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The Constitutional Court and *ubuntu's* “inseparable trinity”

Summary

The purpose of this article is to deconstruct the Constitutional Court's definitions of *ubuntu* as humanness, group solidarity, *umuntu ngumuntu ngabantu*, personhood and a moral philosophy. It is submitted that the philosophy of *ubuntu* or ethnophilosophy represents a religious worldview as it is inseparable from African Religion and the African spirit world. It is argued that the advocating of *ubuntu's* shared beliefs and values by South African courts and the state is to the detriment of other religious philosophies as it violates section 15(1) of the Constitution and constitutes unfair discrimination.

Die Konstitusionele Hof en *ubuntu* se onskiedbare drie-eenheid

Die oogmerk van hierdie artikel is om die Grondwetlike Hof se definisies van *ubuntu* as medemenslikheid, groepsolidariteit, *umuntu ngumuntu ngabantu*, menswees, en 'n morele filosofie te dekonstrueer. Dit word aan die hand gedoen dat die filosofie van *ubuntu* of etnofilosofie 'n godsdienstige filosofie verteenwoordig aangesien dit onskiedbaar is van die Afrika Geloof en Afrika geesteswêreld. Dit word geargumenteer dat Suid-Afrikaanse houe en die staat se verkondiging van *ubuntu* oortuigings en waardes tot nadeel is van ander godsdienstige filosofieë aangesien dit artikel 15(1) van die Grondwet skend en onbillike diskriminasie daarstel.

1. Introduction

Postmodernist philosophy opposes the dominance of Western liberalism and aims at restoring the freedom, equality, autonomy, humanity and dignity of the Other¹ as part of humanity. As human experience does not represent itself to us in the same way it is argued that “every view is equally significant”.² In line with Wittgenstein, African philosophers have appealed for the so-called Principle of Charity to be applied. The Principle of Charity states that one should be maximally charitable when judging worldviews³ of the Other and that one must assume that worldviews from other cultures “accord with the standards of one’s own culture ... and that it is consistent and correct”.⁴ The Constitutional Court must be lauded for doing just that. Since *S v Makwanyane and Another*, the Constitutional Court made a paradigm shift as it no longer entertains only Western thought and jurisprudence but also African thought and legal thinking.

Despite the fact that “the Principle of Charity is ‘forced on us; whether we like it or not’”,⁵ *ubuntu* and its “inseparable trinity”⁶ as well as *ubuntu’s* inseparability from African Religion have to be balanced against South Africa’s Bill of Rights. This article deconstructs⁷ the Constitutional Court’s definitions of *ubuntu* as humanness, group solidarity, *umuntu ngumuntu ngabantu*, personhood and a moral philosophy. It reveals the bigger picture of this unique, ancient African collective worldview which is not only inseparable from African Religion but has the ancestors⁸ at its core.

2. The Constitutional Court and *ubuntu*

The Constitutional Court delivered a landmark judgment in *S v Makwanyane and Another* on 6 June 1995.⁹ Not only did the *Makwanyane* case overturn the constitutionality of capital punishment, but it also introduced *ubuntu* to South African jurisprudence. The court emphasised that recognition had to be given also to “African law and legal thinking as a source of legal ideas, values and practice”¹⁰ as part of the Constitutional Court’s new democratic approach to

1 The philosophical category “Other” includes all the historically “different” or “voiceless” ones in the Western theory of ideas. The Other includes Africans, African-Americans, the Maoris and Aborigines of Australasia, women, homosexuals and lesbians. See Ramose 2002:6-15 and de Beauvoir 1997: 22, 111, 173.

2 Wittgenstein cited in Bell 2002:1.

3 A worldview is one’s ideology or philosophy and is based on one’s values and beliefs.

4 Sogolo 2002:258.

5 Davidson cited in Sogolo 2002:258.

6 According to Ramose 2002:50-5, the wholeness of *ubuntu* can only be comprehended in terms of its three interrelated dimensions, viz. the dimension of the living, the dimension of the living dead or ancestors and the dimension of the yet-to-be-born.

7 Outlaw 2002:138 argues deconstruction is another strategy to read texts with a decidedly different consciousness.

8 According to Broodryk 2007:12, 127, ancestors are the deceased elders of the group or community. They remain ancestors as long as they are remembered by their people but become spirits once forgotten by them.

9 *S v Makwanyane and Another* 1995 3 SA 391 CC.

10 *S v Makwanyane and Another*. para 365 per Sachs J.

jurisprudence, despite the fact that South African law reports and legal textbooks contain few references to African sources or *ubuntu* as part of South African law.¹¹ Sachs J led the court "to take account of the traditions, beliefs and values of all sectors of South African society when developing South Africa's jurisprudence", because "[i]n broad terms, the function given to this court by the Constitution is to articulate the fundamental sense of jurisprudence and rights shared by the whole nation as expressed in the text of the Constitution".¹²

Despite the absence of "a rigorous jurisprudence of substantive reasoning"¹³ and the lack of probing questions and Constitutional adjudication regarding the philosophy of *ubuntu*, South African courts and the *Ubuntu Project*¹⁴ remain committed to translating *ubuntu* into a constitutional value. They, however, fail to indicate how it can be utilised as such.¹⁵ Could it be as Tutu, Koka and Teffo and Mokgoro suggest that *ubuntu* is a very difficult concept to explain in a Western language?¹⁶ Or is it as Mutwa posits that much of *ubuntu* has been "veiled in a heavy *kaross* of mystery" because "[t]he High Laws of the Bantu forbid [Africans] to go into too much detail?"¹⁷ In the absence of rigorous jurisprudential deliberations by the court, one is left with the *caveat* of Mbiti and Turaki who maintain that individual critique of the ancient philosophy of *ubuntu* is not tolerated.¹⁸ Whilst South African courts have as yet been unable to unveil the "heavy *kaross* of mystery", *ubuntu* is described as the essence, crux¹⁹ or root of African philosophy.²⁰ South African courts have omitted to emphasise that *ubuntu* is not only inseparable from African philosophy, but is also inseparable from African Religion as "the spirit world defines the African worldview".²¹

11 *Ibid* para 371 per Sachs J.

12 *Ibid* para 362.

13 Cockrell 1996:11.

14 The *Ubuntu Project* developed out of a one-day conference on the role of *ubuntu* in South Africa and was held by the Stellenbosch Institute for Advanced Studies in March 2004. Since 2004, the *Ubuntu Project* has been exploring the use of *ubuntu* as a justiciable project.

15 In *Dikoko v Mokhatla* 2006 6 SA 235 CC, Mokgoro and Sachs JJ linked the principles of reconciliation and restorative justice to *ubuntu*. At para 68 Mokgoro J states that the primary purpose of a compensatory measure is to restore human dignity and that the restoration of the dignity of a plaintiff is based on the idea of *ubuntu*. At para 86 Sachs J contends that compensation alone is not appropriate relief for defamation but that restorative justice, a well-known relief of the indigenous values of *ubuntu*, should be explored by the courts. According to Naude 2006:10, restorative justice is not unique to *ubuntu* as it can be linked to both African and Western jurisprudence. Naude claims that restorative justice is known to indigenous communities in Canada, Australia, New Zealand, Africa as well as the ancient Greek, Roman and Arab civilizations.

16 Tutu 1999:34; Bhengu 2006:46 and Mokgoro 1998:49.

17 Mutwa 1998:555-556.

18 Mbiti 1991:15 and Turaki 1997:61.

19 Roederer & Moellendorf 2004:442.

20 Ramose 2002:40.

21 Turaki 1997:54.

If South African courts are adamant about protecting South Africa's fundamental rights and freedoms, constitutionalism and the rule of law, they will have to assess the feasibility of translating *ubuntu* into a constitutional value. The mere fact that "ubuntu resists the dictate of Western logic and Western rites of argumentation"²² does not justify the court's lack of jurisprudential rigour regarding this ancient patriarchal collective African worldview. Not only do courts not deliberate the concept of *ubuntu*, but "[i]n their attempt to legalise the value of *ubuntu*, the Constitutional Court Justices in *Makwanyane* remained silent about indigenous spiritual wisdom, magic, mythology, legends and proverbs as these teachings do not fit easily into [Western] legal discourse".²³ If *ubuntu* does not fit into Western legal discourse and resists the dictate of Western logic and Western rites of argumentation as suggested,²⁴ the courts have to seriously question the feasibility of translating *ubuntu* into South Africa's Constitution; a Western constitution which is in line with international and regional human rights and gender mechanisms.²⁵

3. *Ubuntu*: a definition

Since *S v Makwanyane*, Mokgoro J's translation of *ubuntu* has reverberated through South African courts. According to Mokgoro J, *ubuntu* is generally translated as "humanness ... In its most fundamental sense it translates as personhood and 'morality'. Metaphorically, it 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, human dignity, conformity to the basic norms and collective unity, in its fundamental sense it denotes humanity and morality".²⁶ Langa J defines *ubuntu* as a cultural principle which embodies the values of communitarian societies.²⁷

22 Koka *et al* cited in Bhengu 2006:46.

23 Bohler-Muller 2005:275. Mbiti 1991:26-29 states that African Religion is found in wise sayings, proverbs, myths, legends, beliefs, customs etc. "African Religion is found in all aspects of [traditional African] life".

