in many ethnic groupings, under various names, but for the purposes of this discussion, the Chinyanja terms are used, with a brief explanation. I draw on my own knowledge of these practices in Malawi and South Africa. These include polygamy, where a man can have several wives.[457]

Another obsolete practice is *kulowa fumbi* (levirate) which is still common among the Bantu people. *Kulowa fumbi* is practised where the brother of the deceased inherits the widow. The practice is intended to console the widow and assure her that she is still part of the family or community even in the absence of the husband. Unfortunately, the custom is practised without establishing the cause of death of the deceased, which could be related to

456 Malawi Government, 2010b
457 Ibid

HIV and AIDS.[458]

Other problematic African traditions include *jando*, the unsafe circumcision practice for the young boys; *fisi*, practised where a family has problems in conceiving a child and another man is formally organised to have sex with the married woman whose husband cannot impregnate her; and *chidyerano*, practised where married couples exchange spouses as a symbol of togetherness.[459]

In some cases, especially in the rural areas, the above African traditions and practices are continued in good faith, but unwittingly endanger the very existence and sustainability of the communities concerned. Fortunately, governments are taking initiatives in sensitizing these communities on the woes that can arise from some of these African practices through the print media, radio and television.[460]

However, the African *Ubuntu* philosophy is also facing challenges in its application due to the proliferation of new foreign ideologies in the multi-cultural African societies.

4.7 The African Ubuntu Philosophy is Challenged by the Proliferation of Foreign Ideologies.

The *Ubuntu philosophy* articulates such important values as respect, human dignity, compassion, solidarity and consensus, which demands conformity and loyalty to the group. However, modern African society is constituted of people from different cultures and backgrounds. Thus, understanding and practising some of the principles of *Ubuntu* have become problematic, due to multi-cultural challenges.[461]

For instance, recently, Malawi has been at the centre of a controversy on gay marriage and rights. Two men, Mr. Steven Monjeza and Mr. Tiwonge

458 Malawi Government, 2010b
459 Ibid
460 Malawi Government, 2010b
461 Ibid

Chimbalanga, arranged to wed, but were arrested on 28 December 2009.[462] Although a gay lifestyle and gay marriages are acceptable in some societies, both practices are still considered taboo in the Bantu culture and gay marriage is a criminal offence under the Malawian statutes. The couple were charged with "gross indecency and unnatural acts" contrary to the laws of Malawi. In passing judgement, the following observation was made by Chief Magistrate

Judge Siwasiwa **(Malawi Government, 2010a; BBC, 2010b)**:

> The engagement and living together as husband and wife of the two accused persons, who are both males, transgresses the Malawian recognized standards of propriety since it does not recognize the living of a man with another as husband and wife. Both these acts were acts of gross indecency.

When the two men were imprisoned for 14 years, there was an outcry from international bodies, including the NGOs, governments, human rights groups, religious groups, and international organisations, including the United Nations **(BBC News, 2010c).** After the UN Secretary General, Ban Ki-moon, intervened by visiting Malawi, the prisoners were pardoned on 28 June 2010 by the President of the Republic of Malawi, Dr. Bingu wa Munthalika.

This case is symptomatic of a recognition of larger forces that are having an impact on the *Ubuntu* way of life. Within the multi-cultural environment of African urban society, the synchronization of the *Ubuntu philosophy* with some aspects of foreign cultures poses a great challenge to the upholding of principles and beliefs governing traditional African society.

The following section reviews literature on the indigenizing of corporate management systems to address African socio-cultural dimensions. The significance of and challenges in applying the African Ubuntu philosophy are summarized in Table, below.

462 Malawi Government, 2010b

4.2.3. Table: Significance of and challenges in implementing the Ubuntu philosophy.

	Significance of the African Ubuntu philosophy
1.	Community is bigger than an individual under the *Ubuntu* philosophy.
2.	Positive behaviour is related to the *Ubuntu* philosophy.
3.	Synergies and competitive advantages arise under the *Ubuntu* philosophy.
4.	African culture and leadership styles can be founded on the *Ubuntu* Philosophy framework.
5.	African *Ubuntu* collectivism cultivates a team spirit towards
6.	*Ubuntu* Philosophy involves recognizing an employee's socio-cultural values within an African context.
7.	Respect is shown to one's elders under the *Ubuntu* Philosophy.
8.	Respect for the community and corporate social responsibility are part of the African *Ubuntu* Philosophy.
9.	Good corporate governance is made possible under the African *Ubuntu* Philosophy

Source: Own observation; 2018

	Challenges towards the African Ubuntu philosophy
1.	The African *Ubuntu* philosophy is based on unrecorded practice.
2.	There is insufficient information dissemination and sensitization about the *Ubuntu* Philosophy.
3.	The *Ubuntu* Philosophy is negatively associated with some obsolete African traditional rituals, customs and practices.
4.	The African *Ubuntu* Philosophy is challenged by the proliferation of foreign Ideologies.

The above literature review confirms that it has become imperative that cultural analysis be grounded in the local geographical environment, taking cognisance of different historical experiences, socio-demographics, internal politics, and other socio-cultural forces prevalent in the local areas within an African context. International partnerships and collaboration can be reached through consultation and consensus within the African framework. This means that foreign corporations should pay attention to issues surrounding local relationships and socio-cultural ideologies.

The above lessons about African socio-cultural frameworks are significant for organisations based in Africa. Managers need to be more dynamic in addressing the foundations of an African society, namely the *Ubuntu* Philosophy. To become a stable and successful competitor in both local and global economies, an organisation should strive to embrace new management models that are consistent with the local socio-cultural frameworks that apply where the organisation operates. The universal adoption of a foreign model without any adaptation is likely to be a mismatch with African society and may ultimately not succeed. Thus, there is that need to redesign the Balanced Scorecard model to accommodate African socio-cultural frameworks founded on the *Ubuntu* philosophy. Apart from facilitating the redesigning process of the Balanced Scorecard model, the African *Ubuntu* Philosophy can make many positive contributions to local and global management principles and practices.

4.8 Ubuntu‘s Limitations

Furthermore, to argue the differences, limits, and dangers of *Ubuntu* there are many historical experiences attached by sharing a common humanity, there is a solution. Although, the individual does not consider the barriers of age, gender, class, wealth, somatic appearance, cultural style, language, ethnicity, political allegiance and works out opposing positions of exploitation, suffering, violence, denial, wrong-doing, *Ubuntu* can assure, realize, and share common humanity.

Although the dismantling of identity is used to replace *Ubuntu* with a common humanity, Binsbergen argues, it could be a problem.[463]

The theoretical danger of *Ubuntu* is that it encapsulates the entire human race and all forms of status in life, such as, South African citizens who were in a community where the majority experienced atrocities of apartheid and who

463 Binsbergen, 2002

were equally justified. Binsbergen fears that *Ubuntu‘s* use, as a pacifier‘ in a realistic conflicting situation could be dangerous.[464] However, the ”Truth and Reconciliation Commission (TRC) developed after the apartheid situation, expected Black African people to absorb the pain of the unjust and immoral way they were treated. They were not given an opportunity to decide for themselves but were coaxed to apply their tradition of Ubuntu.[465] Also, the reconciliation‘ part of TRC was Christian oriented, and the Black African people finally did not define the terms under which it would be prepared to

leave this past behind . . . justice was administered by European and White dominance. With Bishop Tutu‘s face stamped on *Ubuntu*, it was accepted, it is believed that, the resentment repressed will find White South African society paying the price of the lack of *Ubuntu* in the Truth and Reconciliation effort **(Binsbergen, 2002).**

The White man has also used *Ubuntu* selectively in places like South Africa where life remains controlled in every way even today. The African dare not protest his situation because he has indirectly agreed to succumb to his traditional *Ubuntu.* Furthermore, the post-apartheid South Africa is designated as the highest crime rate in the world. In addition to *Ubuntu*, Binsbergen argues urban-based tools of re- dress‘ is necessary in South Africa and excluding a majority of people from partaking of those values; and a sustained reflection on the dangers of anger, resentment and grief hidden and smothered under sociability‘ could explode in an awful demonstration of emotions.

Further, the dangers of destroying *Ubuntu* are more related to the South African apartheid situation that can rarely be compared in other global situations.[466]

As an added thought, in a theoretical analysis of culture versus religion the final synopsis is that culture‘s relationship to human society, for example, religion, economic system, legal system and ideology, is part of the socio-economic life of society.[467] The outcome of the analysis strengthens the assertions of *Ubuntu* values, that could help turn shame into pride amongst Black African native

464 Ibid
465 Binsbergen, 2002
466 Ibid

values, and around the world, particularly in culture values based in *Ubuntu* Philosophy.[468] (Mapadimeng, 2009).

CHAPTER FIVE

ADVOCACY FOR OBUNTU -BULAMU

Rare photo of Queen Elizabeth II and Prince Phillip bowing before the real original African Royalty, Empress Menen Asfaw and her husband Emperor Ras Tafari Makonnen Woldemikael Haile Selassie I of Ethiopia...

As far as is known Queen Elizabeth and Prince Phillip have never bowed before anybody else...

5.1 Introduction.

Without prejudice there are three major reasons why ideas associated with ubuntu are often deemed to be an inappropriate basis for a public morality in today's South Africa. One is that they are too vague; a second is that they fail to acknowledge the value of individual freedom; and a third is that they fit traditional, small-scale culture more than a modern, industrial society. In this article, I provide a philosophical interpretation of *Ubuntu* that is not vulnerable to these three objections. Specifically, I construct a moral theory grounded on African world views, one that suggests a promising new conception of human dignity. According to this conception, typical human beings have a dignity by virtue of their capacity for community, understood as the combination of identifying with other sand exhibiting solidarity with them, where human rights violations are egregious degradations of this capacity. I argue that this account of human rights violations straight forwardly entails and explains many different elements of Uganda's Bill of Rights and naturally suggests certain ways of resolving contemporary moral dilemmas in Uganda and else-where relating to land reform, political power and deadly force. If I am correct that this jurisprudential interpretation of ubuntu both accounts for a wide array of intuitive human rights and provides guidance to resolve present-day disputes about justice, then the three worries about vague- ness, collectivism and anachronism should not stop one from thinking that something fairly called 'ubuntu' can ground a public morality.

5.2 In Politics, Ubuntu Should Be Used As An Aspect of Socialism And Re-distribution of Wealth.

It propagates for a community where everyone has interests in each other's prosperity. However, this doesn't mean that the community's good takes over the individuals good. It simply means that the community recognizes and appreciates each other's uniqueness and through this, helps each other collectively grow and achieves each other's potential collectively through each ones different skills and strengths. There's a belief that man is born formless like a lump of clay and it's therefore up to the community through the fire of experience and the wheel of social control to mound him into pot that may be of general use.[469]

Ubuntu has principles which govern it and these include the **ethical order** (common justice and caring for the other), **inter-dependence** (shared dignity, global family, communal responsiveness), **sanctity of the spirit of man** (humanness, harmony in other human relationships), **totality/wholeness** (sustainable community and environmental responsibility.) therefore Ubuntu characterizes the following;

- No vengeance.
- Dictates that a high value be placed on the life of human beings.
- Is inextricably linked to the values of which places a high premium on dignity, compassion, humanness, and respect for humanity of another.
- Dictates a shift from confrontation to mediation and conciliation
- Good attitudes and shared concern.
- Favors restorative justice rather than retributive justice.
- Favors restoration and re-establishment of harmony between parties rather than punishing the disputant.
- Mutual understanding rather than punishment.
- Favors civility and civilized dialogue premised on mutual tolerance.
- Encourages face to face encounters of disputance with the differences being resolved rather than conflict and victory to the most powerful.

469 Therefore, any imperfections should be borne by the community which should always seek to redeem the man.

Each of these principles has been adopted and enshrined in to our Constitution[470] in various provisions. However, we shall extensively see that these principles have either been underutilized, misused or abused by those in authority who ought to enforce the law.

5.3 Ubuntu Should Be Advanced As A Moral Theory And Human Rights Defender.

5.4 Ubuntu as a moral theory

Neville Alexander, recently remarked that he is glad that the oral culture of indigenous Southern African societies has made it difficult to ascertain exactly how they understood ***Ubuntu*** (t**utu 2016)**[471] For him and some other intellectuals,[472] the relevant question is less 'How was *?Ubuntu* under- stood in the past?' and more 'How should we understand *ubuntu* now?' I

470 Constitution of the Republic of Uganda 1995 as amended.
471 No future without forgiveness (1999)
472 For representative statements from those in Southern Africa, see S Biko 'Some Afri can cultural concepts' in S Biko *I write what I like. Selected writings by Steve Biko* (1971/2004) 46; Tutu (n 15 above) 35; N Mkhize '*Ubuntu and* harmony' in R Nicol- son (ed) *Persons in community* (2008) 38-41.

agree with something like this perspective, and begin by spelling out what it means to pose the latter question, after which I begin to answer it.

To speak legitimately of *ubuntu* at all requires discussing ideas that are at least *continuous* with the moral beliefs and practices of those who speak Nguni languages, from which the term originated, as well as of those who have lived near and with them, such as Sotho-Tswana and Shona speakers.[473] Some would say that it is fair to call something *Ubuntu* only if it mirrors, without distortion, how such peoples have traditionally understood it.[474] However, I reject such a view, for two reasons. First, analogies with other terms indicate that it can be appropriate to call a perspective *Ubuntu* if it is grounded in ideas and habits that were salient in pre-colonial Africa, even if it does not fully reproduce all of them. Consider, for example, the way contemporary Ugandan lawyers use the phrase 'English Common law'.
Second, there is no single way in which pre-colonial African peoples understood ***Ubuntu***; there have been a variety of different ***Nguni*** (and related) languages and cultures and, with them, different values. One unavoidably must choose which interpretation of *Ubuntu* one thinks is most ……..g iven one's aims.

I submit that it is up to those living in contemporary Uganda to refashion the interpretation of ***Ubuntu*** so that its characteristic elements are construed in light of our best current understandings of what is morally right. Such

refashioning is a project that can be assisted by appealing to some of the techniques of analytic philosophy, which include the construction and evaluation of a moral theory. A moral theory is roughly a principle purporting to indicate, by appeal to as few properties as possible, what all right actions have in common as distinct from wrong ones. What (if anything) do characteristically immoral acts such as lying, abusing, insulting, raping, kidnapping and breaking promises have in common by virtue of which they are wrong?

473 A Shutte *Ubuntu: An ethic for the new South Africa* (2001) 30

474 C Pearce '*Tsika*, *Hunhu* and the moral education of primary school children' (1990) 17 *Zambezia* 147; MJBhengu *Ubuntu: The essence of democracy* (1996) 27; MLetseka 'African philosophy and educational discourse' in P Higgs *et al* (eds) *African voices in education* (2000) 186.

Standard answers to this question in Western philosophy include the moral theories that such actions are wrong just insofar as they tend to reduce people's quality of life (utilitarianism), and solely to the extent that they degrade people's capacity for autonomy (Kantianism). How should someone answer this question if she finds the Ugandan values associated with talk of *ubuntu* attractive?

5.5 Moral-theoretic Interpretation Of *Ubuntu*

I would likely start by appealing to the ubiquitous maxim 'A per- son is a person through other persons. When Nguni speakers state *'Umuntu ngumuntu ngabantu',* and when Sotho-Tswana speakers say *'Motho ke motho ka batho babang*', they are not merely making an empirical claim that our survival or well-being are causally dependent on others, which is about all a plain reading in English would admit. They are rather in the first instance tersely capturing a normative account of what we ought to most value in life. Personhood, self- hood and humanness in characteristic Southern African language and thought are value-laden concepts. That is, one can be more or less of a person, self or human being, where the more one is, the better One's ultimate goal in life should be to become a (complete) person, a (true) self or a (genuine) human being. So, the assertion that 'a person is a person' is a call to develop one's (moral) personhood, a prescription to acquire *Ubuntu or botho*, to exhibit humanness. As Desmond Tutu remarks: 'When we want to give high praise to someone, we say *Yu u nobuntu*; Hey, so-and-so has *ubuntu*. The claim that one can obtain *Ubuntu* 'through other persons' means, to be more explicit, by way of communal relationships with others. As Shutte, one of the first professional South African philosophers to publish a book on *Ubuntu*, sums up the basics of the ethic see: (For an analysis of these two different ways of responding to value.[475]

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

475 see P Pettit 'Con- sequentialism and respect for persons' (1989) 100 *Ethics* 116; D McNaughton & P Rawling 'Honouring and promoting values' (1992) 102 *Ethics* 835).

Just as 'an unjust law is no law at all' (Augustine), Ugandans would say of a person who does not relate communally that 'he is not a person'. Indeed, those without much *Ubuntu*, roughly, those who exhibit discordant or indifferent behaviour with regard to others, are often labelled 'animals'

One way that I have sought to contribute to *ubuntu* scholarship is by being fairly precise, not only about what communal relationships and related concepts such as harmony essentially involve, but also about how they figure into performing morally-right actions. To seek out community with others is not best understood as equivalent to doing whatever a majority of people in society want or conforming to the norms of one's group. Instead, African moral ideas are both more attractively and more accurately interpreted as conceiving of communal relationships as an objectively desirable kind of interaction that should instead guide what majorities want and which norms become dominant.

More specifically, there are two recurrent themes in typical African discussion of the nature of community as an ideal, what I call 'identity' and 'solidarity'. To identify with each other is largely for people to think of themselves as members of the same group, that is, to conceive of themselves '*we*', for them to take pride or feel shame in the group's activities, as well as for them to engage in joint projects, coordinating their behaviour to realizes hundreds. For people to fail to identify with each other could go beyond ***MEREALIENATION*** and involve out right division between them, that is, people not only thinking of themselves as an '*I*' in opposition to a '*you*', but also aiming to undermine one another's ends.

To exhibit solidarity is for people to engage in mutual aid, to act in ways that are reasonably expected to benefit each other. Solidarity is also a matter of people's attitudes such as emotions and motives being positively oriented toward others, say, by sympathizing with them and helping them for their sake. For people to fail to exhibit solidarity would be for them either to be uninterested in each other's flourishing or, worse, to exhibit ill-will in the form of hostility and cruelty.

Identity and solidarity are conceptually separable, meaning that one could in principle exhibit one sort of relationship without the other. For instance, workers and management in a capitalist firm probably identify with one another, but insofar as typical workers neither labour for the sake of managers nor are sympathetic toward them, solidarity between them is lacking. Conversely, one could exhibit solidarity without identity, say, by helping someone anonymously.

While identity and solidarity are logically distinct, characteristic African thought includes the view that, morally, they ought to be realised together. That is, communal relationship with others, of the sort that confers *Ubuntu* on one, is well construed as the combination of identity and solidarity. One statements by Southern African adherents to *Ubuntu* 'Harmony is achieved through close and sympathetic social relations within the group, '[*U*] *buntu* advocates … express commitment to the good of the community in which their identities were formed, and a need to experience their lives as bound up in that of their community;' 'Individuals consider themselves integral parts of the whole community. A person is socialised to think of himself, or herself, as inextricably bound to others … *Ubuntu* ethics can be termed anti-egoistic as it discourages people from seeking their own good without regard for, or to the detriment of, others and the community. *Ubuntu* promotes the spirit that one should live for others.

To begin to see the philosophical appeal of grounding ethics on such a conception of community, consider that identifying with others can be cashed out in terms of sharing a way of life and that exhibiting solidarity toward others is naturally understood in terms of caring about their quality of life. And the union of sharing a way of life and caring about others' quality of life is basically what English speakers mean by a broad sense of 'friendship' (or even 'love'). Hence, one major strand of Southern African culture places friendly (or loving) relationships at the heart of morality, as others have tersely summarized *Ubuntu* on occasion. For instance, speaking of African perspectives on ethics, Tutu remarks:

> Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* – the greatest good. Anything that subverts or under- mines this sought-after good is to be avoided like the plague.

Kasenene similarly says that 'in African societies, immorality is the word or deed which undermines fellowship'.

Tutu and Kasenene indicate that one must, above all, avoid unfriendliness or

acting in ways that would threaten communal ties. However, a fuller statement of how to orient oneself toward friendly relationships is needed, for example, in light of the question of what to do when being unfriendly in a certain respect is expected to have the long-term effect of promoting a greater friendliness.

My suggestion about how to orient oneself toward friendly or communal relationships, in order to act rightly and exhibit *Ubuntu*, is that one ought to *prize* or *honour* such relationships. Such a relation to them contrasts in the first instance with promoting them as much as possible wherever one can.

The latter prescription, simply to maximally produce communal relationships (of identity and solidarity) and reduce anti-social ones (of division and ill- will) would primitively impermissible behaviour. To adopt an example familiar to a philosophical audience, an instruction to promote as many communal relationships as one can in the long run would permit a doctor to kill an innocent, relatively healthy individual and distribute her harvested organs to three others who would otherwise die without them, supposing there would indeed be more of such relationships realised in the long term. A moral theory that focuses *exclusively* on promoting good outcomes however one can (which is 'teleological') has notorious difficulty in accounting for an individual right to life, among other human rights.

I therefore, set it aside in favour of an ethical approach according to which certain ways of treating individuals are considered wrong at least to *some* degree in themselves apart from the results. Honouring communal relationships would involve, roughly, being as friendly as one can one self and doing what one can to foster friendliness in others without one using a very unfriendly means. This kind of approach, which implies that certain ways of bringing about good outcomes are impermissible (and is 'deontological'), most promises to ground human rights,

To sum up, the maxim 'A person is a person through other persons', which is fairly opaque (at least to English speakers), admits of the following, more revealing interpretations: 'One becomes a moral person insofar as one honours communal relationships or 'A human being lives a genuinely human way of life to the extent that prizes identity and solidarity with other human beings', or 'An individual realizes her true self by respecting the value of friendship'. According to this moral theory, grounded in a salient Southern African valuation of community, actions are wrong not merely insofar as they harm people *(utilitarianism)* or degrade an individual's autonomy *(Kantianism)*, but

rather just to the extent that they are *unfriendly* or, more carefully, fail to respect friendship or the capacity for it. Actions such as deception, coercion and exploitation fail to honour communal relationships in that the actor is distancing himself from the person acted upon, instead of enjoying a sense of togetherness; the actor is sub ordinating the other, as opposed to coordinating behaviour with her; the actor is failing to act for the good of the other, but rather for his own or someone else's interest; or the actor lacks positive attitudes toward the other's good, and is instead unconcerned or malevolent.

From the analysis so far, it should be clear that the moral-theoretic interpretation of *Ubuntu* is much more precise than other, more typical renditions of it. In the rest of this article, I aim to demonstrate how this *Ubuntu*-based moral theory plausibly accounts for the human rights characteristic of the South African Constitution and can enable us to address contemporary controversies about justice in South Africa and elsewhere.

Before applying the theory, though, I remind the reader not to conflate it (a philosophical account of what all right actions have in common) with an anthropological description of the world views of any particular sub-Saharan peoples. I am providing one, theoretically attractive way to interpret ideas commonly associated with *Ubuntu*; I am neither suggesting that it is the only way to do so, nor trying to spell out a principle that anyone has actually held prior to now. I do, however, believe that the suggested interpretation of *Ubuntu* is a promising way to unify into the form of a theory a wide array of beliefs and practices that have been recurrent f or a long span of time and a large number of peoples south of the Sahara.

5.6 Ubuntu as a moral theory and human dignity

In order to explain how *Ubuntu* as a moral theory can account for much of the Bill of Rights, I make the presumption that human rights are grounded upon human dignity. In this section, I first motivate this assumption, and then articulate a new conception of human dignity grounded in *Ubuntu* as a moral theory, which I will use in the rest of the article to explain and unify human rights.

5.7 Advocacy for Human rights and human dignity

One has a human right to something, by definition, insofar as all agents have a stringent duty to treat one in a certain way that obtains because of some quality one shares with (nearly) all other human beings and that

must be fulfilled, even if not doing so would result in marginal gains in intrinsic value or in somewhat fewer violations of this same duty in the long run. So construed, a human right is a moral right against others, that is, a natural duty that ought to be taken into account by morally responsible decision makers, regardless of whether they recognize that they ought to. I am therefore not interested in norms that are *inherently* either customarily acknowledged or legally enforced (even though I do use the second chapter of the South African Constitution to illustrate characteristic human rights).

There are utilitarians who claim that human rights are basically rules of thumb designed to maximize the general welfare, but I, with the majority of contemporary moral theorists, presume that such a view has been shown to be implausible, in part because of examples such as the organs case above. Instead, I assume that to observe human rights is to treat an individual as having a dignity, roughly, as exhibiting a superlative non instrumental value. Alternatively, a human rights violation is a failure to honour people's special nature, often by treating them merely as a means to some ideology such as racial or religious purity or to some prudentially selfish end.

Using this framework, one would distinguish the violation of a right from a justifiable limitation thereof, roughly in terms of the reason for which the right has not been observed. It would degrade human dignity, and hence violate a right, to lock up an innocent person in a room in order to obtain a ransom, but it might not degrade human dignity, and hence might justifiably limit a right, to lock an innocent person in a room in order to protect others from a virulent disease he is carrying. Kidnapping and quarantining can involve the same actions, but since the purposes for which the actions are done differ, there is a difference with regard to whether dignity is disrespected and a right is violated, on the one hand, or whether dignity is respected and a right is justifiably limited, on the other.

This theoretical framework, in which human dignity is the foundational value of human rights, has become the dominant view among moral philosophers, jurisprudential scholars, United Nations theorists, and the German and South African Constitutional Courts and so should be for Uganda.

However, they have tended to apply this general perspective in a particular way, namely, by cashing out the content of dignity in terms of *autonomy*. The dominant theme has been that human rights are ultimately ways of treating our intrinsically valuable capacity for self-governance with respect.

Enslaving others in order to benefit oneself, discriminating for the purpose of purifying the race, torturing in order to deter political challenges and the like seem to be well conceived, on the face of it, as degradations of individuals' ability to govern themselves, to make free and informed decisions regarding the fundamental aspects of their lives.

I lack the space here to argue against, or even to explore, this powerful and influential model, initially articulated with most care by the German enlightenment philosopher, Immanuel Kant. Instead, I mention the Kantian theory in order to motivate the idea that what probably theoretically unifies the myriad human rights that intuitively exist is an intrinsic worth of the human person that admits of no equivalent among other beings on the planet. My present task is to articulate a Southern African view that can plausibly rival the Kantian conception by virtue of which we have a dignity and hence are bearers of human rights.

5.8 Human Dignity in Existent Ugandan Thought

Writings by those sympathetic to Ugandan world views include two salient conceptions of human dignity, but, as they stand, neither is particularly useful for the aim of accounting for human rights. One view of dignity analyses it in terms of something variable among human beings that is a function of their degree of *Ubuntu*. The idea is that the more one lives a genuinely human – and hence communal – way of life, the more one has a dignified existence. Traditionally speaking, it would be elders, and especially ancestors, who have the greatest dignity, so conceived. This view might be what Botman has in mind when he says that the dignity of human beings emanates from the network of relationships, from being in community; in an African view, it cannot be reduced to a unique, competitive and free personal ego.

Such a variant conception of dignity obviously cannot ground human rights, which are uncontroversially deemed to be equal among persons. If a merely decent person, let alone a scoundrel, has a right to life to no less a degree than a Nelson Mandela or Mother Teresa (at least in their stereo-typical construals), then we need a conception of dignity that does not vary according to degrees of moral merit. Another way to see the problem is this: A non-violent person who has been put into solitary confinement and hence lacks communal relationships with others nonetheless retains dignity, indeed a dignity that is degraded by virtue of the solitary confinement. If dignity were a function of actually being in community, however, then this individual would counter intuitively lack a dignity.

Now, one does find an invariant conception of dignity among Ugandan

thinkers, according to which what makes us deserving of equal respect is the fact of human life as such. The traditional thought is that every human being has a spiritual self or invisible 'life force' that has been best owed by God, that can out live the death of her body, and that makes her more special than anything else in the mineral, vegetable or animal kingdoms. Such a view would obviously under write an equal right to life, and also probably rights to integrity of the human organism that carries the 'soul'.

However, for several reasons I do not find this conception of human dignity attractive. First, grounding dignity in human life *qua* spiritual does a poor job of accounting for human rights that do not concern 'life and death matters for example, to democratic participation in government or to dignity is more apt for modern, and often multicultural, societies than is a highly contested, particular form of supernaturalism. Third, I seek an interpretation of human dignity that coheres particularly well with the moral theory articulated above, which makes no fundamental reference to God, a soul or similarly supra-physical beings or forces.

5.9 A More Promising Conception of Dignity

In any event, I draw upon alternative resources in Southern African moral thought to construct a conception of human dignity that entails and plausibly explains human rights. Here is my suggestion: One is to develop one's humanness by communing with those who have a dignity in virtue of their capacity for communing. That is, individuals have a dignity insofar as they have a communal nature, that is, the inherent capacity to exhibit identity and solidarity with others. According to this perspective, what makes a human being worth more than other beings on the planet is roughly that she has the essential ***ability*** to love others in ways these beings cannot. If you had to choose between running over a cat or a fellow person, you should run over the cat, intuitively because the person is worth more. While the Kantian theory is the view that persons have a superlative worth because they have the capacity for autonomy, the present, *ubuntu*-inspired account is that they do because they have the capacity to relate to others in a communal way.

Note that some people will have *used* their capacity for communal relationship to a greater degree than others. However, it is not the exercise of the capacity that matters for dignity, but rather the capacity itself. Even those who have misused their capacity for community, by acting immorally, retain the capacity to act otherwise and hence have not thereby lost their dignity.

Now, some people do have a ***greater ability*** to enter into community with

others, but the present conception of dignity is that supposing one has the ability above a certain threshold, one has a dignity that is the equal of anyone else who also meets it. Whenever one encounters an individual with a way of life and caring for others' quality of life, one must treat that capacity of hers with equal respect.

Although the differential use of the capacity for communal relationships, and even a differential degree of the capacity itself, are compatible with equal dignity and equal respect, there is a very small percentage of human beings who utterly lack this capacity, and hence lack a dignity by the present account. Here, one should keep in mind that literally every non-arbitrary and non-specialist theory of what constitutes human dignity faces the problem that some human beings lack the relevant property. Unless we have a dignity merely by virtue of our DNA, it will follow from any theory that anencephalic infants, for example, lack human dignity, meaning that the present view is no worse off than, say, the Kantian one. Furthermore, from the bare fact that there are probably some human beings that lack a dignity, it does not follow that one may treat them however one pleases; for they in all likelihood have a moral status for reasons other than dignity, that is, their capacity to feel pain (or, as I argue elsewhere, their ability to be an object of others' love, even in the absence of their ability to exhibit love themselves).

5.10 An *Ubuntu*-based conception of dignity as the basis of human rights

In this section, I put the *Ubuntu*-inspired account of dignity from the previous section to work, aiming to demonstrate the way that it naturally grounds salient human rights. I start by articulating a principle about how to respond to beings with such a dignity that purports to capture most human rights violations, and then I apply the principle to much of the Bill of Rights from the Fourth chapter of Uganda's Constitution.

5.11 From human dignity to human rights

My proposal is that we understand human rights violations to be serious degradations of people's capacity for friendliness, understood as the ability to share a way of life and care for others' quality of life, where such degradation is often a matter of exhibiting *extra-ordinarily unfriendly behaviour* toward them. Human rights violations are ways of gravely disrespecting people's capacity for communal relationship, conceived as identity and solidarity, which disrespect division and ill-will. As I demonstrate below, many of the most important human rights, for instance not to be enslaved or tortured, are well

understood as protections against enmity, against an agent treating others as separate and inferior, undermining their ends, seeking to make them worse off, and exhibiting negative attitudes toward them such as power seeking and *Schaden freude.*

This explanation of the nature of a human rights violation is a promising start, but is incomplete; as it stands, it requires pacifism and forbids any form of unfriendly behaviour such as coercion. Yet, almost no believers in human rights are pacifists, instead maintaining that, in some situations, violence is justified, at least for the sake of preventing violence. Indeed, one of the most uncontroversial human rights that people have is a claim against their state to use force if necessary, to protect them from attack on the part of domestic criminals or foreign invaders.
Therefore, away forward must be found to account for the impermissibility of unfriendliness when there are intuitive human rights violations, and the permissibility of unfriendliness when there are not. In light of the reflections above about the difference between a kidnap and a quarantine, it is natural to suggest that the difference will importantly depend on the purpose served by the unfriendliness. Consider, then, this principle: It is degrading of apperson's capacity for friendliness, and hence a violation of her human rights, to treat her in a substantially unfriendly way if one is not seeking to counteract a proportionate unfriendliness on her part, but it need not be degrading of a person's capacity for friendliness to treat her in a substantially unfriendly way, when one's doing so is necessary to prevent or correct for a comparable unfriendliness on her part. A kidnap is a human rights violation because the person kidnapped is innocent, namely, roughly, has not acted in an unfriendly way, but a quarantine need not be a human rights violation, if the person quarantined refuses of her own accord to isolate herself so as to avoid infecting others with an incurable, fatal, easily communicable disease.

In short, being unfriendly toward another is not necessarily to degrade her capacity for friendship, as respecting her capacity requires basing one's interaction with her on the way she has exercised it. To respect those who have not been unfriendly requires treating them in a friendly way, while respecting those who have been unfriendly permits treating them in an unfriendly way, under conditions in which doing so is necessary to protect the victims of their comparable unfriendliness. If someone misuses her capacity for communal relationship, there is no disrespect of this capacity and human rights violation if divisiveness and ill-will is directed toward her as essential to counteract her

own divisiveness and ill-will. Hence, violence is justified when, and only when, necessary to protect innocent victims of unjustified violence.

Note that this rationale is not retributive in the sense of justifying the imposition of suffering merely because it is deserved or of treating aggressors as beyond the pale of human community. The principle implies that it would be unjust to treat someone who has been unfriendly in an unfriendly way, if doing were *not* necessary to protect her potential victims or to compensate her actual ones. The principle therefore permits punishment, deadly force and other forms of coercion as they intuitively can be justified, while also underwriting the prescription not to use it when harm can be prevented or alleviated without it. Hence, this principle can make theoretical sense of the tight associations often drawn between *Ubuntu* and restorative justice, on the one hand, *and* between *Ubuntu* and self-defence on the other: Intentional harm may be inflicted on offenders only when necessary to protect their victims, which, in many cases, it is not summing up, according to the moral-theoretic interpretation of *Ubuntu*, one is required to develop one's humanness by honouring friendly relationships (of identity and solidarity) with others who have dignity by virtue of their inherent capacity to engage in such relationships, and human rights violations are serious degradations of this capacity, often taking the form of very unfriendly behaviour that is not a proportionate, counteractive response to another's unfriendliness. This *Ubuntu*-inspired theory is sufficient to account for a wide array of human rights, as I now sketch in the context of South Africa's Bill of Rights. I obviously lack the space to apply it to every single right included there, and so refer to a few major clusters of them only. In addition, in striving to give the reader a bird's eye view of how one might try to unify human rights by appeal to the dignity of our communal nature (rather than our autonomy), I inevitably pass over many important subtleties; issues of justifiable limitation, progressive realization, horizontal application and the like will have to wait for another, much lengthier treatment.

5.12 Human rights to liberties

The Ugandan Constitution counts as 'liberal' at least insofar as it explicitly recognizes individual rights to freedoms of religion, belief, press, artistic creativity, movement and residence. The state and all other agents in society are forbidden from restricting what innocent people may do with their minds and bodies for the sake of any ideology or benefit; only some other, stronger right can outweigh these 'negative' rights to be free from interference.

Respect for the dignity of persons as individuals with the capacity for friendly relationships *qua* identity and solidarity accounts naturally for rights to liberty. What genocide, torture, slavery, systematic rape, human trafficking and apartheid have in common, by the present theory, is that they are instances of substantial division and ill-will directed to those who have not acted this way themselves, thereby denigrating their special capacity to exhibit the opposite traits of identity and solidarity. Concretely, one who engages in such practices treats people, who have not themselves been unfriendly, in an extremely unfriendly way: The actor treats others as separate and inferior, instead of enjoying a sense of togetherness; the act or undermines others' ends, as opposed to engaging in joint projects with them; the actor harms others (which includes stunting their potential to flourish as loving beings) for his own sake or for an ideology, as opposed to engaging in mutual aid; and the actor evinces negative attitudes toward others' good, rather than acting consequent to a sympathetic reaction to it.

Of most relevance in the context of these rights not to be enslaved, tortured and otherwise interfered with is the capacity to identify with others or to share a way of life, where *genuinely sharing* a way of life requires interaction that is coordinated, rather than subordinated. Part of what is valuable about friendship or communal relationships is that people come together, and stay together, of their own accord. When one's body is completely controlled by others, when one is forbidden from thinking or expressing certain ideas, or when one is required by law to live in some parts of a state's territory rather than others, then one's ability to decide for oneself with whom to commune and how is impaired. In order to treat a person as though her capacity to share a life with others is (in part) the most important value in the world, it ought not be severely restricted (unless doing so is necessary to rebut similar restrictions that she is imposing on others).

5.13 Human rights to criminal justice

Although innocent people have human rights to liberty, they also have human rights to protection from the state, which can require restrictions on the liberty of those reasonably suspected of being guilty. The Ugandan Constitution recognizes an obligation on the part of the state to set up a police force that is tasked with preventing crime and enforcing the law. The judgment that offenders do not have human rights never to be punished, or that violent aggressors do not have human rights never to be the targets of (perhaps, deadly) force, is well explained by the principle that it does not degrade another's capacity for friendliness if one is unfriendly toward him as necessary

to counteract his own proportionate unfriendliness. In addition, the judgment that innocents have human rights against the state to use force against the guilty as necessary to protect them is well explained by the principle that it would degrade the innocents' capacity for friendliness, would fail to treat it as the most important value in the world, if the state did not take steps, within its power, to effectively protect it from degrading treatment by others.

Moving away from an explanation of the human rights of the innocent to protection from the state, consider now the rights of those suspected of guilt. Everyone in Uganda who has been charged with a crime is deemed to have rights to be informed of the charge, to be able to prepare a defence, to be tried by an impartial body, to have the trial conducted in a language he understands, to be released from pre-trial detention when feasible, and to remain in touch with family and counsel

These and similar rights are, in large part, a function of the need to avoid punishing or otherwise harming the innocent (even if doing so likely results in the acquittal of a greater number of guilty). Supposing the state wanted to minimize the extent to which those innocent of any offence were inadvertently convicted or made worse off, it would adopt these kinds of rights. And respect for people's capacity for community well explains an urgent concern to avoid coercing the innocent. As mentioned above, respect for this capacity means treating a person in accordance with the way she has exercised it. Roughly, those who have been friendly do not warrant unfriendly treatment such as detention and punishment, whereas those who have been unfriendly do warrant unfriendly treatment, when necessary to protect or compensate those threatened by their own unfriendliness. The state must take care, therefore, to discriminate between the two groups.

5.14 Human Rights to Political Power

Rights to liberty and to criminal justice are ones that a democratic legislature must not contravene, while the present batch of rights concerns the abilities of citizens to participate in democratic legislation. The Bill of Rights accords citizens the rights to form political parties, to support a political party of their choice, to vote in regular elections, and to run for public office

One can fairly sum up these rights by saying that citizens are entitled to an equal opportunity to influence political outcomes. Now, if what is special about us is, in part, our ability to identify with others or to share a way of life, then that is going to require sharing political power.

