

*I Keevy*

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# UBUNTU VERSUS THE CORE VALUES OF THE SOUTH AFRICAN CONSTITUTION

## Abstract

At the dawn of South Africa's new era of constitutionalism the Constitutional Court introduced "African law and legal thinking" and *ubuntu* to South African jurisprudence as part of the Constitution's source of democratic values. Whereas the Constitutional Court averred on the one hand that African law sustains firmly entrenched gender inequality, it was contended on the other hand that *ubuntu* is "in consonance with the values of the Constitution in general and the Bill of Rights in particular". This article deconstructs the concepts "African law and legal thinking" and *ubuntu* and contends that *ubuntu*, African law and African religion are not only inseparable but that *ubuntu* — the basis of African law — sustains the deep-seated patriarchal hierarchy and entrenched inequality in traditional African societies. This article concludes that *ubuntu* "is [not] in consonance with the values of the Constitution in general and the Bill of Rights in particular".

## Opsomming

### *Ubuntu*, die basis van Afrikareg, versus die waardes van die Suid-Afrikaanse grondwet.

Tydens Suid Afrika se nuwe era van konstitusionalisme het die Grondwetlike Hof Afrikareg en regsdenke en *ubuntu* aan Suid Afrikaanse regsfilosofie bekendgestel as deel van die Grondwet se bron van demokratiese waardes. Terwyl die Grondwetlike Hof aan die een kant bevind het dat Afrikareg geslagsongelykheid verskans, was daar aan die anderkant beweer dat *ubuntu* in die algemeen voldoen aan die waardes van die Grondwet, en spesifiek aan die waardes van die Handves van Menseregte. Hierdie artikel dekonstrueer die begrippe "Afrikareg en regsdenke" en *ubuntu* en bevind dat *ubuntu*, Afrikareg en die Afrika geloof onskiedbaar is en dat *ubuntu* — die basis van Afrikareg — die diepgewortelde patriargale hiërargie en verskanste ongelykheid in tradisionele Afrika gemeenskappe volhou. Daar word bevind dat *ubuntu* nóg in die algemeen voldoen aan die waardes van die Grondwet nóg spesifiek aan die `waardes van die Handves van Menseregte.

## 1. Introduction

In 1994, the Constitutional Court embarked, in classic Dworkinian style, on writing the first chapter of constitutional theory according to Dworkin's metaphor of the chain novel. As prescribed in Dworkin's *Law's Empiré*, each chapter, though written by different judges, should fit into the next in such a manner that it seems like the work of a single author.<sup>1</sup>

In Chapter One of this imaginary chain novel, the Constitutional Court commenced on entertaining "African law and legal thinking"<sup>2</sup> and the values of *ubuntu*, as part of the source of democratic values which section 35 of the 1993 Constitution (section 39 of the 1996 Constitution) required courts to promote.<sup>3</sup> Despite the fact that African jurisprudence was not researched for the deliberation of capital punishment in *S v Makwanyane and Another*,<sup>4</sup> the promotion of African jurisprudence was part and parcel of the Constitutional Court's new democratic approach to jurisprudence. The promotion of African jurisprudence was an essential step towards legitimising the Constitution for the new rainbow nation. In their new roles as "social engineers and social and legal philosophers",<sup>5</sup> Constitutional Court judges introduced the jurisprudence of *ubuntu* in an effort "for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society".<sup>6</sup>

Chapter One of the Constitutional Court's chain novel reveals that "*ubuntu* is a shared value and ideal that runs like a golden thread across cultural lines";<sup>7</sup> a "universalistic ethos";<sup>8</sup> and that "*ubuntu* is in consonance with the values of

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1 Van Blerk 2004:92.

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

3 In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 373 it was argued that "recognition should be given also to African law and legal thinking as part of the source of values which sec. 35 of the Constitution required Courts to promote".

4 *S v Makwanyane and Another* paras 252, 258, 371-372.