24 Imbo 1999:12 suggests that traditional African thought, in contrast with European logic, has a distinct epistemology. Senghor 1964:73-75; Fanon 1990:44; Somé 1997:2; Mutwa 1998:612; Irele in Coetzee *et al* 2002:46 and Biko 2006:49 maintain emotion and intuition, rather than reason and logic, lie at the core of traditional African thought and that problem solving involves the ancestors.

25 Bhengu 2006:129 posits that "[t]he concept of human rights as natural, inherent, inalienable rights held by virtue of the fact that one is born a human being, remains a creation of Western civilisation and is foreign to indigenous law. In indigenous society rights are assigned on the basis of communal membership, family, status or achievement. Ubuntu philosophy comes in here". Bhengu argues that the Bill of Rights was framed from a distinct Western perspective and that this foreign Western culture has been thrust upon indigenous African cultures through the process of colonisation. According to Bhengu, the Bill of Rights has given new impetus to the debate surrounding the compatibility of indigenous law with Western perceptions of human rights.

26 *S v Makwanyane and Another*. para 308.

27 *S v Makwanyane and Another*. para 224.

Extra-legal sources define *ubuntu* as either a religious based philosophy, a common spiritual ideal or African mysticism. According to these sources, *ubuntu* is inseparable from African Religion.²⁸ In this vein, Mbigi defines *ubuntu* as "a literal translation for collective personhood and morality. It is best described by the Xhosa proverb, *umuntu ngumuntu ngabantu*, which means I am because we are. We have to encounter the collective we, before we encounter the collective I. I am only a person through others".²⁹ Broodryk defines *ubuntu* as "a spiritual foundation of the worldview of African people³⁰ ... an ancient philosophy and worldview with its roots anchored in traditional African mystic".³¹ Broodryk maintains *ubuntu* is "a comprehensive ancient African worldview based on values of intense humanness, caring, sharing, respect, compassion and associated values, ensuring a happy and qualitative community life in the spirit family".³² He argues that although the values of *ubuntu* and Western values seem similar, once translated into English, the values of *ubuntu* are more "intense" and have a deeper meaning than Western values. Mazrui holds that there is a culture gap between "shallow" Western values and *ubuntu*'s ancient values and ancestral traditions.³³ Like Broodryk, Mazrui implies that *ubuntu* has a different value content than Western values. Whether *ubuntu* values are more intense or less shallow than Western values, it is evident that the understanding of *ubuntu* cannot be detached from its cultural context as the understanding of *ubuntu* is determined by its cultural context. According to Broodryk and Mazrui, the unique value content of *ubuntu* values differs from those of universal Western values.³⁴

28 Mbiti 1991:29-30 contends African Religion dictates "all aspects of African life".

29 Mbigi 1997:2.

30 Broodryk 1997:8.

31 Broodryk 2002:139.

32 Broodryk 2006:17.

33 Mazrui cited in Mbigi 2005: ix. Mazrui 2002:18 contends that culture determines the primacy of values, beliefs, symbols, modes of communication, lifestyles, etc. Gyekye 2002:55-56 maintains values form part of culture and are therefore, unique. Sogolo cited in Hallen 2002:40 states that philosophy and its accompanying values are culturally relative and that "African forms of life are unique and cannot be adequately or fairly treated or understood using the techniques [or words] of Western philosophy".

34 Oduoye 2001:193 argues that the "fundamental African value of hospitality" embodies far more than the Western value of hospitality. Whereas Collins 2004:76 defines hospitality as "kindness in welcoming strangers or guests", Oduoye 2001:101 contends the fundamental African value of hospitality regulates African female-male relationships, ignores the welfare of African women and exploits their sexuality. According to Lala cited in Oduoye 2001:101-102, this fundamental African value encompasses that men who went to the same school of initiation can exchange wives; absent husbands may be replaced by friends appointed by them; brothers, especially twins, can share the duties of being husband and wife; sterile husbands may appoint surrogates to have children and a healer may have sexual relations with his patient. Oduoye (2001:103) maintains that the African value of hospitality is "incompatible with the dignity of women". Moyo cited in Oduoye, 2001:202 maintains that African chiefs offer male visitors women of honour to keep them company for the duration of their visit or to be taken away as wives.

Whereas Khanyile defines *ubuntu* as “the common spiritual ideal by which all Africans south of the Sahara give meaning to life and reality”,³⁵ Ramose states that *ubuntu* is grounded in African Religion because “*umuntu* cannot contain *ubuntu* without the intervention of the living dead”.³⁶ Oduyoye states *ubuntu* is a holistic, religious based philosophy which passes on beliefs that explain prevailing conditions.³⁷ According to Oduyoye, the traditional African way of life is so closely bound up with African Religion that religion and culture are mutually interdependent. Oduyoye and Ramose contend that African Religion is the basis or root of *ubuntu*. African Religion is not only the source of shared beliefs and values in *ubuntu* philosophy, but also the foundation of community, tradition, morals, law and justice in traditional African societies. Bengu defines *ubuntu* as “the moral life of Africa best summed up as Ubuntu”.³⁸

The Kenyan philosopher, Henry Odera Orika, defines the collective philosophy of *ubuntu*, as ethnophilosophy in his *Trends in African philosophy*.³⁹ According to Orika, ethnophilosophy is the collective philosophy or “folk wisdom” of traditional African people which “is at best a form of religion”.⁴⁰ Broodryk contends that *ubuntu* is part of the “brotherhood of ethnophilosophy because

35 Khanyile cited in Broodryk 2005:14.

36 Ramose 2002:51.

37 Oduyoye 2001:25.

38 Oduyoye 2001:25.

39 Ethnophilosophy or *ubuntu* is embedded in the meticulously preserved oral tradition which is sacredly guarded and passed on from generation to generation in sub-Saharan Africa. Whilst ethnophilosophy represents traditional African thought the universalist view on African philosophy employs Western analytical methodology in its approach to philosophy.

40 Orika 1990:43. Orika categorises African philosophy in the following six trends: ethnophilosophy, sage philosophy, political philosophy, professional philosophy, the hermeneutical trend and the literary trend. Neither the Western philosophical tradition nor professional African philosophers acknowledge ethnophilosophy's collective folk philosophy as “philosophy in the strict sense”. Ethnophilosophy reflects the worldview of either a specific group, clan, tribe or the collective worldview of traditional African societies as a whole in sub-Saharan Africa. Orika 2002:121 defines ethnophilosophy as “works or books which purport to describe a world outlook or thought system of a particular African community or the whole of Africa”. According to Orika 2002:121, ethnophilosophy or “folk philosophy” is very different from Western philosophy's individualistic, scientific and logic tradition of philosophy. In ethnophilosophy, “communality as opposed to individuality is brought forth as the essential attribute of African philosophy”. Orika's 1990:43 critique against ethnophilosophy lies therein that he regards it as a “communal consensus”. It identifies with the totality of customs and common beliefs of a people. Tempels 1969:75 describes ethnophilosophy as a “philosophy of vital force [which] is accepted by everyone; is not subjected to criticism, for it is taken by the whole community as the essential attribute of African philosophy”. Vital force or animism is the belief that entities throughout nature are endowed with souls, often thought to be the souls of ancestors, who are no longer individually remembered. According to Solomon & Higgens, 1996:171, “[n]ature, for most traditional Africans, is full of living forces. Spirits dwell within it and human beings can interact with them ... The African conviction that human beings are intimately connected to nature is part and parcel of the traditional belief that nature is essentially spiritual”.

it represents the collective personhood and collective morality of the African people, best described by the Xhosa proverb *umuntu, ngumuntu ngabantu* or "I am a person through other persons".⁴¹ The notion of *ubuntu* as the ancient collective African worldview or sub-Saharan African *weltanschauung* is confirmed by Oruka, Ramose, Broodryk, Mbigi, Mutwa, Bhengu and other African philosophers.⁴² As *ubuntu* does not represent individual philosophies but the collective philosophy of sub-Saharan African societies, it represents the trend of ethnophilosophy in African philosophy.

Ubuntu can be defined as ethnophilosophy or a religious based collective philosophy which reflects the shared beliefs and values of indigenous African cultures in sub-Saharan Africa. *Ubuntu* is generally described as *umuntu, ngumuntu ngabantu* and translated as humanness, group solidarity, personhood and morality.