And supposing we are equally special by virtue of having the requisite capacity to share a way of life, that means according people the equal ability to

influence collective decision making.

One could also underwrite democratic rights by appealing, somewhat less powerfully, I think, to considerations of respect for solidarity. The state must honour communal relationships in part by acting to benefit the people it has allowed within its territory, and it can best do so if they are accorded the final authority to determine political choice. Dictators are rarely disposed to be benevolent, and even when their intentions are good, they lack the knowledge and skills to do what is in fact likely to enable their subjects to live better lives. In contrast, as John Stuart Mill argued long ago, when residents are given the responsibility for governing themselves, then not only is the government more likely to be responsive to their interests, but they also tend to become more active and self-reliant.

Given the plausible assumption that the more passive and dependent one is, the less well-off one is likely to be, a principle of respect for people's capacity for (among other things) mutual aid gives reason to recognize human rights to participate in governance.

5.15 Human rights to socio-economic goods

Uganda's Constitution is famously considered progressive for explicitly entitling (at least) legal residents to a wide array of means. Specifically, people have rights against the state (and, in principle, other agent sin society) to resources such as housing, healthcare, food, water, social security and education

There are two paths running from the principle of respect for our communal nature to the judgment that we have 'positive' human rights to socio-economic assistance. First, for the state to honour communal relationships, it must seek to establish them between it and its legal residents. And that will of course mean, with regard to solidarity, that the state must do what it can to improve their quality of life, and to do so for their sake consequent to a sympathetic understanding of their situation. Furthermore, with respect to identity, residents are unlikely to enjoy a sense of togetherness with politicians and state bureaucrats if the latter are not going out of their way to fight poverty.

Second, another part of the state respecting its residents' dignity as people capable of community will mean doing what it can to foster community among residents themselves. Consider the identity facet, first. It is hard to enjoy a sense of togetherness with others in society when one is seriously impoverished. One feels a sense of shame, inferiority or at least distance when

one's basic needs are not met while substantial segments of one's society enjoy great wealth. In addition, one's ability to engage in joint projects with others is not honoured if one is lacking means. Respect for this ability to co- operate with others means developing and supporting it by providing money and other goods needed to facilitate common projects.

Finally, think about the way solidarity between residents is affected by the fulfilment or disregard for their socio-economic rights. Treating others as though they are capable of relationships of mutual aid means, in part, providing them with the resources that would enable them to commune with others. I attended a South African National Heritage Council *imbizo* that was devoted to *ubuntu*, where an elderly black woman said that, for her, the problem with her being poor is that she is not able to help others, that is, to give wealth away.

Of course, there are more rights than these adumbrated in the Constitution, but discussing of all them is unnecessary in order to provide a sense of what is involved in the claim that people have a human dignity by virtue of their capacity for friendly or communal relationships *qua* identity and solidarity and of how various human rights plausibly follow from a requirement to respect dignity so conceived. The analyses did not appeal to the Kantian notion of autonomy; the invocation of our communal nature did the work, and appears to be worth taking seriously as a rival to the more dominant, more individualist approach to dignity and rights.

5.16 How to Address contemporary human rights controversies

In the previous section I argued that the *ubuntu*-based conception of dignity naturally underwrites a large number of human rights that we intuitively have and that appear in the South African Constitution. In this section, I apply this conception of dignity to a few issues that are more controversial or at least are much less taken for granted in contemporary South Africa and elsewhere on the continent. Contested topics include how to effect compensatory justice with regard to land, how to make political decisions, and how to use deadly force when apprehending suspects. Note that my aim is not to present resolutions of these problems, but rather to indicate respects in which the present moral-theoretic interpretation of *ubuntu* can shed light on them.

5.17 Arguments for a more reconciliatory land reform with ubuntu approach

As is well known, at the end of constitutional and political challenges, nearly 90 per cent of land in Uganda had been vested in government and only about 10 percent of the population had private mailo or free holds, and the 2012 Constitution makes provision to compensate those who have been dispossessed by way of land reform (or comparable redress).

It is also well known that little land has been transferred back to the people In regard to these conditions, I have not infrequently encountered two antipodal responses to the land question, which responses share a common assumption that the *Ubuntu*-based moral theory entails is false. I first spell out the antinomy, then bring out the dubious assumption both positions rely upon, and finally sketch a different approach.

Not surprisingly, the two competing approaches to land reform tend to correlate with race, making the issue black and white. On the white side, sometimes hear it argued that whites owe no restitution to South African blacks since the latter's standard of living would have been worse had whites not taken control of the country. Whites sometimes point out that in the African country where they reigned the longest, the quality of life is the best. Even the worst- off in South Africa are better off, so the argument goes, then the worst-off elsewhere south of the Sahara.

5.18 Politics and Ubuntu

Uganda 's Constitution, along with all other democratic states south of the Sahara, took over the competitive, multi-party style of democracy that is the norm in Western societies. A party has the legal right to govern roughly in proportion to the number of votes that it has obtained via fair procedures, and it has the legal right to make decisions that are expected to benefit its particular constituency. The system of vying for votes and granting the power to make political decisions to those with the most is so ubiquitous that people are often inclined to *identify* democracy with it. However, a form of democratic decision making different from the adversarial, majoritarian form is possible, and is probably what respect for people's dignity as beings capable of community requires.

The interpretation of *Ubuntu* articulated in this article seems to sup- port a consensus-oriented political system of the sort that has been common in

traditional African cultures and that some Southern and other African philosophers have proposed for a modern society. Con- sider a system in which legislators are initially elected by majority vote, but are not tied to any political party, and, once elected, seek unanimous agreement amongst themselves about which policies to adopt. Instead of trying to promote any constituencies' interests, politicians would seek consensus about what would most benefit the public as a whole. There are two major reasons for thinking that respect for the dignity of people's communal nature supports this kind of democracy.

First, return to the rationale above for thinking that democracy of some form or other is required. If what is special about us is in part, our capacity to share a way of life with others, then that is going to require sharing political power, that is, to forbid authoritarian government. Majoritarian democracy is a sharing of power but only in a weak sense, giving to minorities the amount of power they are owed in accordance with the number of votes they have acquired, and giving them the fair opportunity to become majorities in elections scheduled every four or five years or so. A more intense sharing of power would accord every citizen not merely the equal ability to become the ones who determine law and policy, but also 'the right of representation with respect to every particular decision' the right not to be utterly marginalized when major laws and policies are actually formulated and adopted. And it is reasonable to think that when laws obtain the consent of all elected representatives, it is more likely that they would benefit the public as a whole, and not merely a subset, which solidarity would prescribe.

While the first argument for a consensus-based democracy is that respect for our communal nature requires legislators to *exhibit* substantial identity and solidarity with themselves and with citizens whenever they make major decisions, the second argument is that it also requires them to act in ways that are likely to *foster* substantial identity and solidarity, or at least prevent great division and ill-will, in the long run. Consensus-oriented decision making would best avoid creating legislative minorities and their constituencies who repeatedly lose out to the majority, becoming marginalized, alienated and losing out. Generally speaking, in order for a state to produce a sense of togetherness and to facilitate cooperative, mutually beneficial endeavours both between it and citizens and between citizens themselves, its officials must not act for the sake of any subset of the population related to them in some way, a principle entailing that it is unjust for a politician to act for the sake of a constituency.

This reasoning points, then, to a respect in which South Africa's Constitution should be changed to recognize a 'human right to decisional representation'. Although it enshrines people's human right to democratic participation in government, those favouring an *Ubuntu*- oriented perspective on politics might see it as an expression of the conqueror's will for imposing a competitive, majoritarian form. It is worth debating whether people's human right to political power is best understood as requiring a constitutional amendment forbidding any party polity, and whether the Constitution would be on the whole a more coherent document if it were so changed.

Even if no formal alteration of the Constitution is on the cards, the present reasoning entails that the dominant political majority of our time in South Africa, the African National Congress, should be less opportunistic with regard to the power it has legally secured. It should be doing much more to promote a *de facto*, if not *de jure*, government of national unity. Some concrete steps it could take would be to appoint many more persons from other parties to positions in cabinet, and to make appointments based much more on qualifications and much less on patronage. Working together, South Africans could do more.

5.19 Ubuntu-bulamu for a less retributive employment of deadly force

The last major issue of controversy that I address in order to illustrate *Ubuntu* as a moral theory has to do with the way the state ought to respond to serious criminal infractions. Lately there has been debate about when the police may 'shoot to kill', with the Constitutional Court having rendered a unanimous judgment on the topic in *S v Walters* that is guiding a bill that will likely soon become law. The present conception of human dignity entails that the bill and the judgment on which it is based are flawed.

To keep things simple, let us focus on the Court's conclusion in *S V Walters*, which is that deadly force is ordinarily not permitted unless the suspect poses a threat of violence to the arrester or others or is and cronyism, as I argue in T Metz 'African moral theory and public governance' in FM Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 345-348. suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.

According to this logic, a police offer may shoot or otherwise use deadly force against a suspect under one of two independently sufficient conditions;

Either (a) the suspect poses a threat of serious harm to others that cannot be prevented without deadly force; or (b) the suspect has already done or threatened serious harm to others and cannot be detained without deadly force. The relation between (a) and (b) is one of disjunction, not conjunction. That is, the court has ruled that posing a threat of serious harm to others is *not* necessary in order for deadly force to be justified; the mere facts of having already done serious harm (or having threatened to do so) and being unable to be apprehended without deadly force are enough to be liable to be shot.

Following the theoretical interpretation of *Ubuntu* given above, the (a) clause is apt. Recall that respect for a person's capacity for friendliness depends on the way he has exercised it, so that, more specifically, one does no disrespect to another by being unfriendly toward him, if doing so is necessary to help those threatened by, or who have become victims of, his unfriendliness. Hence, if someone is threatening to kill or to impose comparable harm on others, and the only way to prevent that is to inflict deadly force on him, his capacity for friendliness would not be degraded thereby and he would not have a suffered a human rights violation.

However, the *Ubuntu*-based conception of human dignity entails that the(b) clause should be deleted and that it would constitute a human rights violation not to do so. Unfriendliness is permissible, on this conception, only as a counteractive response to proportionate unfriendliness. That is, unfriendliness must serve the function of helping those who have been, are being or will be victims of comparable unfriendliness. This is another place where *Ubuntu* is 'forward-looking', directing a moral agent to consider the likely consequences of her behaviour, and not to determine whether her behaviour is appropriate solely in light of facts about the past. Of course, detaining someone who has committed a serious crime so that he may be tried in a court of law is a future 'benefit' to be sought. But *that* expected good is *not* one that is proportionate to the use of deadly force. The court requires an officer to ensure that deadly force is proportionate, but a sufficient discharge of that obligation, for the court, is reasonably deeming deadly force to be proportionate *to the crime already committed* in the past, not to harm that deadly force could avert in the future.

In a broad sense, the court's judgment is grounded in retributive ideals, not ones that most of those who accept an *Ubuntu* ethic would uphold, or at least not adherents to the theoretical articulation of it presented here. Retributivism

is the 'pay-back' theory of punishment and of negative responses more generally. According to this perspective, a punishment or other critical response should be based solely on the nature of the crime or other wrongdoing committed. The worse the misdeed, the harsher the penalty or harm should be, in order to give the person what he deserves. A retributive approach considers it 'good in itself' that the amount of suffering be increased in the world, so long as it is directed toward the guilty; imposing suffering need not be expected to produce any future benefit such as preventing a similar or greater suffering.

While the court would likely disavow such baldly retributive sentiments, its judgment in *S V Walters coheres* more with a retributive approach than with an *Ubuntuist one*, since it does not require the use of deadly force to serve the function of preventing a comparable harm. Instead, according to the court, a sufficient condition for the justified use of deadly force is the fact of having already done comparable harm (along with being unable to be apprehended for it without deadly force). Furthermore, for the court, the point of using deadly force justifiably can be to ensure that a person suspected of serious wrongdoing is tried in a court of law, that is, is sentenced to a penalty roughly comparable in severity to his wrong doing.

One might reply on behalf of the court that someone who has already committed a serious crime is likely to do so again. But there are two damning responses to be made here. First, it is simply not true. It is a commonplace in criminology, for example, that the recidivism rate for murder is low, not only in relation to other serious offences, but also in absolute terms. Most of those who have killed others did so under extreme circumstances that are unlikely to be repeated. Second, and more deeply, even if it were true, the (a) clause, or something very close to it, would be sufficient to cover the issue, as it permits deadly force when necessary to prevent serious harm.

In this book sought to recommend the idea that *Ubuntu*, suitably interpreted, can serve as a ground of public morality. This recommendation has taken the form of showing that even if various construals of *Ubuntu* up to now have been vague, collectivist or anachronistic, it can be interpreted in a more promising way. My approach has been to draw upon salient beliefs and practices commonly associated with talk of *Ubuntu* (and cognate terms in Uganda) in order to construct a moral theory, a basic principle indicating how all wrong actions differ from right ones.

The favoured moral theory is that actions are right, or confer *Ubuntu* (humanness) on a person, insofar as they prize communal relation- ships, ones

in which people identify with each other, or share a way of life, and exhibit solidarity toward one another, or care about each other's quality of life. Such a principle has a Southern African pedigree, provides a new and attractive account of morality, which is grounded on the value of friendship, and suggests a novel, companion conception of human dignity with which to account for human rights. According to this conception, typical human beings have a dignity by virtue of their capacity for community or friendliness, where human rights violations are egregious failures to respect this capacity.

More specifically, its argued that human rights violations are well understood as failures to treat people as specially capable of friendly relationships, often taking the form of extraordinarily unfriendly behaviour that is not required to protect the victims of another's proportionately unfriendly behaviour. It's contended that this conception of human rights violations straightforwardly accounts for many different human rights in South Africa's Constitution and naturally entails certain *prima facie* attractive ways of dealing with contemporary moral dilemmas relating to land reform, political power and deadly force.

If I am correct that the interpretation of *Ubuntu* provided here both accounts for a wide array of intuitive human rights and can provide concrete guidance for resolving present-day disputes about justice, then the three criticisms regarding vagueness, collectivism and anachronism have been rebutted successfully. Something fairly called *Ubuntu* can indeed be reasonably thought to serve as the foundation of a public morality for South Africa and other contemporary societies.

Ubuntu, as Murithi (2006) argues, gives insights into how the principles of empathy, sharing and cooperation can be utilized in efforts to resolve day-to-day issues that tend to impact negatively on human relations. Both ubuntu and RA advocate the use of co-operative efforts to address the imbalances created by an individual's conduct and aim at bringing about agreement and harmony.[476] The stages Murithi (2006) identifies as a *Ubuntu* processes for bringing about a balance where harm has been done, that is, 'acknowledging guilt, showing remorse and repenting,

476 Anderson, 2003

asking for and giving forgiveness, and where required paying compensation or reparations as a prelude to reconciliation', are consistent with the some of the principles of RA. Similarly, ubuntu values, noted earlier, which include consensus, agreement and reconciliation; embody the principles of RA.[477]

Predictably, forty years ago, before a political activist died in South Africa, he argued that Africa will one day offer the world a more human face—Africa will give the world an extraordinary gift. Thus, the gift is *Ubuntu*, elaborated through reviews of applicable books and articles. One example is a White Zambian anthropologist who studied and researched *Ubuntu* while living among Africans for more than ten years. He further clarifies why *Ubuntu* does not work as it should in Africa, and especially in South Africa. He discusses the utopian and prophetic nature of *Ubuntu* and a personal experience with *Ubuntu* and the Zambian President Kuanda, at the time. Inclusive, are the limitations and dangers, but he assures the reader that *Ubuntu* can be the medicinal treatment for a sick, human lacking world.

5.20 Ubuntu philosophy should be used to enhance Positive behaviour

Behaviour in line with *Ubuntu* is identified as an individual's state of being, where the person's behaviour is governed by a ability to reason and think within the community context.[478] Rational behaviour thus focuses on positive human values, such as love, sympathy, kindness and sharing. Respect refers to an objective and unbiased consideration of and regard for somebody's rights, values, beliefs and p r o p e r t y .[479]

Under African governance provisions, respect, dignity, caring and sharing are considered critical values that build African communities.[480] The fundamentals of sharing are prevalent in African communities. The *Ubuntu* Philosophy implies that one can only increase one's good fortune by sharing with other members of the society and thereby also enhancing their status within the local communities. **Broodryk (2005:175)** enumerates cases that show the human value behaviour of the *Ubuntu*

477 Anderson, 2003; Murithi 2009
478 Maphisa, 1994; Swarts & Davies, 2014: 290-296.
479 Eze, 2006; Tutu, 2004:26; Yukl, 2002
480 Bekker, 2006; Eze, 2006; Poovan *et al.*, 2009

Philosophy, including visiting sick people who are not necessarily one's own relatives, sending condolences to a bereaved family, adopting an orphan as one's own child, providing food for needy people in the community, assisting the elderly in many different ways, and greeting others in a loving, friendly and compassionate way.[481] The issues of corporate conscienceness, where equitable allocation and sharing of wealth is very African, have been recognized as a strategic theme relevant to the conceptual framework of this study.[482]

Broodryk (2005:175) summarizes the *Ubuntu* philosophy as representing

various positive attributes, as indicated in Table 5 below.

Table: Positive attributes and meanings of the African Ubuntu philosophy

Ubuntu attribute	African Ubuntu meaning
U- Universal	Global, intercultural brotherhood.
B- Behaviour	Human (humane), caring, sharing, respect, compassion (love, appreciation).
U- United	Solidarity, community, bond, family.
N- Negotiation	Consensus, democracy.
T- Tolerance	Patience, diplomacy.
U- Understanding	Empathy (forgiveness, kindness).

Source: Adapted from Broodryk (2005:175)

The above attributes of *Ubuntu* show that an African society, which is humanist in nature, is also more community-based and socialist than Western society. Socially, organisations may be motivated to train their employees using *Ubuntu* as a philosophy, because doing so can help African organisations to develop a better understanding of African society and of their roles as an integral part (corporate citizens) of that society. The positive attributes

481 Broodryk (2005:175)
482 Ibid

of *Ubuntu* also demonstrate what an organisation can gain in terms of understanding the seriousness of embracing a corporate conscience that is in line with African society.

5.21. Ubuntu philosophy as an advocate for efficient synergies and competitiveness.

African organisations can build cooperation and competitive strategies by allowing teamwork based on *Ubuntu* principles to permeate the organisation.[483] As a people-centred philosophy, *Ubuntu* stipulates that a person's worth depends on social, cultural and spiritual criteria. It requires a life that depends on a normative engagement with the community, a substantive appreciation of the common good and a constitutive engagement with one another in a rational and ethical community.

In this way, in order for a person to be identified as a true African, community and communality are substantive prerequisites. Communalism and collectivism are essential to the spirit of the African *Ubuntu*

philosophy. Equally important in *Ubuntu* relationships is the aspect of working with others as a team.[484] A spirit of solidarity simultaneously supports cooperation and competitiveness amongst the team by allowing individuals to contribute their best efforts for the betterment of the entire group.

In a team setting, the existence of *Ubuntu* as a shared value system implies that team members are encouraged to strive towards the outlined team values, which consequently enhance their functioning together as a team[485] The team is brought one step closer to being effective because of the increased level of team members' commitment, loyalty and satisfaction, which ultimately has a positive impact on overall performance. Thus, management systems that tend to focus on achievements of individual team members and not the entire group

483 Mbigi & Maree, 2005:93
484 English, 2002:197; Poovan *et al.,* 2006:17
485 Poovan *et al*., 2006:25; Van den Heuvel *et al*., 2006:48

are likely to miss out on all the social and collective framework of an African society.

Conversely, when a team is not intrinsically held together by all members, the consequences can be negative or sub-optimal. Sub-optimality occurs because each team member works towards different goals based on different value systems. This can result in dissatisfaction, a lack of productivity and commitment and a lack of teamwork or team spirit amongst team members.[486] **(**With such a scenario, it would be the task of the team leader to try to create an environment that is conducive to a team culture that appreciates the values of the Ubuntu Philosophy.

Within an African society, oneness and sharing play a pivotal role in local communities and organisations – it is said in the Nyanja language that *Mu umudzi muli mphamvu* [unity is strength]. Community-based approaches also help to build synergies where the whole is more effective than the sum of individual parts. Under the *Ubuntu* philosophy, synergies are realized where the groupings are socially or culturally bound.[487] The spirit of *Ubuntu* leads to cooperative and collaborative work environments, because the community is encouraged to participate, share and support all the team members.[488] People can work together in community groups in order for them to be more productive, for example, they farm, construct roads, fish or fell trees together, while they are singing traditional songs as part of morale boosting. Thus, the community-based *Ubuntu* philosophy enhances productivity and

organisational performance.

Through the *Ubuntu* philosophy, synergies create a great deal of competitive advantage for organisations from employees who practise this philosophy and their teams. An African organisation can gain competitive advantages on the basis of several business premises, including effective human relationships with others, language and communication, decision- making, time management, productivity, age and leadership, and cultural

486 Poovan *et al.,* 2006:25
487 Mangaliso, 2001:28-32; Prinsloo, 2000:275-285
488 Regine, 2009:17-22; Van den Heuvel *et al.,* 2006:48

beliefs.[489] Such business premises about the Ubuntu's contributions towards different areas of business perspectives is in conformity with **English's (2002:203)** argument that it is the spirit of Ubuntu that can give the African continent an edge and that will allow it to find a way forward. Within the redesigning processes of foreign ideologies, an African organisation must be localized in terms of its systems to respond to socio-cultural and environmental demands.

Overall, the above literature review shows that the *Ubuntu* Philosophy conforms to a large extent with the understanding of the conceptual framework of this study in Figure 1 on p. 7. Culture and stakeholder relationships are regarded as one of the strategic themes of corporate performance. To facilitate all these relationships, there is a need for an effective communication system, which would be in line with the precepts of the *Ubuntu* philosophy. The importance of management decision-making and time management issues in facilitating productivity cannot be over- emphasized. The *Ubuntu* philosophy provides its own unique management perspectives, including ones on leadership.

5.22 Ubuntu philosophy framework can be used to promote African culture and leadership

Every geographic environment has its own distinguishing features, including culture. African culture is very different from Western cultures in some ways; this implies that in an African framework, social and cultural linkages are considered to be a key determining factor for the success of any organisation that operates on the continent.[490] The implication of such concerns is that people must come first, before products, profits and productivity. Once people have been given priority and are treated well in their

daily endeavours, productivity, products and profits should automatically be realized.[491]

489 Hampden-Turner and Trompenaars, 1993
490 Broodryk, 2005; Karsten & Illa, 2005; Khoza, 1994; Mangaliso, 2001; Mbigi & Maree, 2005
491 Ibid

Afrocentricity encompasses African history, traditions, culture mythology, and the value systems of communities, according to Khoza, the Chairperson of Eskom, the supplier of electricity in South Africa. Khoza believes that corporations in Africa will be successful if they adopt the *Ubuntu* management and leadership styles, which are people-centred. It is perhaps telling that Eskom registered an after-tax profit of R5.2 billion over a period of 15 months up to the end of March 2005 after the corporation had adopted the *Ubuntu* managementphilosophy.[492]

Similarly, **Wolmarans (2012:4)** reports that South African Airways (SAA) adopted an *Ubuntu* management system in 1994. Since then, the African Ubuntu philosophy has been a driving force in the company. The secret behind its success has been the publicly stated core values of South African Airways these include corporate performance, customer orientation, employee care, corporate citizenship, integrity, safety, innovation and teamwork, which are all embodied in the *Ubuntu* management philosophy.[493] Improved results demonstrate that culture and leadership style play pivotal roles towards the achievement of set goals and strategies of an organisation.[494]

Emerging African management philosophies see an organisation as a community and can be summed up in one word – *Ubuntu*.[495] An African *Ubuntu* management system recognizes the significance of group solidarity that is prevalent in African cultures, acknowledging that an African leadership style involves group and community supportiveness, sharing and cooperation.[496] *Ubuntu*-based leadership dictates sharing burdens during hard times, because by doing so, suffering is also shared and diminished. What is distinctive about the *Ubuntu* philosophy is the premise of a short memory of hate.[497] Africans teach children to communicate effectively, reconcile, and find ways to cleanse and let go of hatred and give the children skills to do so. The *Ubuntu* approach to life enables people to express continued compassion

492 Broodryk, 2005:17
493 Wolmarans 2012:4
494 Ibid
495 Mbigi & Maree, 2005:v-vi
496 Ibid

497 Mazrui, 2001

and perseverance within communities and institutions.[498]

In Africa, when one is offended, both the offender and the offended are taken through a traditional court system. After the hearings and advice, the offender is usually told pay a fine, in the form of chickens, goats or cattle, to the offended party, depending on the gravity of the offence it is a form of restorative justice. The Western judiciary system, which is a punitive system, largely punishes only the offenders by sending them to prison and neglects the offended party in the process. The traditional local judiciary system is both punitive and compensatory, in that the offender is punished and, at the same time, the offended party is duly compensated. In an African traditional court system, the leadership style is designed in such a way that it is reconciliatory as well. Through traditional local hearings, people unite and reconcile within a short time. Such a community-based approach to justice underpins an African leadership style that is founded on community love and solidarity.

However, African leadership that is grounded on compassion should use the *Ubuntu* philosophy with its original good intentions. **Tambulasi and Kayuni (2005:158)** observe that the application of *Ubuntu* should be in harmony with the democratic and good governance principles of a country. If these principles are not properly used, especially by politicians and public officials, claims of using *Ubuntu* in principle can create negative connotations if people say they are applying the philosophy whilst in fact their actual practice is divorced from the principles of democracy and good governance as enshrined in the statutes.[499] For example, handouts to people who have not worked for what they get would not be part of the *Ubuntu* philosophy. The *Ubuntu* philosophy encourages people to work hard within their communities as a team.[500]

498 Ibid
499 Tambulasi and Kayuni (2005:158)
500 Ibid

5.23 African Ubuntu collectivism can be used to cultivate team spirit towards work.

Traditionally, African societies tend to be cohesive and productive, working together as one family in their social grouping. Studies that were done in Malawi and Tanzania confirm that amongst the most outstanding values in these societies is the salience of the group.[501]

The group tradition or collectivism is so strong that generally Africans view success and failure as caused by traditional spirits that are controlled by the

society. For example, before accepting any good offers, such as a promotion, an employee may seek traditional spells before deciding, or can even turn down the promotion altogether for fear of its social consequences. Any achievement or failure is taken as a group obligation – it belongs to the entire community.

In East and Central Africa, family remains, and is likely to remain, a centre piece of collectivism. Using family metaphors may be regarded as one viable option in managing motivation in the workplace (**Carr *et al*., 2014:906)**. If there are any multinational organisations in Africa that continue to promote individualist performance systems, there must be a need to articulate folk theories containing traditional accounts of achievements.[502] The above literature review suggests that a wholesale introduction of individualist performance management systems maybe socially and economically divisive and costly for any organisation based on Africa.[503]
This scenario could also be true with the generic Balanced Scorecard model applications within an African context. The social-cultural framework of an African society is pervasive, even within the management and among employees who have direct attachments with their society.[504]

501 An Afro-centric Alliance, 2001:59-74
502 Carr *et al*., 2014:906
503 Ibid
504 Carr *et al*., 2014:906

5.24 Ubuntu philosophy can be used to recognize an employee's socio- cultural values within an African context

The successful implementation of any plans and goals by the organisation can be realized only if the human resources component is rejuvenated to perform better. It is important that the spirit and morale of employees be renewed, apart from those of the business processes in order to realize the set goals and strategies.[505] The development of cooperative and competitive employees can be achieved through training and educating them on indigenous knowledge. Such training programmes can encompass critical areas such as patriotism and citizenship, which focus on the constant acquisition of different local skills and the best working techniques, based on *Ubuntu* and teamwork.[506]

Apart from an emphasis on employee training and learning on the job, it is important for a company that employees uphold a number of values for them to be effective and productive. In the African context, employees' values

emanate from African socio-cultural underpinnings. For example, employees have to be treated as human beings and not necessarily as programmed machines.[507] Employees have extended family systems that should be respected, and these systems may have an impact, for example, in terms of medical needs and funeral services.

When an individual is included in the community, that person begins to appreciate the idea of having an extended family system. The extended family system is not necessarily based on biological bonds, but rather on bonds of community solidarity[508] Seeing oneself as a part of an extended family provides one with an identity in African society. It is this identity that makes one realize that all people collectively share the same commonalities in life and need to do so positively to co-exist and survive.[509]
A story is frequently told of a male employee who reportedly lost four fathers within the period of one year. For each funeral, the employee wanted financial assistance from his white employer.[510] There was considerable misunderstanding between the two, as the employer insisted that one cannot have

505 Mbigi & Maree, 2005
506 Ibid
507 Prinsloo 2000; Voelpel *et al.*, 2006
508 Poovan *et al.,* 2006:23
509 Ibid
510 Poovan *et al.,* 2006:23

four fathers. The employee earnestly explained that his first father was one of his biological father's elder brothers, the second was one of his biological father's younger brothers, the third was his real (biological) father, and the last was the husband of his mother's sister.[511] The employer was amazed at Africans' extended family systems. The story indicates how extended and community-based African society is.

Even in a working environment, the spirit of extended family systems is practised. In the workplace, there should be a family spirit if there is to be productivity.[512] If all employees regard themselves as members of one extended family in the workplace, Ubuntu would apply in respect of personhood or brotherhood (or sisterhood), and everybody would automatically be a member of this big family – an organisation.[513]
In Eritrea, the extended family system is an important source of security, economic and social support in daily life, in sickness or old age, in cases of job loss and other societal events. It is the moral obligation of an Eritrean who has

an income to support the poor, the aged and the needy within the family financially.[514] This kind of moral obligation and support based on a person's conscience has even been enshrined in the Eritrean Constitution. It is stipulated in the Eritrean Constitution **(Government of Eritrea: Article 22: 3)** that;

> Parents have the right and duty to bring up their children with due care and affection; and in turn, children have the right and the duty to respect their parents and to sustain them in their old age.[515]

In Africa, the traditional heritage in many regions reflects the cultural norms of working together, developing a sense of co-operation, and helping one another in times of adversity and prosperity. Supporting the family is a symbol of solidarity and the interests of the family are always a priority.[516] Thus, if an

511 Ibid
512 Broodryk, 2005:218
513 Ibid
514 Ghebregiorgis & Karsten, 2006:150
515 Government of Eritrea: Article 22: 3
516 Mwenda & Muuka, 2004:143- 158

organisation can function as a kind of community or family, similar employee values can be harnessed through the development of that sense of honour and good relationships with employees, as family members of the organisation. **Fakude (2007:199**) advises that even the most broad- based of economic empowerment programmes must emphasize good labour relations and best practices in that regard for both employers and employees. What a broad-based approach does is to take cognisance of the social context of economic development.[517]

It is important to note the above African ideologies and the social obligations that employees are expected to meet. Such perceived social obligations can have a direct impact on corporate performance.[518] The non- fulfilment of perceived obligations (non-monetary) by organisations might cause employees to refrain from deploying their energies effectively in organisational processes. The perceived obligations by organisations can be conceptualized as "intangible liabilities", which represent the non-monetary obligations that an organisation must accept and acknowledge in order to avoid the depreciation of its intangible assets, such as intellectual capital and knowledge **(Garcia-Parra *et al*., 2009:827).**

The above literature review illuminates basic guidelines regarding issues affecting employee welfare in an African framework. The constitutional provisions in some countries illustrate the national importance attached to

these values that employers should take cognisance of when engaging their employees. Employees need to be given conditions of service that are all-encompassing in terms of the community support that is required by all citizens, including employees.[519] In African Ubuntu-based systems, community relations are made up of extended family systems, distant relatives and friends who all form a close- knit network of human beings of all ages.

In an African organisation, efficiency and competitiveness can be achieved by an emphasis on social well-being rather than on purely technical rationality.

517 Ibid
518 Garcia-Parra *et al*., 2009:827
519 Ibid

The *Ubuntu* philosophy propounds that employees' cultural values, which include extended family systems, medical and funeral arrangements, must be respected.[520] However, the African employee welfare phenomenon is not fully represented in the generic Balanced Scorecard model, which advocates employee empowerment in the form of knowledge acquisition as a kind of human resources capital. The *Ubuntu* philosophy recognizes the significance of treating employees as human beings and not necessarily as "programmed" human resources capital. The *Ubuntu* philosophy is imbued with respect for human beings, especially one's elders.

5.25 Ubuntu Philosophy As an Advocate for Respect to One's Elders.

Apart from the usual organisational culture and individual personalities, the content and style of leadership is dictated by culture. In Africa, authority flows from the old to the youth, and respect for the elderly is a guiding principle. In corporate relationships, age is an essential element in Africa.[521] Thus, an older person is automatically expected to hold a certain level of superiority, regardless of his or her rank, title or education. Respect for one's elders, which is pervasive in all African societies, is one of the requisites that foreign corporations should include in their management systems; and this also applies to multinationals operating in Africa.[522]

It is equally important to understand the social and management implications of respecting one's elders. For instance, in Africa, leadership is more likely to be accepted and is easier to respect when it comes from a more experienced and older individual than from young and apparently inexperienced individuals.[523] What this means is that it is very rare for a young man (and arguably even more difficult for a young woman) to be

comfortable about assuming high office and leading a group consisting of older people who are regarded as senior to that young person.[524] Equally, it would be awkward for older employees to take instructions from the young.

520 Garcia-Parra *et al*., 2009:827
521 Amoako-Agyei, 2009:333; Darley & Blankson, 2008:380
522 Ibid
523 Mangaliso, 2001:29
524 Ibid

This issue becomes especially complicated in a highly structured system such as the military, where compliance is a prerequisite and the leader is required to be more directive.[525] However, respect for one's elders still remains a decisive feature of African society. Apart from respect for one's elders in particular, the *Ubuntu* philosophy also demands respect for the community in general, where individuals are expected to be socially responsible to their local communities and society at large.[526]

5.26 Ubuntu Philosophy as an Advocate for Respect for the Community and Corporate Social Responsibility

The African *Ubuntu* philosophy is displayed through compassion, where individuals express a sense of deep caring for and understanding of each other.

The *Ubuntu* approach allows team members to strive towards becoming caring, understanding and sharing.[527] The compassionate approach enables team members to achieve a common goal. Through a common understanding, community members are able to help and care for each other as members of one family, as required in the humanist African *Ubuntu* approach towards the community and its members.[528] For example, the African *Ubuntu* philosophy, which is premised on community solidarity, demands that success of an individual should not be aggressively achieved at the expense of others as the purpose of the group existence is for communal harmony and well-being of all.[529]

In line with the people-centric Ubuntu philosophy, individualism is not viable, for it is inadequate as a model to understand the basic human elements of a society.[530] By nature, humans are social beings and their wants and capacities are largely a result of society and its institutions.[531] The most

525 Mangaliso, 2001:29
526 Ibid
527 Poovan *et al.,* 2006:24
528 Tutu, 2004:27

529 Ibid
530 Khoza, 1994:4-9
531 Ibid

effective human behaviour is that experienced in the web of relationships people have with the groups, organisations, family and other bigger groupings that they belong to, such as the church, the state and other national and international organisations. African organisations have to understand this kind of relationship between their business activities and the social responsibilities that they have to meet.[532]

The *Ubuntu* philosophy advocates community and engagement with the society that we live in. The communalism that the African *Ubuntu* approach preaches involves care for the community and society. This communalism involves wealth distribution among members of society.[533] In an African setting, a slaughtered cow is shared amongst the community members for their mutual benefit. This social responsibility can also be expressed in terms of harvesting only part of the crop from the field, leaving the rest to the less privileged, the poor, the sick, the elderly, the orphans or the destitute and eventually to the birds of the heavens.[534] Likewise, companies have a social responsibility to the community in which they are doing their business.

As social gratitude and a sign of respect for the elderly, and to encourage organisations to be more community-based and socially responsible, the Malawi Government has embarked on a number of socially-oriented projects, including the Bingu Silver-grey Foundation (BSF), which recognizes the contributions of the elderly (those who are sixty and more years old) to society.[535] The foundation was established in recognition of the fact that the Malawi population is ageing. Under this project, both the public and private sectors participate in achieving Bingu Silver-grey Foundation's institutional goals and its objective of understanding the challenges posed and faced by the elderly, and in turn appreciate and take advantage of the opportunities available.[536] This initiative also ensures that companies show their corporate citizenship through involvement in such benevolent

532 Khoza, 1994:4-9
533 Prinsloo, 2000:283-284
534 Ibid
535 FAO-Rome & BGF, 2008
536 Ibid

programmes, which are in line with the *Ubuntu* philosophy of respect, dignity, caring and sharing.[537]

Meeting social responsibilities which are human-centred in nature is enshrined

in the *Ubuntu* philosophy and has a positive impact on the long-term sustainability of communities and organisations.[538] The philosophy also includes environmental protection, as human beings are considered to be part of creation **(Broodryk, 2005:52-54)**. In Africa, there is considerable skepticism about the view that humans can be defined as lone beings, in terms of individual qualities. Instead, the view is that human being must be defined in terms of their environing physical community.[539]

It is regarded as important to human survival that the natural environment upon which the community survives must be respected and protected. For instance, it may be acceptable in other societies to hunt wild animals with firearms for entertainment or as a pleasurable sport.[540] Such a practice is not acceptable in Africa, since hunting is only excusable if it is done for the purposes of feeding people.[541] . to be in conformity with Ubuntu principles, socio-cultural attributes should never be ignored in any African organisational management systems. Corporate social responsibility should be extended to the notion of ploughing back to the local communities within which corporations do business.[542] Corporations can do this in the form of financial assistance to the disadvantaged, through educational and health systems, donations in times of disaster, and the overall community maintenance of infrastructure and cultural values.[543]

Generally, the caring and sharing concept that forms the core of the *Ubuntu* philosophy has now been recognized globally. Modern corporations now realize that they are part of the local communities within which

537 FAO-Rome & BGF, 2008 538 Broodryk, 2005:52-54
539 Ibid
540 Broodryk, 2005:52-54
541 Broodryk, 2006:20
542 Liker, 2004, Rossouw, 2010e
543 Ibid

their operations are conducted.[544] The literature indicates that the inclusion of the *Ubuntu* philosophy into organisational systems would enable companies to be more responsive to the call for corporate social responsibility and good corporate governance.[545]

5.27 Ubuntu Philosophy as an Advocate for Good Corporate Governance

Issues of corporate governance are becoming more pronounced in modern business practices. Corporate governance, which is intertwined with business ethics, is considered critical in organisational practice, as

well as in general corporate productivity.[546] The founding principles of business ethics and corporate governance are in line with the *Ubuntu* philosophy of regarding all members of an organisation as part of the community. It is this direct involvement of and with community members that brings about greater solidarity, love, caring and sharing within a grouping (organisation).[547]

A major governance challenge in current governance issues has been corruption, which reveals the moral depravity and badness of the perpetrators.[548] Generally, corruption is caused by a lack of commitment to moral beliefs by the perpetrators, which is in turn due to the weak moral will of an individual towards other people. Corruption can be seen as a moral issue, where the perpetrators are fundamentally corrupt due to moral ignorance and confusion.[549] Such a moral issue affects human life in a negative way where individuals abuse their personal and official powers.[550] Corruption comes in different forms, which include nepotism, misuse of power, favouritism and bribery.