5 In *Baloro and Others v University of Bophutatswana and Others* 1995 (940) SA 197 (B) p235 E-F, Friedman JP contended that courts and specifically judges have the additional role of social engineers and social and legal philosophers to promote values referred to in section 35 of the Constitution. According to Obenga 2004:35, the ancient Egyptian definition of the word "philosopher" was found in the Inscription of Antef in the 12<sup>th</sup> Dynasty, 1991-1782 B.C. The Inscription of Antef states that a philosopher is a person "whose heart is informed about these things which would be otherwise ignored, the one who is clear-sighted when he is deep into a problem, the one who is moderate in his actions, who penetrates ancient writings, whose advice is sought to unravel complications, who is really wise, who instructed his own heart, who stays awake at night as he looks for the right paths, who surpasses what he accomplished yesterday, who is wiser than a sage, who brought himself to wisdom, who asks for advice and sees to it that he is asked advice".

6 *S v Makwanyane and Another* at para 302 per Mokgoro J.

7 *S v Makwanyane and Another* at para 307 per Sachs J.

8 *City of Johannesburg v Rand Properties (PTY) LTD and Others* 2006 JOL 16852 W at para 62 per Jajbhay J. In *Wormald NO and Other V Kambule* 2006 (3) SA 562 (SCA) at para 36-37 Maya AJ contended that the spirit of *ubuntu* combines individual rights with a communitarian philosophy and serves as a unifying motif of the Bill of Rights.

the Constitution in general and those of the Bill of Rights in particular”.<sup>9</sup> If “*ubuntu* is in consonance with the values of the Constitution in general and those of the Bill of Rights in particular” it implies a synergy between *ubuntu* and Western values;<sup>10</sup> a synergy between values of the most progressive Constitution in the world and ancient *ubuntu* values which are not only “central to age-old [African] custom and tradition”<sup>11</sup> but also inseparable from African Religion.<sup>12</sup> Extra-legal sources maintain *ubuntu* constitutes the “basis of African law”;<sup>13</sup> that *ubuntu* “legal philosophy must be understood on the basis of the metaphysical”;<sup>14</sup> and that “*ubuntu* philosophy of law is the continuation of [African] religion”.<sup>15</sup> Whereas *ubuntu* is said to be in consonance with the values of the Constitution in general and the Bill of Rights in particular, the Constitutional Court contends African law is based on:

a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family.<sup>16</sup>

Whilst subsequent chapters of the chain novel have been consistent in producing “a seamless text, one appearing to have been written by one author”,<sup>17</sup> on the “prized value[s]” of *ubuntu*,<sup>18</sup> this article seriously questions the so-called synergy between the core values of the South African Constitution and *ubuntu* jurisprudence; it questions the humanitarian ideals of *ubuntu*;<sup>19</sup> and the statement that *ubuntu* is in consonance with the values of the Constitution generally and those of the Bill of Rights in particular. The aim of this article is to juxtapose *ubuntu*'s shared beliefs and values with the core values of the South African Constitution, viz. equality and human dignity.<sup>20</sup> The objective of

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9 *S v Makwanyane and Another* at para 237 per Madala J; Mokgoro 1998:22.

10 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 [African] 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.

11 Bhengu 2006:128.

12 Ramose 2002:93,97.

13 Ramose 2002:81. M'Baye 1974:141.

14 Ramose 2002:93.

15 Ramose 2002:97.

16 In *Bhe v Magistrate Khayelitsa and Others; Shibi v Sithole and Others; SA Human Rights Commission and Others v President of the Republic of South Africa and Others* 2005 (1) BCLR 1 (CC) at para 87.

17 Van Blerk 2004:92.

18 Mokgoro 1998:21.

19 Bohler-Muller 2005:278.

20 The Preamble of the 1996 Constitution states that the Constitution is based on democratic values, social justice and fundamental human rights. Section 7 of the Bill of Rights refers to the “democratic values of human dignity, equality and freedom”. In *Minister of Home Affairs v Fourie (Doctors for Life International and*

this article is to indicate that individuals in *ubuntu* reality are not guaranteed equal rights and human dignity in its deeply embedded patriarchy.<sup>21</sup> As Sachs J has pointed out, “sexism and patriarchy are so ancient, all pervasive and incorporated into the practice of daily life as to appear socially and culturally normal and legally invisible”.<sup>22</sup>

This article deconstructs *ubuntu* in terms of the following: *ubuntu* as the basis of African law; *ubuntu* as ethnophilosophy; *ubuntu*'s stereotyping of women, children, homosexuals, lesbians, witches, strangers and outsiders; *ubuntu* as African Constitution; and *ubuntu* versus regional human rights mechanisms. This article concludes that *ubuntu* is not in consonance with the values of the Constitution in general and the Bill of Rights in particular.