4. *Ubuntu*, a philosophy of shared values and beliefs

As Africa's philosophy of life, *ubuntu* represents the African subcontinent's philosophy of shared beliefs and values. Various scholars maintain that the African subcontinent's indigenous African people share fundamental beliefs and values.⁴³ The philosophy of *ubuntu* extends "from the Nubian desert to the Cape of Good Hope and from Senegal to Zanzibar"⁴⁴ and represents the worldview of all "Bantu speaking peoples of Africa".⁴⁵ It is common knowledge that African cultures differ from one another, but despite cultural differences, this unique collective worldview stretches "from Carthage to Zimbabwe, from Meroe to Benin and Ife, from the Sahara to Timbuctoo to Kilwa, across the immensity and the diversity of the continent's natural conditions".⁴⁶ *Ubuntu* is found "all over Africa and in South Africa this *ubuntu* tendency is called *Batho Pele*".⁴⁷ Broodryk describes *ubuntu* as a universal African worldview which is found amongst all African cultures and in all African languages. Although different languages have different names for *ubuntu* its basic meaning and worth remain the same.⁴⁸

South African courts generally depict *ubuntu* as a shared value system⁴⁹ ignoring the fact that *ubuntu* represents sub-Saharan Africa's shared belief system

41 Broodryk 1997:33.

42 Oruka 1991; Ramose 2002; Broodryk 1997; Mbigi 1997; Mutwa 2003 and Bhengu 2006.

43 Abraham 1962; Mbiti 1991, 1992; Ramose 2002; Broodryk 1997, 2002 and Bhengu 2006.

44 De Tejada cited in Ramose 2002:40-41.

45 Ramose 2002:8,43.

46 Cabral cited in Hallen 2002:76.

47 Phalafala cited in Broodryk 2007:19.

48 Broodryk 2002:17.

49 See *Dikoko v Mokhatla* para 86 and *S v Makwanyane and Another* paras 225 and 307. According to Gyekye 2002:301, the values of Akan culture are kindness (generosity), faithfulness (honesty and truthfulness), peace, happiness, dignity and respect. Mbigi & Maree 2005:vi identify the key values of *ubuntu* as group solidarity,

and that these shared beliefs and values are grounded in African Religion.⁵⁰ Are *ubuntu's* shared beliefs ignored because *ubuntu* as ethnophilosophy or “[g]nosis is by definition a kind of secret knowledge”⁵¹ or is it because no sacred knowledge is to be revealed to strangers or outsiders?⁵² The fact is *ubuntu* is a holistic philosophy of life which is defined by the African spirit world and does not distinguish between spiritual and physical existence.⁵³ *Ubuntu* is “a form of African philosophy ... where the moral and spiritual have the emphasis”.⁵⁴ Should we, like the courts, turn a blind eye “ignoring the ubiquitous conflicts and contradictions, the oppressive immanence of the [*ubuntu*] worldview, the witchcraft beliefs and accusations, the constraint oscillation between trust and distrust, and merely appropriating and presenting the bright side”?⁵⁵ If the Bill of Rights is deemed supreme law, South African courts will have to deliberate *ubuntu* despite the fact that it does not fit into Western legal discourse and “resists the dictate of Western logic and Western rites of argumentation”.

5. *Ubuntu* as “humanness”

Although South African courts translate *ubuntu* as “humanness”,⁵⁶ Bhengu argues there is no equivalent English word for *ubuntu*. According to Bhengu, “English translations are inadequate, because of the very lack of the social reality out of which the term springs”.⁵⁷ Because Africans make no distinction between the material and spiritual, Bhengu maintains the holism of *ubuntu* is foreign to dualistic Western thinking.

Like Bhengu, Tutu maintains that the English word “humanness fails to convey the African worldview”.⁵⁸ The English word “humanness” is defined as “kindness and sympathy”⁵⁹ and does not portray the holism of *ubuntu's* collective African worldview or “moral life of Africa”. Ngubane too laments the superficial translation of *ubuntu* as “humanness” and argues that the English

conformity, compassion, respect, human dignity, hospitality and collective unity (Mbigi 1997:11). The Gauteng Department of Education cited in Broodryk 2002:33 identifies the values of sharing, caring, kindness, forgiveness, sympathy, tolerance, respect, love, appreciation and consideration as *ubuntu's* key values. Broodryk 2002: 23; 2006:28 perceives the values of *ubuntu* as humanness, caring, sharing, respect and compassion.

50 Mbiti 1991:179.

51 Mudimbe 1988:186.

52 Mutwa 1998:556.

53 Turaki 1997:54.

54 Bhengu 2006:90, 101.

55 Bhengu 2006:102.

56 *S v Makwanyane and Another* para 308 per Mokgoro J and para 417 per Madala J; *Dulabh and Another v Department of Land Affairs* 1997 4 SA 1108 LCC A para 54 per Meer J and *BHE v Magistrate, Khayelitsha, and Others* 2004 2 SA 544 C p 554 where Ngwenya J argues that section 23 of the *Black Administration Act* 38 of 1927 is unconstitutional and invalid as it lacks basic humanity, the hallmark of *ubuntu*.

57 Bhengu 2006:47.

58 Bhengu 1996:4 and Tutu 2006:346.

59 Collins 2004:767.

translation "is too simple an understanding touching only on the visible aspects of *ubuntu* in operation. More completely understood, the word refers to a moral philosophy deriving from the dictum that *umuntu ngumuntu ngabantu* — a person is a person through other people".⁶⁰

Koka *et al* are adamant that the English word "humanness" does not convey the essence or meaning of *ubuntu* or *umuntu ngumuntu ngabantu*. They argue as follows on the use of "humanness" as synonym for *ubuntu*: "Asking an African philosopher for the meaning of *ubuntu*, a European will hear that *ubuntu* means 'humanness'. However, *ubuntu* has more to it than this polite and forbearing answer, an explanation of *ubuntu* needs all kinds of associations, images and experiences; *ubuntu* resists the dictate of Western logic and Western rites of argumentation with their demands for distinctive definitions". The dissent of Bhengu, Tutu, Ngubane and Koka *et al* is a clear indication that the English word "humanness" is inadequate to describe *ubuntu*.⁶¹

According to legal hermeneutics, understanding of a word or text cannot be detached from its cultural context. Therefore, understanding of this ancient patriarchal philosophy cannot be detached from its traditional cultural context, as an understanding of *ubuntu* is determined by the cultural context of traditional African societies. According to Van Blerk, a specific cultural context influences the perceptions and meanings of words as "[t]he languages unique to the societies which use them constitute unique worlds for those societies and should not be seen as interchangeable words with different names for the same things. Thus, all meaning is rendered uncertain and true and universal meanings cannot exist".⁶²

Whilst legal hermeneutics places *ubuntu* in the traditional African context, sources maintain that *ubuntu* "is not easily definable"⁶³ as there are limits to Western rationality when it comes to the understanding of the philosophy of *ubuntu*. According to Wittgenstein's *Tractatus*, one cannot say the "unsayable. Whereof one cannot speak, one must be silent".⁶⁴ We are made to believe that Western philosophy's rational approach and dominant beliefs of Christianity are unable to rationalise *ubuntu*'s mystic philosophy of life. Western rationality seems incapable of rationalising that which it cannot conceptualise. *Ubuntu*'s ancient collective philosophy of shared beliefs and values seems to lie beyond the reach and comprehension of Western philosophy and its rationality. Is it as Wittgenstein suggests that "[o]utside the limits of scientific rationality lie all the problems of value, the pressing question of ethics, the very nature of God and religion"?⁶⁵ For Wittgenstein, "ethics, aesthetics, religion" and its accompanying values are "too important to be captured by the logical language of science".⁶⁶

60 Ngubane cited in Bhengu 2006:42.

61 Koka *et al* cited in Bhengu 2006:46.

62 Van Blerk 2004:219.

63 Mokgoro 1998:49 maintains that *ubuntu* is not easily definable. "Because the African worldview is not easily and neatly categorized and defined, any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea".

64 Wittgenstein cited in Soloman *et al* 1996:258.

65 Wittgenstein cited in Soloman *et al* 1996:258.

66 Wittgenstein cited in Soloman *et al* 1996:258.

In an effort, however, to overcome this ideological bias standing in the way of meaningful legal and jurisprudential engagement regarding the philosophy of *ubuntu*, it is imperative to unveil *ubuntu's* "heavy *kaross* of mystery".

As the English language apparently lacks vocabulary to describe *ubuntu's* unique, ancient holistic African worldview or "moral philosophy", it has to be noted that *ubuntu* cannot be translated as "humanness".