While corruption manifests itself in the relationship between individuals and institutions, as a practice, it is mostly rooted in the operations of market

544 Liker, 2004, Rossouw, 2010e
545 Ibid
546 Rossouw, 2005:105
547 Ibid
548 Broodryk, 2005; Moloketi, 2009; Nyarwath, 2002
549 Ibid

forces.[551] Unlike the *Ubuntu* teaching, corruption is a pursuit of individual prosperity, as opposed to the common good of society.[552] Corruption erodes the common fabric, undermines community and perpetuates poverty, inequality and underdevelopment. Ultimately, corruption leads to a rise in the blatant pursuit of individual gains.[553]

When the awareness of moral rights and wrongs is strong, corruption can easily be rooted out. This is the principle behind the community-based *Ubuntu* philosophy. To curb corruption, for instance, the *Ubuntu* philosophy must be the essence of a value system that underpins a commitment to eliminate corruption.[554] There is also a need for strong robust democracies, where all sectors of society, including the media and organisations of civil society, the private sector, trade unions, traditional leaders and faith-based organisations have a responsibility to educate and promote the values of *Ubuntu* philosophy and anti-corruption.[555]

The above observations indicate that there is much that the *Ubuntu* philosophy can contribute towards business ethics and good corporate governance issues. Under the African *Ubuntu* philosophy, people should be aware that individualism and greed, and profit achieved by sacrificing other community members, contravenes the true foundations of humanity (Ubuntu).[556] The notion of *Ubuntu* or humanity teaches community solidarity, caring and sharing amongst the members of a community or organisation. Overall, the literature also reveals the tremendous contribution that the African *Ubuntu* Philosophy has made towards organisations in the form of its unique management style, which is pervasive in Africa.[557] It would be necessary to include all considerations and contributions of the *Ubuntu* philosophy when redesigning the Balanced Scorecard model, as this study aims to do. However, consideration should also be given to the challenges that exist within an

551 Moloketi, 2009:239
552 Ibid
553 Moloketi, 2009:239
554 Moloketi, 2009:243, 247
555 Ibid
556 Moloketi, 2009:243, 247
557 Ibid

African society that would make successful implementation of the Ubuntu philosophy difficult to achieve.[558]

There are positive aspects of African systems which could be adopted to enhance the corporate performance of local and international organisations. The sections below discuss the general contributions that the Ubuntu philosophy can make to the corporate world, and how they can do so.

5.28 Promotion of the Ubuntu Philosophy management systems

Observations about the unique Afro-centric systems show that a new model must be developed for organisations in Africa in order to realize better value creation. Managers need in-depth cross-cultural values for their organisations to penetrate African marketplaces successfully.[559] Thus, a model can be developed and implemented taking cognisance of the teachings of Mbigi and Maree (2005), who advocate an ***Ubuntu-based approach to African management systems.*** The development process must evolve through several distinct phases in order for it to be successful.[560]

The first phase involves the ***creation of a learning community.*** In an African

set- up, the use of ritual and ceremonies is vital, as they enhance the bonding for building a foundation and solidarity and promoting group learning. The learning process is a significant factor in achieving better organisational processes and performance.[561]

Secondly, the ***strategic planning process*** must be instituted. This second phase would involve representatives of all constituencies in an organisation. Strategic visioning and values exercises have failed in the past because of their lack of a spiritual dimension.[562] Again, ritual and ceremony are central, particularly the role of storytelling. Especially important are traditional survival stories that can subsequently be linked to the company's future activities and outlook.

558 Moloketi, 2009:243, 247
559 Amoako-Agyei, 2009:339
560 Mbigi and Maree (2005)
561 Ibid
562 Mbigi and Maree (2005)

Storytelling is part of how African indigenous knowledge is passed on across generations.[563]

The next phase is the *strategy sharing*, which entails the involvement of the entire organisational workforce in fora that are designed to share corporate strategy, suggestions and receive inputs. The sharing of corporate objectives and strategies could involve a series of meetings with employees from different levels, functions and racial groups. The sharing of strategies increases ownership and later reduces resistance to change. Ultimately, strategy implementation becomes easier.[564]

Finally, the last phase requires *participative skills building* with mentors who emphasize close, trustful and helpful relationships.[565] This phase encourages trainees to be self-empowered and become authors of their own identity. One needs to consider and comprehend different factors that are constantly working in an African society for the mentoring process to be effective.[566] For instance, it is not appropriate to apply the Western type of mentoring to Zimbabwean organisations, because of differences in socio-cultural values and beliefs.[567] The significance of mentoring and its impact on attendants' performance ultimately affect their productivity and overall corporate performance.[568]

It has also been established by **English (2002:197-203)** that through the mentoring process, people who attend and participate in indigenous knowledge

training programmes cooperate across local cultures more efficiently than those who do not attend and participate in such training programmes.[569] Furthermore, Mphuthumi Damane, a former chief executive officer of Nuclear Energy of South Africa, recommends that every manager in South Africa be required to pass a course on *Ubuntu* management in the same way as all managers have to understand basic financial management.[570] It can

563 Mbigi and Maree (2005)
564 Ibid
565 Mbigi & Maree, 2005
566 Ibid
567 Manwa & Manwa, 2007:41
568 English, 2002:197-203
569 Ibid
570 Damane, 2001:34

therefore be observed that human resources development is a prerequisite for any successful strategy development and the implementation of the plans of an organisation based in Africa; and that the *Ubuntu* philosophy should be part of it.

5.29 Utilization of African social capital

Generally, the corporate world can use Africa's uniqueness and social capital to build on corporate performance. Social capital, which constitutes an organisation's emotional and spiritual resources, is a distinctive competitive factor, like intellectual capital.[571] Social capital affects the impact of any strategic intervention and the ultimate effectiveness of policies, procedures and processes. However, the current corporate practices, management thinking, and literature are weak in managing and using emotional and spiritual resources, which also help to determine the value of an organisation in Africa.

It would be important for people to think through and know who they are socially and culturally, why they are, and what they can become.[573] Social capital can, for example, be acquired through collective dancing, singing, drumming and storytelling, as well as mythography, a technique that requires the facilitator to capture the collective story of the group in the form of a heroic mythology with distinctive events and characters to dramatize the message.[574] The ritual elements of workshops can be as important as the content and discussions of the groups. It is worth noting that in Africa, the dominant spirits determine the organisation's outcomes, consciousness, conscience, culture and energy levels, which ultimately determine corporate performance.[575] The belief in good relationships and communication within

community members is also critical in the African *Ubuntu* Philosophy.

571 Mbigi, 2000:16-21; Ngunjiri, 2010:765
572 Ibid
573 Binedell, 1994; Mbigi, 2000; Moloketi, 2009
574 Broodryk, 2005; Mbigi, 2005; Mwenda & Muuka, 2004
575 Ibid

5.30 Ubuntu as a Source of Effective Communication and Public Relations

Communication and effective control systems constitute a significant component of a successful organisation.[576] In an ancient Afro-centric conception of the *Ubuntu* philosophy, communication is reflected in various African traditional forms that regard communication as directly connected by the underlying concept of communalism.[577] Within such underlying elements, community members effectively communicate on various aspects for the survival of the community.

The other useful attributes of Afro-centric systems include the reciprocity and mutuality of human relations that emphasize the belief that respect should always be reciprocated. Reciprocity underlies the *Ubuntu* phenomenon, where one only becomes a person through one's relations with others, thereby creating harmonious world relations with others. This also forms part of the ancient African philosophies that relate to communication.[578] These aspects of the African philosophy may explain why public relations theorists and practitioners increasingly find African public relations intriguing, posing challenges to accepted normative approaches, as they seek a conceptualization of a sustainable new global model of management.[579]

5.31 Ubuntu Philosophy as an Advocate for Global Transformation

There is a lot that the African community can contribute towards itself in particular and to the world in general. Organisational transformation is not just an intellectual journey – it is also an emotional and spiritual journey.[580] In order to access the emotional and spiritual resources of an organisation, appropriate bonding symbols, myths, ceremonies and rituals are needed. With this understanding, the *Ubuntu* literature suggests that Africa can provide a unique contribution to the global practice in many management systems that revolve around *Ubuntu*, as propagated by Steve Biko.[581] **(in Coetzee & Roux, 2008:30):**

576 Neely, 2008, 2016
577 Mersham & Skinner, 2016

578 Skinner & Mersham, 2008:251
579 Ibid
580 Khoza, 2006; Mbigi & Maree, 2005
581 Ibid

> We believe that in the long run, the special contribution to the world by Africa will be in the field of human relationships. The great powers of the world may have done wonders in giving the world an industrial and military look, but the great gift still has to come from Africa – giving the world a more human face.[582]

The *Ubuntu* Philosophy which is founded on the African framework has applicability on a global scale because of its values that are based on human relationships. Such values as solidarity, compassion, generosity, mutuality and commitment to community can find resonance well beyond Africa's borders.[583] It is based on this notion that the *Ubuntu* philosophy has spread its wings worldwide. Former President of the United States, Bill Clinton, embraced the *Ubuntu* philosophy when on 28 September 2006 he told the Labour Conference in the United Kingdom to embrace *Ubuntu*.[584] **(BBC News, 2006):**

> **All you need is Ubuntu**. Society is important because of *Ubuntu*. If we were the most beautiful, the most intelligent, the wealthiest, the most powerful person – and then found all of a sudden that we were alone on the planet, it wouldn't amount to a hill of beans.[585]

The African *Ubuntu* Philosophy has also been acknowledged and accepted by the US Department of State. When she was sworn into office on 18 June 2009, Ambassador Elizabeth Frawley Bagley, the Secretary of State's Special Representative for Global Partnerships, expounded on the concept of *Ubuntu* philosophy.[586](US Government,2009:n.p.):

> The concept of *Ubuntu* dates back centuries and appears in various forms in traditions throughout the world; and yet globalization has heightened our awareness of this interconnectedness. In the same way that Secretary [Hillary] Clinton has often said that ***It takes a village to raise***

582 Coetzee & Roux, 2008:30
583 Ngunjiri, 2010:765
584 BBC News, 2006
585 Ibid
586 US Government, 2009: n.p.

> ***a child***, we are now realizing that we must apply a similar approach worldwide. This is the Ubuntu Diplomacy where all sectors belong as partners, where we all participate as stakeholders, and where we all succeed together, not incrementally but exponentially[587]

Thus, the African *Ubuntu* Philosophy has a global impact in corporate management systems. With globalization, the modern management regards the firm as a community and not just as a collection of individual entities.[588] Therefore, an *Ubuntu* global Philosophy will make managers understand the purpose of management as a tool for promoting the common good of all the stakeholders of an organisation.

The literature analysis on the African *Ubuntu* Philosophy underscores the significance of Africa's unique socio-cultural framework, which has a direct impact on the performance of an organisation based in Africa. In an African society, community is paramount and society is founded on the *Ubuntu* philosophy, which is community-based and socialist in nature.[589] The inclusion of the African social-cultural framework would be a basic step towards redesigning the generic Balanced Scorecard model.

This segment has reviewed and analyzed literature on the African *Ubuntu* Philosophy, considering its implications for management and thus for its inclusion in formulating corporate frameworks for organisations in Africa. It gives the background on the *Ubuntu* Philosophy and how it can be linked up with performance measurement theories for organisational success.[590] One of the profound lessons on *Ubuntu* is that it integrates African organisations with the local communities. The reviewed literature also reveals that organisations are able to realize synergies through communalism and collectivism that arise from the *Ubuntu* principles. Based on the *Ubuntu* Philosophy there are several external factors that automatically affect organisational internal operations.[591] Such external factors include African

587 Ibid
588 Lutz, 2009:313
589 Ibid
590 Lutz, 2009:313

culture and leadership styles, business ethics and good corporate governance, employees' socio-cultural values, including extended family systems, and corporate social responsibilities. It also analyzed some challenges impinging upon the applications of the *Ubuntu* philosophy. Finally, theories suggesting the successful implementation of Afro-centric management systems have also

been analyzed.[592]

In general, within the *Ubuntu* philosophy, the importance and value of the human being (*munthu*) and the community are pivotal. The practices of the *Ubuntu* philosophy with regard to humanity, care, sharing, teamwork spirit, compassion, dignity, consensus decision-making systems and respect for the environment are all positive elements that could make a contribution towards the improvement of corporate performance. The literature in fact indicates that there is now a global shift in management thinking which is now taking note of the *Ubuntu* Philosophy.[593]

I have also reported on the literature review which highlights the need for management systems to be realigned with the local *Ubuntu* Philosophy that defines the African socio-cultural framework to be a successful organisation in Africa. Thus, the *Ubuntu* Philosophy attributes, as discussed above, would constitute an indispensable input towards the redesigning process of the Balanced Scorecard model. ***All we need is Ubuntu.***[594]

Globally, man only begins to see his folly, as he restlessly looks around him for a deep need of self-identity. Thus, as technology increases and speedily looms ahead, self-identity wavers and will "allow individuals to wreak havoc and mass destruction".[595] We, as humans, endowed with free agency and the attribution of certain characteristics, have the privilege to control our own lives, and to recognize the effects of the application of scientific knowledge and its practical purposes on ourselves.[596] Albert Borgmann, Regents Professor of Philosophy at the University of Montana, puts technology into perspective. Technology he

592 Ibid
593 Lutz, 2009:313
594 Ibid
595 Battle, 1963
596 Ibid

says is not evil, but its myriad manifestations coalesce into a culture, or way of life. In other words, we are being seduced into a technological culture."[597] Subsequently, seduction weakens not only the individual but also family, community, and finally the nation. On the other hand, we also have to realize that an extraordinary thing is happening when we humanely communicate with each other, rather than to be persuaded indirectly via media.[598]

Furthermore, the loss of the ability to communicate and to share has become visibly drastic. Man cannot live in solitary confinement[599] and he must realize he has a purpose and responsibility as a communicating human. Similarly, he

refers to what Africans call "*Ubuntu*," (oo-boon-too) the contraction of 'umuntu ngumuntu ngabantu'.[600] Specifically, *Ubuntu* is a traditional African philosophy, defined as communicating, caring, and sharing with humans in harmony with all of creation. Tutu argues that, it is about the essence of being human; it is part of the gift that Africa will give the world. It embraces hospitality, caring about others, being willing to go the extra mile for the sake of another.[601] Africans believe that a person is a person through other persons and humanity is bound inextricably with yours. When we dehumanize you, we inexorably dehumanize myself. The solitary human being is a contraction in terms. Therefore, you seek to work for the common benefit because your humanity comes into its own in the community and belonging.[602]

Hence, in many instances the application of *Ubuntu* has benefited humanity, such as after the apartheid era in South Africa. *Ubuntu* was implemented for those who were victimized to restore to them justice through truth and reconciliation. Thus, *Ubuntu* is the positive form of what happened during the negative apartheid era that stood for all that was oppressive and demoralizing in South Africa. Therefore, in a small way, the antonym *Ubuntu* makes up for injustice on a deeper scale and to take the African perspective of restoring justice further after the devastating effects of the apartheid rule,[603] **(Elechi, Morris & Schauer, 2009,**

597 Battle, 1963
598 Ibid
599 Tutu, 2008/9
600 Ibid
601 Tutu, 2008
602 Ibid
603 Elechi, Morris & Schauer, 2009, p. 317-327

p. 317-327) allows *Ubuntu* into effect in the African justice process. The most serious consideration, is the individual in the community, and that *Ubuntu* better captures the underlying African world - view that expresses Africa's egalitarian, humanistic, interconnectedness, communitarian and participatory democratic values"[604]

Further, an ethical perspective of *Ubuntu* is taken by **Ross (2010),** a non-African, who explains the central point regarding African religion, spirituality, and ethics that assert "The ethical principle of *Ubuntu* (a contraction of "umuntu ngumuntu ngabantu") and translates to mean, "a person is a person through other persons".[605] Thus, *Ubuntu* ethics based on moral and spiritual values, could appeal to an individual desirous of a good life.

A person is unique, both in the cultural and intercultural situation and should be acknowledged in the least sense. It all begins with self, basic courtesy and understanding in the cultural and intercultural communication realm to the advantage of self and the dissimilar other.[606] **Edward T. Hall (1983)** describes the individual as:

Human beings are such an incredibly rich and talented species, with potentials beyond anything it is possible to contemplate. . . it would appear that our greatest task, our most important task, and our most strategic task are to learn as much as possible about ourselves (and others . . . My point is that as humans learn more about their incredible sensitivity, their boundless talents, and manifold diversity, they should begin to appreciate not only about themselves but also others.[607]

Similarly *Ubuntu* is expressed as the" highest being of existence"[608] and defined as "the very essence of being human"[609] and applied in many situations successfully to overcome, heal, learn, respect, and to communicate, and its continued application could benefit society. Examples of *Ubuntu* are prolific

604 Ibid
605 Ross, 2010
606 Ibid
607 Edward T. Hall, 1983, p.185
608 Thiong'o, 2009
609 Tutu, 2008

in Dalene M. Swanson's book," Where have all the fishes gone: Living *Ubuntu* as an ethics of research and pedagogical engagement" (2009). She argues that *Ubuntu* provides the capability of producing a course that understands and transcends the contradictions of immoral theory, and considerations befitting the unrestricted competition of the free market of today.[610] *Ubuntu* is humanness found and cherished to transform the oppressor and the oppressed.

5.32 Ubuntu Philosophy as a Gift from Africa

We believe, in the long run, the special contribution to the world by Africa, will be in the field of human relations. The great powers of the world may have done wonders in giving the world an industrial and military look, but the gift still has to come from Africa giving the world a more human face.[611] Notably human beings have much in common, in relation to fundamental values and desires'. Sheltered under many of the values and desires, are the family, children, accomplishments, security and enjoyed friendships. Therefore, **Lundin and Nelson (2010)** argue humans focus on their differences rather than acknowledging similar values and essentially the same genes. To conquer

inhumanity consideration of the application of *Ubuntu* is a gift from the most humble man on earth the African.[612] Although **Mungai (2009)** weighs the roots of an African cultural philosophy with community, generosity, and equality, some criticize it as Utopian. It would be difficult to give reasons or evidence against the basic ideals of *Ubuntu* that are certainly needed by the world.[613] Steve Biko (1970) recognized the failure of great world powers to preserve humanity. Therefore, knowing the world's weakness he also knew that *Ubuntu* is the gift the world would need. The gift of hope, given to the progressive failure of individuals, families, communities, organizations, nationally and interculturally, in the name of human
communication or *Ubuntu*.[614]

5.33 Utopian and Prophetic Nature of Ubuntu

From the ancient Greek ou-, meaning no and tops meaning place, the word

610 Dalene M. Swanson 2009
611 Biko, 1970
612 Lundin and Nelson (2010)
613 Mungai (2009)
614 Steve Biko (1970)

utopian' illicit the perfect place such as can only be found in the Philosopher's blue print'. Plato initiated utopia (in treatment of Egypt), followed by Plutarch (utopian Sparta), Thomas More, Swift and Montesquieu and then Engels, Mannheim, Bloch, Buber, Dahrendort end up in the intercultural philosophy of Mall. The prophetic term "philosophy's pious twin-sister theology is utilized by them.[615] Binsbergen is not speaking about, in the name of God, but more relatively to, the ills, contradictions and aporias of one's time and age, allotted to members of a society Therefore, he argues, that it is impossible to study *Ubuntu* Philosophy separate from its members of society whether it is about local culture or intercultural communication.[616]

In the early 1970s, Binsbergens and his associate lectured in sociology at the University of Zambia and examined surrounding provinces. He lectured on president Kaunda's contributions to political philosophy and ideology called Zambian humanism.[617] Thereafter, Binsbergen and Margareth Hall fell into the worst design of detailing and analyzing Zambian humanism. Their inexperience dealt them a humorous response from some, and others criticized them as having arrived straight from our European universities, to meddle in local political thought.[618] They panicked and thought they were going to be classified as prohibited immigrants, but almost immediately, they received an appreciative letter from Mr. Kaunda himself displaying *Ubuntu*.[619]

The Zambian humanism portrayed was *Ubuntu* that creates a moral community, admission to which is not necessarily limited by biological ancestry, nationality, or actual place of residence. Thus, in this moral community, to participate, is not a matter of birth right. This birth right is for any member of the human species that allow expression of concern about other humans, or humans who live in conditions less than human.[620] This moral community consists of people sharing a concern for the present and future of a particular local or regional

615 Binsbergen, 2002.
616 Ibid
617 Binsbergen, 2002
618 Ibid
619 Binsbergen, 2002
620 Ibid

society, seeking to add to the latter's resources, re-dressing its ills, and searching its conceptual and spiritual repertoire for inspiration, blueprints, models, encouragement in the process.[621] We can understand how Mr. Kaunda was able to save the situation by explicitly re-admitting, by his charismatic personal intervention, two young Europeans into this moral community.[622]

Further, the words used to describe *Ubuntu* are not exact but are dreams and practices of the past and of the intimacy of alleged closely-Knit villages, urban wards, and kin groups of found in urban and modern societies.[623] Binsbergen stresses that it was *Ubuntu* that allowed him admission to these communities he shared and researched, and that it was an exceptional experience in his life. He researched, and that it was an exceptional experience in his life. He expresses, it is an honor from which l do not wish to disassociate myself permanently by an act of conceptual deconstruction even though this refusal greatly complicates my life as both an analyst and a participant.

Although, Ramose thinks that *Ubuntu* can prevent globalization complications, Binsbergen argues *Ubuntu* is understood as part of the product of globalization. He further stipulates that Ubuntu must be understood and appreciated, as format under which the ideas, beliefs and images of today's village communities, and family situations, and how they present themselves .[624]

5.34 Ubuntu Philosophy as an Advocate for A Humanist Ethic: Understanding Moral Obligation and Community

The secular conception of ubuntu, as proffered by Thaddeus Metz, supplies a foundation for a humanist argument that justifies obligation to one's community, even apart from a South African context, when combined with Kwasi Wiredu's conception of personhood.[625] Such an account provides an argument for accepting the concept of *Ubuntu* as humanistic and not

necessarily based in communalism or dependent upon is upper naturalism. By re-evaluating some core concepts of community as they are presented in Plato's Republic.

621 Binsbergen, 2002
622 Ibid
623 Binsbergen, 2002
624 Ibid
625 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," Ethical Theory and Moral Practice 15(2012): 391.

It's argued that this account of ubuntu fits as the basis from which to understand obligation to community from a secular humanist perspective.[626]

5.35 The Noble Lie and the community

Regardless of the claims made for secular foundations of morality, whether deontological, consequentialist, or virtue-based, a widespread and popular belief remains with regards to ethical obligation and concern in Western thought, which is that there must be some super-natural story used to ground moral consideration forothers[627]

Perhaps the most famous example of such a story is that which Plato proposed as a response to Glaucon's immoralist challenge in Book II of *The Republic* Despite strong arguments favoring justice over and against injustice, the Noble Lie is to be implemented in the case of moral obligation to the community, at least according to Plato's argument.[628]

Socrates states at the end of Book III of *The Republic* that this Myth of the Metals, as a supernatural genesis myth, is necessary for the citizens of the kallipolis to feel bound to one another The case of the Noble Lie is a typical case of the belief that community morality cannot stand on humanist arguments alone when it comes to an *actual* or *potential* community and one's moral obligations to that community.[629] This assumption that a supernatural story is necessary for community morality is flawed. The flaw in argument stems, at least in part, from an atomistic conception of the individual, wherein the individual person precedes the community and must therefore be convinced by a supernatural 'just-so story' that the community is something to which the individual is bound.[630] The assumption that the individual is the primary social or moral unit that is then added to other individuals to form a community is a predominantly Western idea. If the individual is taken as such a prior entity,

626 Plato, Republic, trans. G.M.A. Grube (Indianapolis: Hackett, 1992) 627 Ibid

628 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)
629 Ibid
630 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)

then providing a humanist justification for moral obligation to one's community is surely a difficult task.[631]

If we look at one of the main principles of South African philosophy, however, we find perhaps contrary to common overgeneralizations and assumptions concerning African thought being prescientific and based upon nothing but folk beliefs a strong humanist foundation from which to understand individuals' obligation to community.[632] The South African concept of *Ubuntu* can provide such a foundation, but this foundation is not necessarily obvious, especially because of the variety of interpretations that have been given to the term, as well as incorrect assumptions made concerning personhood, spirituality, folk beliefs, and African philosophy.[633]

The argument that the secular conception of *Ubuntu*, as proffered by Thaddeus Metz, supplies a foundation for a humanistic argument that justifies obligation to one's community, even apart from the South African context, when combined with Kwasi Wiredu's conception of personhood.[634] To make this argument, It provides a survey, briefly offering many of the types of meanings of *Ubuntu*. It explicate Metz's particular argument concerning *Ubuntu* as a secular moral foundation, adding elements of Kwasi Wiredu's quasi-physical conception of personhood in order to expand *Ubuntu* beyond a strictly South African context.[635] Such an account of personhood provides an argument for accepting the concept of *Ubuntu* as humanistic and not necessarily communalistic or dependent upon supernaturalism.[636] Finally, Its re-evaluated some of the core concepts of community as they are presented in Plato's *Republic*, supplanting the Western conception of the person with Wiredu's, combined with Metz's account of *Ubuntu*.[637]

631 Ibid
632 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)
633 Ibid
634 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391.
635 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright (Lanham, Md.: University Press of America, 1984), pp. 149–162.
636 Ibid
637 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)

This re-evaluation involves an analysis of key elements of community as proffered by Plato, and reveals how well the concept of moral obligation from

the perspective of *Ubuntu* fits as the basis from which to understand being bound to one's community as a humanistic obligation, especially in contrast to a supernatural story to account for such obligation.[638]

***Ubuntu*, secularized**

Ubuntu is from the South African Bantu languages, its root being *ntu*, which signifies primal being. Magobe B. Ramose has provided an analysis of the prefix (*ubu*-) and the stem (*ntu*). According to Ramose, the prefix "evokes the idea of be-ing in general".[639] *Ubu*- specifies a one-ness, while *ntu* specifies a wholeness. *Ubu*- is oriented towards *ntu* as a being becoming whole. The concept of *Ubuntu* as a progression into wholeness is the basis of understanding *Ubuntu* as an ethical concept and provides a foundation from which to understand the various meanings that have been assigned to the word throughout the twentieth century and into the twenty-first.[640]

In his essay, "The Historical Developments of the Written Discourses on *Ubuntu*," Christian B. N. Gade presents the wide varieties of the meaning of the term, beginning with *human nature* in 1850.[641] Gade states that there are five primary types of definition that have been assigned to *Ubuntu* in the literature he has surveyed: A) as a human quality; B) as either connected to, or identical to, a philosophy or ethic; C) as African humanism; D) as a worldview; E) as connected to the proverb, '*umuntu ngumuntu ngabantu*' [people are people through people].[642]

The first meaning is the vaguest, simply referring to one's "humanness." Despite the vague meaning, humanness is the root of all the meanings that have followed and Ramose has indicated that *–ness*, which is "characterized by dynamism, change, and temporality," is the correct suffix attached to human. "Humanity" would be an incorrect meaning of *Ubuntu*, connoting a static set. *Ubuntu* pertains to the ongoing process of becoming human.[643]

The second meaning, as philosophy or ethic, is general, but pertains to the interdependence, or mutual provision, of people within a community Pieter H. Coetzee has defined the community with regard to morality in African

638 Iibid

639 Mogobe B. Ramose, "The Ethics of *ubuntu*," in *The African Philosophy Reader, Second Edition*, eds. P.H. Coetzee and A.P.J. Roux (London and New York: Routledge, 2003), p. 324.

640 Ibid

641 Christian B.N. Gade, "The Historical Development of the Written Discourses on *Ubuntu*," *South African Journal of Philosophy* 30 (2011): 307.

642 Ibid

thought, as "an ongoing association of men and women who have a special commitment to one another and a developed (distinct) sense of their common life."[644] The third meaning, pertaining specifically to African humanism, indicates that *Ubuntu* refers to the particular sympathies and aids involved in the interdependent relationship within community.[645] The fourth meaning, which was likely popularized by the writing of Desmond Tutu, is that of a worldview centering upon amnesty and love. [646] The fifth and most popular meaning is that based upon the proverb, '*umuntu ngumuntu ngabantu*.' This is from the Nguni languages of Zulu, Xhosa, and Ndebele. In Sotho- Tswana, the proverb is, '*Motho ke motho ka batho babang.*' Both mean, "A person is a person through other persons," or "I am because we are."[647] This last meaning of the term is best for understanding moral obligation to community because it entails the general meaning of humanness, but specifies how the human being becomes constituted as a being through the community.[648] In addition, *ubuntu* as "I am because we are" does not require a supernatural backdrop or dogmatism of any kind. As Ramose states, "One of the first principles of *Ubuntu* ethics is the freedom from dogmatism. It is flexibility oriented towards balance and harmony in relationship between human beings

643 Mogobe B. Ramose, "The Ethics of *ubuntu*," in *The African Philosophy Reader, Second Edition*, eds. P.H. Coetzee and A.P.J. Roux (London and New York: Routledge, 2003), p. 324.

644 Pieter H. Coetzee, "Partcularity in morality and its relation to community," in *The African Philosophy Reader, Second Edition*, eds. P.H. Coetzee and A.P.J. Roux (London and New York: Routledge, 2003), p. 274.

645 Ibid

646 Desmond Tutu, *No Future without Forgiveness* (London: Rider, 2016).

647 Ibid

648 Desmond Tutu, *No Future without Forgiveness* (London: Rider, 2016).

and between the latter and the broader be-ing or nature."[649] This conception of *Ubuntu* contributes to a humanistic foundation from which to base the moral obligation of individuals to the community in which they exist.[650]

In his argument for an African moral theory that is secular, Thaddeus Metz has attempted to capture what he takes to be six uncontroversial moral judgments and six specifically African moral judgments by providing a theoretical formulation of an African ethic.[651] Metz proffers the following definition of *Ubuntu* as this theoretical formulation: "An action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community."[652] Whether or not Metz accurately captures a specifically *African* ethic is beyond my purposes here. Given criticisms

levied towards Metz's argument, there is surely doubt that he has captured such an ethic.[653] What he has provided, despite arguments regarding whether or not his formulation is appropriately African, is a powerful formulation for moral obligation within and to one's community.[654]

In order to understand how such a foundation is supplied and is humanistic, it is helpful to first explicate Metz's argument, which is based upon the combination of the moral judgments he provides, as well as his conception of *Ubuntu*.[655] Although Metz's agenda is to "construct an African theory of right action," it is my contention that his construction is well-served as a foundation for moral obligation that is humanistic.
Using Metz's argument in this way re-directs it away from a specifically African theory of action and towards a more general basis of moral duty to one's

649 Mogobe B. Ramose, "The Ethics of *ubuntu*," in *The African Philosophy Reader, Second Edition*, eds. P.H. Coetzee and A.P.J. Roux (London and New York: Routledge, 2003), p. 324.
650 Ibid
651 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391.
652 Ibid
653 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391.
654 Ibid
655 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391.

community.[656]

Metz has stated that he has attempted to "develop a normative ethical theory of right action that has an African pedigree and offers something different from what is dominant in Western moral philosophy." In order to develop such an ethical theory, he focuses on *ubuntu* as a central normative principle of sub-Saharan African thought.[657]

Focusing on *ubuntu* provides a useful contrast with traditional Western moral principles that tend to be rooted in atomistic conceptions of the individual. As Mangena has indicated, the Western emphasis on individuals and individualism does not seem to pertain well to most African cultures, especially with regard to concepts of *rightness* or *justice*.[658]

Based upon this contrast, Metz attempts to provide a formulation that can account for the shared moral judgments between Western and Sub-Saharan African cultures, as well as those judgments specific to sub-Saharan African

cultures that help explain why such individualism is discordant to such cultures.[659]

The six moral judgments that Metz proposes are "accepted by both adherents of *Ubuntu* and Western people in modern, industrialized, constitutional democracies." These moral judgments are largely unproblematic as generally accepted judgments. Metz states that it is *pro tanto* immoral: "to kill innocent people for money"; "to have sex with someone without her consent"; "to deceive people, at least when not done in self- or other- defense"; "to steal (that is, to take from their rightful owner) unnecessary goods"; "to violate trust"; "to discriminate on a racial basis when allocating opportunities."[660] Note that all of these forbidden types of actions violate the rights of another individual, but they

656 Ibid
657 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391.
658 Ibid
659 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391
660 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

also affect the general strength of the community.

The six moral judgments that Metz claims are specific to adherents of *Ubuntu* are centered on particular aspects of the South African community.[661] According to Metz, it is uncontroversial *pro tanto* immoral: "to make policy decisions in the face of dissent, as opposed to seeking consensus"; "to make retribution a fundamental and central aim of criminal justice, as opposed to seeking reconciliation"; "to create wealth largely on a competitive basis, as opposed to a cooperative one"; "to distribute wealth largely on the basis of individual rights, as opposed to need"; "to ignore others and violate communal norms, as opposed to acknowledging others, upholding tradition and partaking in rituals"; "to fail to marry and procreate, as opposed to creating a family." From these twelve judgments, Metz makes it his "task to find a principle that captures all of the commonsensical moral judgments ... and that is fundamentally secular."[662] The principle he finds is *ubuntu*, which he formulates, as indicated above, as: "An action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community."[663] Metz reaches this principle in his attempt to account for the moral judgments he lists, and in doing so he also develops a conception of harmony around which the principle is based.[664]

Harmony, as conceived by Metz, is a combination of shared identity and good-

will. "To be close or part of the whole is reasonably understood as sharing an identity, whereas to be sympathetic or realize the well-being of others is to have good-will. The combination of the two conditions is what I deem to be the most attractive conception of harmony."[665] Based upon his idea of harmony, Metz enriches his definition of *Ubuntu* to:

"An action is right just insofar as it promotes shared identity among people

661 Ibid
662 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391
663 Ibid
664 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391
665 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

grounded on good-will; an act is wrong to the extent that it fails to do so and tends to encourage the opposites of division and ill-will."[666] The conception of harmony, along with part of the list of moral judgments provided by Metz, supplies a bridge by which to connect the principle of *Ubuntu* to the idea of community that does not give precedence or preference to the individual over and above the community rather, it supplants any alleged need for a supernatural account of obligation to the community with a humanistic account.[667]

In order to understand a person's moral obligation to the harmonious function of community, there must be an explanation of what a person is and how that relates to community. Metz does not provide such an account in his argument concerning *Ubuntu*,[668] but Kwasi Wiredu has supplied a compelling explanation of personhood that is humanistic.[669] In addition, Wiredu's explanation provides a convenient link between the South African concept of *Ubuntu* and morality more generally conceived, i.e. morality as cutting across cultural differences of custom.[670]

5.36 Personhood, naturalized

Kwasi Wiredu's conception of personhood is radically different from that of much of traditional Western philosophy, as well as much of African philosophy. Much of African philosophy is based in a dualistic conception of personhood, in which both a visible and an invisible world exist. The person is the medium and center of the universe through which communication between the two realms is made possible.[671]

Unlike much of Western philosophy, African philosophy does not include an atomistic notion of personhood. "Individuals become real only in their

666 Ibid
667 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391
668 Ibid
669 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright (Lanham, Md.: University Press of America, 1984), pp. 149–162.
670 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright
671 Ibid

relationships with others, in a community or group." D.A. Masolo comments that Wiredu's framework for thought "poses the fundamental question that could be re-framed as follows: What would the philosophical theories as we have been made to know them look like if we were to change the basic underlying sociological assumption the category of the subject upon which they are built?"[672] Utilizing his philosophical background in both Western philosophy and Akan (the language and culture of Ghana), Wiredu's conceptions of community and personhood are based upon communication; personhood is only possible via community. As he states, "No human society or community is possible without communication, for a community is not just an aggregation of individuals existing as windowless monads but of individuals interacting as persons, and an interaction of persons can only be on the basis of shared meanings.[673]

Indeed, without communication there is not even a human person. A human being deprived of the socializing influence of communication will remain human biologically, but mentally is bound to be subhuman." From the interaction of the human organism, i.e. the biological entity, with its surrounding community, that organism develops the function of mind (*adwene* in Akan), which is concomitant with becoming a person.[674] This conception of personhood is taken from the traditional Akan understanding "that a human creature is not a human person except as a member of a community.[675]"

Wiredu bases the ability for human creatures to create communities upon their shared biology. This biological similarity "makes possible the comparison of experiences and the interpersonal adjustment of behavior that constitute social existence."[676] This picture of human personhood developing through the interaction of organism and social environment is reminiscent of John Dewey's position that claims a "natural continuity between

672 D.A. Masolo, *Self and Community in a Changing World* (Bloomington: Indiana University Press, 2010), pp. 158–159; cf.
673 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

674 Ibid

inquiry and the elementary form of organic behavior," to which Wiredu approvingly refers Wiredu's stance concerning the person's reliance upon the community for becoming a person shares a similar foundation to Dewey's position concerning community.[677] Both provide humanistic arguments regarding the development of personhood, which entail the person coming into being through what Dewey refers to as "the give-and-take of communication." This humanistic position is one in which a person becomes a person through a community of other persons.[678]

A person being a person through others mirrors the proverb of *Ubuntu*: '*umuntu ngumuntu ngabantu*.' What Wiredu has provided in addition to the proverb is a biological basis from which to understand the development of the human creature through community into person.[679] For instance, in contrast to the Akan philosopher Kwame Gyekye, who proffers a conception of personhood containing a supernatural and immaterial component of self, Wiredu's conception of the person is entirely humanistic, avoiding any ontological reliance upon supernatural concepts.[680]

Wiredu's position is in stark contrast to much of African philosophy, as argued by Chukwudum Okolo, and, as mentioned above, closer to that of John Dewey. According to Okolo, there is a general resemblance between the conception of the self in African philosophy and that of John Dewey because both conceive of the person as being born from a series of interactions and interconnections within a social matrix, but this resemblance ends with Dewey's naturalism, in which reality is entirely within nature.[681] Wiredu's conception of personhood sustains this resemblance with Dewey's position, which is a *quasi-physicalist* position in which there is no dualism, especially not a dualism consisting of the natural and the supernatural.[682] All of

677 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

678 Ibid

679 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

680 Ibid

681 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

682 Ibid

reality is within nature. Concepts like mind (*adwene* in Akan), for instance, are considered as capacities, which are not substances, that contribute to the constitution of particular persons and are a part of nature. The position is not a strict physicalism because it is merely based on the imperative that entities

should not be multiplied beyond necessity.[683] Quasi-physicalism does *lean* toward physicalism and sustains an adherence to natural causes without reliance upon super- natural causality, but it also contains a built-in fallibilism that provides openness to other possibilities without actually suggesting that those possibilities are the case.[684]

In contrast to supernatural conceptions of personhood, the quasi-physicalist, humanistic understanding of personhood that Wiredu proffers is stable ground for a humanistic ethic of *Ubuntu*. The person is an organism considered as a quasi-physical entity born from other persons functioning as a community.[685]

5.37 Personhood and *Ubuntu,* Naturalized

Because the person's existence *qua* person is rooted and supported within the existence of community, it is the sustenance of community that is the basis of moral obligation. Obligation to one's community facilitates preventing the collapse of that community.[686] To act disharmoniously within the community threatens one's very personhood, which, as Wiredu states, is contingent upon the community. The projects and achievements of persons are interdependent with community, forming an obligatory bind between persons and their communities.[687] As Okolo notes, even one's first name, which individuates the person as a person, is granted by the community. Morality is connected to the harmony of the individual's interest in survival and the interests of others. As Wiredu indicates, this becomes obvious when we reflect upon commonly accepted moral imperatives, such as those presented by Metz. In fact, all six of the general, uncontroversial moral judgments that Metz lists help perpetuate

683 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

684 Ibid

685 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

686 Ibid

687 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

the harmony of the community.[688]

The six *specifically South African* moral judgments Metz indicates not only foster community harmony; they also perpetuate what might be called a *communalistic* ethic. From specific Bantu perspectives, this might entail that *Ubuntu* is necessarily a communalistic ethical concept. According to some theorists, such as Okolo, most of African philosophy proffers a communalistic ethic based upon the overwhelmingly social nature of self.