6. *Ubuntu* as "group solidarity"

The Constitutional Court's definition of *ubuntu* as "group solidarity"⁶⁷ highlights the stark contrast between African communalism and Western individualism. *Ubuntu's* communitarian ideals reject Western individualism as it is "anti individualism while at the same time it is incurably religious".⁶⁸ Whereas a person in the West is defined as an individual, the collective African worldview defines the African person as a member of the community.⁶⁹

African persons are part of many interdependent relations in a supernaturally ordained community. The goal of these relationships is to maintain the cosmic harmony and well-being of the group rather than that of the individuals. According to Senghor, "Negro-African society puts more stress on the group than on individuals, more on solidarity than on the activity and needs of the individual, more on the communion of persons than on their autonomy. Ours is a community society".⁷⁰ Strong communitarianism is the cornerstone of *ubuntu*. The traditional African community represents *ubuntu*; there is no *ubuntu* without community. *Ubuntu* manifests only through interaction with others and is best illustrated by the Shona proverb, "a thumb working on its own is useless". *Ubuntu* represents collective solidarity and rejects Western atomistic individualism. Western individualism ultimately results in the disintegration of *ubuntu* and the destruction of its collective solidarity and brotherhood.

The features of African communitarianism are not only unique if compared to Western liberalism, but are also the defining characteristics of traditional African societies.⁷¹ African communitarianism, or strong communitarianism,

67 *S v Makwanyane and Another* para 308.

68 Sebidi 1988:3.

69 Tutu 1995:xiv states "[a] person is a person through other persons. A total self-fulfilling human being is ultimately subhuman ... we need each other to become fully human".

70 Senghor 1964:93-94.

71 Gyekye 2002:306 describes African communitarianism as "radical or excessive communitarianism". Ramose 2002:115 describes communalism as follows: "Communalism is the doctrine that the group constitutes the main focus of the lives of the individual members of that group, and that the extent of the individual's involvement in the interests, aspirations, and welfare of the group is the measure of that individual's worth. This philosophy is given institutional expression in the social structures of African communalism". Communitarianism opposes the idea of individualism in Western liberalism. Liberalism is the epitome of individual autonomy, individual freedom and fundamental human rights. Communitarianism regards community as the basis of life and opposes individual autonomy divorced from the group. According to van Blerk 2004:195, "[p]ersonhood in the communitarian sense

with its shared beliefs and values is said to be more fulfilling than Western liberalism. Van Blerk juxtaposes strong communitarianism and Western liberalism as "two diametrically opposed types of substantive political society built upon equally polar principles of association".⁷² According to Van Blerk, strong communitarianism does not only focus upon community as the source of value, but also upon which value to follow. It is not concerned with the "mere presence of shared values, but the content and scope of the shared values" and does not respect the plurality of values among diverse communities but emphasises the "cultivation of the single value of substantive community". *Ubuntu* juxtaposes universal Western values.

Strong communitarianism is characteristic of closed societies⁷³ and represents what African traditionalists define as indigenous Africa's single or unique set of collective values. The shared beliefs and values of these closed societies are derived from African Religion and "uphold the life of the people in their relationship with one another and the world around them".⁷⁴ Tsele maintains that values are not universal and therefore "[w]hat is moral to us may be immoral to others".⁷⁵ As Western individualism and capitalism juxtapose *ubuntu*'s communitarian ideals, *ubuntu* exists "mainly in South African rural areas, it being a value lost through the process of urbanisation".⁷⁶ Somé maintains that Western culture diminishes "anything aboriginal" and that that which is indigenous, viz. the philosophy of *ubuntu*, can only thrive in indigenous societies.⁷⁷ It is argued that Western liberalism suffocates *ubuntu* as it is the anti-thesis of this ancient collective African worldview.⁷⁸

7. *Ubuntu* as "*umuntu, ngumuntu ngabantu*"

The Constitutional Court and African sources⁷⁹ seem to agree that *ubuntu* represents the ancient collective "moral philosophy" of African people described by the Xhosa proverb, *umuntu, ngumuntu ngabantu*, or in Sesotho, *motho ke motho ka batho* — "I am because we are and because we are, therefore, I

means presence and participation in the life of the community. Individual rights presume the liberal conception of the self as an independent being who joins social life only to further self-centred interests and values".

72 Van Blerk 2004:202-203.

73 Popper cited in Broodryk 1997:88 defines a closed society as a society characterised by belief in magical taboos and superstitions. According to Popper, open societies give preference to reason.

74 Mbiti 1991:12.

75 Tsele cited in Villa-Vicencio & de Gruchy 1994:126.

76 Smit, Deacon & Schutte 1999:32.

77 Somé 1997:57-58. Mutwa 1998:691 warns that Western values bring about the destruction of indigenous African values.

78 Khumalo cited in Bhengu 2006:58.

79 *S v Makwanyane and Another* para 308. Whereas Bhengu 2006:42 defines *ubuntu* as a "moral philosophy", Mbigi 1997:30 defines *ubuntu* as "a literal translation for collective personhood and morality. It is best described by the Xhosa proverb, *umuntu, ngumuntu ngabantu*, which means I am because we are. We have to encounter the collective we, before we encounter the collective I. I am only a person through others".

am". As Mokgoro J has indicated, *umuntu, ngumuntu ngabantu* is cardinal in the understanding of *ubuntu*.⁸⁰

In contrast with Western individualism, African communitarianism is portrayed by African proverbs, viz. the Xhosa proverb *umuntu, ngumuntu ngabantu* and the Sotho proverb *motho ke motho ka batho* which negates Western individualism and affirms that a person can only be human through other persons. African proverbs affirming "I am because we are, and since we are, therefore I am";⁸¹ "a person is a person through other people" and "injury to one is injury to all" emphasise that the African person is seen not as an individual, but as part of the whole or community. Membership of the traditional African community defines the African person. An African individual becomes a person through membership of the community and ceases to be a person if detached from the community.⁸² *Ubuntu* emphasises the mutual interdependence of every member of the extended African family. Unlike Western nuclear families, the African extended family embraces all those who have blood ties.

The extended family stretches over many generations and includes not only persons who are alive, but also those who have passed away and those yet to be born. Bhengu states that "[m]embers of the extended household of several related extended families belong to a common ancestor".⁸³ According to Bhengu, there is solidarity among members of the extended family who can trace their origin to a common ancestor and they regard such extended family as "their blood". As the African extended family reaches beyond the grave the relationship and constant communication between the living and the living dead or ancestors in *ubuntu* reality is sacrosanct and unbreakable. The African community "is bound together and lives by ancestor veneration, rites of passage and ritual" as communal life is a single entity with religious and moral obligations.⁸⁴ Every community is a religious one which has at its centre the ancestors.⁸⁵ Ramose describes this triad of the "three interrelated dimensions" or the "inseparable trinity" between the living, the living dead and yet to be born as "an unbroken chain of relationships which are characteristically of

80 *S v Makwanyane and Another* para 308 and *BHE v Magistrate Khayelitsha and Others; Shibi v Sithole; South African Human Rights Commission and Another v President of the Republic of South Africa* 2005 1 BCLR 1 CC para 163.

81 Mbiti 1991:123. In African societies the individual exists in terms of the family, clan and ethnic group. "Only in terms of other people does the individual become conscious of his own being, his own duties, his privileges and responsibilities towards himself and towards other people ... The individual can only say I am, because we are: and since we are, therefore, I am".

82 Van der Walt 2006:113.

83 Bhengu 2006:41.

84 Kasenene cited in Villa-Vicencio *et al* 1994:141. Mbigi 1997:53 states that "[a]ncestor worship is central to our lives ... We have communion with ancestors on all aspects of our lives, such as marriage, birth, career advancement, job hunting, death, business travel and any crises".

85 Kasenene cited in Villa-Vicencio *et al* 1994:14. Ramose 2002:70 posits that every facet of African reality is regulated by *ubuntu's* religious philosophy of life of which "ancestors form the core".

a one-ness and wholeness at the same time".⁸⁶ *Ubuntu*'s ancient holistic philosophy of life cannot be sustained without this "inseparable trinity". There is no *ubuntu* without the intervention of the living dead as the living dead form the core of this triad. Ramose maintains that "[u]muntu cannot attain ubuntu without the intervention of the living dead", as the living dead are responsible for the upkeep and protection of the family of the living.⁸⁷ The wholeness of this triad is the foundation of *ubuntu*'s "collective immortality" which, according to Ramose, defies Western logic.⁸⁸ *Ubuntu*'s sense of community including the living, living dead and yet to be born, juxtaposes the atomistic Western notion of community as a contract between individuals.

The ancestors or living dead are not only the source of "sacred values of *ubuntu*",⁸⁹ viz. caring, sharing, respect, compassion, hospitality and preservers of tradition, but also the extended family's source of knowledge.⁹⁰ Nkabinde confirms this notion and states that when the ancestors call a person to become a prophet, healer or *sangoma* such a person receives their sacred knowledge from their ancestors.⁹¹ Ancestors play an essential role in tribal courts, dispute resolution, the settling of divorces, mediation and the punishment of offenders. Not only are the living dead the source of sacred *ubuntu* values, tradition and knowledge but they are also the legislators who lay down rules, norms and taboos for the community.⁹² In *ubuntu*'s oral culture, African laws are passed on from generation to generation under the supervision of the living dead. The living dead have to approve African laws and, therefore, form "the basis for the authority of law in *ubuntu* philosophy".⁹³ Not only is *ubuntu* inseparable from African Religion but also African law.⁹⁴ Because *ubuntu* metaphysics underlies also the philosophy of African law, norms and rules have to be authorised by the living dead or ancestors.

86 Ramose 2002:50-51, 94.

87 Ramose 2002:51.

88 Ramose 2002:73.

89 Broodryk 2007:41. Khapoya 1994:49 and Mbiti 1991:179 maintain *ubuntu*'s values and norms are derived from African Religion and handed down by the ancestors.

90 Senghor 1964:72 and Mbigi 1997:137.

91 Nkabinde 2008:26,57. The ancestors, for example, indicate to the *sangoma* which herbs to use for healing and which for making lightning.

92 Turaki 1997:66 and Mutwa 1998:78.

93 Mutwa 1998:78; Turaki 1997:66 and Ramose 2002:96-97.

94 In contrast with Christianity and Islam, which derive their scriptures from the Bible and the Quran respectively, African Religion is not derived from sacred or holy writings and is, therefore, not a theology. African religion is an "unrevealed religion". Ramose 2002:53 argues that *ubuntu* philosophy and African religion has no theology for "[a]ccording to ubuntu understanding of be-ing, the world of metaphysics is the world of *u-nkulu-nkulu*: the greatest of the great; the ineffable. The ineffable is neither male nor female. But if it must be genderised at all, it is female-male ... The main point though is that *u-nkulu-nkulu* is neither definable nor describable. This preserves the essence of *u-nkulu-nkulu* as unknowable. Therefore it is best to remain quiet about the unknowable ... This, it is submitted, is a basic starting point to explain why ubuntu philosophy and religion have got no theology".

In *ubuntu* reality, African justice strives towards perpetuating the balance and harmony within its cosmic universe. The violation of norms and taboos results in the punishment of the offender by the community and the living dead. The living dead punish an offender with sickness, death, poor harvest or poverty. Punishment will be perpetuated until the offender appeases the living dead by making either a sacrifice or an offering. As there is no law enforcement system, viz. the police in traditional African communities, the living dead serve as the protectors of the community.⁹⁵ Somé maintains that the living dead protect all homes in African villages and that their spirit interventions create safety for the extended family.⁹⁶ This “inseparable trinity” which characterises *ubuntu* accentuates the dire need for the community to invoke ancestral spirits⁹⁷ as spirit intervention creates safety for the community.

8. *Ubuntu* as “personhood”

The Courts’ definition of *ubuntu* as personhood⁹⁸ is personified in the proverb “I am because we are and since we are, therefore I am”. In *ubuntu* reality African individuals are entangled in a relational web of community even before birth. Imbo⁹⁹ posits this web of community begins before birth as it is believed that constant interaction between spirits and the living persists everywhere. Imbo maintains that the individual’s “[p]ersonality is thus moulded through the relations with the spirits, ancestors and the living” and that freedom is won from the chains of societal life only in slow stages and never completely.¹⁰⁰ Individuals are free to make ethical choices but their choices are subordinate to *ubuntu*’s shared ethics as they remain accountable to their ancestors and blood relations.¹⁰¹

African individuals are progressively incorporated into the community by means of different prescribed rites of passage and rituals which begin before

95 Somé 1997:50. Somé describes how village houses have no doors that can be locked because the open door in Africa symbolises the open mind and heart of the community. He sees “the presence of a law enforcement system as an indication of something not working”. The police force in African societies is the spirits who oversee everybody and everything. “To do wrong is to insult the spirit realm. Whoever does this is punished by the spirits”. Ebo in Woodman & Obilade 1995:39 maintain the ancestors are the authority behind the law and that they are so effective that a police force is unnecessary.

96 Somé 1997:10,53.

97 According to Nkabinde 2008:54, ancestors can be invoked by “[t]he dancing to the beat of drums in *sangoma* ceremonies [which] prepares us to welcome our ancestors. It connects us with our bodies and with the earth”. As a unique relationship exist between ancestors and *sangomas*, ordinary people can make use of *sangomas* to contact and interact with ancestors. Nkabinde 2008:45 and Mutwa 1998:571 posit that ancestors can be spoken to at their graves. According to Ephirim-Donkor 1998:127, “[n]o one goes to the ancestors or God without first going through the elders”. Mbiti 1991:77-81 maintains ancestors visit relatives in dreams, visions or openly.

98 *S v Makwanyane and Another* para 308.

99 Imbo 2002:146.

100 Imbo 2002:146,149.

101 Turaki 1997:69 and Ephirim-Donkor 1998:119-120.

birth and continue after the death of the individual. Successful completion of all prescribed rites and rituals eventually assists certain persons to attain the position of elder and personhood.¹⁰² Personhood is mostly reserved for males in these patriarchal societies and gained step by step through the successful completion of various rites of passage and rituals. Personhood is, however, something at which a person can fail.¹⁰³ Without this prescribed incorporation of the individual into the African community, such a person is regarded as an "it" to indicate that he or she is not incorporated into the body of persons.¹⁰⁴ Ramose states that individuals who have not undergone the community's prescribed rites and rituals which integrate them into the community "are considered to be mere danglers to whom the description person does not apply".

A baby, for example, is integrated into the community at the *imbeleko* sacrifice to the ancestors. Ramose states that parenthood and babyhood are not established at the birth of the baby but at the sacrifice to the ancestors. According to Ramose, the newborn baby has to be integrated into the extended family and community through specified rites in order to be acknowledged as a member of a specific youth group.¹⁰⁵ As each individual fits into a social hierarchy, individuals can only progress from one social category to the next provided the community qualifies the person for the next category. The climax of puberty rites is initiation, a rite of passage whereby the African child progresses from childhood to adulthood.¹⁰⁶ According to Ramose, the puberty rite of initiation is a prerequisite for marriage and fulfils a threefold function, viz. the incorporation

102 According to Mbiti 1991:143, "[r]ites and festivals are religious ways of implementing values and beliefs of society". These rites include rites of birth, initiation, marriage and death. Menkiti 1979:176,171 describes personhood as "something that has to be attained in direct proportion as one participates in communal life through the discharge of the various obligations defined by one's stations. It is the carrying out of these obligations that transform one from the it — status of early childhood ... into the person-status of later years, marked by a widened maturity of ethical sense." In contrast with Western society, the African community defines the person in terms of community, "not some isolated static quality of rationality, wills or memory".

103 Menkiti 1979:159.

104 Ramose 2002:65-66.

105 Ramose 2002:66,77 and Bhengu 2006:161. Nkabinde 2008:9 describes her introduction to her mother's ancestors as follows: "I was introduced to my mother's ancestors when I was one year and six months of age. I was nearly a teenager when I was introduced to my father's ancestors. My mother held me in her arms and my parents and elders from my mother's family took me to the family graveyard. Two chickens — a cock and a hen — were sacrificed for my male and female ancestors from my mother's family. My uncle and an elderly relative spoke to the ancestors, informing them that I was a child of those parts and that my father was from the Nkabinde clan. My uncle called on the ancestors to open up the path in front of me and teach me the ways of my clan. Afterwards, a celebration was held. A goat was slaughtered and a feast was prepared for my family and my neighbours from all around. A bracelet was made from the goat's hair — *isiphandle* — was tied around my left wrist, the side of my mother. Some months later, when the ancestors had settled in me, the bracelet fell of on its own. That was the sign that the ancestors were happy that I had taken my place in the family."

106 Mbiti 1991:141 defines rites as "religious ways of implementing values and beliefs of society".

of the initiated into the community of the living; the establishment of a link between the initiated and the living dead; and the obtaining of the qualification to get married.¹⁰⁷ As marriage is the meeting point of three layers of the triad or extended family, initiation is a prerequisite for marriage.¹⁰⁸ Children are the goal of marriage as procreation in marriage is essential to facilitate the African flow of life or reincarnation. The belief in reincarnation is central to *ubuntu* and creates an opportunity for the ancestors to return to their tribe and family.¹⁰⁹

During initiation, whether by circumcision or clitoridectomy,¹¹⁰ the blood of males and females are spilled on the land¹¹¹ as a sacrifice to the

107 Ramose 2002:72. Initiation represents more than just physical circumcision. During the initiation period initiates are taught tribal laws, customs, values, crafts etc. Nyirongo 1997:132 states that “[t]hroughout the training the members [male initiates] are forbidden to see women and to stray out of the camp. Anyone who disobeys the rule is instantly killed within the camp”.

108 In contrast with Western notions of marriage the traditional African marriage is not a contract between two individuals but a contract between two families and their respective ancestors. Mbiti 1991:104,133 states as follows: “Marriage is the uniting link in the rhythm of life. All generations are bound together in the act of marriage — past, present, and future generations ... Failure to get married under normal circumstances means the person concerned has rejected society and society rejects him in turn”. Reed 2001:172-173 maintains polygyny or polygamy is grounded in the philosophy of *ubuntu* and that this form of marriage originates from the ancestors. The ancestors also permit traditional female marriages and marriage to an ancestral wife for one’s male ancestor. See Nkadinde 2008:86.