According to Wiredu's conception, however, *Ubuntu* is not necessarily a communalistic ethical principle. Rather, it simply indicates that the South African ethic portrayed by Metz may lean towards communalism more than individualism.[689] On the difference between communalism and individualism, Wiredu comments that it is merely that of "custom and lifestyle rather than anything else," going on to say that the distinction is only one of degree. This means that when *Ubuntu* is considered a moral concept, as Metz has argued, rather than a concept attached to lifestyle or custom, then it is applicable to various systems, regardless of which way they lean. This raises the question: is it possible to sustain Metz's conception of *Ubuntu* without necessarily accepting the six ethical judgments that he has deemed specifically South African?[690]

Given Wiredu's conception of personhood as contingent upon the harmony of the community, it does not seem as though these six South African ethical judgments are necessary for *Ubuntu* to be applied as a moral obligation that persons have to the community.[691] Metz's definition of *Ubuntu* is: "An action is right just insofar as it promotes shared identity among people grounded on good-will; an act is wrong to the extent that it fails to do so and tends to encourage the opposites of division and ill-will." If necessary conditions of community are shared identity and good-will, which Metz has combined into the concept of harmony, then this definition of *Ubuntu* fits

688 Ibid

689 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

690 Ibid

691 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

Wiredu's concept of personhood, even apart from the six South African moral judgments.[692] This is evident when analyzing the six general moral judgments provided by Metz in tandem with his definition of *ubuntu* and Wiredu's concept of personhood.

The six moral judgments that Metz considers to be shared both by adherents of *Ubuntu* and Westerners in modern, industrialized, constitutional democracies are that it is *pro tanto* immoral:[693]

> to kill innocent people for money.
> to have sex with someone without her consent.
> to deceive people, at least when not done in self- or other-defense. to steal (that is, to take from their rightful owner)

unnecessary goods.
to violate trust, for example, break a promise, for marginal personal gain.
to discriminate on a social basis when allocating opportunities.

Combining Metz's definition of ubuntu with Wiredu's conception of personhood, while not including the six moral judgments specific to South Africa, ubuntu becomes a viable humanistic ethic that grounds community morality in non-South African-specific contexts.[694] The conception of personhood proffered by Wiredu is one that explains the genesis and development of personhood as dependent upon the community. In order for the person to come into being, there must be a community in which this may occur. Communication is a necessary process that facilitates human organisms to develop into persons within communities.[695] In order to sustain lines of communication and the ensuing development of personhood, harmony and solidarity are required. Harmony provides the community with stability from which persons may develop. Solidarity provides the community with identity that contributes to the identification of the person

692 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright
693 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391
694 Ibid
695 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

as a person.[696] These two qualities of action – promoting harmony and promoting solidarity are the conditions necessary for an action to be moral from the standpoint of the ubuntu ethic that Metz proposes.[697] Actions that betray the harmony and solidarity of the community are thereby immoral in accordance with the same ethic of *Ubuntu*.

As Metz correctly remarks, all six of the moral judgments shared between Westerners and South Africans pertain to actions that threaten the harmony and solidarity of the community. What Wiredu provides with his conception of personhood is a humanistic foundation upon which to understand the connection of ubuntu, i.e. moral obligation to sustaining harmony and solidarity, between the person and the community, which is lacking in Metz's account on its own.[698] Jason van Niekirk, in an attempt to overcome this lack of foundation between the person and the obligation to the person's community, proposes an autocentric account of ubuntu that provides a basis for

the shared intuitions that ground the moral judgments that Metz supplies.[699] Van Niekirk's autocentric account is that persons aspire to genuinely care and value others for their own sake, rather than merely for the sake of self-development, in addition to being motivated by the ultimate benefit that pursuit of this aspiration rationally supplies. The account proffered by van Niekirk is compatible with Wiredu's conception of personhood, but it does not seem to be a necessary condition for the moral obligation a person has to community through the ethic of ubuntu.

From the humanist perspective that combines Wiredu's conception of personhood with Metz's definition of ubuntu, persons are obliged to pursue the harmony and solidarity of the community because not to do so would threaten their very status as persons. The genesis and perpetual development of a person as a person is dependent upon the continual interdependent relationship of that person with the community. That inter-dependent relationship is

696 Ibid
697 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391
698 Ibid
699 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

only sustained if harmony and solidarity are continually promoted within the community by the persons who comprise that community. A threat to the harmony and solidarity of the community is a threat to those persons who are persons through the community.

The obligation to engage in truth-telling as evinced by Wiredu, provides a simple example of the interdependent relationship between person and community, the importance of harmony, and how the need for harmony of community leads to moral principles (rules) like those listed by Metz.[700] According to Wiredu, community is dependent upon communication, and it is community that is the vehicle for the subsequent creation and development of persons. Communication, the necessary condition of both community and personhood, is only possible if truth-telling is considered binding because, as Wiredu states, "if truth-telling were, by open common avowal, not binding, and everybody could tell lies without let or hindrance, no one could depend on anyone's word." Communication would be impossible if there was no underlying obligation to tell the truth.[701] The very basis of communication is the belief that what is being conveyed is *not* being conveyed as an attempt to deceive.

Contrary to Kantian ethics, which would support the principle that one has a

moral obligation to tell the truth based upon the categorical imperative, Wiredu provides justification for truth-telling as a moral rule based in the importance of sustaining the community. As he states, "A rule of conduct is not a moral rule unless its non-existence or reversal would bring about the collapse of human community." Moral rules, when grounded in sustaining community, do not cause the same dilemma as Kantian ethics with regard to being able to be universalized.[702] The moral rule is that persons should consistently tell the truth in order to sustain the harmony and solidarity of the community, but

700 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

701 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

702 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

that truth-telling is not obligatory in those cases in which the harmony and the solidarity of the community are threatened *because of* truth-telling.[703]

Due to the necessary condition concerning sustaining the community, a moral rule is one that also helps sustain the genesis and development of persons, given the interdependence between persons and the human community. Truth-telling is thus a moral principle that consistently helps sustain the harmony and solidarity of the community and is thereby also a moral principle that helps sustain persons *as* persons.[704] Each of Metz's general moral principles is a case of a rule that helps to sustain the harmony of the community in ways similar to truth-telling.[705] Thus, the ethic of ubuntu provides a general rule that captures these moral principles. When combined with Wiredu's conception of personhood, *Ubuntu* is a humanistic ethic that does not require supernatural scaffolding. This provides a means by which to supplant the atomistic conception of personhood and morality as put forth in *The Republic* with this combination of community-dependent personhood and the ethic of *Ubuntu*. Re-evaluating the community established in *The Republic* with this humanistic combination of personhood and moral obligation provides an answer to Glaucon's immoralist question that does not require a supernatural narrative as originally put forth by Plato.[706]

The Noble Lie, Supplanted By *Ubuntu*

Initially, applying the relational accounts of personhood and *Ubuntu* to Plato's Republic might seem ill-conceived, especially after considering the contradiction with the individualist account of the person proffered by Plato. Both Metz and Mangena have remarked on the stark contrast between the

ethics of Plato and that of *Ubuntu*, but neither has pursued an attempt to apply the concept to Plato's account

703 Ibid
704 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright
705 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

of moral obligation within a community of persons.[707] In fact, applying the ethic of *Ubuntu* to Plato's conception of the individual might be an impossible task, but when the atomistic conception of the individual is supplanted with Wiredu's relational concept and combined with *Ubuntu*, this provides a humanistic basis for moral obligation to the community. This obviates any need for a supernatural narrative to buttress moral obligation within the community proposed by Plato. From this example, the same obviation should be apparent regarding moral obligation to communities more generally.

The super-natural narrative that is proposed in *The Republic* is the Noble Lie The Myth of the Metals that is meant to provide the bond between persons in order to sustain community.[708] The implication of proposing the Noble Lie is that without this narrative, the individuals within the community will not be morally obliged to that community. This is an interesting case with regard to Wiredu's comments concerning truth-telling and community.[709] In this particular instance, not abiding by truth-telling as a moral rule is justified because *lying* actually sustains the harmony of the community. This lie, however, is only necessary because Plato operates with an individualistic moral conception of personhood. Working from an atomistic understanding of personhood in attempting to establish and sustain the harmony of a communalistic society, i.e. the kallipolis, requires a narrative connecting the individual personsto the community.[710]

Replacing this conception of the individual with Wiredu's relational conception eradicates the need for such a lie. Wiredu's conception of personhood, when inserted in Plato's Republic instead of the atomistic conception, provides a stable, humanistic foundation for the kallipolis because persons only *exist* as persons *through* the existence of the kallipolis as a community. Persons are not atomic entities that precede the community

707 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)
708 Ibid
709 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright

and thereby must later be bound to the community through the use of a fabricated, enforced supernatural narrative. As Menkiti remarks, this is a predominantly Western conception of the relationship between individual and community. Rather than this Western conception, a humanistic perspective takes persons to be naturally bound to the community through their genesis as persons from within the community. Unlike the atomistic conception of personhood, the relational idea of personhood directly aligns with the ubuntu ethic as proposed by Metz.[711] The quality that defines ubuntu harmony is also the quality that is essential for the just community as conceived by Plato.[712] The entire functioning of the kallipolis as conceived in *The Republic* is rooted in being harmonious. Through a brief re-evaluation of some specific aspects of the kallipolis within *The Republic*, this connection between the just community as Plato imagines it, and the concept of *Ubuntu* as proffered by Metz, becomes strikingly clear.

Before the Noble Lie is presented in Book III of the Republic, Socrates puts forth his ideals of early education, which will entail children being educated in music and poetry, followed by physical training.[713] One of the main purposes of such training is harmony of the soul Even here, the focus on education, especially when considered against the backdrop of Wiredu's conception of personhood (replacing soul with his notion of *okra*) indicates that human beings are becoming persons through their education. In fact, they are developing as harmonious with the community in which they are being raised through the use of fables and stories that provide them with the ethos fundamental to making them persons Just before the Noble Lie is proposed at the end of Book III Socrates remarks on the dangers of the individual not being harmonious when he criticizes those who are too soft and over cultivated, or too hard and savage[714]

If a relational conception of personhood is here considered, then it becomes

711 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

712 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)

713 Ibid

evident that harmony refers to not merely harmony of oneself (as in the atomistic conception), but harmony with the rest of the community. The discussion of the Noble Lie follows upon this consideration of basic education because Plato has only considered the early education of children as if they are individual entities separated from the community in which they are being educated.

Wiredu's conception of personhood provides a corrective to this assumption.[715] In fact, the relational idea of personhood also better supports Plato's claim in Book IV that the outcome of education is a newly finished person Returning momentarily to Ramose's etymology of *Ubuntu* (see above), the concept of *Ubuntu* as a progression into wholeness nicely captures the concept of education within *The Republic*, especially as it pertains to the development of the person from within the community.

The four virtues of the kallipolis, as they are discussed in Book IV, are all based in sustaining the community. Wisdom concerns good judgment pertaining to the laws and judgments within the kallipolis that sustain the community. Courage is a preservation of the values and laws of the community. Moderation is a kind of harmony within the city that keeps the people and their desires in check Justice consists of each person being what they are and doing what they are supposed to do within the community. All four of these virtues are supported by Metz's definition of ubuntu in that they promote "shared identity among people grounded on good-will" and function to prevent any vice that "fails to do so and tends to encourage the opposites of division and ill-will."[716]

The definition of injustice supplied in Book IV is evidence of the importance of the kind of moral obligation to the community that is advocated by ubuntu: any action that destroys harmony is unjust Every movement away from the moral obligation of ubuntu within *The Republic* leads to the destruction of the community and the persons of that community.[717] This is most obvious in the case of the tyrant in Book IX, who, through destruction of the community, ceases being a person. This reiterates Wiredu's contention that

715 Ibid

716 Thaddeus Metz, "An African Theory of Moral Status: A Relational Alternative to Individualism and Holism," *Ethical Theory and Moral Practice* 15 (2012): 391

a human organism without community and the communication entailed by the community is bound to become less than a person. The person who becomes tyrannical was not morally obliged to the community because of a supernatural narrative that binds the people together.

The person who became the tyrant had been morally obliged to the community because it was the community that developed and sustained that person as a *person*. Once the person betrayed that obligation, they revoked their personhood. This obligation is less contentious if understood as being

humanistically grounded rather than based upon a supernatural narrative that merely a falsehood for the sake of the community.

Conclusion

Ubuntu supplies the humanistic moral rule that underlies the obligation the person has to the community and provides an understanding that this moral rule works to sustain the harmony of the community. Without a humanistic foundation to moral rules, Plato deemed it necessary to propose the Noble Lie, i.e. a supernatural narrative that was meant to sustain moral obligation to the community.[718] This is plainly not necessary once we replace Plato's conception of personhood with that of Wiredu and supplant the Noble Lie with *M*etz's idea of ubuntu. A relational conception of personhood, combined with the ethic of ubuntu, provides a humanistic foundation upon which to accept a moral obligation to upholding the virtues Plato describes, all of which contribute to the harmony of the community.[719]

Given Wiredu's conception of communitarianism being custom and lifestyle rather than a necessary outgrowth of the ubuntu ethic,[720] moral obligation to community does not merely relate to communities such as the extreme case in Plato's *Republic*.[721] As a humanistic foundation for moral obligation,

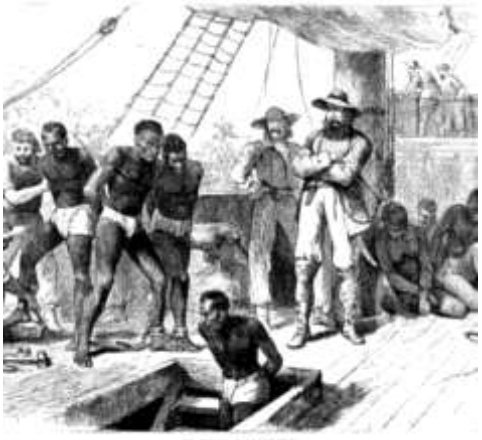
718 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)
719 Ibid
720 Kwasi Wiredu, "How Not To Compare African Thought With Western Thought," in *African Philosophy: An Introduction, Third Edition*, ed. Richard A. Wright 721 Plato, *Republic*, trans. G.M.A. Grube (Indianapolis: Hackett, 1992)

Ubuntu actually pertains to communities that lean towards individualism, as well as those that lean towards communitarianism. Bringing together Metz's secular account of *Ubuntu* with Wiredu's conception of personhood provides a stable humanistic foundation for moral obligation to community that is rooted in African philosophy, but is applicable to both African and non- African contexts. This basis of moral obligation, as is evident by re-evaluating Plato's *Republic*, supplants the need for supernatural narrative, thus simplifying and strengthening the secular foundations for morality.[722] Even if all gods are dead, not everything is permitted, and we need not resort to supernatural 'just-so stories' to account for morality. As persons, we are still obligated to the community through ubuntu.

722 Ibid

CHAPTER SIX

COURT ASSESSORS AS A WOULD BE (PROPER MANIFESTATION) OF OBUNTU-BULAMU



6.1 Introduction.

This book consists of a statement of the rules that govern the appointment, operation and process of Court assessors in the Ugandan Justice system inclusive of Court decisions where the judges have referred to or not of the opinions of the Court assessors as part of the legal framework on the same.

Additionally, the non-legal aspects of the Court assessors shall also be considered inclusive of policies, different scholarly views and Articles concerning the process and selection of Court assessors in the Ugandan Justice system.

6.2 Legal Framework of Court Assessors.

International Legal Framework.

The Statute of the International Court of Justice, 1945.

Article 30 (2) of this statute provides for the rules of Court which may provide for the assessors to sit with the Court or with any of its chambers, without the right to vote.

The Rules of Court of the International Court of Justice, 1978.[723]

Under sub Section 3 of the Rules, Article 9, they provide that the Court may on its own volition or under the request of a party made not later than the

closure of the written proceedings, decide for the purpose of a contentious case, to appoint Court assessors[724] to wit with it during the case hearing but without the right to vote.

Article 9 (2) provides that the president shall take all the necessary steps to obtain all the information relevant to the choice of assessors and they shall be appointed by secret ballot and by most of the votes of the judges composing the Court for the case.[725]

Giorgio Gaja; Assessing Expert Evidence in the International Court of Justice, 2016.

He notes in his Article that the assessor's opinions couldn't be treated as evidence before the Court because their major role is to assist the Court to assess scientific and technical evidence[726]. **Lucas Carlos Lima, Expert Advisor or non-voting Adjudicator; the Potential Function of Assessors in the Procedures of the International Court of Justice, 2016.[727]**

Carlos notes that assessors are not adjudicators and are perceived as fulfilling the important task of translating to the adjudicative, the technicalities of their own scientific domain.[728]

The Corfu Channel Case (United Kingdom V Albania), 1949.[729]

723 Adopted on 14th April 1978 and entered into force on 1st July,1978.
724 15 Law and practice of the International Courts and tribunals, (2016) 409, 418.
725 Article 9 (3) of the Rules of Court supra note 47.
726 Page 418.
727 99, Rivista Diritto Internazionale, (2016), 1123.
728 Page 1139.
729 Merits, ICJ Reports 1949, 4, 21.

The International Court of Justice notes that it cannot fail to give great weight to the opinion of the experts who examined the locality, in a manner giving every guarantee of correct and impartial information.

Regional Legal Framework.

Appendix IV of the East African Court of Justice Strategic Plan, 2018-2023.[730]

The plan takes cognizance of the Court system in various states to the Community and the subordinate Courts in Tanzania[731] that require lay men; assessors to sit beside the judge for the determination of the dispute before the judges.[732]

Rule of Law and Accessing Justice in Eastern and Southern Africa; Showcasing Innovations and good practices, United Nations Development Program, 2013.

The UNDP noted that one of the ways that Eastern and Southern Africa can enhance the access to Justice is by establishing the centers for administration of Justice and strengthening the informal Justice system by capacitating Court presidents, clerks and assessors and providing the required training for them. Thus, Court assessors are a means to ensuring the access to Justice.

National Framework.

Constitution of the Republic of Uganda, 1995 as amended, Article 126, 127.

Article 126 (1) of the Constitution provides that judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with the law and values, norms and aspirations of the people.

Article 127 on the other hand provides that Parliament shall make law providing for the participation of the people in the administration of Justice by the Courts.

730 April, 2018.
731 The Magistrate Court System.
732 Page 50.

This law in place has been the assessor's rules within the Trial on Indictments Act.

Trial on Indictments Act Cap.
23. General Provisions on
assessors.

This Act was created to consolidate the law relating to the Trial of criminal cases on Indictment before the High Court and for matters connected thereto.

Section 3 (1) of the Act provides that all Trial before the High Court shall be with the aid of assessors who shall ne two or more as the Court thinks fit.

Section 65 provides that where the accused person pleads not guilty, then the Court will proceed to choose assessors to try the case.

Section 69 (1), the Act provides that if in the course of a Trial before the High Court at any time before the verdict however, any assessor is prevented from

attending throughout the Trial for sufficient cause, or absents themselves and it's not practicable to enforce their presence immediately, the Trial shall proceed with the aid of otherassessors.
However, where more than one of the assessors are prevented from attending or have absented themselves, Section 69 (2) provides that the proceedings shall be stayed, and a new Trial held with different assessors.

Section 70 of the Act provides that if a Trial is adjourned, the assessors shall be required to attend the adjourned sitting at any subsequent siting until the conclusion of the Trial. However, when the assessors have been chosen, the advocate for the prosecution shall open the case against the accused person and shall call witnesses and adduce evidence in support of the Indictment.[733]

Section 81 of the Act provides that the assessors shall not be required to leave the Court while the issue of the admissibility of a confession is being tried and the judge may seek their opinions on any fact relevant to that issue but the decision

733 Section 71.

with regard to the admissibility of the evidence shall be on the judge alone and not on the assessor as well.

In consideration of the closure of the case, the judge shall round up the law and evidence in the case to the assessors and shall require each of the assessors to state their opinion orally and shall record each of such opinion. The judge shall then give their judgement but shall not be bound to conform to the opinions of the assessors.[734]

Section 82 (3) of the Act further provides that where the judge doesn't conform to the opinions of most of the assessors, they shall state their reasons for departing from their opinions in their judgement. The assessors may however have time to retire after the Trial to consider their opinions within which time they can consult each other.

Assessors Rules.

The assessor's rules are in the schedule to the Trial on Indictments Act and provide a more specific approach regarding the appointment of the assessors before the High Court.

Rule 1 requires that the Chief Magistrate prepares a list of all suitable persons in their magisterial areas liable to serve as assessors, before the first day of March.

Rule 2 provides that all citizens of Uganda between the ages of 21-60, who can understand the language of Court with a degree of proficiency enough to be able to follow the proceedings, shall be liable to serve as assessors at any Trial held before the High Court. There are however specific persons who are exempt from doing this and these include: person who are priests, medical practitioners, legal practitioners in Active practice, members of the armed forces and on full pay, members of the police forces or of the prison's office and mentally incapacitated persons.[735]

The Rules additionally provide for the publication of the lists which contain the names of the persons who have been appointed as assessors and are residing in

734 Section 82.
735 Rule 2 (2) of the Assessors Rules.

each magisterial area, shall be posted for the public inspection at the Court house of the chief magistrate, the objections of which shall be determined by the chief magistrate.[736]

The chief registrar under Rule 5 shall then write to the resident magistrate Courts to summon as many assessors who may be needed for Trial during the sessions and the form of this summoning ought to be in writing and shall require the individual assessors attendance at the time and place specified in the summons.[737]

Rule 9 creates a penalty for the non-attendance of the assessors for their sessions without lawful excuse to be liable to a fine not exceeding 400 shillings. The fine as the rules provide, may be levied by a chief magistrate or a magistrate grade 1 by attachment and sale of any moveable property belonging to the defaulter within the local limits of the jurisdiction of the magistrate.

6.3 Case Law regarding Court assessors.

Midrange s/o Nyagu V R [1959] EA 875.

The East African Court found that where the challenge of an assessor is disputed, it becomes a triable issue and the person challenged may be examined by the Court as to the allegations about his incompetence.

Godfrey Tinkamalirwa and another V Uganda Criminal Appeal No. 63/ 2015.

The Court stated that the judge ought to direct the assessors an specific matters inclusive of the contradictions and inconsistencies in the evidence, the weight

to be given to certain pieces of evidence such as hostile witnesses, when Court may base a conviction on the identification of a single witness and when the Court may rely on circumstantial evidence.

Uganda V Charles Kangameito Criminal Appeal No. 1/1978.

The Court noted that it was improper for assessors to form their opinions before

736 Rule 3 Ibid.
737 Rule 6.

hearing counsels' submissions and the summing up.

King Emperor V Tirumal Reddi (1901) 24 Madras 523

The use of assessors was adopted because it was considered that the European judge would better administer Justice if he had the benefit of the opinion of respectable local inhabitants acquainted with the local custom and habits.

R V Mutwiwa s/o Maingi (1935) 2 EACA 66.

The Trial judge had taken into consideration the opinion, unsupported by evidence of one of the assessors, that a form of oath which the accused was forced to take, was not known among his tribe. It was later held that the judge was entitled to do so as one of the objects and purposes of Court assessors was that they may assist the Court on questions which may arise as to the laws and customs of any tribe and community. However, this position wasn't broadly accepted and in 1947 and 1948, in the decisions if **R V Ndembera s/o Mwandawale** and **R V Kiswaga s/o Luguma**, the East African Court of Appeal noted that the native custom must be proved in evidence and couldn't be otherwise obtained from the assessors.

R V Gusambizi Wesonga (1948) 15 EACA 85.

The Court pointed out in its judgement that whereas one of the purposes of a judge sitting with assessors is to consult with them in order to ascertain matters of local custom, it doesn't make the testimony of a witness called to testify about the same inadmissible. The judges noted that the admissibility of the testimony depends on the view that the trail judge talked of the status of the witness called to testify and if admitted, then the duty of the assessors if requested by the judge, is to give an opinion as to what weight should be attached to it.

BenyaminiPande s/o Mawuku V R[1951] 18 EACA 392.

The East African Court of Appeal again found that the native custom must be

proved in evidence and could not be obtained as an opinion from assessors from whom the defense had more opportunity of challenging.

R V Alivereti Sauroutu Fiji Supreme Court, Criminal Jurisdiction No. 6/1961.

As regards the binding nature of the opinions of Court assessors, the Court noted that it will not disregard the assessor's opinions as regards the knowledge of village life and custom as relevant.

6.4 Non-Legal Framework on Court Assessors.

The non-legal framework on Court assessors basically includes Articles, policies and institutional framework on the same that has no legality to it as compared to the earlier discusses Section on the legal framework which consists of laws and convention in place concerning the same.

The Judiciary Staff Handbook, Courts of Judicature, 2006.[738]

The essence of the publication of the handbook is to ensure that the judicial officers and the staff of the judiciary have easy access to key information about matters relating to the operation of the judiciary, in order for them to understand their roles and execute them in favor of the whole judiciary.[739]

Regarding assessors, the handbook notes that the Trial by assessors if analogous to expert witnesses and the opinions of both are on the same footing as those of expert witnesses.[740] The editor's note that the basis of this was in European law where they were having difficulty in administering Justice in a foreign land because of their deficiency in the understanding of the customs and habits of the parties and witnesses appearing before them and were deficient in judging the demeanor in the witness box.[741] Thus, it was important for them to have the opinion of two or more natives of the land as assessors possessing such knowledge and judgement, made it relevant to have the institution of the assessors.[742]

738 1st edition November, 2006.
739 Page 8, Ibid.
740 Page 22 supra note 62.
741 Ibid.
742 Ibid.

The function of the assessors is therefore two-fold

1. The duty to assess and advice; they assess or weigh the evidence as a whole and decide whether the accused is guilty or not considering

their special knowledge as of the habits, customs and modes of thought and language of the society from which the accused comes.[743]

2. Duty to advice the judge on matters upon which they have skill and knowledge and give their view in abstract of what the custom is in the circumstances under review.[744]

The editors further noted that the assessors must be sworn in after the accused has pleaded to the Indictment. However, before the assessors are sworn, the accused or their advocate and the advocate for the prosecution have the right to challenge the propriety of the choice of an assessor.[745]

The Uganda Weekly Observer; Judges Divided on Assessors Relevance, written by Derrick Kiyonga on September 2nd, 2015.[746]

These writings were a documentation of a Validation Workshop on Reform of Procedural Laws Organized by The Uganda Law Reform Commission (ULRC) at Kabira Country Club on August 31, 2015. Justice Yorokamu Bamwine, the principal judge, opened the debate by saying that the judiciary needs to move away from the colonial judicial system, which introduced Court assessors.[747]

Most of the judges confessed to never referring to the opinions of Court assessors or never reading the same opinions in the determination of their final decision because most of them have no understanding of the law or rules of evidence. Thus, most of them voted that they be removed from the record of having them during criminal proceedings due to their irrelevance.

743 Ibid. The editors further note that the assessors were preferred because they are qualified to judge the probability of the story told not only by a witness but also by the accused and may detect their demeanor; something that may escape the judges. 744 Ibid.

745 Ibid.

746 https://observer.ug/news-headlines/39641-judges-divided-on-assessors-relevance, accessed on 10th March, 2020.

747 Ibid.

United Nations Office on Drugs and Crime, Access to Justice in Courts; Criminal Justice Assessment Toolkit, 2006.[748]

This provides for the assessors Guide/ Checklist under ANNEX B; for assisting them in keeping track of the topics covered, with what sources and with whom. These are inclusive of statistical data, legal framework, structure of the criminal Justice system, management authority and the special

tribunals.[749] The Tool Kit also provides for the criteria for the selection of lay Court assessors by a Court and these include but are not limited to: who is qualified to serve as a lay assessor? Are they a representation of the community? How are they notified of their obligation to serve? Who within the Court is responsible for convening the chosen assessors within a list?

Uganda Radio Network, Experts: Court Assessors are irrelevant, hosted by Halima Athumani on 20th July, 2012.

An interview by very prominent Uganda legal officers such as Nicholas Opiyo, an Advocate of the High Court, Human rights lawyer Ladislaus Rwakafuzi, Jane Amooti Magdalene, legal officer working with the Uganda Law Society all note that the essence of Court assessors is rather irrelevant because they have no understanding of the technicalities involved in some legal cases and they don't give very useful or credible advice to the judge at the end of the Trial.[750]

However, Herbert Ojuka, an assessor of the High Court was recorder to have been saying that whereas as assessors they might not understand various cases due to their technicalities, he still believes that this can be used to aid the judge in passing the judgement as their presence in Court is a representation of the lay person in Court.[751]

Conclusion.

In conclusion, the legal framework concerning the Court assessors is themed into

748 New York, 2006.
749 Page 26.
750 https://Ugandaradionetwork.net/story/experts-Court-assessors-irrelevant, accessed on 10th March, 2020.
751 Ibid.

the international, regional and national legal framework inclusive of the case law which entails majority of the interpretations of these laws on Court assessors. The Non-legal framework focuses particularly on newspapers, radio talk shows or Articles that may not necessarily have legal binding force on the Court or on parties but non the less, address the issue of Court assessors in Uganda.

6.6 EVALUATION OF THE IMPLEMENTATION OF THE LAW ON COURT ASSESSORS IN THE UGANDAN JUSTICE SYSTEM.

Introduction.

This book entails an in-depth evaluation of the implementation of the use of

Court assessors in the Ugandan Justice system regarding its effectiveness since its inception during the British regime. It will mainly focus on the laws in place concerning Court assessors and the cases that have been decided with the aid of the opinions of the assessors.

Challenges encountered.

The challenges encountered with the implementation of the Court assessors was firstly set out at a validation workshop on reform of procedural laws organized by the Ugandan Reform Commission at Kabira Country Club on 31st August, 2015.[752]Justice Yorokamu Bamwine, the former Principal judge, opened the debate at the workshop stating that there was a need to move away from the colonial system which introduced the Court assessors because they aren't useful anymore.

Justice Gidudu of the Anti-corruption Court then, noted that the evidence produced at his division is very technical as it deals with financial fraud, accounts, computerized fraud to mention but a few and it gets very difficult for the assessors to give opinions on the same because they didn't understand.

Justice Stephen Musota of the High Court Civil division then, noted that the Court assessors add no value to criminal Trialbecause they don't understand most of the things that go on in Courtand at the end of the day, their opinions don't matter.

The head of the Commercial Court then, Justice David Wangutusi noted;

"for the last 15 years, I have not even reflected on the opinion the assessors give me when am making my judgements because they are of no consequence."

There have been challenges regarding the use of assessors especially regarding judges limited knowledge on their application and selection process.

752 Published in the Observer newspaper of 2nd September 2015, in an Article written by Derrick Kiyonga: Judges divided on Assessors relevance.

Byaruhanga Fodori V Uganda Criminal Appeal No. 24/ 1999[753]

The first instance was seen in the decision of Byaruhanga where one of the grounds of Appeal was that the learned judge erred in law in appointing assessors without the approval of the appellant and erred in holding the case with a single assessor, instead of the number prescribed by law. The appellant argued that this was a fatal irregularity which would warrant a re-Trial.

The Honorable lady Justice Mukasa-Kikonyogo noted that the way the judge appointed the assessors left a lot to be desired. She noted that there was no record of how the assessor was appointed or their particulars. She further

stated that it was established law that a Trial can proceed with the assistance of a single assessor if the one fails to turn up during part of the Trial or for any reason absents themselves and misses the Trial, but not at the judge's discretion.

In determining whether this caused a miscarriage of Justice that warranted an Appeal, the judge noted that whereas the role of Court assessors can't be underestimated, it is merely advisory and not binding. The judge further noted that;

"While their role might have been important when the judges were foreign and not acquainted with our customary law usages, their role is diminishing with the replacement of foreigners with Ugandan judges."

Thus, she concluded by saying that the failure to record the particulars of the assessors doesn't cause a miscarriage of Justice. This is because if a Trial can be permitted for a single assessor when they are absent, there's no big difference when the Trial starts and ends with one assessor. The ground of Appeal failed.

With regard to the appellant being given the opportunity to challenge the selection of the judge, Justice Mukasa referred to the decision of **Ndirangu s/o Nyagu V R**[754] where the Court noted that despite the fact that there was no express provision in the law that gave the accused an opportunity to object to any assessor, to do so was sound practice which ought to be followed. The appellants had however not challenged the selection at the Trial and thus, couldn't

753 Appeal from the judgement of Justice Ogoola from the High Court of Masindi.

754 [1959] EA 875.

do the same on Appeal.

The judge concluded this ground of Appeal by stating that there was no condonation of the failure to strict adherence of the Trial in Indictments Act regarding the selection and participation of assessors. However, the impact of Trial by assessors ought to be assessed considering the provisions of Article 126 (2) (e) of the Constitution which enjoins the administration of substantive Justice without undue regard to technicalities.

From the analysis of the decision of Byaruhanga, it's clear that up to 1999, the judges in Uganda were still confused as to the selection and the processes that the Court assessors ought to follow and the unclarity of the law on the same doesn't make it desirable at all. Additionally, due to their fading role and the already existing bias towards the same by some judges of the Court, it is very

difficult to find that there was a miscarriage of Justice with the failure of one of the processes because it wouldn't be fatal to the final decision of the Court.

However, if Article 127 of the Constitution is to be put into consideration, the literal interpretation of the same is that there ought to be a participation of the people in the administration of Justice because according to Article 126, the judicial power is derived from the people and exercised in accordance with the norms and values of the people. Thus, the deprivation of this participation or the non-strict application of the same seems to defeat the purpose for which the Court assessors were instituted in the first place.

Bakubye Muzamiru, Jjumba Tamale Musa V Uganda Supreme Court Criminal Appeal No. 56/ 2015.

Additionally, the same challenge concerning the unclear laws on Court assessors and the confusion caused to the judges regarding the interpretation of the laws on the same was stated by Justice Bart Katureebe, the Supreme Court judge then, in the case of Bakubye[755]and in consideration of ground 1 of the Appeal, had to determine to whom the responsibility of summing up the evidence and the law to the assessors and whether the responsibility can be delegated.

755 Appeal from the decision of the Court of Appeal at Kampala before Justice Nshimye of 2015.

In determination of this, Section 82 of the Trial on Indictments Act clearly provides that the judge shall be the one to sum up the evidence and the law to the assessors and shall require each assessor to state their opinion orally and shall record such opinion. The case before the bench however disclosed that the summing up to the assessors was done by the deputy registrar of the criminal division and not the judge.

Justice Bart Katureebe however noted that this could not occasion a miscarriage of Justice that warranted an appeal because the judge when writing the summing up had not misdirected herself on any point. The judge however strictly noted that the law doesn't provide for a delegation of the same and the prActice should therefore be discouraged. Thus, he noted that the judge who presided over the hearing must personally give direction to the assessors and delegation to another Court official should only occur if the presence of the judge has been made impossible by grave circumstances.

In this decision, it is very clear that the judges are very willing to create

exceptions to the already existing law on assessors in order to bridge the existing gap in the same. This is a hinderance to the development of the law on Court assessors and if there are existing gaps and loopholes, then the law reform committee ought to review the existing law and make recommendations for its review to the Parliament.

Kiwanuka Eric Kibuuka V Uganda Criminal Appeal No 378/ 2017.

In further establishing the challenge as to the interpretation of the law, the decision of Kiwanuka[756], decided on 25th July, 2019 in the Court of Appeal by Justice Cheborion Barishaki andJustice Stephen Musota, espoused this in a discussion on the law of absence of assessors in criminal Trials.

The background of the case is that the missing assessor had been replaced in the middle of the Trial. In resolving this, Section 69 of the Trial on Indictments Act was referred to and it provides for the Trial to proceed with other assessors in the absence of one and both assessors. The judge however, noted that the decision

756 Criminal Appeal No 378/ 2017

of the Trial judge to replace an assessor after the prosecution had closed its case and bringing in a new assessor at the defense stage was contrary to the law and occasioned a miscarriage of Justice rendering the Trial a misTrial.[757]

Despite the fact that the Court of Appeal protected the sanctity of the institution of assessors in this decision, it should be noted that this is only one of the many decisions that have compromised on the position of the law regarding Court assessors which has deteriorated the relevance and role of assessors in the judicial system because of the fluidity of the law and the judges use of their discretion to amend the already existing law.

Okao Jimmy Alias Baby & 4 others V Uganda Criminal Appeal No. 55, 62, 67/2016.

Additionally, the Court of Appeal has been seen to protect the sanctity of the system of Court assessors as was evidenced in the decision of Okao Jimmy,[758] where Honorable Justice Kenneth Kakuru and Justice Egonda Ntende unanimously held that the absence of an assessor from a criminal Trial isn't a mere irregularity and a sentence based on the opinion of such assessors should be quashed and a reTrial conducted in the Trial Court.[759] This was on the basis that an assessor was allowed to resume participation in the Trial after its commencement which was a fundamental irregularity which occasioned an in Justice because the assessors opinion was based on incomplete

evidence and it could have influenced the decision of the judge.
There are several challenges in the system of the use of Court assessors as analyzed in the various decisions above all point to the inadequacy of the law on Court assessors and the misinterpretation of such laws by the judges because of their bias towards the relevance of Court assessors in the judicial system. These challenges however cannot evade the achievements and successes that the system has attained over the years. This will be the point of discussion in the

757 Justice Cheboroin further stated that criminal Trial ought to be conducted viva vice regarding the evidence and submissions so that the accused and assessors can follow the proceedings. Thus, he concluded that summing up before the submissions and recording the opinion of assessors using written submissions was incurably defective.
758 Criminal Appeal No. 55, 62, 67/2016 in the Court of Appeal.
759 Ibid, page 4.

next Section.

Achievements of the Court Assessors.

At the validation meeting, there were some judges that took cognizance of the achievements that the assessors have made since their inception during the British colonial rule.

Justice Wolayo, the resident Judge of Soroti stated that she finds assessors valuable in the Court because they understand the social and cultural dynamics of the area. She stated that much as they may not understand the law and the fActs, they are important in helping resident judges like her, who have been transferred to a totally new area, to understand the area they have been assigned to especially with reference to various matters before the judge.

Justice Remy Kasule, judge of the Court of Appeal then, stated that it would be wrong to totally abolish the system of assessors from the judicial aspect in Uganda. He stated;

"we judges administer law in conformity with the values and norms of the society and these assessors represent the views of a lay person. The assessor's opinions help a lot when writingjudgements."

He further stated that rather than abolish the use of assessors completely, there was a need to redirect the efforts to the capacity and productivity of the assessors to hire those who are skilled and not those who attend Court to sleep during the proceedings.

Some Ugandan scholars and lawyers have noted that the role of assessors is twofold: the duty to assess and advice.[760] During the colonial times, the role

of assessors was to advice the judge on questions of fact and custom and were present to protect against a possible miscarriage of Justice.[761] Thus, the assessors have a role to ensure that they weigh the evidence as a whole and decide whether

760 Ayebarebruno.blogspot.com/2015/10/criminal-law-notes-on-assessors.html? m = 1 accessed on 18th March, 2020.
761 Ibid.

the accused is guilty or not in light of their special knowledge as to habits, customs, modes of thought and language of their particular society from which the accused comes.[762]

Thus, even though there's an argument that the role of assessors is diminishing and being set aside, they have helped some judges in the evaluation of evidence from a lay person's perspective and in the observance of demeanor and particular custom of persons in a specific location. This role shouldn't be overlooked but rather, appreciated.

Looking at other jurisdiction such as common law and the English Courts, this was published by the Modern Law review in its Article; The Province and Function of Assessors in English Courts[763] further provides the role and function of assessors.

The review notes that assessors sin county Court proceedings have assisted in instances where special knowledge or experience is required and where without their assistance, then the complex or conflicting evidence would be provided by expert evidence or further specialist tribunal created to deal with such matters.[764]Thus, where the law/ statute requires that a judge be assisted by assessors when hearing the case, then the judge must sit with them, even though its very unlikely that any question on which they could give assistance would arise in the case before the Court, otherwise, the Court isn't properly constituted, this was the position that was adopted in the decision of **Soanes V Corporation of Trinity House.**[765]

This is very important to note because the Ugandan laws such as the Trial on Indictments Act, requires a judge of the High Court to sit with two assessors during criminal proceedings and Trials in order to aid the judge with the evaluation of evidence and factual instances during the Trial process. Thus, the assistance of assessors in the Justice system is very vital for the determination of

762 Bruno, supra note 96, further notes on page 8 that the assessors may be able to tell from the demeanor that the accused or witness is telling a lie which may escape the presiding judge's mind.

763 September 1970, volume 33.
764 Modern law review, supra note 99, page 494.
765 [1950] 84 LLL Rep. 432

the cases during the Trial processes. Thus, the relevance of assessors even today, is still vital.

Conclusion

In conclusion, the system of Court assessors in the Ugandan judicial system has been seen to deteriorate over the years and the judges have outrightly stated the need to review and adopt a new criterion for the selection of the assessors. Some of the challenges include the scanty law regarding the selection of Court assessors and the procedure which the judges aren't well vast with because it was initially a colonial system that was established to assist the foreign judges. The Ugandan judges have thus decided that there is need to abolish the system. However, despite this, there are some considerable achievements that the Court assessor's system has managed to succeed which have been outlined in the discussion above.

6.7 COMPARATIVE ANALYSIS WITH REGARD TO THE USE OF COURT ASSESSORS IN THE UGANDAN JUSTICE SYSTEM.

Introduction.

This book will be mainly focusing at making a comparative analysis with various jurisdictions, pointing out the success stories and the failed stories. The focus is on commonwealth countries that were British colony, to whom the system of Court assessors was passed onto. The countries which shall be looked at include **Tanzania, Kenya and Botswana**.

Comparative Analysis.

Tanzania.

Tanzania, formerly Tanganyika which was first under the German colonial rule in 1884, had two judicial systems: one for the foreigners and the other for the natives.[766] The native's disputes were adjudicated upon by the local leaders, who

766 Rainer Michael Bierwagen & Chris Maina Peter, Administration of Justice in Tanzania

had received the authority from the Sultan and they had to do this in accordance with the African laws as they were not deemed to be sufficient to come under German law.[767]

In 1920, Tanganyika became a British colony[768]. The Courts Ordinance then provided for the establishment of the native Courts and superior Courts to whom an Appeal could be effected.[769]The Local Courts (Amendment) Ordinance No. 38/ 1961, abolished the Court of Appeal and replaced it with the High Court. This Court was to sit with assessors versed in customary law but their votes weren't binding. With the attainment of Tanganyika's independence and the Unification with Zanzibar in 1964, this system has been maintained.

In Tanzania, the Court assessors in the criminal system are provided for under Section 256 of their Criminal Procedure Act[770]; which provides that it is mandatory for Trial in the High Court to be conducted with the aid of assessors, the number of whom shall be two or more as the Court thinks fit. A Tanzanian Magistrate Court judge in an Article he wrote on the role of Court assessors in the Courts of Tanzania[771], noted that their major role is a threefold role: to assist the judge in the interpretation of the facts of the case before the Court in light of the customs, beliefs and ways of life of the inhabitants; they are a representative of the public and their presence in the Courts help to identify the public with the judicial process; and lastly, they Act as consultants of customary law.[772]

The Magistrate[773] further opines that the most important role of the Court assessors is the representation of the public. This is because the Tanzanian laws provide for the need of the public to participate in the judicial process and thus, the inclusivity of assessors gives a proper representation of the same with regard to the norms and values of that particular group of people, especially with regard

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and Zanzibar: A comparison of two judicial systems in one country: Cambridge University Press, April 1989 page 395-4122.

767 Ibid, page 397.

768 This was following the defeat of German in WW1 and the reassignment of its protectorates to other super powers as stipulated under Article 119 of the Treaty of Versailles of 1919.

769 Ibid.

770 Cap. 20 of 2002.

771 Published in 1967 in the East African Law Journal at page 343, volume 3. 772 Ibid.

773 Supra note 104

to their knowledge concerning customary law.

The Tanzanian Court of Appeal also pronounced itself on this matter in its decision in the case of **Mbarak & another V Kahwili**[774] where one of the issues on appeal was whether it was necessary to record the opinion of

assessors even when they agree with the chairman of the Tribunal. The Court noted that it was mandatory for the opinion of the assessor to be on record and it was a serious irregularity in the Trial where the assessors weren't given their opinion. In determining whether such an error could be cured, the Court noted that the omissions went to the root of the case as the assessors weren't present during the Trial in the land Tribunal. Thus, it was concluded that the Trial was vitiated by irregularities and nullified the tribunals proceedings.

This judgement, which was passed in 2016, is a clear position of the standing of assessors in Tanzania and their role regarding the administration of Justice.

The same Court of Appeal in a more recent decision in 2017 in the case of **Kato Simon and Vicent Clemence V The Republic**[775] was faced with a determination of whether the failure of the judge in the Trial Court, to sum up the evidence to the assessors was a nullity of the decision. Justice Bongole referred to Section 298 of the Tanzanian Criminal Procedure Act Cap.20 to note that the judge has to sum up the evidence of both sides in the case to the assessors who are thereafter required to give their opinion orally. The Court referred to the East African Court of Appeal in the decision of Washington s/o Odindo V Republic[776] noted that:

> *"the opinion of assessors can be of great value and assistance to a Trial judge but only if they fully understand the facts of the case before them in relation to the relevant law. If the law isn't explained and attention not drawn to the salient facts of the case, the value of the assessor's opinion is correspondingly reduced."*

The Court concluded by finding the sentence and judgement of the Trial Court a nullity because the Court failed to sum up the evidence of vital points of law to

774 Civil Appeal No. 154, 2015 [2016]
775 Criminal Appeal No. 180/2017.
776 [1954] 21 EACA 392

the assessors and failed to explain to them their duty which was a gross anomaly on the part of the Court.

The essence of this judgement is to reemphasize the treasured role of Court assessors in the administration of Justice in the Tanzanian Courts and the relevance of the judges in ensuring that all persons have a fair hearing and chance to achieve Justice.

Additionally, the Institute for Security Studies in its Policy brief of 2009[777], notes that customary law in Tanzania was restricted to civil matters, with the

lower Courts including the non-expert assessors who attempted to ensure that custom is respected. The Policy brief further discloses that Tanzania has three major systems: the formal criminal Justice system, the customary law and Islamic law. Customary law has a working of the lower level primary Courts in which they can support and even overrule the decision of the Magistrate and from which prosecutors and advocates are forbidden as the concerned individuals conduct their cases.[778]

The brief further notes that the assessors aren't trained in English law and that their adjudication is largely customary in nature. The brief additionally notes that even in the High Court of Tanzania, the opinions of the assessors aren't really binding on the presiding judge.[779]

Thus in conclusion, the system of Court assessors as outlined in the discussion above in Tanzania, is operational and a number of cases have been determined with the aid and assistance of the assessors in the interpretation of customary issues in particular, and the Courts have stated that the judges ought to cooperate with the assessors to ensure that their involvement in the judicial system is recognized.

777 A Place For Tradition In An Effective Criminal Justice System, Institute for Social Security Studies: Customary Justice in Sierra Leone, Tanzania and Zambia: Policy Brief Nr 17, October, 2009.
778 Ibid, page 2.
779 Supra note 115.

Kenya.

Kenya was taken over by the Crown in 1985 from the Imperial British East African Company.[780] The first Court in Kenya was set up by the East African Order in Council of 1897 which expected the judicial officer to the have the power of a sessions judge and the full Court was referred to as the High Court.[781]The administrator of the Court thus had the discretion to order for a Trial by jury under Section 269 of the Code but this power was never exercised.[782] The 1902 Order in Council under the Criminal Procedure Ordinance of 1906 stated the Europeans and the Americans committed to a Trial by jury of the westerners. This power was however lost in 1907 with the enactment of Court's Ordinance Np. 13/ 1907.

The Court Ordinance provided that except as otherwise provided in any law, a person committed for Trial to the High Court has to first be tried by a Judge siting with not less than 3assessors.

Section 87 of the Civil Procedure Act of Kenya requires that a question arises

as to the custom or law of any tribe in any Court, the Court may try the question with the aid of one or more competent assessors. Additionally, Section 65 of the same Act provides that the Chief Khadi or two other khadi's as assessors shall sit with the judge on matters of appeal from the khadi's Courts to bring out issues of Islamic law which the judge may not be conversant with.

In the decision of **Said Kupata Mwakombe V The Republic**[783]Justice Omolo Githinghi on Appeal noted that the assessors who ought to have been present during the accused Trial was one from his community and knew its temperament. The Court referred to Section 269 of the Criminal Procedure Code required the opinions of the assessors to be recorded which wasn't at the Trial proceedings of the case. The appeal was allowed and the conviction was reduced to manslaughter.

780 J.H Jeary, Trial by Jury andTrial with the aid of Assessors in the Superior Courts of British African Territories: School of Oriental and African Studies, Journal of African Law, Volume 5 No. 1/1961, page 36-47; page 40.
781 Ibid.
782 Supra note 118.
783 [2007] eKLR, July 20th, 2007.

The High Court at Maindi in the decision of **Republic V Mohammed Iddi Omar**[784] noted that assessors aren't experts in any way in a criminal Trial and are common people. The judge took cognizance of the fact that in pre-independence times, the Court assessors were seen as expert witnesses and indeed played the role of experts. The rationale for this was given in the Indian decision by Justice Bhashyman **Ayyangar in the case of the King Emperor V Tirumal Reddi**[785]where he stated:

"… assessors are analogous to expert witnesses and in principle their opinion is substantially on the same footing as that of an expert witness. This provision was however made by the legislation of the Europeans administering Justice in a foreign land and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them and deficient in judging of their demeanor in the witness box. Thus, having an opinion of two or more respectable natives of the land as assessors possessing such knowledge would assist the judges in reaching at a conclusion."

The Court in the Mohhamed Iddi case, noted further that the concept has been developed and the assessors are no longer referred to as experts of customary law because such law has no application in criminal Trials. Thus, the underlying role of assessors in Kenya's current judicial system are that they are representatives of the broader community charged with injecting an element of

lay values and common sense into the criminal Justice system process. Justice Ouko further noted that this role is however debatable because it has waned over the years because their opinions aren't binding on the judge and because their participation has caused delay and it has become financially costly to sustain them.

The judge concluded by stating that many countries that inherited this system inclusive of Kenya, have either removed it from their statutes or are in the process of doing so. This is because of the realization that the social-economic conditions that existed in pre-independence time have ceased to exist. However, in Kenya, the stage of waning away the relevance of assessors hasn't yet reached and thus, they ought to be present in every criminal Trial before the High Court.

784 Criminal case No. 12/2006.

785 (1901) 1 LR 24

The Court cited the decision of the East African Court in the case of **R V Gusambizi Wesonga**[786], where the Court noted that in the exercise of any function of assessors, the Court is always to apply the test of what is fair to an accused person keeping in mind the principles of natural Justice and to ensure that there is no failure of Justice. Thus, from the onset, it was the intention of the legislators that the assessors would come from the same place as the accused person.[787]

Justice Ouko emphasized that the Criminal Procedure Code of Kenya weakens the institution of assessors by making them mere spectators by providing in compulsory words that the Trials in the High Court shall be with the aid of assessors and at the same time, and in a similar mandatory language, provide that the opinions of the assessors shall not be binding on the judge. Thus, he notes that such provisions make the institution of Court assessors a 'sham'. Additionally, it has previously been noted the indusTrial unrest caused by assessors demanding their pay especially through go-slow strikes and lastly, the assessors have a difficulty in comprehending the summing up of the evidence due to their literacy. Justice Thacker in the decision of **R V Ogende s/ Omungi**[788]rather harshly discredited the institution of Court assessors by noting that:

> *"Each of the assessors returns an opinion of not guilty and I suspect that their opinions are based not upon the evidence they have heard but upon their tribal prejudice. I deplore their opinions which are either as a result of stupidity or pervasiveness."*

Justice Ouko in his concluding remarks, noted that the believed that the institution of assessors served its purpose when it was introduced in Kenya in the post-colonial era and have no role today in the criminal Justice system due to the strict statutory provisions regarding the standard of proof and criminal liability.

786 (1948) 15 EACA 65.

787 However, the accused has the right to object to the presence of an assessor who they believe to be biased, and thus, they ought to be disqualified from the proceedings, as was seen in the decision **of Ndirangu V R** (1959) EA 875.

788 (1941) KLR 25.

Therefore, it can be argued that the position of Kenya regarding Court assessors is fading away because of the fundamental change in the social and economic position as compared to what was during the British colonial period. Thus, their Justice system is slowly accepting the fact that the assessors have to be done away with.

Botswana.

Botswana didn't receive the English jury system even though it applied in south Africa.[789] They were however allowed to call the aid of assessors where customary law was involved.[790] However even with this, the role of assessors wasn't clearly spelt out. it wasn't clear whether they were part of the Court or advisors or merely present to assess the situation.[791]There was no cleat position that was taken regarding that issue.[792] In assessing, the assessors give their opinion on the probability of the story or the demeanor of the litigant and involves the weighing of the evidence. However, on the other hand, the duty to advise entails giving their view in the abstract of what the custom or law is in the circumstance postulated; thus, they only give the judge expert knowledge on specific point of custom and law.[793]

By 1935 therefore, the Court could still call to its assistance the native assessors but they weren't chosen by the Resident commissioners but rather, they were chosen from a narrowly defined group.[794]Section 2 of the said Amendment provided that the assessors were to be chosen from the chiefs, counsellors, or headmen or other natives qualified to aid the Court.
In the 1952 High Court Amendment proclamation of Botswana, tried to clarify

789 Bojosi Otlhogile, Assessors and the Administration of Justice in Botswana: Botswana Law Society, Botswana notes and records Volume 26 (1994) page 77-86.

790 Ibid page 77.

791 Ibid page 78.

792 Ibid.

793 Sir John Gray, Opinions of Assessors in Criminal Trials in East Africa as to native Customs, 1956 JAL 5; Allot, the Judicial Ascertainment of Customary Law in Africa', 20 MLR 244 at 249-251; J.H Jeary, The Trial By Jury and Trial with the aid of assessors in the Superior Courts of British African Territories, 1961, JAL 82.

794 This was in the Statutory Instrument of Special Court Proclamation (Amendment) making provision for native assessors, Amendment No. 22/ 1935. The discretion to sit with assessors according to the Amendment was placed on the judge and it wasn't the right of the litigant.

the role of assessors under its Section 8 which provided that it would be the duty of the assessors to give such assistance and advice as the judge may require but the decision shall be vested exclusively with the judge. Thus, the assessors weren't part of the Court and could only give advice either during, or after the Trial as the judge deemed fit.[795] The Privy council of Basothol and in the case of **Tumahole Bereng V R**[796] noted that either party; the crown or the accused is entitled to raise an objection to an assessor on the ground that he is interested in or connected with the subject matter if the proceedings or those concerned so that it is desirable for him to sit as an assessor.

After independence of Botswana, the provision of the Court assessors was retained under Section 7 of the High Court Act which provided:

"in any proceedings whether criminal or civil, the presiding judge may summon to the assistance of the Court, two or more persons to sit and Act as assessors in an advisory capacity. Section 7 (2) further provided that it would be the duty of the assessors to give the assistance and advise as the judge presiding may require, but the decision shall be vested exclusively with the judge."

The Courts in Botswana have pronounced themselves on this position in cases such as the decision of **Kweneng Land Board V Kabelo Matlho & another**[797]Justice Horwitz at the Trial Court requested the registrar to appoint assessors who were learned in tribal land law. The reason for this was because the judge required guidance on the questions raised regarding the land laws of the particular tribe. On appeal however, Justice Aguda noted that according to Section 7 of the High Court Act required that the persons appointed as assessors ought to be knowledgeable on the issue and be able to advice the judge on the same.

Thus, from these sources, its evident that the Botswana judicial system has a firmly established system of Court assessors and there has been no complaints filed against the system, thus, presumably, the system is effectively working for the country and its judicial system.

795 Supra note 127, page 79

796 [1949] AC 253; R V Tangafukana, (1932) 3 NY LR 46.

Conclusion.

It should be noted therefore that the system of Court assessors in the countries in point in this chapter have both success and failed stories. In Tanganyika for example, the research shows that since the onset and adoption of the assessors system since the pre-independence times, there has been no registered complaint of the system and case law has disclosed that judged indeed follow the laws and guidelines in place to ensure the proper functioning of the system. The same case scenario was discovered from the research from Botswana. The system is effectively working and has firmly been established in its judicial system.

However, the case is different in Kenya. This is because the judges have over and again questioned the relevance and financial implications of having an assessor's system in place. The judges have also honestly opined that the purpose for which the assessors were established in the pre-colonial times has since ceased to exist and therefore, there is no need to continue with a system that has proved not to be adoptive to the social and economic changes. Therefore, there have been suggestions that the system ought to be dropped. Thus, in comparison to the situation in the Ugandan Justice system, the situation in Kenya is more relatable because the judges who ought to implement the laws concerning Court assessors, are the same judges against the whole system. Therefore, there is need to check the system in order to get a more appropriate solution.

CHAPTER SEVEN

JURY SYSTEM (A PROPER MANIFESTATION) OF OBUNTUBULAMU

A photo of British Colonialists hanging Africans in 1890's Bulawayo, Zimbabwe. The Photo was so prized by a British officer in Rhodesia Robert Baden Powell, founder of the Boy Scouts and Girls Guides' that he kept it in a scrapbook entitling it "The Christmas Tree"

Introduction.

This chapter will generally include the background of an evaluation of the role of the Court assessors in the Ugandan Justice system and suggest the need for a review on whether to adopt the jury system in order to ensure the participation of the people in the system, objectives of the study, problem statement, scope of the study, significance and justification of the study and the general and specific objectives of the study.

Article 126(1) of the Constitution of the Republic of Uganda, 1995 as amended, provides that the judicial power is derived from the people and shall be exercised by the Courts established in the name of the people and in conformity with the law, values, norms and aspirations of the people. Article 257 of the same Constitution defines judicial power as the power to dispense Justice among persons ad between persons and the State under the laws of Uganda.

Article 127 of the Constitution[798] provides that Parliament shall make laws providing for the participation of the people in the administration of Justice by the Courts. The Parliament of Uganda has indeed passed an Act of Parliament known as the Trial on Indictments Act Cap. 23[799] which provides for the Court

appointment of two assessors who are members of the public, to hear the evidence presented and the submissions of counsel in a criminal case, and write an opinion thereafter, which shall guide the judge in passing their judgement.[800]

The essence of these Constitutional provisions and Acts of Parliament is to ensure the participation of the public in the administration of Justice. However, current statistics show that over 60% of the judges of the High Court rarely or never apply the opinions written by Court assessors.[801] Most of them argue that a lay man's understanding can't be applied into a legal settlement of disputes between parties.[802]This attitude by the judges thus, frustrates the whole essence of Article 126 and 127 of the Constitution to ensure the inclusivity of the people in the administration of Justice.

Thus, this paper seeks to suggest a solution to this problem. In order to ensure the public participation in the judicial process, adopting the use of a jury system that constitutes of lay persons from the society, will satisfy the provisions of the need to ensure public participation in the administration of Justice in Uganda.

History and Background.

The history of Court assessors predates to the colonial times[803] where Uganda was a protectorate and, most of the judges who sat on the bench were white. These judges had no idea of the customs that the people of Uganda lived by and were

798 1995 Constitution of the Republic of Uganda, as amended.

799 The provision of appointment of Court assessors was inspired from Article 126 of the Constitution of the Republic of Uganda, to ensure the participation of the public in the administration of Justice. The application of this Act is for the High Court of Uganda.

800 Section 3 of the Act and the Rules of Curt Assessors in the Schedule to the Act.

801 Validation workshop on Reform and Procedural laws organized by the Uganda Law Reform Commission (ULRC) at the Kabira Country Club on August 31st 2013.

802 Supra note 4.

803 This is the period 1894-1962 under the Protection of the Queen of England; Griffiths, Tudor. "*Bishop Alfred Tucker and the Establishment of a British Protectorate in Uganda 1890-94*." Journal of Religion in Africa, vol. 31, no. 1, 2001, pp. 92–114. JSTOR, www.jstor.org/stable/1581815.

subject to, therefore the need to appoint persons of the land that would assist the Court to interpret the customs and assist the judge in reaching a decision based on this.[804]

This was clear in the decision of **Rex V Maceio**[805] where Justice Hamilton equated an African marriage to wife purchase because it didn't correspond to the monogamous Unions understood in the Western civilization. It was further

noted that the repugnancy clauses applicable to the Africans at that time were those that applied the notions and Justice of morality as prescribed in the English context. Further still, in the decision of **Gwao Bin Kilimo V Kisunda Bin Ifuti**[806]Justice Wilson stated that he had no doubt that the only standard of Justice and morality which a British Court in East Africa can apply is its own British standard.

Thus, with this clear misinterpretation of the Justice system by the whites during the colonial times, there was need to ensure the participation of the Africans to ensure that there is a balance of the applications of the African customs in the decisions passed by the judges.

In 1971 after independence, the Parliament of Uganda passed the Trial on Indictments Act Cap. 23[807], which provided for the Rules of appointment of Court assessors under the High Court criminal jurisdiction. Section 3 of the Act provides that all Trials in the High Court shall be conducted in the presence of two or more assessors as the Court thinks fit. The Act further provided for the Rules governing the Court Assessors that give a more descriptive analysis of the application of the Court assessors.

The Rules governing Court Assessors further provided that the assessors were to be selected by the Chief Magistrate from the locality of an area[808]and the procedure for selecting an assessor was provided for in the schedule of the

804 Rationale for the appointment of Court assessors in accordance with the colonial laws in Uganda at the time. Supra note 3.

805 7 EALR 14 (1917)

806 (1938) 1 Tanganyika Law Reports 403

807 The long title of the Act describes it as an Act to consolidate the law relating to the Trial of criminal cases on Indictment before the High Court and incidental cases thereto.

808 They must have a good reputation in the area. This is provided under Section 2 of the Act Ibid.

Act.[809] After selection of the assessors, the list was posted in the Court house for inspection by the public and any objection was heard and presented before the Chief Magistrate.[810] For one to qualify to be an assessor, they must have had an understanding of the English language, language of the Court and proficiency sufficient to follow the proceedings and must have been between the ages of 21-60. The assessors were then sworn in before the commencement of the Trial but
before the preliminary hearing.[811]

The advocates could question the legibility of the appointment of the assessors on grounds of either presumed or Actual partiality, character or inability to

understand tQhe language of the Court.[812]Court would then examine the questioned assessor's competence before commencement of the Trial.[813]
The history of the jury system predates to 1066 AD, during the Anglo-Saxons and the Normans.[814] A distinctive characteristic of the system is that it consists of a body of men, quite separate from the law of judges, summoned from the community at large, to find the truth of disputed fact sin order that the law may be properly applied by the Court.[815]The Law review notes that the origin of the jury can't be found or traced using the same distinct features as those it holds currently but some characteristics of the same fit perfectly into what existed 1000 AD and if systematically developed and improved to fit the growing exigencies of current society, would form part of the current system.[816] These features were brought into England by the earliest invaders upon which the Norman influence is largely credited.

Other states have also developed this system over time and in Athens during the time of the Pericles, there was an establishment of the Dikasteries or Courts

809 This provides for the Rules that govern the Assessors. Rule 1 provides that the Chief Magistrate shall provide a list of suitable assessors in the area before the 1st day of March every year. Rule 2 provides for exceptions of persons who can't qualify to be assessors including priests or persons in Active legal practice.

810 Section 3 Ibid.

811 Section 67 Ibid.

812 Section 68 Ibid.

813 Ndirangu s/o Nyanu vs R [1959] EA 875.

814 University of Pennsylvania Law review, Vol. 70: University of Pennsylvania Law School; Chestnut streets, November 1921 page 4

815 Ibid.

816 Ibid. page 4

of Justice that consisted of 10 panels, 500 of which were selected from 6000 citizens drawn annually.[817] The Dikasteries were ultimately the judges of both law and fact. The Romans had a judicial council called Comitia (Assembly) which had the personal power to delegate the criminal jurisdiction to minor bodies made up of members of the Comitia. The Comitia set up a formal system of pleading to determine the issues for Trial and the magistrate defined the in writing, the disputed points, referring them to Trial to a lay judge or judges sworn to the performance of their duties and corresponding in some ways to the present jury system.

In Sweden, similar tribunal existed comprised of 12 common men sworn to investigate and ascertain the truth in any case before whom the witnesses appeared. In Denmark, the Tingmead consisted of a quorum of 7-24 persons who passed upon the public affairs of the district. These were succeeded by the

Navingers who were next in line and were more like the jurors as they were 12 in number and chosen from the inhabitants of the district by the prosecutor or the magistrate and were to decide the preliminary proofs.

This all shows a system of continuity in the adoption by various states of the system of the jury and the participation of the common man in the determination of the affairs of a community. Following the backdrop of the adoption of Court assessors into the criminal Trial system in Uganda, there is need to follow the trend in most common law countries that have successfully effected the system and have ensured the inclusivity of the people into the affairs in the Justice system.

The Ugandan Constitution under Article 126 (1) and 127 provides that judicial power is derived from the people and shall be carried out in the name of the people, and it further provides that Parliament shall make laws for the involvement of the people in the administration of Justice through the Courts. Parliament has indeed taken steps to make such a law in Uganda, and that is the Trial on Indictments Act Cap. 23, that provides for the use of Court assessors in

817 They were presided over by a Magistrate who stated the questions at issue and the results of his own primary examination ad was followed by the statement of the parties and their witnesses.

the High Court as lay men to aid in the administration of Justice as envisaged under Article 127. These provisions' applicability is however in theory and not in practice, which derails the object and purpose of the Constitutional and statutory provisions.

The framers of the 1995 Constitution of Uganda envisaged the full participation of the people in the administration of Justice by providing that the judicial power shall be derived from the people. 60 % of the decisions of High Court judges don't put into consideration the opinions written by the Court assessors since they are not binding and some of the judges confess not to read these opinions[818].

These were some of the views of the judges at the Validation workshop on Reform and Procedural laws; Justice Lawrence Gidudu[819] noted that the evidence adduced during such cases is technical and digital and therefore most times the assessors usually have no opinion to give thus are useless. He was supported by Stephen Musota[820] who additionally stated that the assessors add no value to criminal Trials. This is because some don't understand the

language of the Court and what's going on therefore their opinion also doesn't matter. Justice David Wangutusi[821] admitted that he has near considered the opinions of the assessors in writing his judgements therefore they are of no use. Additionally, Jane Amooti[822] states that the relevance of assessors is not objective any ore due to their lack of legal knowledge. This is because lawyers can evaluate evidence better than the assessors themselves.

As much as their opinions aren't binding as they are from the perspective of a lay person, this doesn't preclude their application by the judges in the administration of Justice in order to get an objective persons' view on the same.

Additionally, the formulation by parliament of a law providing for such inclusivity of the people in the administration of Justice and limiting it to the high Court further defeats the object and purpose of the framers of the Constitution in

818 Supra note 4.
819 Judge at the Anti-corruption Court 820
Head of the High Court Civil Division.
821 Head of the Commercial Court.
822 Legal officer working on the decongestion program at the Uganda Law Society

formulating Article 127. The Ugandan Court system in accordance with Article 129 of the Constitution provides for several Courts under the judicial system inclusive of the Supreme Court of Uganda[823], the Court of Appeal/Constitutional Court[824], the High Court, Magistrate Court[825]and other subordinate Courts that Parliament may by law establish[826]. All this lay out of the Courts of judicature have no provision for the inclusivity and the participation of the people in the administration of the Justice, as provided for by Parliament, which restricted the law envisaged under Article 127 to the high Court.

The omission by Parliament to create a general law for the provision of inclusion of the people in the administration of Justice rather than restrict it to the High Court, defeats the whole purpose of Article 127 of the Constitution and so does the non-binding nature of the opinions of the Court assessors. Therefore, there is a need to bridge this gap and rectify the situation by the proposition of adopting a jury system that will apply for both civil and criminal jurisdiction of the Courts of judicature laid down under Article 129, thus, upholding the intention of the framers of the Constitution envisaged under Article 126 (1) and 127 of the Constitution.

The purpose of this book is to examine the fading role of Court assessors in the Ugandan Justice system and the shortfall it creates in ensuring the participation

of the people in the administration of Justice. This will further identify the history and purpose of the adoption of Court assessors and whether this purpose has been fulfilled since its inception. It will additionally seek to examine the history and application of the jury system in common wealth countries and explore the possibility of the Ugandan Justice system adopting the jury system in order to fulfill the Constitutional provision of ensuring the participating of the people in the administration of Justice.

The book will therefore to produce empirical knowledge to fill the missing gaps that have been identified above and identify possible recommendations for

823 Established by Article 130 of the Constitution.
824 Established by Article 134 and 137 of the Constitution.
825 Established by the Magistrates Courts Act Cap. 16
826 These include Qhadis Courts for marriage, divorce, inheritance of property and guardianship, Court martial to mention but a few.

reform to help the government and other stakeholders who are or are likely to be so affected to bridge the gap.

The Ugandan Constitution and other international instruments that Uganda has ratified provide for the full participation of the people of a state in the administration of Justice. Despite the codification of the law on the same, the implementation of the same has been lacking since the enactment of the Constitution and the ratification of the various international instruments. Even though the appointment of Court assessors has been done at the High Court of Uganda, their opinions and scope of application of their contribution is limited as most judges don't put into consideration their 'lay man opinions.' There is thus need, to adopt a measure, the jury system, that will bridge this gap and ensure the full participation of the people in the administration of Justice in accordance with the Coded laws.

This book is aimed at creating a pool of knowledge concerning the history and purpose of the Court assessors in the Ugandan legal system and the intention the framers of the Constitution had in including a provision ensuring the participation of the people in the administration of Justice. This book will further make recommendations of a more appropriate system to ensure the inclusivity of the people in the Justice system, through the adoption of the jury system as used by most common wealth countries.

7.1 Some notable Authors on the Role of Court Assessors.

R Knox Mewer, Juries and Assessors in criminal Trials in some common wealth countries: A preliminary Survey; Cambridge University Press, 1961.

Mawer notes that the development of the Jury system originated from the Courts of England, America and Western Europe.[829]He goes on to note that much as at the beginning of the century the jury system was widely revered, due to the numerous problems in working the system, a judge sitting with assessors is more generally preferred in the circumstances. The author notes that there is no provision for Trial by jury system in common law countries in East Africa such as Uganda, Kenya and Tanzania but is present in West African states such as Ghana.[830]

In considering the development of Court Assessors, the author notes that the use of Court assessors in England requires the aid of one or more assessors specially

827 Section 67; 69; 70; miscellaneous provision of the Trial on Indictments Act, Rules of Court Assessors.

828 Article 126 (1); 127 of the Constitution of the Republic of Uganda 1995 as amended.

829 Courts on Trial, Myths and Reality in American Justice, Jerome Frank; Princeton University Press, London; Trial by Jury in Modern Continental Criminal Law, Dr. Hermann Mannheim, 1937.

830 He however notes that the jury Trial in Ghana is limited to the crimes punishable by death or life imprisonment. The role and use of the jury is fading in countries such as Fiji and Singapore due to the costly nature of the proceedings and its inefficiency.

qualified to try and hear the matter in question. The appointment of such assessors is based on nautical and skill and experience in Admiralty Actions. He defines assessors using the literal meaning as those who sit by the Judge and aids him in making a determination of a particular case.[831] He further notes that the opinions of assessors are generally not binding however in some jurisdictions, the judges Actually put into consideration the opinions of these assessors and order for reTrials where there has been a divergent opinion of the assessors.[832]

The author further reiterates the fact that whereas the original purpose of the assessors was to ensure that they provide guidance to the judges in matters regarding the local custom and habits of an area, the have increasingly been referred to as approaching a status equal to that of jurors.[833]

Mawer's major focus in his book is on the development of the jury system and its reference over Court assessors in the judicial system and doesn't seem to

put into consideration the various advantages of both systems to weight them alongside each other to see which one is more preferred. Additionally, whereas he focuses on the preference of the use of Court assessors, he doesn't conduct a comparative study with other countries to contrast the successes and failures of the Court assessor's system. This paper and research will bring to light some of the legal challenges faced by both systems and weigh them against each other to arrive at a more preferred system in the subsequent chapters.

Bojosi Othogile, Assessors and Administration of Justice in Botswana; Botswana Law Society, 1994 volume 2.

Bojosi in considering the role of assessors in Botswana, focuses on a case study in the decision of the Botswana High Court in **Lweneng Land Board V Kabelo Lister Matlho and another** a decision where the judge failed to put into consideration the opinion of the assessor as regards the customary law among the Bakwena tribe was. Justice Aguda in his judgement noted that the duty of assessors was merely to advice the Trial judge and not to reach a decision upon

831 R Knox Mawer, Juries and Assessors in criminal Trials in some common wealth countries: A preliminary Survey; Cambridge University Press, 1961, Page 895

832 Ibid. Jurisdictions such as Malaya.

833 Ibid, page 896.

the arguments of counsel nor to usurp the powers of the judge.[834]

The author in a bid to address the controversial role of Court assessors in the administration of Justice, seeks to give a history of their evolution from the colonial times. He notes that the Courts of law established during the colonial times by the Dutch gave the judges the power to call upon the assistance of Court assessors in the administration of Justice where customary law was involved whether at Trial or appeal. This was the most preferred system then as compared to the jury system because the Africans weren't equipped with the requisite knowledge to assist in the adjudication of disputes under the jury and with regard to the bitter racial feelings among the two sets of people, there was a high probability that the jury bench would consist of a majority of the Dutch settlers.[835]

The emphasis that Othogile places in his writings is to establish the clear cut role of the assessor and the process of appointing the same which wasn't spelt out by the colonial laws that were left in Botswana, thus leading to a dilemma during the contemplation and selection of assessors at the time the case of Lweneng Land Board was being heard. Thus, my dissertation will seek to explore the clear-cut laws concerning the appointment, procedure and process

of Court assessors in the current international, regional and national scene in Uganda, and further provide for an analysis of the challenges being faced to date concerning the redundancy of the Courtassessors.

Opinions of Assessors in Criminal Trials in East Africa as to the native Custom; Sir John Gray, 1943-1952.

Sir John Gray writes this in his capacity as the Chief Justice of Zanzibar between 1943-1952. He took cognizance of the fact that the Trial by assessors was mostly used in the East African countries of Uganda, Kenya, Zanzibar and Tanganyika then. His writings focus on creating a similarity between the Trial by assessor's system and the jury system in the sense that both require the judges

834 Bojosi Othogile, Assessors and Administration of Justice in Botswana; Botswana Law Society, 1994 volume 2, page 77.
835 Ibid.

to sum up the evidence at the conclusion of the Trial in order to guide them in the determination of the same. The only difference he points out is the requirement for a unanimous decision of the jury and not of the assessors at the conclusion of the case.

Whereas Johns major focus is on the role, purpose and process of the Court assessors as compared to the jury system, he doesn't point out different comparative studies with other countries that have used the system and have either failed or succeeded and he additionally doesn't point out the weaknesses in the system. This paper will however seek to establish the different systems and create a comparative analysis with the success stories of other states in the effective use of Court assessors and the failure stories will be used to establish whether the criminal Justice system in Uganda need to adopt the jury system in order to bridge the gap of people participation in the administration of Justice.

The Judicial Staff Handbook; 1st edition November 2006, Ugandan Courts of Judicature.

Regarding assessors, the handbook notes that the Trial by assessors if analogous to expert witnesses and the opinions of both are on the same footing as those of expert witnesses.[836] The editor's note that the basis of this was in European law where they were having difficulty in administering Justice in a foreign land because of their deficiency in the understanding of the customs and habits of the parties and witnesses appearing before them and were deficient in judging the demeanor in the witness box.[837] Thus, it was important for them to have the opinion of two or more natives of the land as assessors possessing such knowledge and judgement, made it relevant to have

the institution of the assessors.[838]

The handbook focuses on establishing the history of the adoption of Court assessors in the Ugandan Trial system in order to aid the judges but it doesn't discuss whether this purpose has Actually been achieved in the current situation

836 Page 22 supra note 62.
837 Ibid.

in Uganda and whether there is still need to continue a policy that was set up by the colonialists that may have ceased to be of relevance to date due to the changed circumstances. The root of this paper is to analyze the relevance of Court assessors to establish if there is still need to continue with the same practice or to totally do away with it and additionally, to determine whether in place of the same system, a jury system could be adopted.

> *Historical globalization and colonial legal culture: African assessors, customary law and criminal Justice in British Africa, 2009.*[839]

This book basically revisits the history and intention towards the adoption of native African assessors and this the author notes, is because of the desire by Britain to adopt the same legal system it had back in the United Kingdom, to its colonies in Africa.[840] The application of customary international law was limited to the repugnancy test in order to determine what culture had the legal force and which one didn't.[841] however, due to the difficulty involved in the interpretation of the custom in place,[842] the colonial judges sought to seek the aid of the native assessors in order to help in the interpretation of the same as they were presumed to be knowledgeable about local customs and traditions.[843]The assessors were therefore seen as exponents, interpreters and sometimes inventors of local custom who were shaping the processes and outcomes of colonial law and Justice.[844]

The book lists down the various countries that adopted the system of Trial by assessors as imposed from the British colonizers and the author notes that this adoption was being made at a time when the Trial by assessors was greatly fading in the British system, but the Queen sought to expand the horizon of the

839 Journal of Global History: McMaster University, Ontario, 2009.
840 Page 431, Ibid.
841 Page 432, Ibid; Sally Falk Moore, Treating the law as knowledge; Telling Colonial Officers What To Say To Africans About Running Their Own Native Courts, Law and Society Review, 26, 1992, page 18.
842 1932 conference of East African Governors, senior colonial administrators; Kenya National

Archives, AP/1/1659, 'Proceedings of the conference of the East African Governors, Nairobi, 1932.'