109 The African belief in reincarnation is confirmed by Mbigi 1997; Ephirim-Donkor 1998; Mutwa 1998 and Ramose 2002. According to Mbigi 1997:52, the belief in reincarnation is a very significant pillar in African Religion. When someone dies, he continues to live among his relatives as an ancestral spirit who protects them from danger and attends to their daily needs. In return, spiritual sacrifices are made in honour of the ancestral spirit. People who were influential before their death may choose a suitable host or medium to possess regularly during appropriate ceremonies and rituals. Somé 1997:53 maintains ancestors can *inter alia* be reborn into the trees, mountains rivers and stones to guide and inspire the community. Ancestral spirits are immortal for as long as they are remembered by their people. According to Broodryk 2002:127 and Mbiti 1991:77, ancestors are generally remembered by their families for about five generations. Mbiti 1991:127 states many forgotten ancestors do not return to the spirit world and stay in trees, lakes, rivers, rocks and animals. “Some of these unknown spirits may be used by witches and other individuals who wish to do harm to their neighbours. Others are used in divination and medical practices to help in the diagnosis of diseases and problems. Some mediums and diviners call back the spirits of the dead”.

110 Clitoridectomy or FGM (Female Genital Mutilation) is the partial or total removal of a girl’s external genitalia of which some forms of clitoridectomy are more severe than others. It is a widespread practice in sub-Saharan Africa, of which the most radical form of clitoridectomy is called *infibulation* or pharaonic circumcision. Clitoridectomy is still a prerequisite for the transfer of bridewealth or *lobola* in certain sub-Saharan African societies. According to Akokpari & Zimble 2008:113-115, this harmful traditional practice is “deeply rooted and entrenched in patriarchal cultures” and is currently practised in 28 African countries.

111 *Ubuntu* and its “inseparable trinity” are inextricably bound to the land. Bhengu 2006:41 holds that “[a]ll land belongs to the ancestors. Paradise, according to African thought,

ancestors.¹¹² "By spilling the blood of females [or males] onto the soil, a sacrifice is made and the meaning of the sacrifice is that the initiated person is thenceforward bound to the land and consequently to the departed members in society".¹¹³ Initiation ensures the person of a link with the ancestors;¹¹⁴ evolving from an "it" to becoming more of a person. An individual who is not initiated will be regarded as an outsider because the gate for marriage has not been opened. Such an individual will remain an "it", an outsider, "a half person, a nobody ... an outcast".¹¹⁵ A person who has not been initiated into adulthood as prescribed by the community remains in a state of immaturity: subhuman or not fully human. As community rites and rituals are prescribed by the ancestors, adhering to the ancestors' prescriptions guarantees the individual's well-being. Somé maintains that "[w]here ritual is absent, the young ones are restless or violent, there are no real elders, and the grown-ups are bewildered. The future is dim".¹¹⁶ The authority of the living dead or ancestors over the living is evident in all aspects of *ubuntu*'s holistic philosophy of life.

is not somewhere in the sky, it is in the underworld of the ancestors — *kwabaphansi*. Man must aspire to a spiritual state that shall re-unite him ultimately with his ancestors. Hence, land is not simply regarded as a piece of real estate; it has very deep religious significance. Land is perceived as an organism that sustains the bond between the unborn, the living and the dead. What it means is that man must practise *ubuntu* if he hopes to get reunited with his ancestors". Davidson cited in Coetzee *et al* 2002:168 argues that during the colonial dispossession of land "the ancestors were banished to realms of impotence and anonymity from which there seemed no way of recalling them, and so, for 'the living and the yet unborn', there was no way of conserving the notion of community as these people had learned to understand".

112 Khapoya 1994:48 contends the shedding of blood onto the ground during initiation "binds the initiate with the ancestral spirits living in the ground". Khapoya narrates how, in the case of the Vusugu, "at the precise moment of the circumcision, the father of the initiate stands on top of the hut to invite the participation of the ancestral spirits and to ask for their help. Often temporary shrines are erected to honour the dead grandparents of the initiate. The rejoicing and showering of the initiate with presents of money and animals demonstrates this sense of community and the welcoming into it of the young person as a new adult". According to Mbiti 1991:96-103, not only are customs and values of the tribe taught to the initiated individuals during the initiation period but each initiate also gets a new name because he/she is deemed a new person.

113 King Zwelethini, King of the Zulu nation, has restored the ancient Zulu custom, *Ukwetshwana*, or first fruit ceremony at his eNyokeni Royal Palace since December 1992. During the ceremony young Zulu warriors have to kill a black bull with their bare hands to prove their manhood and to gain a bond with the regional ancestors. See *The Sunday Tribune* December, 2004: 12.

114 Nkabinde 2008:60-66 posits trainee *sangomas* undergo initiation ceremonies to bond them with their ancestors.

115 Nyirongo 1997:72,101. Mbiti 1991:98 confirms that the blood shed during initiation binds the person to the land and the ancestors. He states: "the blood is like a covenant, or solemn agreement between the individual and his people. Until the individual has gone through the operation he is still an outsider, Once he shed his blood ... he becomes truly one of them".

116 Somé 1997:105.

Elders are persons who have achieved personhood.¹¹⁷ An elder is a person who has achieved immortality and has acquired as much life force or vital force as he can. An elder, as head of the family, has the power to bless or withhold blessings. Elders are the pillars and collective memory of the community and hold the wisdom and traditions which keeps the community together. They initiate the young ones, prescribe rituals for various occasions and monitor the dynamics within the community. An elder's "ability comes from the ancestors, to whom he is very close, and he follows their wisdom and counselling for his large family".¹¹⁸ Elders are perceived as having lived an "altruistic ethical life and having achieved a name worthy of remembrance and evocation".¹¹⁹ As the ultimate authority in the community of the living remains with the elders they are regarded as sages and consulted for their advice and counsel. Mangena maintains "elders have reached the stage in life which accord them the position of and role of running the juridical system in the lineage and beyond to the last communal level of a particular territory".¹²⁰ As the position of elder is the highest existential office in the community of the living, elders fulfil the tasks of intercessors,¹²¹ mediators, councillors, judges and preservers of tradition in the community. For an elder to have obtained personhood means the individual has attained immortality and ancestorhood,¹²² since upon their death, elders become ancestors as a rule.

117 The concept of "personhood" indicates that the individual is whole. Personhood is a state which can only be achieved after having gone through all ubuntu's prescribed rites and rituals and having lived an "ultruistic and ethical life". Ramose 2002:64 maintains "[w]holeness is the starting point of the African concept of a person. Consequently the human person in African thought is not definable in terms of a single physical or psychological characteristic to the exclusion of everything else". To become an ancestor, the deceased had to be an elder who achieved personhood. Ephirim-Donkor 1996:129 states "[a]ncestors are therefore a distinct group of eternal saints, apart from other spiritual personalities who are also endowed with immortality but are not ancestors". According to Ephirim-Donkor 1996:126, elders have already attained immortality and ancestorhood in the flesh and are awaiting the final transformation through death. "Elders take their responsibilities seriously, for they are being watched by the omniscient ancestors before whom they must appear and be judges upon their deaths". Should elders fail their duties, they are removed from their duties, firstly for having been rejected by the ancestors and secondly, for failing the community.

118 Somé 1994:23.

119 Ephirim-Donkor 1998:121

120 Mangena 1996:59.

121 Intercessors are intermediaries between the Supreme Being or God and the community. Visible intermediaries include kings, rainmakers, chiefs, prophets, priests, medicine men, diviners, mediums and seers. Invisible intermediaries include semi-deities, spirits and the ancestors.