843 Supra note 48.

844 Ibid.

judicial system.[845]

Much as this book gives the legal back drop to the adoption of the system of Trial by assessors from the British judicial system, the current position since 2009, more than 10 years later, isn't put into consideration. This paper will thus seek to streamline the current status of the native assessors in the judicial system and whether there is still need to continue with the operation of the same, or whether a new system ought to be adopted.

J.H Jearey, Trial by Jury with the Aid of Assessors in the Superior Courts of British African Territories, Journal of African Law: School of Oriental and African Studies, Volume 5, 1961.

Professor Jeary in this book focuses on various commonwealth countries such as Zanzibar, Kenya, Tanzania. In Zanzibar, the author notes that the British Court prior to the attainment of independence had the Trial by jury to establish the law of the Queen, however the 1949 Criminal Procedure Decree that was enacted after, adopted the use of Court assessors to assist judges in the deliberations. The use of the jury system and adoption of Court assessors by the state of Zanzibar was a clear imitation of the British procedures and the laws from India then, which were not viable for the condition in Zanzibar. Initially, the State of Kenya had in force the jury system during the colonial days that started in 1895 but when it became a British colony, it had to adopt the system of native assessors.

Much as this book focuses on the clear adoption of the system from the British laws into an African system that the same wouldn't be necessary, it doesn't give the loopholes or the challenges of adopting such a system within the African context which this paper will do. The paper will focus on establishing, through the history of the adoption of the Court assessors, that its design wasn't made for the African judge and Court but rather, the foreigner judge in an African setting. Thus, once there was a change in circumstances, the system and its relevance has slowly been fading from the 60's, to date.

This paper will further review the relevance of the same system and whether

845 Page 432, 433.

there is need to change the trend through the adoption of the jury system in the Ugandan Justice system especially.

Authors on the jury system and their legal perspective.

Jury decision making: Implications for and from the legal perspective: Brian H Bornstein; University of Nebraska-Lincoln & Colorado Springs, 2011.

Brian notes that the jury is a unique institution where ordinary citizens who lack legal training to hear evidence, make sense of conflicting facts, can apply legal rules to reach a verdict about which all jurors can agree. He notes that this system is used in countries such as Australia, Canada, England, Wales, Ireland, New Zealand, Korea, Scotland, Japan, Spain, Russia and the Unites States. He however notes that there have been arguments that lay people are ill equipped to handle complex evidence because they are swayed by sympathy and award extravagant sums of money for frivolous claims.[846]
Despite these challenges with the jury system, the author notes that the empirical data in place already shows that juries do such a good job of weighing evidence and applying the law which shouldn't be measured against the occasionally and universal principle of erring among human beings.

The author throughout the book focuses on mentioning the process of juries arriving at decisions, their selection process and the effect of their decisions to the legal arena. He however doesn't mention in depth, the pros or cons of using such a system or make recommendations on what could be improved to make the system more effective. This paper will focus on pointing these out and then seeking, through the comparative analysis, establishing whether such a system can be adopted by Uganda in place of the Court assessors.

846 Greene, Phycological Issues in civil Trials, 2009; Bornstein & Robicheaux, Crisis? What crisis? Perception and reality in civil Justice, 2008; Greene & Bornstein, A summary of empirical research on jury decision making in civil cases, 2003.

Julius H. Miner, The Jury Problem: Journal of Criminal Law & Criminology, 1946, Volume 37.

Julius notes that this book was inspired by the increasing criticism on the juries especially regarding acquittal of notorious criminals where the proof clearly indicated their guilt. However, before he delves into the discussion, he notes that the historical perspective of the jury predates to the establishment of the democratic government, to ensure the involvement of the people in the Justice system, which is now recognized as a Constitutional right.[847]

Julius in the discussion in his book however makes some recommendations on how the jury system can be improved in order to be more effective in order to ensure that it's not completely abolished and these include: an understanding

of the underlying causes and reasons for its failure to function adequately. One of them is the selection process by the lawyers wherein they consider the political, social, economic and religious background with which to manipulate them in order to win the case.

Much as Julius mentions this problem of the jury and even gives recommendations to the improvement of the system, he doesn't carry out a comparative case study from the different countries that Actually use the jury system to establish whether they are successful and whether the USA could borrow some pointers as to how to make their system better. This paper will have a whole chapter that will give a comparative analysis of the various countries that have successfully applied the jury system in their criminal and civil systems and later, give recommendations on whether Uganda should or should not adopt this system.

The Jury System: John Walker & Desmond Lane, 1994.

Walker and Lanes book focuses on noting down the changes that have occurred to the jury system since its inception in England in the 13th century to replace the old system of Trial by physical ordeal. The authors open a debate on whether there is need to further change the jury system or outrightly abolish it. Thus, the book will seek to give arguments for and against the abolition of the jury

847 Page 1.

system.[848]

In laying down the failures of the system though the procedure, the authors not that Trial by jury can be in both civil and criminal cases, and whereas it has achieved considerable success in the criminal cases, the civil Trial still have challenges. This is because in civil cases, the jury may only be used in the Supreme or County Court, it may not be held for certain civil cases and such a case can only be heard if one of the parties have requested and paid the requisite fees.[849]

In consideration of the role played by the jury during a Trial inclusive of fact finding, deliberations and verdict and unanimity/majority verdicts, the authors note that some of these cases are very complex with regard to the fact finding and evidence presented before Court for a lay person to easily understand and follow the submissions by the lawyers. Therefore, this makes it very difficult to reach unanimity from the decisions made by the juries in various cases. However, this can be remedied by a prior introduction of the case to the jury in

simple and not legalistic terms especially by the lawyers.

This book gives very great insight regarding the procedure, process and selection of the jury system and the limitations and recommendations, it doesn't give a comparative analysis of various countries and their application of the jury system and how successful or unsuccessful the application has been. This makes it difficult to compare the achievements of the system since the 13th century. This paper will give this comparative analysis of both the successful and failed application of the system in different states and the viability of its adoption in commonwealth states such as Uganda.

Stanley E Sacks, Preservation of the Civil Jury System, 1965 volume 5.[850]
Stanley notes that he wrote this book in order to make a proper argument for the preservation of the jury system that is under attack from the society. His argument is that the jury system forms the very backbone of a democratic system

848 Page 1.
849 Ibid.
850 Washington and Lee Law Review, Volume 22, Issue 1 Article 5.

and the abolishment of the same would be against the very object for which it was established and that is to prevent tyranny and in Justice in a state.[851]He further states that much as the system isn't infallible, it only needs to have some revisions and strengthening but not total abolition of the same.

He quotes the words of Joseph H. Choate who was the then president of the American Bar Association, given at the annual banquet[852] saying:

"The truth is however that the jury system is so fixed as an essential part of our political institution that it has proved itself to be such an invaluable security for the enjoyment of liberty, life and property for so many centuries. Its so justly appreciated as the best and perhaps only means of admitting the people to a share, and maintaining their wholesome interest in the administration of Justice, such an indispensable factor in educating them their personal and civil rights. It has become so embodied in the Constitutions which declare that it shall remain forever inviolate, requiring a Convention or an Amendment to alter that position. That there can however be no substantial ground or fear that any of us will live to see the people consent to give it up."

Stanley further adds that the persons propagating for the demise of the jury system are not giving any alternative to ensure a better remedy is given and this could create a worse illness than the one preset. He states that their major arguments against the system are that it alleged to be the cause of congestion

and delay in the Courts and its incompetent to perform the assigned tasks.[853]

Stanley's book deliberates on the exact issue that my paper will seek to consider such as the preservation of the jury system in order to establish whether it can be adopted by the Ugandan Justice system. My paper will therefore add to the already existing pool of knowledge regarding the success and failure stories of the jury system and recommendations of how it can be made stronger in order to preserve the participation of the people in the administration of Justice, which is a Constitutionally guaranteed right.

851 Page 76.
852 Address by Joseph Choate, American Bar Association Annual Banquet, 1898.
853 Page 78.

Conclusion.

In concluding this chapter, it is very necessary for the reader and the researcher to interact with the writings and various literature on the particular research topic, from different jurisdictions preferably, in order to get a more holistic approach towards getting a central solution to the fading role of Court assessors in the Ugandan Justice system. Thus, the literature presented above considers both that on native Court assessors and the jury system.

CHAPTER EIGHT
FINAL THOUGHTS

As stated earlier, Article 127 of the Constitution of the Republic of Uganda provides that there ought to be participation of the public in the administration of Justice in our Court system. Article 126 of the Constitution further goes on to provide that the Courts in Uganda shall be established in accordance with the norms, values and customs of the people in the country. The Trial of Indictments Act provides for the assessor's rules which specifically give guidance as to the appointment and procedure to be followed by the high Court during a Trial byassessors.

From my findings, the Ugandan Justice system doesn't give any weight to the provisions of the Constitution or the Trial on Indictments Act which specifically provide for the Court assessors to be utilized especially for questions concerning the norms and customs of person's communities. This is because the judges on the bench on 2011 in a validation workshop evaluating the role of Court assessors,[854] admitted to not considering the opinions of the assessors at all because they consider them as laymen without a proper understanding of the law and evidence presented by the lawyers in a particular case.

The judges further stated that it would be better to save tax payers money by completely and totally doing away with the whole system. The same sentiments

854 Supra note 35.

were shared by the judges on the Kenyan bench in the High Court who further not that most of the assessors never put into consideration the real submissions of the lawyers but are mostly clouded by tribal lines.[855]Thus, both systems both agree on the fact that the purpose and relevance for which assessors were established has since changed, thus, need for the judicial system to adopt laws and policies that are adaptable to the current economic and social statuses of the independent states, inclusive of Uganda and Kenya.

Recommendations.

My major recommendation from my research and the sole purpose for this study is to evaluate whether the Ugandan judicial system can consider adopting the jury system as an alternative to the Court assessors. This is in order to balance both contingencies, either totally drop the application of the

system of Court assessors or continue running on a failed system, or adopt the jury system and still achieve the purpose that the drafters of the Constitution has to ensure the full participation of the public in the judicial system.

In considering this recommendation, I will thematize this Section by looking at the procedure/ workability of the jury system which is inclusive of the mode of selection, the Trial and the jury deliberations together with the weight of their judgements. This procedure is adopted from the practice in the Courts of California as stated in Section 190 – 237 of their California Code of Civil Procedure.

I will then make a conclusive inference showing that this is the most viable solution to the full application of Article 127 of the Constitution of the Republic of Uganda.

Jury Selection.

Prior to the start of the jury Trial, the judge will require the prospective jurors to assemble before the Court room so that the selection process

855 Supra note 122.

can commence. However, prior to the start of the selection process, the jurors are required to swear that they will truthfully answer the questions asked to them about their qualifications to serve as jurors in the case. The same is read as follows:

> ***"Do you, and each of you understand and agree that you will accurately and truthfully answer, under penalty of perjury, all questions propounded to you concerning your qualifications and competency to serve as a Trial juror in the matter pending before this Court and that failure to do the same may subject you to criminal prosecution?"***

Then, the Court clerk will call the jurors to the assembly room each independently for questioning by the judge and the attorneys representing the case. The judge, the whole time speaking to the jurors and telling them the names of the parties to the case and stating what the case is about. The questions by the judge or the attorneys to the jurors will be directed to establish whether they are biased or prejudiced or establish whether there is any other reason why they cannot be fair and impartial. This process is called a *voire dire*.[856]

The law thus permits the judge or the attorney to excuse any individual from service for various reasons and if a lawyer wants to excuse a juror, then they

have to use a challenge as provided for under Section 231 of the California Code of Civil Procedure. This questioning commences until 12 people are finally settled to serve as jurors and once this is done, the judges and the lawyers all agree that the jurors selected are qualified to impartially and intelligently deliberate on the Actual issues of the case.

At the end of this selection, the jurors are reminded that it is their duty and obligation to ensure that the ends of Justice meet and ultimately, they are obligated to take the following oath;

"Do you each understand and agree that you will well and truly try the cause now pending before this Courts and a true verdict render according only to the evidence presented to you and to the instruction of the Court?"

856 The juror thus has to demonstrate that they understand the law and if they don't, they need to let this known to the judge.

The Trial.

The judge before the Trial, point the juror to their duties and expectations during the Trial. These include;

- Don't talk to others about the case. This includes the lawyers, the witnesses, the accused person or any other person related to the case. This is because the verdict of the jury has to only be based on the evidence presented to the Court and numerous interactions with different people will create ideas on what the possible verdict ought to be. If a juror is approached by any person, they must report immediately to the judge through the bailiff.
- Don't make up the mind before hearing all the evidence. This includes the duty not to express the opinions about the case to anyone; even to the fellow jurors, until all the evidence has been submitted and judgement has been delivered.
- Do not conduct your own investigation about the case and this is inclusive of not visiting the scene of the crime or event related to the case. In case a juror has a question with relation to the evidence produced in Court, they should ask the judge by handing a note down through the bailiff.
- The juror must follow the law as judge states it to them, inclusive of the standard and burden of proof of the same.

Jury Deliberations.

The jury is taken to a separate room by the bailiff for the deliberations after the closing statements of the attorneys and the instructions on the law given to

the jurors by the judge. The jury will be required to then appoint a fore person whose sole duty will be to see that the discussion happens in a free and orderly manner and every juror is given the opportunity to participate. Where there are disagreements between the parties, each of them ought to give their opinion and the reasons supporting their opinions in order to ensure that the whole jury bench arrives at a unanimous verdict. Then each juror is required to vote only according to their own honest convictions.

The fore person will then have the duty to see that the voting is done properly. In a civil case, the judge will usually direct on the number of votes by the jurors in order to arrive at a verdict. However, in criminal Trials, the unanimous agreement of all the 12 jurors is required in order to arrive at a verdict.

In instances where the jury fails to arrive at a decision within a reasonable time and they indicate to the judge that there is no possibility that they can reach a verdict, then the judge has the discretion to dismiss the jury and order for a mistrial, where the case will be reopened with a new jury.

The jury trial verdict is binding only in that case and isn't a legal binding precedent in any other cases. The implication of this is that the jurors actually have a say in the administration of justice in the jury system and their evaluation of the evidence is actually considered.

Deduction.

Having stated the procedure, selection, Trial process and deliberation, it's important to now make a deduction concerning the viability of the Ugandan judicial system adopting the same. However, before I make these deductions, am going to briefly set out the advantages and disadvantages of the jury system, and with that set out the possibility of Uganda adopting this.

Pros.

- The system creates public confidence which are the fundamentals of a public society.
- Establishes jury equity; this is because the decisions are made on fairness and not the word of the law.
- It ensures an open system of Justice.
- The lawyers explain things clearly so that the general public can understand and follow the proceeding.
- Allows the public to take part in the administration of Justice.
- The secrecy of the jury deliberation room ensures the protection from influence of outside pressure.

Cons.

- Perverse decisions from the jury can be a protest the law.

- There's a high possibility of jury tampering/ bribery or threats.
- Media coverage of the case may influence the jurors.
- Lack of understanding on technical aspects of the law such as insurance law.

therefore, considering the advantages and disadvantages of the system, its my opinion that the advantages outweigh the disadvantages thus, showing that this system may be the second-best alternative to ensuring the Constitutional mandate of the participation of the public in the administration of Justice.

Thus, much as the Ugandan judicial system may not be at the point of adopting a new and totally different system from the norm, it is important to ensure the implementation of the Constitutional mandate to ensure the total participation of the public in the administration of Justice. Thus, my recommendation is that the Law Reform Commission of Uganda, will, using the finding of this research paper and suggestions by the judges currently on the bench, review the viability of Uganda adopting the jury system in place of the fading assessor's system.

Additionally, the binding nature of the jury decisions will give weight to the opinions held by lay men and ensure that the full and comprehensive understanding of Article 127 is considered. The current assessor's system doesn't give weight to the decisions passed by these lay assessors hence the reluctance of judges to consider their opinions, hence rendering the whole system ineffective. Thus, Uganda may do well to adopt a jury system in order to ensure the full and effective participation of the public in the administration of justice.

Conclusion.

In concluding my research paper, it is my sincere hope that this research will Actually be considered in a bid to ensure the creation of a more practical and applicable system to the Ugandan Justice system as it is evident that the existing system of assessors isn't outrightly respected by the judges that are on the current bench, thus, causing a hindrance to the involvement of the people in the administration of Justice.

8.2 Jury versus Assessors an Ubuntu Factor

A jury is a group of people usually chosen at random among adults in the community. Most juries contain six to 12 people[857] depending on the size of the case and whether it is civil or criminal.[858] The Jury always works in a jury trial.[859]The jury is called to serve when the defendant pleads not guilty. The

jury service is considered to be an important civic or public duty, it is expected that the jury comes with an open mind instead of making a verdict out of their knowledge of events.[860]In addition, the jurors besides deciding upon facts to determine someone's guilty or not and listen to disputes and take notes on evidence and facts presented to assist in making a decision, jurors also add certainty to the law .that is the jury merely states that the accused is guilty or not guilty and does not give a reason. There is no disputing that decision. And also the jury is capable of providing social and psychological inputs where the rigidity and objectivity of the law cannot. In Uganda, there is no jury system but its assessors. The law requires that every criminal case to be tried in the High Court have at least 2 assessors. ***Section 3***[861]is to the effect that all trial before the High Court be conducted with at least two assessors.

An assessor is an ordinary person residing in an area of court, who is called upon to aid court in a case.[862]In brief they are lay people without legal training.[863]

857 In Patton V United States 281 U.S.276 (1930) one of the jurors became incapacitated and counsel for the defendant and agreed to continue with 11 jurors. The U.S Supreme Court ruled that this was acceptable if the prosecution and the court as well as the defendant agreed to this procedure

858 http://www.rotlaw.com/legal-library/howdoesajurytrialwork

859 A jury trial is one which the jury and not the judge decides whether the facts of the case have been proven or not.

860 http://www.lawteacher.net/free-law-essays/common-law/definition-of-the-jury-system-law-essays.php

861 Trial on indictment Act CAP 23

862 Douglas Brown. Criminal Procedure in Uganda and Kenya pg. 137

863 Juliet Kigogngo. Daily Monitor. " Court assessors shun Muslim clerics trial" Thursday January 19 2017

In regards to their selection, ***Nyagu V R***[864]**,** it was stated that though there is no express provision in the law that an accused be given an opportunity to object any assessor, to do so was sound practice which should be followed. That's to say it's not mandatory for an accused to be given the opportunity to object the selection of an assessor.

The role of assessors or the use of assessors emphasizes that they are representatives of the broader community, charged with injecting an element of lay values and common sense into the criminal justice process.[865]

The fundamental point of the assessor system is that the judge is not bound by the opinion of the assessors and is free to overrule them and return a verdict contrary to their opinions.[866]

However, ***Section 82 (3)***[867] is to the effect that where the judge does not conform to the opinion of majority of assessors, she shall state his or her reasons for departing in her judgment, however much the decision of the

assessors is not binding.

In ***Byaruhanga Fodori V Uganda***[868] the first ground of appeal was that the learned trial judge erred in law in making appointment of assessors without approval of the appellant and erred in holding the trial of the case with only a single assessor instead of the number prescribed by law. It was stated in this case that in considering the apparent irregularities like deficiency in the record on assessors and the decision of the trial judge to commence and proceed with the trial with a single assessor, the court must determine whether the irregularity caused a substantial miscarriage. In order to determine whether in fact any miscarriage of justice occurred, the role of assessors in our criminal justice system must be taken into account into account. Their importance in advising a trial judge on matters of fact cannot be underestimated. However, their role is merely advisory and not binding on a trial judge.

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864 (1959) E.A.875

865 *Journal of Pacific Studies, Vol.21, 1997.pg 194*

866 The decision of the assessors is not binding on the judge in that if the assessors find the accused innocent or guilty the judge can depart from that decision of the assessors in that their decision is not binding. **By Barefoot Lawyers-Uganda 20th oct 2015**

867 Trial on indictment Act CAP 23

868 Criminal Appeal No.24 of 1999

However, their role is diminishing with replacement of foreign judges with Ugandan judges. In our view, failure to record the particulars of the assessors or whether they were sworn in or not does not cause any miscarriage of justice. Further that if a trial with a single assessor be permitted when the other assessor absent himself, we don't see a big difference when the trial starts and ends with the assistance of one assessor, the ground failed.

Disadvantages of the Use of Assessors

- Assessors lack legal knowledge as was emphasized by Jane Amooti[869] She adds on that assessors cannot evaluate the evidence before court.[870]
- They fail to understand some cases due to legal technicalities.
- Their decision is not binding and besides judges have a local understanding

of cases as compared to the colonial era where the judges were foreigners.

Advantages of use of assessors

- Use of assessors portrays transparency in the judicial system due to their lay man opinion[871]
- Assessors understand the social and cultural dynamics of an area[872]

8.3 Lessons learnt from trial by jury in various common law countries as a manifestation of ubuntu in action.

United States of America.

The jury in the United States is the most common and the importance of the jury was stated in the U.S Supreme Court ruling of ***Duncan V Louisiana***[873]**,** the court

869 Jane Amooti a legal officer working on the decongestion program at Uganda Law Society.

870 Anti-corruption court Judge Lawrence Gidudu added that assessors are useless in his court because evidence presented is often very technical. Reported **in the observer, Judges divided on assessors' relevance, sept 2, 2015.Derrick Kiyonga.** He emphasized that the evidence at his court is not ordinary in that its deals with fraud, accounts, computerized fraud so in such cases they have no opinion to give**.**

871 **The observer, Judges divided on assessors' relevance, sept 2, 2015.Derrick Kiyonga**

872 **Henrietta Wolayo, the Soroti resident judge** said that she finds assessors valuable in her court as they understand the social and cultural dynamics of an area. Reported **in the observer, Judges divided on assessors relevance, sept 2, 2015.Derrick Kiyonga.** She emphasized that the assessors understand Soroti more than she does so she applies their understanding

873 (1968)

said "Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to voices of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right trial by jury of his peers gave him an inestimable safe guard against the complaint biased corrupt judge or prosecutor:"

In the US, the constitution gives parties in federal court the right to a jury trial if the amount in dispute is over $20.00 a large sum back in the 1789 and a small one today.[874]

In the U.S every person accused of a crime punishable by incarceration for more than six months has a constitutional right to trial by jury which arise from the federal court from the 6th, 7th amendment. Further the Supreme Court ruled further that if imprisonment is for 6th month or less, trial by jury is not required.[875] There are three types of juries in the US: criminal grand juries, criminal petit juries and civil juries.

The juries are established under ***Article 3 and the fifth, sixth***[876] ***and seventh***[877] ***amendment***[878][879]

Criminal juries

Grand jury. This; decides whether or not there is enough evidence (probable cause) that a person has committed a crime in order to put him or her on trial. Its proceedings are not open to public and the defendant is not allowed to appear before the grand jury.[880]Composition is 16-23 members

874 http://www.rotlaw.com/legal-library/how does a jury trial work
875 Baldwin V New York ,399 U.S. 66(1970)
876 Article III of the US Constitution states that all trial shall be by jury. The right was expanded with the sixth amendment United States constitution which states in part, "in all criminal law prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed."
877 The seventh amendment guarantees a jury trial in civil cases
878 United States Constitution
879 http://www.juryinfo.org/home.aspx
880 "Types of juries" United States courts. Retrieved 2015-12-01

Petit jury. This is also known as trial jury and it is the standard used in the United States of America. These are responsible for deciding whether or not a defendant is guilty of violating a law in a specific case. Composition is 6-12 people. Their decision is a verdict.[881]

Civil juries. A right to trial in a civil case is addressed by the seventh amendment to the U.S Constitution which is to the effect that in suits at common law ,where value in controversy shall exceed twenty dollars ,the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law,[882]***In Seventh Amendment right to jury Trial: A study in the irrationality of rational decision making***[883]**,** it was stated that the seventh amendment comes to preserve the right of trial by jury than to emphasize trial by jury.

Pros and cons of jury system in United States of America

- The jury helps to sustain democratic values.
- The jury is also key part of the due process protections guaranteed by bill of rights.
- The jury is the guardian of public trust and the voice of the community values inside a legal system dominated by lawyers and judges.
- The cons are: juries are biased.
- Juries disregard the judge's instruction or the law it's self when reaching a verdict. Juries know too much about a cased from media publicity to be able to render a fair judgment, or juries know too little and are unable to comprehend the issues in complex cases.[884]

England and Wales

In England and Wales, a case is decided by a judge (or jury) who does not

881 "Types of juries" United States courts. Retrieved 2015-12-01
882 "The Constitution of the United States of America. "Gpoaccess.gov. Archived from the original on 2008 -09-06
883 Martin H. Redish. Seventh Amendment right to jury Trial: A study in the irrationality of rational decision making. Vol. 70 .No. 3 printed in the U.S.A

884 John Paul Ryan. The American Trial jury: Current issues and controversies
investigate the facts but acts as an umpire.[885]

A jury is a panel of independent citizens selected to assess the evidence produced by the parties involved in a dispute in court and to come to verdict on guilt or innocence at the end of a trial. Juries are considered a fundamental part of the English legal system. Members of a jury are known as jurors. Juries are not required to give reasons for the decision or to disclose any other form of information as to how they reached the conclusion - the verdict of the jury is final. In criminal cases, the function of the judge is to advise the jury on the law but it is for the jury alone to decide whether an accused is guilty or innocent as charged.

In England and Wales, obtaining a trial by jury is not considered a right and it is subject to restrictions and limitations established by parliament. **The Criminal Justice Act 2003** altered the system in England and Wales by granting the Crown court discretion to deny trial by jury for certain fraud offences. Part 7(43) of the (Criminal Justice Act) CJA 2003 allows the prosecutor to make application to the crown court for the trial to be conducted but without jury.

Pros and cons

The jury system in England and wales has the advantage of providing individuals accused of offences with ability to obtain trial by jury for more serious offences.

It also has the advantage of preserving a practice that has become a traditional expectation among citizen of England and Wales with respect to operation of courts.

Cons

Increasing costs for courts and placing a burden on jurors in cases involving lengthy and complex proceedings

Greater risk that the jury will render an erroneous verdict because of nullification or inability to understand complex facts or the application of the law to facts.

885 The Judicial System of England and Wales A visitor's guide. Prepared by judicial office international Team

Hong Kong

Trial by jury is recognized in the *basic law* ***Article 86,*** which is to the effect that the principal of trial by jury previously practiced in Hong Kong shall be maintained.

Section 25(4)[886]**,** is to the effect that the jury shall consist of not less than five persons in any civil or criminal trial or coroner's inquest.[887]

The accused person can challenge and dismiss a juror for good cause.

All criminal trials in the Court of First Instance must be held with a jury. Jury trial is not available for offences designated as summary offences which are usually minor offences. Thus, the most serious offences are tried in the Court of First Instance, and not in an inferior court.[888]

In addition, ***Section 4***[889]is to the effect that a person shall be fit to serve as a juror when he /she has reached 21 years of age, but not 65 years of age.

Pros and cons

Cons

Less representative of society

All jurors are assumed to have no prior legal training and sometimes the presented evidence may be too complicated for non-experts to understand e.g. medical reports

Language accents as per judge that's why some people argue that there should be trial by Chinese. (pro)

Australia

The jury is the means by which the people participate directly in the administration of justice**.**[890]

886 Jury ordinance Cap 3

887 Jury Ordinance CAP 3, section 25. Death or discharge of a juror

888 (*This Executive Summary is an outline of the Consultation Paper. Copies of the Consultation Paper can be obtained either from the Secretariat of the Law Reform Commission, 20/F, Harcourt House, 39 Gloucester Road, Hong Kong, or on the internet at http://www.hkreform. gov.hk)* Pg. 2

889 Jury Ordinance Cap 3

890 Dennis Challinger. *The Jury.* Australian Institute of Criminology, Seminar Proceedings

Section 80 of the Australian Constitution, is to the effect that the trial on indictment of any offence against any law of the common wealth shall be by jury, and every such trial shall be held in the state where the offence was committed, and if the offence was not committed within any state, the trial shall be held at such place or places as the parliament prescribes.

The importance of trial by jury was expressed in passionate terms ***by Deane j in his judgment in Kingswell V The Queen 1985, "***the guarantee of section 80 of the constitution was not the mere expression of some casual preferences for one form of crimnaltrial.it is a reflected deep conviction of free men and women about the way in which justice should be administered in criminal cases……The nature of the jury as a body of ordinary citizens called from the community to try the particular case offers some assurance that the community

as a whole will be more likely to accept a jury's verdict than it would for a judge or magistrate who is portrayed as being responsive to authority and remote to concerns of the people."

Canada

The right to be tried by judge and jury is a constitutionally afforded right provided by **subsection 11(f) of the *Canadian Charter of Rights and Freedoms.***[891] Canada's jury system derives most directly from the English common law, which entitled accused persons, in certain cases, to be tried by judge and jury.

Jury trial procedures are now set out in Part XX of the *Criminal Code.* Modern Canadian juries are composed of lay persons chosen at random, called upon to legally determine the guilt or innocence of an accused person charged with a serious crime.**9** A jury is usually composed of 12 persons, **10** male or female, who are to act as impartial triers of fact in assessing whether the Crown has proven its case against the accused beyond a reasonable doubt.[892]

879 *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being schedule B to the *Canada Act 1982* (UK), 1982, c 11

880 Terry Skolnik. The Jury System in Canada Pg. 17

The jury system in some common law countries is indeed the way to go for No. 11 Pg.13

Uganda.

In the United States of America, the decision of the Jury is binding to judge which shows the aspect of democracy since the lay man's decision is taken into consideration contrary to Uganda where the decision of the assessors is not binding thus no democracy because it is the decision of the judge to either follow it or not that is its at his discretion therefore the jury system in America is the way forward for Uganda so as to up hold democracy.

In the United States of America in the case of **Duncan V Louisiana**, it was clearly stating that the jury guards against arbitrary action. That is providing an accused with the right trial by jury of his peers gave him an inestimable safeguard against the complaint biased corrupt judge or prosecutor. In Uganda, since the assessor's decision is not binding people are not protected from corrupt judicial officers therefore Uganda should adjust on its jury system and it's the perfect way forward for Uganda.

In the United States of America, there is a Grand jury. This decides whether or not there is enough evidence (probable cause) that a person has committed a crime in order to put him or her on trial. Its proceedings are not open to public and the defendant is not allowed to appear before the grand jury. Uganda should adopt this system before a trial is brought up because it in my opinion

saves time of the judges.

The Jury system of the United States of America is the way forward for Uganda in that it also provides for civil juries to listen to civil cases as per the seventh amendment different from Uganda which is basically for criminal cases.

In the United States of America, the jury is also key part of the due process protections guaranteed by bill of rights. Which is the way forward for Uganda because Uganda belies in protection of fundamental rights as enshrined in Chapter four of the constitution, under objective 4 of the National Objectives and Directive Principles of State Policy.

In Hong Kong, the age of one to be a juror is prescribed that is that a person shall be fit to serve as a juror when he /she has reached 21 years of age, but not 65years of age. Uganda should then adopt this system of specifying the age.

In the United States of America, the composition of jurors in the various types of juries is given and is followed which should be the way forward for Uganda since in Uganda the composition is not definite a judge can go on with only on jury yet it is stated that its to be 2 juries.

As noted a jury refers to a certain number of men and women selected according to law and sworn (jurati) to inquire into certain matters of fact and declare the truth upon evidence to be laid before them.[893] It can also be defined as a body of men or women temporarily selected from citizens of a particular district and invested with power to present or indict a person of a public offense or to try a question of fact. The jury has various subdivisions such as the grand jury[894], petit jury[895], common jury, special, coroner's and sheriff's jury.

Trial by jury is usually available where a person is accused of a crime punishable by incarceration for more than 6 months. No trial by jury where the punishment is a fine. It's the States discretion to decide whether cases are fit for juries or not. In light with the US jury system, article 3 of the US constitution states that all trial shall be trials by jury. The 6th amendment of the same constitution states that an accused in criminal proceedings is entitled to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. The 7th amendment also provides for a jury in civil cases too. The importance of the jury was noted by the US Supreme court in its ruling in ***Duncan vs Louisiana***[896]where in it noted;

> ***"Those who wrote our constitution knew from history and experience that it was necessary to protect against unfounded criminal charges***

brought to eliminate enemies and against the judges too responsive to the voice of higher authority… they strove to create an independent judiciary but further protection placed against arbitrary action.

881 Bryan A Garner, editor in chief, Black's Law Dictionary, 13th ed. page 2503
882 Made of 16-23 members and it sits to decide whether there's enough evidence for the accused to go trial accused is usually not allowed to appear and it's not public.
883 Consists of 6-12 people and is usually known as the trial jury. It decided whether a person is guilty or not guilty for violating a certain law. Their deliberations are private and the decision is known as the verdict.
896 (1986) 391 US 145

Providing an accused with the right to trial by a jury of his peers gives him an inestimable safeguard against the corrupt or overzealous prosecutors and against the complaint, biased or eccentric judge."

Therefore, the principle of *Ubuntu* of let the community decide your fate, not individuals who may be too emotional or biased and solely based on legal intelligence, is applied under the jury system. The role of the jury is four fold; weigh up on the evidence and decide what the true facts of the case are, listen to the direction of the judge as the as to the relevant law and apply the law to the facts before reaching a verdict. There, justice should not only be done but be seen to be done as was stated by the judges in the case or ***R vs Sussex Justices Exp. McCarthy***[897]. Thus, the essence is to make the legal system more open and form confidence in the public.

The jury system has a number of both strengths and weaknesses. In assessing the strengths, it is essential as the jurors are impartial. This is because selection is done based on voter's registration and citizenship or licenses. Therefore, random members of the public are chosen and they have no attachment or bind that could bias their decision, therefore, their verdict is entirely based on opinion unlike the individual judge's case-hardened decision. Therefore, their impartiality enables a fair and free decision to be arrived basing on the evidence presented against both parties.

Additionally, the jury system creates confidence in the public concerning the judiciary and the system as the cases are tried fairly, openly and impartially and it's very difficult to alter the system politically. This is because there is no way the random selection of the jurors can be premeditated and its unlawful to have interactions with the members of the jury before or after they are selected and sworn in. Thus, the public has more confidence in the justice system compared to the individual judge's opinion that could be biased or politically

interfered with, as judges are more prone to feel obligated to be answerable to a higher authority.
Further still, it's important to note that 12 heads are better than 1. This is because

897 [1924] 1 KB 256

form the 12 people that sit on a petit jury, there are a variety of opinions and perspectives from which the verdict can be arrived at. This makes it fairer because all the options and possibilities are explored compared to an individual that passes the decision solely based on the facts before, the law and his opinion whose decision cannot be waived or altered, based purely on a legal perspective. Where the jury fails to reach an agreement, there's usually a re-trial to re hear the merits of the case.

The decisions of the jury are further made on what seems right rather than whether the law states it as legal or illegal. This is because a jury's decision is more opinionated based on the objective test (the reasonable man's test). Therefore, where a person successfully convinces a jury that the crime was committed on reasonable grounds with no malicious or pre meditated ill motive, then they are acquitted contrary to a judge who bases the decision solely on the facts of the casein the law (subjective test). This presumption has been evidently applied in cases such as ***R vs Pointing***[898] where the defendant plead that the official secrets he disclosed were for the benefit of the nation and therefore not to be held liable for disclosure of official secrets. He was acquitted by the jury and found not guilty as he had disclosed the information on reasonable grounds. It was further applied in ***R vs Kronlid & others***[899] where the defendant successfully argued that the plane that they destroyed worth 1.5m pounds that was being sold to the Indonesian government, would be used to terrorize the people of East Timor and was thus acquitted by the jury for acting reasonably.

The jury system however has weaknesses despite its strengths. The first being that there's a very high chance of selecting incompetent individuals onto the jury who aren't able to deal with the court atmosphere. This was seen in ***R vs Chapman***[900]where a deaf juror sat through the whole trial without hearing a word of the trial. However, the decision in the case was upheld and not avoided because the proceedings had not been compromised. Lord Denning, following this case, noted that there was need to apply a 'suitability test' to decide whether a juror is adequate to perform the duties however it would have high financial

898 (1985)
899 (1996)
900 (1974)

implications. This will also defeat the whole principle of selecting an impartial body from laymen immaterial of their qualifications. Therefore, the only qualification that could stand is ability to read and write in English.

Additionally, having a re-trial in instances where the jury has failed to reach a decision is usually expensive for both the court and the parties involved in terms of the legal fees involved. The jury also loses out on earnings as they have to take more time off work which the court has to compensate. Therefore, it's more affordable to have a single judge to sit and decide on a case on its merits as his decision is usually final and only challenged by an appeal.

Sometimes, basing on the juries opinion rather than the facts and the law, juries can reach perverse decisions wherein they can't be questioned as their deliberations are made in private and are not obligated to give reasons for their ruling, therefore it becomes very questionable whether they understood the case or not[901]. There are instances where the jury has refused to make a ruling on a clear point of law as was seen in ***R vs Randall and Bottle***[902] where the defendants wrote a book 25years after the crime in which they vividly narrated the way they helped a spy escape from prison. The jury refused to convict the defendants.

A trial by jury is also expensive to the tax payers especially during selection and also because they have to pay for the compensation that the jurors are awarded for the loss of earning during the trial. This ultimately tolls and becomes burdensome on the tax payers. It's therefore more cost effective to have a single judge to sit and decide on a case as this will be less taxing on the tax payer.

Further still, some jurors may not fully understand the case and may resort to voting the best barrister rather than voting on the facts of the case. This defeats the whole essence of impartiality and ensuring fairness in the justice system. They may thus base on which barrister presented their case better than the other which will put fairness in the ruling at stake therefore, the difficulty in the legal court language makes it difficult for some of the jurors to follow the case.

901 ***R vs Young***(1993)
902 1991

Jurors may be influenced by corrupt external sources and influencers. This is because the jury isn't paid but merely compensated for the loss in the earnings for that period thus may be bribed to vote in favor of either of the parties. Media is also a culprit of corrupting and biasing jurors such as newspapers and televisions. This was seen in ***R vs Taylor***[903] where newspapers gave false information of a video consequence that the trial involved.

There are some instances where there's a dominant juror than the other jurors who tends to influence the others to vote inclined to a particular side. This may either be in from of age, experience or financial capacity. Ability to be outspoken may be another factor that makes a juror dominant over the rest.

Due to the decisions made by the lay men, mistakes are inextricably bound to be made. A study done on 370 trials in the late 1970's[904] it was found that 25% of the acquittals were questionable so were 5% of the convictions. This is because some of the decisions were racially based as was seen in ***R vs Gregory***[905] where the juror showed racial overtones.

Some trials can also be very harrowing to the jurors and they need to receive counselling after the trial. This is because of the lack of emotional intelligence needed in some of these criminal cases. This becomes very taxing on the jurors and expensive for the court to handle.

In considering the applicability of jury system in our Ugandan system, it's necessary to first understand the current judicial system that is at work. It's important to note that Uganda doesn't use the jury system but rather uses the assessor's system where 2 or more assessors are needed to assist the judge in making the ruling. It's however to be noted that the decision of the assessors isn't binding and can be done away with.

The assessors are only applicable in criminal cases at the High Court. The Court

903 (1993)
904 At the Birmingham Crown Courts
905 [1993]

requires at least 2 or more assessors to aid the court in reaching a decision.[906] An assessor is basically an ordinary lay person with no special training to the court system but is merely appointed and informed by the judge of the case against what prosecution must do to prove the case. An assessor can also be defined as a person appointed to advice the judge.[907]

The rationale for having assessors predates to the pre-colonial times where Uganda was still a protectorate and, most of the judges who sat on the bench were white judges. These judges had no idea of the customs that the people of

Uganda live by and were subject to, therefore the need to appoint persons of the land that would assist the court to interpret the customs and assist the judge in reaching a decision based on this. Therefore, the assessor simply gives the judge an advice from the perspective of a lay man. This is immaterial of whether the prosecution has proved the case beyond reasonable doubt basing on the circumstances and evidence adduced. They also assist in formulating material issues to the case at hand. The opinion of the assessors isn't binding on the judge but where the majority have the same decisions, then the judge has to give reasons why he/she has departed form the decision.

The assessors are selected by the Chief Magistrate from the locality of an area[908] the procedure for selecting an assessor is provided for in the schedule of the Act.[909] After selection of the assessors, the list is posted in the court house for inspection by the public and any objection is heard and presented before the Chief Magistrate.[910] For one to qualify to be an assessor, they must have an understanding of the English language, language of the court and proficiency sufficient to follow the proceedings and must be between the ages of 21-60. The assessors are then sworn in before the commencement of the trial but before

906 Section 3 Trial on Indictments Act Cap. 23

907 Douglas Brown; *Criminal Procedure in Uganda & Kenya;* at page 137.

908 They must have a good reputation in the area. This is provided under section 2 of the Act Ibid.

909 This provides for the Rules that govern the Assessors. Rule 1 provides that the Chief Magistrate shall provide a list of suitable assessors in the area before the 1st day of March every year. Rule 2 provides for exceptions of persons who can't qualify to be assessors including priests or persons in active legal practice.

910 Section 3 Ibid.

the preliminary hearing.[911] The advocates can question the legibility of the accused on grounds of either presumed or actual partiality, character or inability to understand the language of the court.[912] Court examines the questioned assessor's competence before commencement of the trial.[913]

The assessor's opinion is to be recorded either orally or written or both when the trial has been summed up.[914] It is very crucial that the assessors state their opinion only after hearing both counsel's submissions and the summing up of the trial as was held in ***Uganda vs Charles Kangameito.*** The judge then records the opinion of the assessors and includes it in his ruling. Where he doesn't follow the opinion, he ought to sate reasons why he doesn't.

It has however been questioned what the relevance of assessors is if their opinion isn't binding. Previously, their role was to prevent the miscarriage of justice during colonial days as it would be unfair for a judge with no customary background of the society to give a ruling based on their personal

norms and values. Presently however, the assessor's advice the judge on the present knowledge they might have on particular person. Also, they take notice of demeanor of the accused basing on particular behavior in their particular communities and customs.[915]

Therefore, to be able to sufficiently advice on whether the jury system can be applicable in our jurisdiction, it's important to also assess the strengths and weaknesses of the assessor's system. At a validation workshop organized by the Law Reform Commission[916], the judges largely debated on the applicability of the assessors in our present situation. This was sparked by the principle judge Justice Yorokamu Bamwine as to whether Uganda ought to move away from the colonial judicial system which introduced the court assessors.

911 Section 67 Ibid.
912 Section 68 Ibid.
913 Ndirangu s/o Nyanu vs R [1959] EA 875.
914 This is on direction of the judge on matter of inconsistency of evidence, the judge is also required to sum up the law for the assessors and the evidence stated as was seen in ***Tinkamalirwa Godfrey vs Uganda***
915 The language and habits of that particular community is also notes.
916 Validation workshop on Reform and Procedural laws organized by the Uganda Law Reform Commission (ULRC) at the Kabira Country Club on August 31st 2013.

Justice Lawrence Gidudu[917] noted that the evidence adduced during such casesis technical and digital and therefore most times the assessors usually have no opinion to give thus are useless. He was supported by Stephen Musota[918] who additionally stated that the assessors add no value to criminal trials. This is because some don't understand the language of the court and what's going on therefore their opinion also doesn't matter. Justice David Wangutusi[919] admitted that he has near considered the opinions of the assessors in writing his judgements therefore they are of no use. Additionally, Jane Amooti[920] states that the relevance of assessors is not objective any ore due to their lack of legal knowledge. This is because lawyers are able to evaluate evidence better than the assesses themselves.

Herbert Oluka[921] notes that the layman's opinion in court proceedings is very essential but he agrees that sometimes the assessors don't understand the cases due to the legal language used especially the Latin maxims, and the technicalities involved and yet they have to give an opinion at the end of the trial, yet they haven't understood. Ladislaus Rwakafuzi[922] states that the assessors aren't relevant since their advice isn't binding and were needed during colonial times tenable the judges understand the custom, culture and the language more. However, currently, the judges are local and have sufficient knowledge on the custom and culture of the area therefore there's need to

abolish the assessors. Nicholas Opio[923] states that Uganda should therefore revolutionarize its laws through reform and amendment to relieve the assessors of their rather redundant duty.

However, the justices in support such as Judge Henrietta Waloyo[924]stated that the assessors are valuable in her court because they understand the social and cultural dynamics of the area which she isn't very accustomed to. Their assessment of

917 Judge at the Anti-corruption Court 918
Head of the High Court Civil Division.
919 Head of the Commercial Court.
920 Legal officer working on the decongestion program at the Uganda Law Society
921 An assessor at the High court
922 A Human Rights Lawyer
923 A lawyer and political commentator
924 Soroti Resident Judge

the case ad their pinions therefore matter as they make information readily and easily available to her. This was supported by Justice Remy Kasule[925] who stated that the assessors represent the ordinary people in court proceedings.

"*We judges administer the law in conformity with the norms and values of the society[926] and the assessors represent the views of the lay people in society."*

It was his opinion that the judiciary therefore revises the appointing of the assessors rather than completely doing away with them. This can be done by hiring people with skill and the capacity to productivity. Erias Kisawuzi[927] notes that the presence of the assessors is very relevant as it is a sign of transparency in the judicial system.

In making recommendations on the jury systems applicability in our jurisdiction, it's necessary to note the strengths and weaknesses of each system. The principle of *Ubuntu* with its concept of unity and oneness would advocate more for the jury system as the people would have a say on the justice affairs of their fellow peers thus leaving justice in the hands of the people to decide as enshrined under article 126 of the constitution.[928] What better way to enforce this by putting power to decide the fate of others especially in criminal cases in the hands of the people? This will be effective because as we've already seen, the assessors have no say and opinion in the matters that judges have to decide on.

However, jury's decision is binding to the court. Therefore, the bench of 12 will be sufficiently able to engage the public more often into the legal procedures and actually have a say in how the justice is administered contrary to the assessors ole which has been deemed to be redundant and inactive. Uganda

would therefore preferably work better and involve the public more in satisfaction of article 126 by adopting the jury system.

The jury system also creates an aura of confidence and trust by the public in the judicial system as its more open, transparent and impartial compared to the one-man bench. This has been evidenced by the mistrust the public has in the Uganda

925 Court of Appeal Judge
926 Article 126(1) of the 1995 Uganda Constitution, as amended.
927 Judiciary spokes person
928 Justice administered in accordance with the norms, values and aspirations of the people.

Judicial system which is believed to be greatly influenced by persons in higher authorities which is contrary to the notion of independence of the judiciary which was stated in ***Evans vs Gorey, Acting Collector of Internal Revenue***[929]. This was clearly seen in the case of ***Uganda Law Society vs AG***[930]where there were allegations of the army storming into the High Court premises at exactly the same time when the judge was to make rulings concerning the bail of Besigye and others concerning the offences they had been accused of treason and misprision. Court ruled that this act was contrary to article 128(1) of the Constitution that advocates for the independence of the judiciary from external interference from other organs.
This is a clear sign the executive can ultimately indirectly influence the decisions of judges through intimidation. This has also been evidenced in the partiality of most of the Supreme Court ruling on election petition cases.[931] This is because the justices are appointed by the president and approved by the parliament. Therefore, to a certain extent, it has been alleged that they rule in order of the ruling party to secure their jobs. And as was stated by the justices in ***R vs Sussex Justices Exp. McCarthy***[932] justice should not only be done but be seen to be done, therefore, if there are any suspicions as to the justice system by the public on grounds of bias or partiality, then justice has not been seen to be done.

Therefore, on these premises, it's very important that Uganda considers adopting the jury system to be able to adjudicate effectively on matters without any political interference and restore the competence and confidence of the judicial system in the eyes of the public. The adoption of this system will also be able to effectively apply the objectivity test in deciding of cases. This is because the reasonable man's test will be applied in all circumstances

presented before court. This is more preferable rather than the subjective test that was used in the colonial times cases such as ***R vs Amkeyo*** where the judges gave their rulings based on their own customs and laws that deemed our customs repugnant and did not objectively apply the customs and what a reasonable man in that particular society considers. Therefore, the jury system will enable justice be

929 253 US 245
930 Constitutional petition no. 18/2005
931 ***Kiiza Besigye vs Yoweri Museveni & Electoral commission*** Supreme court petition 2001
932 Ibid.

administered more objectively on whether a reasonable man could have acted the same way as the defendant did in the circumstances. Thus, there's need to adopt this system in the Ugandan jurisdiction.

However, it might not necessarily be the way to go for the Ugandan justice system because Uganda isn't prepared for such a system because it requires high financial expenses and leaving justice in the hands often people makes it more susceptible to ruling basing on emotions or prior bribes rather than on what the law states. Most of those other jurisdictions make references to the use of assessors rather than juries as the selection process is very costly and more so the compensation for the earnings lost therefore, its more preferable for one judge take the ruling.

Therefore, in conclusion, much as the jury system seems the way to go for Uganda, various considerations have to be made as to how the competence and honesty of jurors that shall be the new law makers through their decisions, is to be determined before they are assigned to various cases to decide. However, nevertheless, it should be highly considered if we are to live according to the principles of *Ubuntu* and let the community decide the fate of others.

In the United States of America one of the disadvantages of a jury system is that Juries disregard the judge's instruction or the law itself when reaching a verdict. This is not the way forward for Uganda because Uganda believes in the independence of the judiciary as per Article 128 of the Constitution of the Republic of Uganda 2012 as Amended. Since Judiciary is to be impartial and independent when carrying out its duties.

In the United States of America, Juries know too much about a cased from media publicity to be able to render a fair judgment, or juries know too little and are un able to comprehend the issues in complex cases contrary to Uganda where under Article 28 of the constitution one has a right to a fair hearing.

In England and Wales, the juries do not give reasons for their decision which

violates natural justice in Uganda as enshrined in Article 28 of the Constitution in that one has a right to reasons thus it's not the way forward for Uganda.

In England and Wales, there is increasing costs for courts and placing a burden on jurors in cases involving lengthy and complex proceedings. It is not the best system for Uganda to follow because currently assessors do not show up to court because they are not paid just as in sheik Kamoga's case where assessors did not show up because it is alleged that they were not paid. Therefore, bringing such a system would worsen Uganda's situation.

In the United States of America, the decision of a juror is binding which is not the way forward for Uganda because assessors lack legal knowledge as was emphasized by Jane Amooti[933] She adds on that assessors cannot evaluate the evidence before court therefore them making final decision would be in appropriate thus not the way forward for Uganda.

I recommend that points of assessors should remain a guide to the judges and not binding because the points they raise are most likely not to be legal because they don't have legal knowledge. However, judges can borrow some ideas from assessors and give reasons why they have done so which promotes transparency and engagement of people in the criminal justice system

I recommend that the impact of trials with assessors on our criminal system should be assessed in light with Article 126(2) (e) of the constitution which enjoins our courts to administer substantive justice without undue regard to technicalities.

I recommend that the decisions of assessors in Uganda should be taken into great consideration due to expertise in issues concerning the locals as compared to the judges.

I recommend that the decision of the assessors in Uganda should also be taken into consideration to uphold rule of law.

I recommend that caution should be taken as the decision of assessors is being taken into consideration so as to desist from violating the principle of separation of powers.

933 Jane Amooti a legal officer working on the decongestion program at Uganda Law Society.

8.4. Improving Sentencing Guidelines to Harmonize with Ubuntu

Introduction

Sentencing is a complex process and its purpose in a Canadian perspective as per ***Section 718, Criminal Code of Canada,*** is stated that the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives,

to respect for the law and their maintenance of a just, peaceful and safe society by imposing just sanctions.

The fundamental principle of sentencing is emphasized in ***Section 718.1***[934]***,*** ***a*** sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[935]
Sentencing guidelines are rules that set out a uniform sentencing policy for individuals and organizations convicted of felonies and misdemeanors.

Sentencing guidelines are documents which set out a way for judges and magistrates to consider the seriousness of particular offences, and so decide on the appropriate sentence for each case.[936]
In the United States of America, the United States Federal court system uses these policies of sentence guidelines to handle serious Class A misdemeanors.

In the ***United States Sentencing Commission Guide lines Manual 2016***[937]**,** it was stated that in determining the sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. Degree of crime refers to classification of a

934 Criminal Code of Canada
935 **R. v. C.A.M., [1996] 1 S.C.R. 500**, the fundamental principle is that of retribution which requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender as well as the gravity of the offence.
936 <http://sentencingcounciljudiciary.gov.UK/sentencing/what-are-guidelines.htm> 937 United States Sentencing Commission, Guidelines manual,3E1.1(Nov.2016)[USSG]

crime into several grades of guilt.[938]

Although the Chief Justice of the Supreme Court of Uganda recently issued advisory sentencing guidelines aimed at bringing uniformity, consistency, and transparency to the country by establishing sentencing ranges and other sentencing guides. But however, the guidelines cover limited offences. Among the notable aspects of sentencing guidelines is the emphasis on the victim and community engagement in the sentencing process, restoration and promotion of non-custodial sentences.[939]

The Chief Justice of Uganda (as he then was) Benjamin Odoki on April 26, 2013.Issued the Constitution (sentencing guidelines for courts of Judicature)

(practice) Directions the sentencing guidelines.[940]

In Uganda, the sentencing guidelines promote various alternatives and shall be unveiled in the essay below.

Death penalty[941]**.** ***Article 22***[942]is to the effect that no person shall deprive of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. Therefore, in Uganda imposition of a death sentence by a court in accordance with the law cannot be successfully challenged as unconstitutional.[943]

The death penalty can however be challenged in instances where first the method of execution could constitute an inhuman punishment. This challenge emanates from ***Article 24***[944]which is to the effect that no person shall be subjected to any

938 http://definitions.uslegal.com
939 http://www.loc.gov/law/help/sentencing guidelines/uganda. php
940 http://www.judicature.go.ug/files/downloads/sentencing%20 guidelines
941 Section 22 of Uganda sentencing guidelines
942 Constitution of the Republic of Uganda 1995 as Amended
943 Susan Kigula & Ors V UGANDA Criminal Appeal No.1 of 2004, it was stated that the death sentence was constitutional as it is stipulated in the constitution
944 Constitution of the Republic of Uganda 1995 as Amended

form of torture or cruel, inhuman or degrading treatment or punishment. This was more espoused in the case of ***Susan Kigula & Ors V Uganda***[945], where the appellants challenged the constitutionality of the death penalty in that it is inconsistent with Article 24 of the constitution in that it is degrading as per the way people on death row are treated and it was considered. Secondly, the death penalty could be open to challenge on the basis that in a particular case it was disproportionate to the offence.

Suspended Sentence: The imposition of a suspended sentence is not provided for in the Magistrates Courts Act and Trial on Indictment Act**.** However, where the sentence is imposed the offender is not to commit any offence in that period. Further ***Section 331(3)***[946]**,** is to the effect that where the appellate court maintains or imposes a sentence of imprisonment not exceeding three years in the exercise of its powers under the provisions of subsection (1) or (2) of this section, if the appellants satisfies the court that there are special reasons, having regard to the nature of the offence for which he was convicted, his age or antecedents that the sentence should be suspended and shall record its

reasons for making such orders.
The suspend sentence is always recommended where there is need to reduce on the number of inmates and the magistrate or Judge on appeal in appropriate cases should inform the accused of his right to apply for suspended sentence.

Imprisonment in default of a fine; Imprisonment in default of a fine is provided for under Magistrates courts Act. ***Section 192 (d)***[947] which requires Magistrates to fix a sentence of imprisonment in case of default of payment of a fine as per scale. In addition ***Section 109(d)***[948]sets the scale for imprisonment in High court in default recommendation where a defendant is sentenced to a fine of minor nature of offence, he should not be sent to prison in default but should instead be sentenced to a community based penalty.

945 Criminal Appeal No.1 of 2004
946 Criminal Procedure Code 116
947 Magistrates Courts Acts CAP 16
948 Trial on Indictment ACT CAP 23

Probation*;* This is a system whereby the offender, instead of being imprisoned of fined or bound over, is placed under the supervision of a probation officer for purposes of rehabilitation of the offender.[949]***Section 1(a)***[950]***,*** is to the effect that every jurisdiction to make a probation order where a person has been convicted of any offence the sentence for which is not fixed by law.[951] In addition, ***Section 2***[952]also is to the effect that where a court before which a person is convicted of an offence (not being an offence the sentence for which is fixed by law)[953] is of the opinion after due inquiry has been made that having regard to the circumstances, including the nature of the offence and character of the offender, it is expedient to do so, the court may instead of sentencing him or her make a probation order.
Conditional discharge: Any court has power to discharge an accused person without punishing him or her. ***Section 190 of the Magistrates Courts Act CAP 16 and Section 199 of the Trial on Indictment Act.***is to the effect that where in any trial, the court thinks that the charge against the accused person is proved, but is of the opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, either without proceeding to conviction make an order dismissing the charge or convict the accused person and caution[954]him. However, the court will only make such an order where the sentence is not fixed by law. The order is also deemed to be a conviction for purpose of awarding costs, compensation and restitution.
Fines: Principles governing sentences of imprisonment are the same as

sentences for imprisonment. The main principle is that the offence must be such that a sentence of imprisonment is not required. Then the amount of the fine must be related amongst other things to the offenders own resources in deciding

949 This is governed by the Probation Act CAP 122
950 Probation Act CAP 122
951 This jurisdiction is conferred upon the High Court and the Magistrates courts.
952 Probation Act CAP 122
953 An offence for which sentence is fixed by law is defined under ***s.1(b) Probation Act*** as an offence for which the court is required to sentence an offender to death or to imprisonment for life.
954 The law empowering the Magistrate to impose a caution is to be found in Section 202 of the Magistrates courts Act, 1970.However imposition of a caution is left to the judge or magistrates discretion to decide on which case merits a caution.

whether a fine is appropriate and what amount of fine should be paid.

Community sentences: Community sentences are always issued by a community order. The community service order remains one to do unpaid work in the community for between 40 to 240 hours as specified by court. Before a Court imposes a community sentence, it must be satisfied that the offence was serious enough to warrant such a sentence. This will normally mean that the case should be one that could not be dealt with satisfactorily by a fine or compensation order or both together. Once the Court has satisfied itself on that point, it must choose the community order or orders, which are appropriate according to two criteria. The first is that the restriction on liberty must be "commensurate with the seriousness of the offence", and the second is that the particular order or orders should be "the most suitable for the offender."

Lessons to Learn from Sentencing guidelines of the United States of America

The United States federal sentencing guidelines[955] are rules that set out a uniform sentencing policy for individual and organizations convicted of felonies and serious (class A) misdemeanors in the united states federal court system. In addition, these don't apply to less serious misdemeanors.

Originally, the sentencing guidelines were mandatory which violated trial by jury. However, in the aftermath of ***United States V Booker, the*** aspect of the sentencing guidelines being mandatory was over ruled because it violated the sixth Amendment right to jury. Some Supreme Court Cases like ***Blakely V Washington (2004),*** guidelines are now considered as advisory only. Judges are not affected by guidelines in that they must calculate the guidelines and consider them when determining a sentence but not required to issue a sentence within the guidelines.

The sentencing guidelines determine sentences based primarily on two factors; first, the conduct associated with the offence (the offence conduct, which produces the offence level). Second, the defendant's criminal history (the criminal history category). This aspect is displayed on the sentencing table.

955 The guidelines are a creation of United States Sentencing commission also created by Sentencing Reform Act of 1984

The Offense Level (1–43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I–VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "***Life***" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24–30 months of imprisonment.[956]

The offence level consists of 43 levels, The criminal history. There are six criminal categories each associated with a range of criminal history points. For instance, a defendant with 0 or 1 criminal history points would be in criminal history category I while one with 13 would be in IV. Departures from the sentence guidelines are allowed in cases involving substantial assistance to authorities in the investigation or prosecution of another person who has committed an offence. Indeed, the sentencing reform Act even allows a departure below the applicable statutory mandatory minimum in such cases.

There is no penalty for refusal to assist authorities. Departure can be from other grounds which include Death. If death resulted, the court may increase the sentence above the authorized guideline range. In that loss of life does not automatically suggest a sentence at or near the statutory maximum. The sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as defendant's state of mind and degree of planning or preparation physically injury and many more.

Sentencing guidelines are out of touch with the degree of criminality case study: United States of America a vivid application of Ubuntu lessons for Uganda.

Under the offence of **murder,** In the *United States of America*, the sentence varies as per the degree of the murder. Under ***the first degree murder,*** Base level 43 applies which is life imprisonment. The guideline here applies in cases of premeditated killing. In the case of premeditated killing, life imprisonment

956 United States Sentencing Commission, Guidelines manual,3E1.1(Nov.2016) [USSG]

is the appropriate sentence if a sentence of death is not imposed. A downward departure would not be appropriate in such a case. A downward departure from a mandatory statutory term of life imprisonment is permissible only in cases in which the government files a motion for a downward departure for the defendant's substantial assistance, as provided in 18 U.S.C. § 3553(e).

Then when death results from commission of certain felonies. If the defendant did not cause the death intentionally or knowingly, a downward departure may be warranted. For example, a downward departure may be warranted if in robbing a bank, the defendant merely passed a note to the teller, as a result of which the teller had a heart attack and died. The extent of the departure should be based upon the defendant's state of mind (e.g., recklessness or negligence), the degree of risk inherent in the conduct, and the nature of the underlying offense conduct. However, departure below the minimum guideline sentence provided for second degree murder in §2A1.2 (Second Degree Murder) is not likely to be appropriate. Also, because death obviously is an aggravating factor, it necessarily would be inappropriate to impose a sentence at a level below that which the guideline for the underlying offense requires in the absence of death.[957]

Under ***Second degree murder;*** It's under *base offence level 38*. Here, if the defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted. Under second degree murder, there is voluntary manslaughter which is under base offence level 29 and involuntary manslaughter under base offence level 12 which is basically due to negligence and recklessness.[958]

In addition, solicitation or conspiracy to commit murder under base offence level 33If the offense involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase by **4** levels.[959]

However, in Uganda, the offence of murder is not treated under degrees.

It's just conclusively murder and the penalty under law is death or life

957 United States Sentencing Commission, Guidelines manual,3E1.1(Nov.2016)[USSG] pg. 55

958 United States Sentencing Commission, Guidelines manual,3E1.1(Nov.2016)[USSG] pg. 56

959 United States Sentencing Commission, Guidelines manual,3E1.1(Nov.2016)[USSG] pg. 57

imprisonment.[960]Which was followed by a 2009 Supreme Court decision which held that mandatory death sentences are unconstitutional.[961]The guideline sentencing range is thirty years' imprisonment to death[962]with a presumed sentence of 35 years subject to aggravating[963] and mitigating

factors[964]. Then a court may impose life imprisonment if it concludes the circumstances of the case do not warrant a death sentence.
Therefore, the sentencing guidelines are out of touch with the degree of criminality in such a way that the sentencing guidelines are conclusive as to murder it does not breakdown various circumstances when imposing the death penalty as compared to the United States which has the first and second degree murder.

In addition, in Uganda, the manslaughter is not split into voluntary and involuntary manslaughter as it is in the United States of America which makes the imposition of the sentence the same as per the person who commits voluntary and involuntary manslaughter yet they are to be different.

In the *United States of America*, under **aggravated assault**[965], the sentence varies as per the degree of the aggravated assault that is bodily harm. Therefore, as the degree of bodily harm increases the level also increases in the sentencing table. For instance, Bodily injury add level 3, Serious Bodily Injury add **5,** Permanent or Life-Threatening Bodily Injury add **7,** If the degree of injury is between that specified in subdivisions (A) and (B), add **4** levels; or If the degree of injury is between that specified in subdivisions (B) and (C), add **6** levels.

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960 Section 189 of the Penal Code CAP 120
961 Attorney General v Susan Kigula & 417 Ors (Constitutional Appeal No.3 of 2006) [2009] UGSC 6 in that although the imposition of the death penalty does not constitute cruel, inhumane or degrading punishment, the various provisions providing for a mandatory death sentence are unconstitutional
962 Which occurs in rarest of cases for instance commission of an offence was premeditated, the victim was a state witness.
963 Degree of premeditation, nature of weapon used vulnerability of the victim and what the victim deems relevant
964 Lack of premeditation, subordinate role of the offender as a member of a group or gang in the commission of offense, guilty plea and provocation of the victim
965 Base level 14

However, in Uganda aggravated assault is just as provided in the penal code and not in degree that is under ***Section 236***[966] Any person who commits an assault occasioning actual bodily harm commits a misdemeanor and is liable to imprisonment for five years. Thus, out of line with the degree of criminality.

***Under* kidnapping, abduction and unlawful restraint**, In the *United States of America*, If the victim sustained permanent or life-threatening bodily injury, increase by **4** levels; (B) if the victim sustained serious bodily injury, increase by **2** levels; or (C) if the degree of in jury is between that specified in

subdivisions
(A) and (B), increase by **3** levels, Including other specifications.

However, in Uganda, under the sentencing guidelines, no range is given for human trafficking as per the sentencing guideline range. In addition, as per ***Section 239***[967] Any person who conveys any person beyond the limits of Uganda without the consent of that person or of some person legally authorized to consent on behalf of that person is said to kidnap that person from Uganda. Then ***Section 241***[968] Any person who kidnaps any person from Uganda or from lawful guardianship commits a felony and is liable to imprisonment for ten years. In Uganda, the provisions don't provide various degrees or levels in which one can be found guilty of the offence of kidnapping only a few as provided under section 239-252 of the penal Code CAP120. Thus, out of degree of criminality.

Under **Burglary and trespass**. In the *United States of America*. Burglary is further broken down into different categories, for instance burglary of a residence or a structure not a residence.[969]the sentence will vary as per the loss incurred that's to say If the loss exceeded $5,000, increase the offense level as follows: $5,000 or less no increase, More than $5,000 add **1,** More than $20,000 add **2,** More than $95,000 add **3,** More than $500,000 add **4,** More than $1,500,000 add **5,** More than $3,000,000 add **6,** More than $5,000,000 add **7,** More than $9,500,000 add **8**.

966 Penal code Act CAP 120
967 Penal code Act CAP 120
968 Penal code Act CAP 120
969 Base offence level17 and 12

As compared to Uganda, burglary[970] is under ***Section 295***[971]**,** which is to the effect that any person who breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony in it; or having entered any building, tent or vessel used as a human dwelling with intent to commit a felony in it, or having Committed a felony in any such building, tent or vessel, breaks out of it, commits the felony termed housebreaking and is liable to imprisonment for seven years. And if the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years. Therefore, Uganda is out of the degree of criminality in such a way that the offence of Burglary is general there are no specifications as to the losses incurred which is evidence of degree of criminality not followed.

In relation to trespass, under the sentencing guidelines provided under ***section***

37-40 and the sentencing guideline range is to the effect that guide line range is a warning to one year imprisonment, with a presumed sentence of six months to in prison subject to aggravating and mitigating factors .In addition, in Uganda it is provided under ***Section 303***[972] which is to the effect that any person who enters into or upon property in the possession of another with Intent to commit an offence or to intimidate, insult or annoy any person or having lawfully entered into or upon such property remains therewith intent thereby to intimidate, insult or annoy any person or with intent to commit any offence, commits the misdemeanor termed criminal trespass and is liable to imprisonment for one year.

However, in the USA, the offence of trespass varies from as per the place in which the trespass is committed. That's to say, the trespass occurred at a secure government facility, at a nuclear energy facility, on a vessel or aircraft of the United States, in a secure area of an airport or a seaport, at a residence, and many other more increase by**2** levels or the trespass occurred at the White House or its grounds, or the Vice President's official residence or its grounds, increase by **4** levels. This makes Uganda's sentencing guidelines out of degree of criminality because it does not specify the degree of the crime it generalizes.

970 Section 44-48 of the sentencing guidelines of Uganda
971 Penal Code Act CAP 120
972 Penal Code Act CAP 120

Under the offence of **robbery**, in the *United States of America*, the sentence will vary as per the various degree of the offence carried out that is, if the property of a financial institution or post office was taken, or if the taking of such property was an object of the offense, increase by **2** levels. If a firearm was discharged, increase by **7** levels, if a firearm was otherwise used, increase by **6** levels, if a firearm was brandished or possessed, increase by **5** levels, if a dangerous weapon was otherwise used, increase by **4** levels, if a dangerous weapon was brandished or possessed, increase by **3** levels or if a threat of death was made, increase by **2** levels.

As compared to *Uganda*[973], ***Section 285***[974] is to the effect that Any person who steals anything and at or immediately before or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits the felony termed robbery. And further, any person who commits the felony of robbery is liable on conviction by a magistrate's court, to imprisonment for ten years, on conviction by the High Court, to imprisonment for life.[975]The sentencing guide lines besides are silent on the aspect of robbery.

Under **criminal sexual Abuse**, in *United States of America* under base offence level 30,38 the sentence will vary as per the age of the victim that is If the offense involved conduct described in 18 U.S.C. § 2241(a)or (b), increase by **4** levels. If subsection (a)(2) applies and (A) the victim had not attained the age of twelve years, increase by **4** levels; or (B) the victim had attained the age of twelve years but had not attained the age of sixteen years, increase by **2** levels. If the victim was (A) in the custody, care, or supervisory control of the defendant; or (B) a person held in the custody of a correctional facility, increase by **2** levels.

Contrary to *Uganda* where under defilement[976] provided under ***section 123***[977]**,** any person who unlawfully has sexual intercourse with a girl under the age of

973 Section (30-32) of the sentencing guidelines Uganda
974 Penal Code Act CAP 120
975 Section 286 of the Penal Code Act CAP 120
976 Section22-capital sentence consideration, section 33-36 of the sentencing guidelines Uganda.
977 Penal Code Act CAP 120

Eighteen years is guilty of an offence and liable to suffer death. Any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to imprisonment for eighteen years with or without corporal punishment. We see that the sentence at all ages is the same as long as the victim is below the age of 18 which is out of degree of criminality because in USA, the sentence as per the sentencing table will vary as per the age as discussed above.

The sentencing guidelines of *Uganda* in general are limited and specific in such a way that the guidelines are limited to specific offences theft which the guideline range is one to ten years imprisonment with a presumed sentence of five years subject to aggravating and mitigating factor. Obtaining goods by false pretense of which the guideline range is six months to five years imprisonment with a presumed sentence of two and a half years subject to aggravating and mitigating factors. Criminal Trespass which the guideline ranges is a warning to one year imprisonment, with a presumed sentence of six months to in prison subject to aggravating and mitigating factors. Murder, Manslaughter and human trafficking whereby no guideline range is provided. Only the above offences are given the specific guidelines which make it out of degree of criminality because most or majority of offences are to be given sentencing guidelines,

As compared to the *United States of America* where the sentencing guidelines

cover various offences for instance murder, manslaughter, assault, sex offences etc.[978]

The sentencing guidelines of both Uganda and United State of America encourage probation. However, they both differ in terms of probation in different ways which makes Uganda sentencing guidelines divert from the degree of criminality.

In *Uganda* as discussed above, probation[979] under probation Act cap 122, is

978 United States Sentencing Commission, Guidelines manual,3E1.1(Nov.2016) [USSG]

979 This is a system whereby the offender, instead of being imprisoned of fined or bound over, is placed under the supervision of a probation officer for purposes of rehabilitation of the offender. ***Section 1(a), is*** to the effect that every jurisdiction to make a probation order where a person has been convicted of any offence the sentence for which is not fixed by law. In addition, ***Section 2***also is to the effect that where a court before which a person is convicted of an offence (not being an offence

discussed in brief the requirements of a probation order, probation officer and does not go into details as that of the USA, which provides conditions under which a probation order is given which include the mandatory, discretionary, specific conditions. For instance the mandatory conditions is to the effect that for a felony, the defendant shall (A) make restitution, (B) work in community service, or (C) both, unless the court has impose fine, or unless the court finds on the record that extraordinary circumstances exist that would make such a condition plainly unreasonable, in which event the court shall impose one or more of the discretionary conditions set forth under18 U.S.C. § 3563(b) (*see* 18 U.S.C. § 3563(a)(2)).And further more we see that in the USA probation also encourages community service ,fines etc. as an alternative compared to Uganda sentencing guidelines which makes it out of the degree of criminality.

8.5 What and How Uganda can Learn in Line Proper Sentencing Guidelines to improve its Jurisprudence.

Uganda can amend the laws which do not provide for the degree of criminality for instance murder so as to provide for first and second degree as per the United States of America to improve its jurisprudence in line with proper sentencing guidelines.

Uganda can expand on its sentencing guidelines to provide for guidelines for various offences since its sentencing guideline is specific to some offences and not to all offences so as to improve its jurisprudence as discussed above.

The imposition of sentences is a decision of critical importance can scarcely be doubted. It determines how much the offender must suffer for his offence, and that suffering may include deprivation of liberty. It may be pointed out

that changes and "reforms" of sentencing law are currently frequent features of legislative programs in most countries. New sentences are introduced, others phased out; maximum sentences are increased or reduced; the powers of various courts are enlarged or curbed. In that regard, one frequent form of legislation in the 1980's was the mandatory minimum sentence; introduced in several

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the sentence for which is fixed by law) is of the opinion after due inquiry has been made that having regard to the circumstances, including the nature of the offence and character of the offender, it is expedient to do so, the court may instead of sentencing him or her make a probation order.

jurisdictions including the United States, Singapore, and Uganda and in many other countries. Usually a mandatory sentence is aimed at a form of criminality regarded as a significant social menace, such as the carrying of firearms, importation of drugs or embezzlement and causing financial loss[980].

However, research in the United States casts doubt on the deterrent value of such laws and on their ability to produce consistent and predictable sentencing. This is because prosecutors and judges often go to considerable lengths to circumvent mandatory sentences in cases where they are considered unduly harsh, thereby emasculating the legislation. Having a sentencing policy is an essential guide in the area of sentencing. However, sentencing policy is not inherently a legal matter and there is no logical reason to leave to a judge an unfettered discretion within the often-wide boundaries drawn by the Parliament.

It has accurately been said that sentencing is an amalgam of morality, tradition *(Ubuntu)* and politics. Therefore, any debate on public policy matter such as sentencing must deal with respective roles of Parliament and the Courts. In so doing, the following issues may arise: At this stage, one may be tempted to think that perhaps it is time in Uganda for Parliament in consultation with the legal profession and other interested parties to sit down and carefully determine the principles upon which a modern sentencing system ought to be developed. Having provided clear guidelines to the Courts, Parliament can then leave the implementation of the principles through individual sentences up to the Judges. Furthermore, fundamental to any sentencing policy is the role that prisons play in the system and the use of non- custodial sentences.

In Uganda, prisons in their current form do not rehabilitate offenders back into the community. Equally so, are lengthy terms of imprisonment which fail to deter potential offenders from committing serious crimes of violence. In reality the only real deterrent they may offer is the fear of being caught.

Regarding alternative sentences, the solution is to be found in developing and using noncustodial sentences for offenders convicted of crimes other than those

980 Justice law and order sector.

involving serious violence[981]. However, one issue of particular concern is that the judiciary in Uganda have in the past been reluctant to use those non-custodial sentences that are available on a more frequent basis.

Accordingly, that issue must be explored as to why non- custodial sentences are not imposed more readily. Whatever the reasons, there is now need for a change of attitude. This may best be achieved by enacting a legislation giving clear guidance to judges and magistrates as to how they exercise their sentencing discretion. If Parliament decides it is desirable to seek community - based sentences for example, to be used more frequently, the courts should properly reflect this policy in their sentencing. Responding to the safety and well-being of victims are of the utmost importance in any criminal jurisdiction. There is growing concern for victims at both national and international levels. In 1985 for example, the United Nations adopted the Declaration of Basic Principles of Justice for Victims of Crime and the Use of Power. The Principles in the Declaration include access to justice and fair treatment, restitution, compensation and assistance. Improving efficiency is not the only goal of a criminal justice system. Providing justice to victims and defendants as well as protecting society is generally considered to be its principal goals. These goals require that persons who have been victimized receive the protection; treatment and compensation that are needed to alleviate their distress. Defendants must be treated fairly, as well as efficiently and offered opportunities for rehabilitation and for integration into the community after their sentences have been served[982]. Too often criminal justice process has become impersonalized; that is, little emphasis is placed on the personal qualities of the Defendant in determining guilt and in framing appropriate sanctions. The challenges posed to the criminal justice officials in this country in particular, and throughout the world in general are ever mounting. This situation should be seen as both an opportunity as well as a challenge to exchange experiences from each other's systems. This is because officials in several industrialized nations are currently exploring new ways to effectively combat crime and improve on criminal justice management without involving massive expenditures for new prisons, expensive technologies and

981 Justice law and order sector
982 Justice law and order sector

ever increasing personnel needs[983]. In the same way, developing countries including Uganda that have not yet made tremendous capital investments in similar facilities and technologies may explore such alternative methods to avoid some of the problems that may have been encountered in industrialized nations. However, in doing so, they should develop criminal justice processes that more closely reflect their society's values and way of life. Below is a critical analysis of our penal laws particularly the penal code Act cap 120 and recommendations on how it can meet the currently evolved sentencing guidelines internationally

Felony and Misdemeanor

The Penal Code in section 2[984] defines a felony as an offence declared by law to be a felony, or, if not declared to be a misdemeanor is punishable with death or imprisonment for three years or more. The punishment however differs for example unlawful oaths c/s 45 provides for life imprisonment while other unlawful oaths c/s46 and unlawful drilling c/s 48 provides for seven years' imprisonment and yet fraudulent marriage ceremony carries a sentence of five years.

The punishment for a misdemeanor where no punishment is provided for is governed by section 22 of the Penal Code, which provides for imprisonment not exceeding two years. These misdemeanors are for example: forcible detainment c/s78, challenge to fight a duel c/s 80,perjury and subordination of perjury c/s 94, false swearing c/s 100, deceiving witnesses c/s 101, compounding felonies c/s 104, compounding penal actions c/s 105, advertisements for stolen properties c/s 106, offences relating to judicial proceedings c/s 107, frauds and breaches of trust by person employed in the public service c/s 113, false information c/s 115, insult to religion c/s 118, disturbing religious assemblies c/s 119, trespassing on burial places c/s 120, hindering burial of dead body c/s 121, desertion of children c/s 156, neglecting to provide food ,etc. for children c/s 157 and master not providing for servants or apprentices c/s 158. However other misdemeanors to wit: writing or uttering words with intent to wound religious feelings c/s 118, affray c/s 79, provide for imprisonment of up to one year.