122 According to Mbigi 1997:32-22, "[t]he ancestral spirit will constantly come back to look after the living relatives as an invisible energy centre. The ancestral spirit may enter and occupy people, places, animals and trees. Ancestors are always alive, without bodies, and still play a major part in our social life. We have to venerate them because they can act for either good or evil on behalf of those who are still living in bodies. The belief in the spirit and reincarnation is central in our African way of life, consciously and unconsciously. Spirit possession by ancestors is a

9. *Ubuntu* as a "moral philosophy"

The Constitutional Court contended in the *Makwanyane* case that *ubuntu* denotes morality.¹²³ Like the court, Oruka maintains that *ubuntu* or ethnophilosophy's "folk philosophy ... ceremoniously bind the people together through the institutionalised moral form of life"; a morality which Oruka describes as "a form of religion".¹²⁴

Oruka argues that whilst Western culture has Christianity and parliamentary political democracy as its greatest moral achievements, Africa's greatest moral achievement lies in its reverence for and communication with the dead.¹²⁵ According to Oruka, "[i]n this sphere, morality is not just a set of rules for the living. It is a set of rules for both the living and the dead ... the voice of the ancestor is said to hold the key to personal and community well being".¹²⁶ Oduyoye maintains that *ubuntu* is religion based;¹²⁷ a holistic view of life which enables persons to firstly, understand and accept their status and identity, and secondly, to pass on beliefs which explain prevailing conditions. According to Oduyoye, the traditional way of life is so closely bound up with African Religion that religion and culture are mutually interdependent. In indigenous Africa the wishes and expectations of the dead are advanced by the living through ritual, a dialogue between the living and the dead. "This sort of morality, binding both the dead and living, is a multi-world morality".¹²⁸ Wherever the African person is, there is his religion as religion is the basis of everything.¹²⁹ The philosophy of *ubuntu* is dependent on African Religion because "umuntu cannot contain ubuntu without the intervention of the living dead". Various scholars acknowledge that *ubuntu* is inseparable from African Religion.¹³⁰

Some scholars are adamant that morality in *ubuntu* reality cannot be maintained without the living dead. Ancestors control the supernatural and social relationships and hold the social fabric of the community together. Mbiti maintains that "some of the departed and the spirits keep watch over people

common event and sight in our life. As blacks we live and act in a religious and spiritual world. Our social and religious systems are strongly interrelated, so that it is difficult to discuss one without the other".

123 *S v Makwanyane and Another*, para 308.

124 Oruka 2002:59 and Oruka 1990:43.

125 Oruka 2002:59.

126 Oduyoye 2001:25.

127 Oduyoye 2001:66. According to Oduyoye, African culture is based on religion.

128 Oruka 2002:59.

129 According to Mbiti 1992:2, African Religion is not for the individual, but for the community of which the individual is a part. African Religion encompasses the life of the community and involves beliefs, ceremonies, rituals and festivals of the community. "A person cannot detach himself from the religious beliefs of the group. For to do so is to be severed from his roots, his foundation, his context of security, his kinship and the entire group of those who make him aware of his own existence. Therefore, to be without religion amounts to self-excommunication from the entire life of society, and African peoples do not know how to exist without religion".

130 Mbiti 1991 and Mazrui 2002:14.

to make sure that they observe the moral laws and are punished when they break them".¹³¹ Whereas Oruka defines African morality as "a set of rules for the living and the dead", Oduyoye holds that "morality binds the living and the dead".¹³² According to Oduyoye, "[w]e are dealing with a religious based culture ... The traditional way of life is closely bound up with religion and religious beliefs ... African Religion provides a holistic view on life". These sources seem to confirm the words of Kenyatta when he states that African Religion integrates every aspect of African life in indigenous African societies.¹³³ Ethnophilosophers maintain *ubuntu* represents traditional Africa's collective religious worldview.¹³⁴ In *ubuntu* philosophy "[i]t is evident that the distinction between the natural and supernatural does not exist ... [as] the distinction between the material and the spiritual has no place in African thinking".¹³⁵ According to Mbigi, *ubuntu* manifests in the interaction between the community and the African

131 Mbiti 1991:174. He posits these moral laws keep society from disintegration.

132 Oruka 2002:59 and Oduyoye 2002:25.

133 Kenyatta 1968:316. African Religion is said to differ from all other religions. Mutwa 1998:555 posits the difference lies in the fact that other religions "are supposed to be something apart from all earthly or materialistic matters ... but with the Black man everything he does, thinks, says, dreams of, hopes for, is moulded into one structure — his Great Belief. Things like doubt, agnosticism, atheism and disbelief are entirely unknown, unfathomable, senseless, within the framework of the great Belief". Mutwa 1998:554 states that African Religion is inflexible and declares anything new as an insult to the Gods. According to him, any man or woman who tries to invent something new in African Religion is assuming powers only Gods possess. "This kind of religion was developed with the specific purpose of resisting or discouraging change of any description, because such changes breed impiety and irreverence for things once declared holy". African Religion is not only inflexible, but also inaccessible to other people who would like to become converts or join the religion. This inaccessibility of African Religion to others is confirmed by Mbiti 1992:5, Turaki 1997:63 and Mbigi 1997:56. The fact that outsiders or strangers cannot join African Religion confirms that these are closed societies. Mbiti 1991:15 contends "[y]ou have to be born into the religion as it is immoral to allow other races to adopt African Religion. African Religion can also not be practised on an individual basis; it functions only on a communal basis through ceremonies, festivals, rites etc. which involve the community. Because African Religion belongs to the people, no individual member has the right to reject the whole of his people's religion. To do so would mean to cut oneself off from the total life of the people".

134 Tempels, Kagame, Senghor, Horton, Ruch, Onyewuenyi, Mbiti, Mutwa, and others maintain collective African philosophy, or *ubuntu*, is inseparable from African Religion.

135 Teffo *et al* 2002:167-168. Bhengu 2006:16 argues "[r]eligion and culture are inextricably intertwined. Most of the religious rituals are appropriated into the cultural scheme of things and the cultural domain shapes and influences the religious philosophy and practices. It is in this context and against that background that any attempt to dichotomise African spirituality into the sacred and the secular; the physical and the spiritual; the individual and the corporate, results in gross distortion and misconstrual of its theology and its praxis". Tutu 1995:xvi states that "[t]he African worldview rejects popular dichotomies between the sacred and the secular, the material and the spiritual. All life is religious, all life is sacred, all life is a piece".

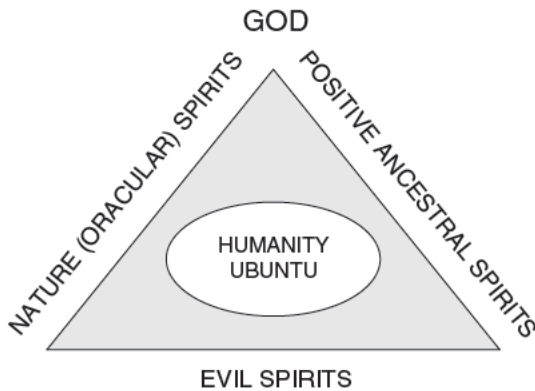
spiritual universe which consists of God, the ancestors,¹³⁶ nature spirits and evil spirits.¹³⁷ Mbigi illustrates the essence of *ubuntu* as a spiritual relationship between the community of the living and its spirit Beings as follows:¹³⁸

136 The living dead or ancestors occupy the position between ordinary spirits and men and between God and men. They constitute the largest group of intermediaries in African societies. Not everyone can become an ancestor but as a rule all elders become ancestors upon death. As everyone eventually achieves the status of the living dead, they will function as intermediary sooner or later. The belief in ancestral spirits, also called shades, ancestors or the living dead, is widespread in Africa. Because they are not yet ordinary spirits, ancestors are regarded as people. According to Mutwa 1998:572, one of the most deeply-rooted beliefs in the whole of Africa is the belief that a man lives solely to serve his ancestors and that tribal unity is based on this belief. "The tribe as a whole must keep the spirits of its founders alive — every tribe in Africa believes this." Ancestors only remain ancestors as long as they are remembered by their people. Broodryk 2002:127, Ramose 2002 and Mbiti 1991:77 maintain ancestors are generally remembered by their families, friends and relatives for four to five generations. Once they are forgotten they become ordinary spirits. Ancestors are the most important spirits in the family and are concerned with family affairs. Mbiti 1991:77-81 states ancestors live close to the homes where they used to live as humans and visit their relatives in dreams, visions or openly. Ancestors control the supernatural and social relationships and hold the social fabric of the community together. Mbigi 1997:137 posits ancestors preserve traditions; are a source of spiritual wisdom for the family; and seek collective interdependence in all spheres of communal life. Bhengu 2006:41 narrates that although ancestors have a heightened existence, they are still the same people they were on earth.

137 Mbigi, a rainmaker, 1997:56-59 categorises the following African spirits from most powerful to least powerful: the rainmaker spirit (*Gombwa*); the hunter spirit (*Shavi Reudzimba*); the family or clan spirit (*Mudzimu*); the spirit of divination (*Sangoma*); the war spirit (*Majukwa*); the wandering spirit (*Shave*); the avenging spirit (*Ngozi*) and the witch spirit (*Umtakati*). Turaki 1997:57 confirms the existence of a hierarchy of spiritual beings consisting of "higher and lesser beings, superior and inferior beings and powerful and weaker beings". Turaki argues that a hierarchy also exists between spiritual and human beings as spiritual beings are higher than human beings but that humans can obtain higher status "at death with a ripe age". Evil spirits can only do harm or evil. Malevolent spirits are thought to be the spirits of bad people who have died. The fear of witchcraft, sorcery and black magic is deeply rooted in African life. According to Mutwa 1998, Holland 2001 and Mbiti 1991, witches and sorcerers are a reality in Africa and among the most hated people in traditional African societies. Witches are usually women and are frequently killed by the community. Whilst witchcraft is regarded as mystical forces inborn in a person, sorcery is performed with spells, poisoning and injuries done secretly by the sorcerer to a person, animal or thing. Teffo *et al* 2002:169 state the Provincial Commission of Inquiry of the Limpopo Province and a research team appointed by the Human Sciences Research Council found that "executions of witches without formal trials by members of the community increased dramatically over the past ten years". The research team concluded that witchcraft is still a factor that has to be reckoned with in all regions of South Africa. According to Mukasa 2008:57, the burning and victimisation of women considered to be witches are one of the harmful traditional practices against women which are prohibited in Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2005.