983 The constitution (sentencing guidelines for courts of judicature) (practice) directions 2013.

According to **"Black's Law Dictionary"**[985]**,** sixth edition, felony is defined to mean a crime of a graver or more serious nature than those designated as mis demeanors, e.g. aggravated assault (felony) as contrasted with simple assault (misdemeanor). In the United States, the federal 1and many state criminal codes define felony status crimes, and in turn also have various classes of felonies (e.g.; class A, B, C, etc.) or degrees (e.g.; first, second, third) with varying sentences for each class. On the other hand, the term "Misdemeanor" is defined to mean offences lower than felonies and generally those punishable by fine, penalty forfeiture or imprisonment otherwise than in penitentiary. Under federal law, and most state laws, any offence other than a felony is classified as a misdemeanor. Certain states also have various classes of misdemeanors for example Class A, B, C etc.

Accordingly**, I recommend that :**(i) the distinction between felonies and misdemeanors in the penal code appear meaningless. Both felonies and misdemeanors are not sufficiently defined and classified, as is the case in the United States. Such offences should be classified and graded according to the seriousness of the offence. Failure to classify them, they should be discarded so that those offences are punished according to their seriousness.

(ii) If the distinction between felonies and misdemeanors is discarded, it follows that Chapter V that provides for general punishment for misdemeanors under Section 22of the Penal code should be decriminalized and all those provisions in the Penal code that make reference to those terms should be adjusted accordingly.

Offences against the State

Seditious offences

Article 29(1)[986]

Every person shall have the right to:

(a) Freedom of speech and expression, which shall include freedom of the press and other media;

(b) Freedom of thought, conscience and belief which shall include academic freedom in institutions oflearning;

I Recommend in this respect that:

As can be seen from the above provision, the offences of sedition contravene the provisions of the Constitution. Accordingly, it is recommended that the seditious offences falling under Sections 42, 43, 44 and 45 of the Penal Code should be decriminalized. Some of the purposes seditious offences serve could still be achieved by making reference to treasonable offences against the state

under Chapter VII and those relating to the Administration of Justice, under chapter XI of the Penal Code.

Defamation

(a) Section 179[987] provides: -

"Any person who, by print, writing, painting, effigy or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter concerning another person with intent to defame that other person, is guilty of misdemeanor termed libel".

Our Recommendation therefore is that:

The offence of libel is akin to the offence of sedition and hence it also falls under the protection of Article 29(I) of the Constitution. Besides, libel is very adequately catered for by the tort of defamation. Accordingly, it is recommended that all offences falling under Chapter XVII of the Penal Code in Sections 179- 181 of the Penal Code should be decriminalized and handled in civil courts as civil actions as opposed to the current dual recourse for remedy. This will also minimize on the delays in exposing of such cases and also save on costs incurred by both the state and the victim.

Piracy

(a) Section 55[988] provides

"Any person who is guilty of piracy or any crime connected with or relating or akin to piracy is liable to be tried and punished according to the Law of England for the time being in force."

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987 Penal code Act cap 120

988 Penal code Act cap 120

(b) Article 28 (7)[989] of the Uganda Constitution provides:

"*Except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed bylaw".*

(c) The offence of piracy is not defined, and it cannot therefore be enforced under our Laws as it contravenes Article 28(7) of the Constitution.

(d) Black's Law Dictionary defines piracy as:

(i) Those acts of robbery and depredation upon the high seas which, if committed
on land, would have amounted to a felony

(ii) Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.5

I recommend therefore that the offence of piracy should be defined presumably along the definition in (d) (i) and (ii) above but with special reference to the usage in Uganda[990].

Duties relating to the preservation of life and health:

All the duties as enumerated under Chapter 19 of the Penal Code do not create any offences. They simply state responsibilities and duties that are expected to be fulfilled by persons in charge of others. They do not define any offences nor prescribe any penalties.

It is thus recommended that: -

(i) Offences should be created and penalties prescribed.

(ii) Alternatively, if offences are not created and penalties prescribed, they should be deleted from the Penal Code as their continued existence thereon does not serve any useful purpose.

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989 1995 constitution of the republic of uganda

(iii) Some of these responsibilities and duties are provided under Sections 152,153and 154 of the Penal Code and offences are created thereof. This is duplication. These should accordingly bedeleted.

Offences against Morality

Defilement

(a) Defilement is defined in section 129 as:

Any person who unlawfully has sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to suffer death.

Any person who attempts to have unlawful sexual intercourse with a girl under the age of eighteen years is guilty of an offence and liable to imprisonment for eighteen years with or without corporal punishment.

As teenagers approach adulthood, their parents' responsibility for them is reduced. Young people should begin to take more responsibility for the consequences of their own decisions and actions. They are at an intermediate stage between childhood and adulthood. The arrangements for dealing with people of this age – 16 and 17 years old (near adults) should reflect this. The current definition of the offence of defilement by raising the age of the victim from 14 – 18 years does not reflect this thinking. As a result, it has watered down the seriousness of defilement where the essence of the offence is having unlawful sexual intercourse with a female under the age of consent by equating it to rape where the essence of the offence is having unlawful carnal

knowledge with a woman or girl without her consent.

Recommendations

(i) It is therefore recommended that in order to strengthen the need to protect young girls particularly those falling in the age bracket of near adults – 16 – 17-year-old, and at the same time allowing them freedom to prepare for founding their own families in terms of Article 31(1) of the Constitution, the age of consent in terms of Section 129 of the Penal Code should be reduced to 16 years while
maintaining the punishment.

(ii) After the age of 16 years, offences committed to the near adults' 17 –18-year-old would be catered for by the offence of rape which in its current state caters for both women and girls and besides it attracts the same penalty as defilement.

Under chapter fifteen that deals with offences against morality, it is only the offence of elopement contrary to Section 121A where courts are empowered to make an order for the convict to pay the aggrieved party compensation in addition to any other punishment. In that regard, our recommendations are:

(i) That courts should be empowered to require an offender to pay compensation to the victim for any injury, loss or damage resulting from the offence of which he was convicted and any other offence taken into consideration. Accordingly, Sections 129B, 130 and 129A should be amended to reflect a compensation order in addition to any other sentence that the court may impose. By enabling courts to order the payment of compensation either instead of, or in addition to/or dealing with the offender in any other way, a compensation order could therefore be a disposal in its own right.

(ii) Furthermore, where the court does not order compensation, the court will be required to give reasons for not doing so. It is hoped that such a provision will encourage courts to use compensation orders more readily. By so doing, they would place the responsibility where it belongs by requiring offenders to pay for the injury, loss or damage they have caused. In addition, such an approach will be in line with the spirit and aspirations of the people as expressed in Article 126(2)
(c) of the Constitution that empowers courts in adjudicating cases of both a civil and criminal nature to award adequate compensations to victims of wrongs[991].

(iii) It is recognized that there is a high rate of HIV infection in Uganda. Many times the offenders for the offences of Rape and Defilement may be

HIV positive. It is suggested that where somebody knowing that he is HIV positive does rape or commit the offence of defilement or where anybody is

991 The constitution (sentencing guidelines for courts for courts of judicature) (practice directions) 2013

Convicted of any of the above offences and is proved HIV positive then that should be an aggravating factor in the sentencing process.

Adultery

Black's Law Dictionary defines adultery as voluntary sexual intercourse of a married person with a person other than the offender's husband or wife, or by a person with a person who is married to another. In that regard we would recommend that the definition of adultery should be gender sensitive. It should not provide two sets of definitions for the same offence and besides, it should not provide different sentences for the same offence as that may be interpreted to offend Article 21 of the Constitution. A different definition for the same offence also promotes disparity in sentencing.

Accordingly, I recommend that: -

(i) One definition similar to one given by Black's Law Dictionary above could be adopted as a unified definition,

(ii) The law should provide the same sentences for the offence irrespective of which member of sex commits the offence;

(iii) Section 154 of the Penal Code should accordingly be amended in the light of (i) and (ii) above.

Indecent Assault

(a) Section 128[992] provides: -

(1) "Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony and is liable to imprisonment for fourteen years, with or without corporal punishment."

(b) Section 147 provides

"Any person who unlawfully and indecently assaults a boy under the age of eighteen years is guilty of an offence and liable to imprisonment for fourteen years"

992 Penal code Act cap 120

I accordingly recommend that;

(i) There is need for these provisions to be made gender sensitive that is to have one unified definition of the offence of Indecent Assault, as is the case with Adultery above.

(ii) Furthermore, there is need to have the same penalty for the same offence to avoid having different penalties that apparently appear to be based on the sex of the victim. That will reduce disparity in the sentences that may be imposed.

Status offences

Status Crime - According to Black's Law Dictionary, status crime is defined as a class of crime, which consists, not in proscribed action or inaction, but in the accused's having a certain personal condition or being a person of a specified character. Status crimes are constitutionally suspect. For example, being a drug addict is no longer a punishable offence in the United States.

Vagueness Doctrine[993]Under this principle, a law, for example, a criminal statute which does not fairly inform a person of what is commanded or prohibited is unconstitutional and in violation of due process. The doctrine originates in due process clause of the Fourteenth Amendment, and is basis for striking down legislation, which contains insufficient warning of what conduct, is unlawful. It requires those penal statutes give notice to ordinary persons of what is prohibited and provide definite standards to guide discretionary actions of Police officers so as to prevent arbitrary and discriminatory law enforcement. Status offences have been a common object of attack in the United States. They are said to be vague and overbroad. Indeed, courts have invalidated statutes on this ground where jurisdiction could be assumed over a wayward minor, defined as one who was "morally depraved or in danger of becoming morally depraved"

The American Bar Association Juvenile Justice Standards Project advocates for the removal of the status offence jurisdiction on the grounds that it would encourage more people to get more effective help; stimulate the creation and extension of a wider range of voluntary services than is presently available,

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993 Canadian sentencing commission, sentencing reform; A Canadian Approach; Canadian government publishing centre 1987

and the corrosive effects of treating non-criminal persons as though they had committed crimes; and free up a substantial part of resources[994]. This submission tallies with the Poverty Eradication Action Plan (PEAP) that is currently being pursued by the Government of Uganda to increase access of justice to the poor. In that regard, the legislators in Uganda should adopt the

same reasoning and revise those laws accordingly.

(a) Section 138[995] defines prostitution as:

"A prostitute means a person who, in public or elsewhere, regularly or habitually holds himself or herself out as available for sexual intercourse or other sexual gratification for monetary or other material gain"

(a) Section 136(1) provides:

"Every person who knowingly lives wholly or in part on the earnings of prostitution and every person who in any place solicits or importunes for immoral purposes is guilty of an offence "

For reasons that have been given above, **I accordingly recommend that the offences of: -**

(i) Persons living on earnings of prostitution, contrary to Section 138 of the Penal Code;

(ii) Brothels, contrary to Section 137 of the Penal Code;

(iii) Definition of prostitution under Sections 138 and 136;

(iv) Idle and disorderly persons, contrary to Section 167 of the Penal Code; and

(v) Rogues and vagabonds, contrary to Section 168 of the Penal Code, should be decriminalized.

Other offences

Issue of False Cheques:

Section 385 provides:

(1) "Any person, including a public officer in relation to public funds who: -

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994 American bar Association and institute of judicial Administration (1977). Juvenile justice standards project (Tentative Draft). Cambridge Massachusetts; ballinger

995 Penal code Act cap 120

(a) Without reasonable excuse proof of which shall be on him, issues any cheque drawn on any bank where there is no account against which the cheque is drawn; or

(b) Issues any cheque whether in respect of any account with any bank when he has no reasonable ground, proof of which shall be on him, to believe that there are funds in the account to pay the amount specified on the cheque within the normal course of banking business; or

(c) With intent to defraud, stops the payment of, or countermands any cheque previously issued by him, commits an offence"

I recommend therefore that this offence is civil in nature than criminal and as such, the criminal law has not handled this case effectively. Interested parties settle most of the cases involving cheques out of court amicably. It is

therefore recommended that the offence should be decriminalized, and the matter be handled by the Commercial Court.

Statutory offences

The Witchcraft Act

The term "witchcraft" is not defined properly; the ingredients of this offence cannot be properly determined. If one does not sufficiently know the ingredients of the offence he is charged with, he cannot adequately prepare his defense. For example, in Canada a statute that was vague was held unconstitutional in a leading case of *Canadian Pacific Ltd -vs. R*[996].

A Statute that purports to encroach on a personal or proprietary right of a citizen should be construed strictly.

The Witchcraft Act compounds its vagueness by permitting the prosecution to adduce evidence of reputation that the accused is a witch or that witchcraft articles in issue by common repute are used in the practice. Under this legislation what is required in evidence is not scientific truth alone but also the subjective beliefs of the public, however unscientific they may be so long as they lead

996 *Canadian Pacific Ltd -vs.- R. (1996) 1 LRG 78*.6.1.3.A

some people to believe generally that so and so practices witchcraft. Thus, a law will be found unconstitutional if it is vague and so lacks in precision as not to give sufficient guidance for legal debate. The Witchcraft Act to that extent is therefore unconstitutional in so far as it contravenes **Article 24, 26, 28 (12), and 44.** Although as per the case of **salvatori Aboki v A.G**[997]it was repealed.

I accordingly recommend that in light of the observations made herein above, and considering the fact that this legislation is archaic, and the fact that it is cruel, ambiguous and violates the provisions of the constitution as indicated, this legislation should be decriminalized.

The Traffic and Road Safety[998]

The purpose of the new Act was intended to address the rising number of traffic cases by meting out harsh sentences in the hope that drivers and other road users would be more responsive in taking extra care on the road. While the intention of the Act was to raise the fines that had become meaningless under the old 1970 Act, most of the fines under the new Act were made disproportionate to the offences and are rather too on the high side. No

wonder, shortly after it became operational, taxi drivers/operators staged a two day strike which led Government to suspend the operation of certain sections of the Act at least those that most affected the taxi drivers, like **section 107** relating to conditions of motor- vehicles; section 10 relating to causing bodily injury or death through dangerous driving; section 108 relating to causing bodily injury or death through careless driving; section 111 relating to reckless or dangerous driving.

I Recommend therefore that:-

(i) In view of the above observations, an urgent study in the use of prompt fine son site by offenders should be made. This would empower police officers to deal with the less serious traffic offences promptly. This is the case in many jurisdictions like the United Kingdom, Sweden, Australia, Spain and several other countries.

(ii) There is also need to harmonize and/or reduce fines. Much as there is need to

fight traffic offenders, there is also need to look at the means to pay the fines

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997 Salvatori Abuki v A.G

998 **The Traffic and Road Safety cap 361 of 1998**

The Local Government Act[999]

The Act came in to amend, consolidate and streamline the existing law in Local Government in line with the certification to give effect to the decentralization and devolution of functions, powers and services; and to provide for decentralization at all levels of Local Governments to ensure good governance and democratic participation in and control of decision making by the people and to provide for revenue and the political and administrative set-up of local governments; and to provide for election of Local Councils and any other matters connected to the above. It should be noted that the Act does not provide as to how those who have defaulted would be brought to book. It is noted that in many cases, defaulters have been apprehended, tied up on ropes after the Council Officials mount road blocks and demand for tax tickets. This procedure is not only humiliating and degrading but also unconstitutional.

Further Recommendations

(i) Apart from what is provided in Regulation 9 spelling out who are exempted from paying graduated tax. There is need to come out with a definition of what would constitute "lawful excuse".

(ii) There is also need for the government to come up with guidelines/methods that would be followed in apprehending defaulters.

(iii) In respect to a defaulter who is convicted but is not able to pay the fine he should carry out community service in the locality at the end of which he should be given a ticket worth his assessed tax.

The Children Act[1000]

11.1 This statute, which came into force in 2014, was intended to reform and consolidate the law relating to children, to provide for the care, protection and maintenance of children, to provide for local authority support for children, to establish a family and children's court, to make provision for children charged with offences and for other purposes connected therewith. It also implements international obligations relating to the Children under the United Nations Conventions and the O.A.U charter. It may be observed that the statute specifies

999 **The Local Government Act 1/94**
1000 **The Children Act No.6/1996**

detention to be used only as a last resort and to be undertaken in identified centers for children. It also provides for alternatives to imprisonment, which include caution, conditional discharge, binding over to be of good behavior, compensation, restitution, fine and probation. We sincerely do hope that the Courts will make use of the options provided in this Statute. As have of course already considered elsewhere that some of the options available in this Statute should also be utilized for adults in appropriate cases.

The Habitual Criminals (Preventive Detention)[1001] **Act,**

Definition

Section 2 provides:

1. When a person who in the opinion of the Court is not less than thirty years of age:

(a) is convicted of an offence punishable with imprisonment for a term of two years or more; and

(b) has been convicted on at least three previous occasions since reaching, in the opinion of the court, the age of sixteen years, of offences punishable with such a sentence, and was on at least two of those occasions sentenced to imprisonment, then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time the Court may pass on him, in addition to or in lieu of any other sentence, a sentence of preventive detention for such term of not less than five or more than fourteen years as the court may determine; Provided that where a sentence of preventive detention is passed in addition to any other sentence

the total term of preventive detention and imprisonment shall not exceed fourteen years.

Article 28 (8)[1002] provides:

"*No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed".*

The High Court has consistently held that when considering whether preventive detention should be awarded, the Courts should be guided by the same principles

1001 **The Habitual Criminals (Preventive Detention) Act,**

1002 1995 constitution of the republic of Uganda

as those, which have been laid down in England. (However, preventive detention was abolished in England since 1967). Again it should be remembered that in the case of serious crime a sentence of imprisonment of sufficient length may often properly be given which will give adequate protection to the public as well as punishment to the prisoner. Finally, insufficient regard is often given to the fact that a prisoner may have shown that he was able to and had held down a job for a substantial period immediately before the offence for which he is being sentenced. Again, one can only generalize but where such period is over twelve months preventive detention should not ordinarily be imposed.

The High Court has interfered on appeal or revision where preventive detention has been imposed in a number of cases, mainly on the ground that the accused had apparently "gone straight" for a considerable time. A brief historical survey reveals two recurrent difficulties. First, legislation on persistent offenders have usually been framed in broad terms, often without clear and precise guidance about the types of offender to be included and excluded. Secondly, and more fundamentally, there has been little agreement about the group or groups of offenders who should be the target of special sentences. Terms such as "Professional Criminal" and "real menaces" have been used without much effort to precision. In addition, it has been pointed out that prison sentences may prove counter-productive[1003].

The inference is that present methods not only fail to check the criminal propensities of such people but may actually cause progressive deterioration by habituating offenders to prison conditions which weaken rather than

strengthen their characters."

In short, it is possible that the considerable use of prison sentences makes these offenders less able to live law abiding lives and more likely to re-offend on release. Thus, if the cumulative principle is based on individual deterrence, and if the point of deterrence is to protect the public, reliance on imprisonment for this

1003 Documents relating to the development of a sector wide approach for justice, law order sector including the medium-term budget framework paper 2001/2002 and strategic framework and priorities

purpose may be a self-defeating strategy.

A further Recommendation: -

In view of the above observations, the trend of sentencing habitual criminal's renders the Habitual Criminals (Preventive Detention) Act obsolete and outdated. It should accordingly be decriminalized. Habitual Criminals should be sentenced in accordance with the approaches of sentencing persistent offenders namely: -

(i) Flat rate sentencing; according to which a sentence should be governed by the crime and not at all by the offender's prior record;

(ii) The cumulative principle; according to which, for each new offence the sentence should be more severe than the previous one and;

(iii) The progressive loss of mitigation; which contains two parts: namely that the offender should receive a reduction of sentence and the other is that with second and subsequent offences an offender should progressively lose that mitigation. This principle assumes a limit beyond which the sentence cannotgo, no matter how many previous convictions the offender has.

Besides the original principles, which were supposed to guide courts in Uganda have since been abandoned with the abolition of the Prevention of Crime Act 1908 which was similar in wording with the current Habitual Criminals Act in Uganda.

Custodial sentences

Minimum and Maximum Sentences

In many countries the very existence of minimum sentences is being increasingly criticized. For example, the preliminary drafts of the French and Belgian Criminal codes abolish both minimum sentences and mitigating

circumstances and leave the courts an unfettered discretion which is only limited by the maximum sentences[1004].

1004 A study report on rape and other sexual offences, Uganda law reform commission publication No 1 2000

Similar measures have been put forward in Canada. The contemporary tendency to legislate in this direction has been criticized, in particular by Bamberger who argues that the minimum legal sentence was a fundamental criterion for the courts.

However, it is by no means certain that the latter always attach so much importance to these figures when they have a purely indicative value. It is common in France that the maximum fines for misdemeanors are periodically updated by the legislature while the minimum fines are left unchanged. Generally, the courts make considerable use of these means of mitigation and his legal machinery does not prevent them from doing so. For example, the Italian provision that, where there are both aggravating and mitigating circumstances, the sentence should be based on a comparison between the two is generally interpreted by the courts as a means of reducing minimum sentences**.**

The position in France is comparable, where aggravating circumstance for recidivism are not in fact taken in account except when the prosecution or the court wishes to pass a sentence above the maximum authorized for a first offence, which rarely happens bearing in mind the severity of these maximum sentences.

A Further Recommendation

In view of the experiences as outlined above from other jurisdictions on the same issue, it is suggested that there is need to review the current minimum and maximum penalties in our criminal justice system so as to reflect the relative seriousness of different types of offences. This is so because the current ranges of sentence for offences are too wide to give sufficient guidance to the court and the relative seriousness of the offence.

The Death Penalty

In Uganda, the imposition of a death sentence by a court in accordance with the law cannot be successfully challenged as unconstitutional on the basis of **Article 22**[1005], however, there are two situations in which the death penalty might not be beyond challenge. First the method of execution could constitute an in human punishment. Secondly, the death penalty could be open to

challenge on the basis

1005 1995 constitution of the republic of Uganda

that in a particular case it was disproportionate to the offence. The International Covenant on Civil Political Rights[1006] referred to earlier, actually specifies that "sentence of death may be imposed for the most serious crimes. In Uganda the challenge could emanate from the provisions of **Article 24** of the Constitution on the premises that the death penalty is a cruel and inhuman punishment. This approach has been the argument advanced in many countries and courts including the United States, European

Union, Canada, India, Jamaica, South Africa and Zimbabwe, the Uganda Constitutional Commission reported that the majority of the people favored the retention of capital punishment and thus the Draft Constitution retained the death penalty. The issue was further debated in the Constituent Assembly, which was almost evenly divided, but the receptionists obtained majority votes and the death penalty was retained with safeguards.

In that regard, it is recommended that: -

(i) The struggle must go on and the legal profession and public spirited individuals and activists must continue to advocate for the abolition of the death penalty by law if not by the Constitution, or to challenge its execution using human rights standards.

(ii) The legislature should be slow to create new capital offences and even be

prepared to remove the current ones from our statute books.

(iii) If public opinion continues to favor the death penalty, it should be limited to very grave and atrocious offences like treason and murder. Otherwise life imprisonment seems to be an adequate and humane alternative to capital punishment.

(iv) In that connection life imprisonment should mean imprisonment for the life of an offender not subject to release as opposed to the current term of twenty years.

The extension of capital punishment for rape and defilement may have had good

1006 International covenant on civil and political rights

motives but it seems unlikely to have had any effect on the incidence of these crimes, which seems to be on the increase or on the sentencing policy of the courts, which have so far not imposed any death sentence. It is accordingly

recommended that the death penalty for rape and defilement should be replaced by life imprisonment, which will mean imprisonment for life of the offender.

Caution

The law empowering a magistrate to impose a caution is to be found in **section 202** of Magistrates Courts[1007]Act; however, there are no clear guidelines as to when or what type of offences a caution may be used. It would appear the discretion is left to the Judge/Magistrate to decide when and what case merits a caution. Since there are many minor offenders who would not constitute a threat to society and their imprisonment may further damage rather than rehabilitate them there is need for provision of a system that will; balance between punishment and rehabilitation thereby reducing recidivism.

Accordingly, it is recommended that the Chief Justice should come out with guidelines as to which type of offences and when discharge with caution would be used by sentences.

Conditional Discharge

A person convicted may be discharged by the court with or without sure ties on condition that he keeps peace and good behavior for 12 months other than being sent to prison. It would appear that these provisions are very rarely used by the courts. It is also not known for which offences and on what type they may be used. As an alternative to imprisonment, there is need for the courts to put in use these provisions.

Its accordingly recommend also for the Chief Justice to come out with guidelines as to what offences and the type of offenders on whom they may be used for and were commend so.

Suspended Sentence

Both the Magistrates Courts Act and Trial on Indictments Decree do not provide

[1007] Magistrates courts Act cap 2007

for the imposition of a suspended sentence after conviction, where the sentence is suspended for a period of time provided the accused commits no offence during the period.

However, section 331(3) of the Criminal Procedure Code provides: -

Where the appellate court maintains or imposes a sentence of imprisonment not exceeding three years in the exercise of its powers under the provisions of the sub-section (1) or (2) of this section, if the appellant satisfies the court that there are special reasons, having regard to the nature of the offence for

which he was convicted, his age or antecedents that the sentence should be suspended, the court may order that it be suspended and shall record its reasons for making such order."

One of the cardinal considerations of sentencing is the rehabilitation of the offender but, of course, without losing sight of the fact that society must be protected. Where therefore, there is need to reduce on the number of inmates but of course bearing in mind that those who commit offences should be punished, we would recommend;

(i) The use of suspended sentence, which hitherto appears to have been used very sparingly by the courts.

(ii) The Magistrate or Judge on appeal in appropriate cases should inform the accused of this right to apply for suspended sentence.

(iii) That this provision be enacted in both the Magistrates Courts Act and the Trial on Indictments Decree so that they are available to be used by the accused other than have them restricted to those on appeal only.

Restitution or Compensation or Restoration Section 213

of the Magistrates Courts Act provides: -

(a) If any person charged with any offence as is mentioned in Chapters XXVI to XXXI, both inclusive, of the Penal Code, in stealing, taking, obtaining, extorting, converting, or disposing of, or in knowingly receiving any property is prosecuted to conviction or admits the offence under any of the provisions of this Act, the property shall be restored to the owner or his representative.

"(b) If in every case in this section referred to, the court before which such offender is convicted shall have power to award from time to time orders for restitution for the said property or to order the restitution thereof in a summary manner."

The use of restitution/compensation/restoration is only limited to those offences covered in Chapters XXVI up to XXXI. However much as the legislation state that restitution/compensation/restoration is to be meted out to those offences in Chapter XXVI to XXXI some of the offences created therein do not specifically provide for compensation other than for the offences of Embezzlement c/s 257, Causing Financial Loss c/s 258 and Robbery c/s272 and 273 of the Penal Code.

A further Recommendation

(i) There is therefore need to specifically provide for restoration/compensation/ restitution for all these offences in the chapters referred to above.

(ii) The Judges/Magistrates should be given guidelines by the Chief Justice as

to
how much, to whom and where it should be used.

(iii) There is also need to educate the people as to how they should quantify their claims should they need to make a claim.

Fines

The principles that govern the use of fines are in general the same as those that govern sentences of imprisonment. The main principle that governs the use of fines is that the offence must be such that a sentence of imprisonment is not required. Secondly, the amount of the fine must be related amongst other things to the offender's own resources in deciding whether a fine is appropriate, and what amount of fine should be paid.

The fines as prescribed by the current legislations have not kept pace with inflation. Many of the minimum and maximum are now absurdly low. Our discussion with the First Parliamentary Counsel reveals that there is already a new Bill titled the Law Revision (Fines in Criminal matters) Bill, 2000. The purpose of the Bill is to revise the fines in criminal matters as specified in that enactment to cater for inflation and the fall in the value of the shilling over the years. The Bill also seeks to express fines in currency points at a rate specified in the Schedule. In our view, this is a step in the right direction. The sooner this Bill becomes law the better for society.

Day Fine or Unit Fine

The most obvious drawback of the ordinary fine of a specified monetary amount is that its punitive bite varies with the resources of the offender. A $1,000 (£1000) fine is a devastating penalty to a poor defendant, but trivial in the case of a millionaire.

The day fine addresses this difficulty by assessing the fine in income units: the offender is assessed the equivalent of so many days' work (or so many days' worth of disposable income), instead of so many dollars and pounds. The actual monetary amount is then calculated on the basis of the offender's income. Assessing day fines involve two steps namely, deciding how many day fine units (that is how many days' worth of income) should be assessed against a Defendant) and; deciding the actual amount involved per unit, given that defendant's earning power.

European day fine earning systems have guidelines for the second step: a day fine unit consists of the estimated daily incomes, minus certain specified deductions, (e.g. for child support). However, there generally have been no

guidelines for step one: it is largely up to the Judge to decide, within broad statutory limits, how many day fine units are to be imposed on a particular Defendant. The recommended number of day fine units is graded according to the gravity of the offence. A modest downward adjustment in the number of day fine units is then authorized for defendants who lack a significant criminal record; and further adjustments are also permitted for aggravating and mitigating circumstances relating to the offence.

A system of day fine results, of course, in offenders convicted of the same crime paying different amounts: the rich Defendant pays more per unit than the Defendant with only modest means. Is that a disparity? The theory of the day fine is that it is not, but rather a way of avoiding disparity: the proportion of income taken from the two Defendants is the same, making the punitive bite comparable. Yet the measure of punitive damages used – namely, units of income is an objective and readily measurable one. Purely subjective differences in sensitivity to punishment would pay as many units for a given offence as the prodigal one, though payment might subjectively "hurt" more. The day fine is best suited for Defendants with regular, measurable (and legal) income flow. Where day fines are normally prescribed but the Defendant is indigent, a sanction of comparable onerousness may need to be imposed.

The day fine system also requires an efficient system of collection. In Sweden, fines are collected by the agency that collects overdue taxes and other debts owed to the State and that agency has wide powers of attachments, garnishments[1008], etc. However, other jurisdictions, where day fines are new, may have to develop alternate collection mechanisms.

Imprisonment in Default of a fine

The law requires the magistrate under the Magistrates' Courts Act in section 192

(d) to fix a sentence of imprisonment in case of default of payment of a fine asper scale (see Table192 (d) MCA). In the High Court section 109(d) of the Trial on Indictments Decree sets the scale for imprisonment in default.

Recommendation

Where a Defendant is sentenced to a fine because of the minor nature of the offence, he should not be sent to prison in default but should instead be sentenced to a community basedpenalty.

Probation

1008 Institute henry Dunant seminar for heads of the penitentiary Administrators of the

Objects of Probation

The idea of a probation system is that an offender, instead of being imprisoned or fined or bound over, is placed under the supervision of a probation officer so that his rehabilitation is the main object. A probation order helps the offender to help himself, for without his willing co-operation the order will fail to achieve any result. However, there is a basic contradiction about the probation order, which ought to be resolved.

This is that probation is being widely promoted as suitable for offenders who might otherwise be in custody, but it is still technically a conditional sanction, which is used instead of a penalty. It is misleading and counter-productive to maintain that a penalty, which may make heavy demands on an offender and involves a restriction of liberty is not really a penalty at all.

Recommendation

(i) A probation order should become a sanction in its own right.

(ii) The recognition of the probation order as a full penalty would have the added

benefit of dispelling the "soft –option" image which it has.

(iii) There should be clear statutory recognition of the probation order as a

sentence in its own right.

House Arrest

In some jurisdictions like the UK house arrest is one of the measures that may be imposed on a convicted offender. This arrangement is for offenders who are basically of no risk to the public and are unlikely to require heavy punishment and/or to be involved in any further criminal activity. In this case the offender would either report to Police or Probation officer weekly or as the case may require. By this the offender would remain working and stay with his family. In Uganda's case the offender would probably report to the LC 1 Chairman of the area where he resides, Probation officer or to the nearest Police. It is observed that as of now there is no legislation to put in effect this kind of arrangement.

Recommendation

Legislation, which would enable the courts to put it in use in appropriate cases, should be put in place.

Non –custodial sentences

Community Sentences:

The arrival of new forms of sentence in the last 25 years, such as suspended sentences, community service orders and probation orders have been accompanied by references to "alternatives to custody". The new measures have been advanced as suitable for cases, which are serious enough for custody. However, courts have often not regarded them in this light, believing that neither in their conception nor in their enforcement can they be compared to prison. It has now been accepted that "in reality there can be no alternative "to custody, but it is argued that there are "other ways of punishing". There can and should be "punishment in the community", the punishment being "in the restrictions on liberty and in the enforcement of the orders".

The new community orders are intended as a range of measures to deal with more offenders in the community than ever before. In one sense they are "alternatives to prison," because they are intended for use in cases which might hitherto have received custody. The four main orders are community service orders, probation orders, combination orders and curfew orders/ house arrest.

The community service order remains as an order to do unpaid work in the community for between 40 and 240 hours as specified by the Court. The probation order is to be recognized as a sentence of the Court, and as having the purpose of rehabilitating the offender or preventing the commission of further offences by him.

A Court may also include additional requirements in the order, being requirements as to residence, or specified activities, or attendance at probation Centre, or treatment for a mental condition, or treatment for drug or alcohol dependency. The combination order is a new form of sentence consisting of between one- and three-years' probation together with 40 to 100 hours' community service.

This is intended as an especially demanding form of punishment in the community, which might be suitable for some offenders such as persistent property offenders who now receive custody. The curfew order enables a court to require an offender to remain at a specified place (usually, his/her home) for between two and twelve specified hours on any day during a period of up to six months. The Act also provides for courts to require the electronic monitoring of a curfew order in areas where facilities are available. Before a Court imposes a community sentence, it must be satisfied that the offence was serious enough to

warrant such a sentence. This will normally mean that the case should be one that could not be dealt with satisfactorily by a fine or compensation order or both together. Once the Court has satisfied itself on that point, it must choose the community order or orders, which are appropriate according to two criteria. The first is that the restriction on liberty must be "commensurate with the seriousness of the offence", and the second is that the particular order or orders should be "the most suitable for the offender."

These requirements can be viewed as an attempt to combine proportionality with individualization. The seriousness of the offence should indicate the level of the penalty, which should be pegged on the proposals for rehabilitation or for public protection.

Policy reform

Establishing Basic Principles

A lack of guiding principles, a lack of co-ordination and a lack of communication have been prevailing characteristics of penal policy in most jurisdictions including Uganda. The various non-custodial sentencing options have been introduced into a system, which might be seen, without exaggeration as out of control. If a system is to be established which deals with those offenders who are convicted in as human and effective a manner as possible, then the system must be brought under control. Unless this is done, it is likely that the most serious penalty available will continue to be meted out to an increasing proportion of those who are convicted, and that other offenders will be dealt by means of community based penalties which become increasingly demanding as a result of efforts to gain credibility with the Courts.
Making changes in the range of penalties available, or altering their content, is unlikely to be effective unless fundamental questions about the principles and organization of criminal justice are dealt with. Deliberations about these fundamental issues have featured much less in the Uganda penal policy than in other jurisdictions.

Recommendation:

(i) Sentencing should be guided by the principle that provides for the selection of a sentence based on the criterion of what will be most effective in meeting sentencing objectives.

(ii) Where the choice is between sentences that are likely to be equally effective, options that are least costly in human, social and financial terms should be preferred.

(iii) Selecting the most economic method of achieving maximum effect

makes the most efficient use of social resources. The application of this principle suggests that community based penalties are generally to be preferred.

Restricting the Use of Custody:

A lead in making a clear statement of principle should come from Parliament in a legislation to restrict the use of custody. As well as being a very important statement of principle, such legislation would limit the use of custody in courts directly and also indirectly.

Section 95(4) of the Children's Statute provides:

> *"Detention shall be a matter of last resort and shall only be made after careful consideration after all other reasonable alternatives have been tried and where the gravity of the offence warrants the order."*

A similar requirement could be included in legislation specifying criteria for custodial sentences on adult offenders, stating that the courts must be satisfied that the circumstances, including the nature and gravity of the offence, are such that a sentence of imprisonment is appropriate. The restrictions on the use of custody for young offenders provide a good model that should be extended.

A review of existing offences should be undertaken with a view to reducing the number of offences that carry a custodial sentence.

Back door Imprisonment

As well as limiting imprisonment directly, steps need to be taken to ensure that people do not continue to be imprisoned through the "back-door". In principle, if the original offence is not so serious as to warrant imprisonment then it should not be possible for a custodial sentence to result, even indirectly. The courts do have a problem in dealing with the rising numbers of fine defaulters. But the solution to this problem rests in measures to ensure that fines are fixed at realistic levels and improvements in the collection of fines. The use of imprisonment should not be allowed to substitute for much needed improvements in the fines system. This argument might be applied to default on fines imposed for imprison able as well as non- imprison able offences, but it is stronger in relation to the latter.

For this reason, it's recommended that:

It should no longer be possible for someone to be imprisoned for default on a fine imposed in respect of a non- imprison able offence.

Cost considerations

Sentences are resistant to the idea that cost considerations should be relevant to their decisions. Certainly, saving money should not be an objective of

sentencing in the sense that an ineffective sanction is imposed simply because it is cheaper. However, within a wider context, there are issues about how taxpayer's money is spent on this one element in the social response to crime. Cost considerations should not mean that expensive penalties are not imposed when they are needed, but equally resources should not be wasted. The financial costs of available sanctions vary considerably.

Even the most expensive forms of community supervision, such as probation hostels rarely approach the cost of imprisonment. Three young offenders can be given attendance Centre orders for about the same cost as keeping one in a young offender establishment for a week. Discharge of course costs nothing to administer. Fines actually bring in revenue, even after allowing for enforcement costs. There is a strong case for providing sentences with up to-date information on the costs of various disposals. This would enable them to make a calculation of what they are spending and to consider whether or not money is being spent in the most effective way. Prison is an expensive resource and it is wasteful to use it to achieve aims which can effectively be met in less costly ways.

The human costs of various sanctions are at least as important as financial ones. Prison resources are limited and an unsparing use of them leads to the degrading and in human conditions that characterize many of today's penal institutions. Even without the added punishment that is inflicted by current conditions, imprisonment often deprives people of their homes, their jobs, family ties in addition to their liberty. These conditions also underscore the value of community based sanctions, which can achieve sentencing objectives without the risk of causing further problems for offenders with which society must then deal. It is a waste of human resources to use prison when a less damaging sanction could equally be effective. All these considerations point to a sparing use of penal sanctions and especially of imprisonment. It is argued that punishment involves he infliction of some deprivation upon a member of society. Since it is generally accepted that it is wrong to inflict harm, or deprivation upon members of society (indeed, much of the criminal law is concerned with that), it seems right that the state ought to inflict the minimum punishment consistent with its aims. Crimes themselves inflict misery on victims, but the state ought to avoid adding to the overall misery in society except to the extent that this may be necessary to attain other aims.

There are good grounds for adopting this argument. It implies that sanctions which do not involve restricting personal liberty should be preferred to those that do, and that sanctions which control and supervise the offender in the

community should be preferred to those involving incarceration.

In conclusion, as from the above background it can be authoritatively contended that the sentencing guidelines of Uganda are entirely out of touch and need urgent reform through legislation to meet the changing needs of society. Therefore, parliament can do a better job in consultation with the legal profession and other stakeholders in determining the principles upon which a modern system can be developed. Having provided clear guidelines to the courts, parliament can leave the implementations of the sentencing principles to the judges.

I recommend that the offences which have not been catered for under the guideline should also be catered for because the specific guidelines are really limited to a specific offence. AS discussed above, I recommend that those offences which have been given guidelines the guidelines should also be elaborate just as those for the United States of America.

I recommend that the advocating for removal of the death penalty should be strengthened and also if the people keep supporting the retention of the death penalty it should be limited to very grave offences like murder and treason.

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