138 Mbigi 1997:54.

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It is evident that *ubuntu* is not a “moral philosophy” as suggested by South African courts, but rather, a religious philosophy of life. Whereas a moral philosophy regulates the horizontal relationships between “being and being” or human beings only, a religious philosophy regulates the vertical relationship between “beings and Beings” or human beings and spiritual Beings. *Ubuntu’s* ancient holistic philosophy regulates the “inseparable trinity’s” interaction between human and spiritual Beings and constitutes a religious philosophy. Teffo *et al* maintain that *ubuntu’s* horizontal morality is regulated by vertical spiritual interaction as follows:¹³⁹

[T]he deceased [ancestors] assist the living sections of their families, and provide and exercise moral leadership among them. The ancestors thus have to do with group solidarity and tradition and in this way help to guarantee moral consistency.

Ubuntu serves as a spiritual ideal or blueprint to the extended family or “inseparable trinity” as it regulates the relationships between the living, the living dead and those yet to come in indigenous African societies. Every facet of indigenous African reality is regulated by *ubuntu’s* unique collective philosophy or ethnophilosophy of which “ancestors form the core”.¹⁴⁰ There is no *ubuntu* without the intervention of the living dead.¹⁴¹ *Ubuntu*, sub-Saharan Africa’s

139 Teffo *et al* 2002:168.

140 Ramose 2002:70.

141 Ramose 2002:51. Mbigi 1997:53 admits that “[a]ncestor worship is central to our lives. We have communion with ancestors on all aspects of our lives, such as marriage, birth, career advancement, job hunting, death, business travel and any crisis”. According to Mbigi, the “cult of the ancestors” continues to be a central influence in the African’s life. Mutwa 1998:572 states that man lives solely to serve his ancestors; every tribe in Africa believes that they keep the spirits of the ancestors alive. According to Broodryk 2002:127 and Mbiti 1991:77, ancestors are generally

shared philosophy of fundamental beliefs and values does not represent a moral philosophy. As ethnophilosophy *ubuntu* represents, as Oruka stated, "a form of religion"; a religious philosophy or "spiritualism with a strong leaning to the occult".¹⁴²

10. Religious philosophies and the Constitution

Section 15(1) of the South African Constitution guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion and requires courts to treat religions equally. The right to religious freedom extends also to religious worldviews. Individuals and groups therefore have the right to reject religious beliefs and religious worldviews not in accordance with their own, and to oppose religious worldviews or philosophies imposed by the state or courts.

In *S v Lawrence*,¹⁴³ the Constitutional Court confirmed "the right of people to be who they are without being forced to subordinate themselves to the cultural and religious norms of others and highlights the importance of individuals and communities being able to enjoy what has been called 'the right to be different'".¹⁴⁴ In this judgment the majority judgment held that the state has to treat religions equally. O'Regan J contends that at national level, one religion should not be favoured to the exclusion of others.¹⁴⁵ The fact that South African courts advance the values of *ubuntu*, described by African sources as "at best a form of religion", a religious philosophy or religious worldview poses a constitutional dilemma. African sources confirm that it is impossible to separate *ubuntu* from African Religion as the living cannot attain *ubuntu* without the intervention of the living dead.¹⁴⁶ There is no *ubuntu* without the intervention of the African spirit world, as illustrated by Mbiti in his diagram. Without the "three interrelated dimensions" or "inseparable trinity" *ubuntu*'s ancient philosophy of life cannot be sustained.¹⁴⁷ *Ubuntu* cannot be separated from African Religion.¹⁴⁸ As the indigenous African worldview is fused with African Religion, it has to be questioned why the Constitutional Court created the precedent in *S v Makwanyane and Another* to favour the values of *ubuntu* or ethnophilosophy to the exclusion of the values of all other religious philosophies? The fact that the constitutionality of capital punishment was *inter alia* determined by utilising only values of *ubuntu* and no other religious values, viz. Christian values which represent the values of the

remembered by their families, friends and relatives for five generations. Once they are forgotten they become ordinary spirits. The ancestors are the most important spirits in the family and are concerned with family affairs.

142 Mutwa 1998:654.

143 *S v Lawrence* 1997 4 SA 1176 CC.

144 *S v Lawrence*: 1997 para 24.

145 *S v Lawrence*: 1997 para 122.

146 Mbiti 1991:2-3,5 and Wiredu 2002:20 maintain *ubuntu* and African Religion are inseparable.

147 Ramose 2002:50-51,122.

148 Mbiti 1992:3-5 denotes the difficulty in attempting to separate African Religion and *ubuntu*'s collective African philosophy from one another in any meaningful and significant sense.

majority of South Africans, constitutes unfair discrimination. In contrast with the judgment in *S v Lawrence*, South African courts are favouring the values of one religious worldview to the exclusion of all others.

It must be noted that the Ubuntu Campaign, launched by the National Heritage Foundation (NHC) in August 2008, envisions mainstreaming the values of *ubuntu* as part of public policy, as well as integrating *ubuntu* into the curriculum of all South African schools and programs for offenders.¹⁴⁹ The NHC contends that “[u]buntu is a concept with values that cut across all cultures and religions so it helps to bridge any cultural divide amongst South Africans”. It is highly contestable whether *ubuntu* and its “inseparable trinity” do cut across all cultures and religions. Like the NHC, Bhengu is adamant about integrating *ubuntu* into the public sphere. He maintains that there is an urgent need to bring spirituality back into education through *ubuntu* as “[t]he lack of spirituality in many of our children and the youth in general, is indeed, a cause for concern”.¹⁵⁰ Bhengu argues *ubuntu* has an important role to play in our value system as it is derived “specifically from the African mores: ‘I am because you are human’”.

Whilst the Bill of Rights limits the right to freedom of religion for Christian, Rastafarian Islam, Hindu and other religions, religious beliefs, and religious worldviews in section 15(1),¹⁵¹ *ubuntu* gets the right of way in South African courts whilst being disguised by the “heavy *kaross* of mystery” as “humanness”, and a “moral philosophy”. What is evident from under the *kaross* is that *ubuntu* is inseparable from African Religion as its shared beliefs and values are derived from African Religion. Whilst the Constitution proclaims all religions equal, South African courts give preference to the philosophy of *ubuntu* over the rights to freedom of conscience, religion, thought, belief and opinion of Christianity, Islam, Rastafarianism and other religious philosophies.

11. Conclusion

Deconstruction of the Constitutional Court’s definitions of *ubuntu* has revealed the following: The court’s translation of *ubuntu* as “humanness” is meaningless and does not convey the meaning or essence of the philosophy of *ubuntu*. There is no European word which describes this ancient collective African worldview. The court’s definition of *ubuntu* as a “moral philosophy” is misleading as *ubuntu* is “at best a form of religion”. *Ubuntu*, sub-Saharan Africa’s philosophy of shared beliefs and values, is inseparable from African Religion and constitutes a religious philosophy or ethnophilosophy as Tempels, Senghor, Oruka, and many others maintain. Since *S v Makwanyane and Another*, South African courts endeavoured to legalise the values of *ubuntu* but conveniently remained silent of the fact that this worldview is inseparable from African Religion and that the ancestors constitute its core.

149 *The Star* September 23, 2008:26.

150 Bhengu 2006:211, 212.

151 *Prince v President, Cape Law Society* 2002 2 SA 794 CC and *Christian Education South Africa v Minister of Education* 2000 4 SA 757 CC.

The court's definitions of *ubuntu* as "group solidarity", "*umuntu ngumuntu ngabantu*" and "personhood" reflect the essence of this unique collective "folk philosophy". These definitions depict *ubuntu* as the worldview of traditional societies throughout sub-Saharan Africa; the collective philosophy or ethnophilosophy of strong communitarian societies. *Ubuntu*'s "inseparable trinity" sustains this ancient collective worldview's extended families, closed communities, African spirit world and belief in reincarnation.

In an era of postmodernism the Principle of Charity is sacrosanct as the (religious) worldviews of Others are as significant as one's own. But when the state or courts advocate for the shared beliefs and values of a particular religious worldview to the detriment of others it constitutes unfair discrimination. Not only does their propagation of *ubuntu* philosophy violate the section 15(1) Constitutional right to religious freedom, but it violates our hard-earned constitutional values: it constitutes the rape of constitutionalism and the rule of law.

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