## 2. *Ubuntu* as the basis of African law

Ramose maintains “*ubuntu* is the basis of African law”.<sup>23</sup> In order to assess whether *ubuntu*, the basis of African law, is in line with the Constitution in general and the Bill of Rights in particular, this section deconstructs African law.

### 2.1 African law: a definition

African law is not codified customary law or official African customary law. African law is uncoded living law, also known as living African customary law. Since pre-colonial times African law represented the oral tradition.<sup>24</sup> As unwritten law, African law represents the African oral culture, a meticulously preserved tradition which is sacredly guarded and passed on by word of mouth

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*Others, Amici Curiae*); *Lesbian and Gay Equality project and Others v Minister of Home Affairs* 2006 (10 SA 254 (CC) at para 48 Sachs J referred in the majority judgment to “the concepts and values of human dignity, equality and freedom.

21 Section 9(4) of the 1996 Constitution guarantees *all* people the right not to be unfairly discriminated against.

22 *Volks NO v Robinson* 2005 (5) BCLR 466 (CC) at para 163. In *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at 930 Mokgoro J referred to the “delicate and complex” task of accommodating customary laws to the values embodied in the South African Bill of Rights and noted that “[t]his harmonization exercise will demand a great deal of judicious care and sensitivity.”

23 Ramose 2002:81. M'Baye 1974:141.

24 According to Mutwa 1998, certain aspects of the oral tradition are kept secret by traditional African societies. South Africa's well-known Zulu High Sanusi, sangoma and sage, Credo Mutwa, 1998:654 discloses that the “Great Knowledge” or the total of all African knowledge of history, legends, mythology, philosophy, psychology and spiritualism “with a strong leaning to the occult”, are controlled by the “Chosen Ones” or “High Custodians” of traditional Africa. According to Mutwa 1998:555-556, only certain knowledge is passed on from the Chosen Ones to the High Ones of the tribe and only if their duties require such knowledge; little knowledge is passed on to the ordinary or “common people” of the tribe and no knowledge is ever revealed to “strangers” or outsiders. Mamdani 1996:112 cites Governor Cameron who explains how difficult it was for a judge during the colonial era to find out what customary law entailed because although African assessors “knew perfectly well, but for one reason or the other, they may not tell you”.

from generation to generation. The fact that African law is unwritten does not mean that it is either unknown or no longer practised.<sup>25</sup>

African law can be defined as unwritten:

rules of behaviour which are contained in the flow of life [...] the construction of communal life and resort to protection by supernatural forces as the basis of African law [...] with] equilibrium, justice, harmony and peace the implicit aims of African law.<sup>26</sup>

African law regulates the relationships between African people in traditional African societies and consists of moral rules<sup>27</sup> which are handed down from generation to generation “under the supervision of the initiated”, or ancestors.<sup>28</sup> The ancestors or living dead are not only the authority behind African law but also play a central role in preserving these male-dominated or patriarchal societies. Ebo states:

The spirits of the ancestors also have their share of the stake and commitment in ensuring law is preserved intact against anything that would derogate from its plenitude of authority and control [...] the authority behind the law is so overwhelming as to make enforcement by means of a body of officials such as police unnecessary.<sup>29</sup>

Ebo defines African law as a law not only for the living members of the clan or community, but a law also for its living dead.<sup>30</sup> According to Ebo, African law regulates the living members of the community as well as the African spirit world and maintains “an act of rebellion against the legal status quo is regarded as odious and scandalous in the eyes of not only the living contemporaries but also of the ancestral spirits who perpetually hover around the edge of the community”. This inseparable symbiotic relationship between the living, the living dead and African law illustrates why African law cannot be defined without incorporating the ancestors and African spirit world. Ramose describes this symbiotic relationship between the living, the living dead and African law as follows:

[P]rotection by supernatural forces constitute the basis of African law. [...] The constant communication between the living and the living dead (ancestors) speaks once again of the rheomodic character of African thought and law. In African thought, the triad of the living, the living dead and the yet-to-be born forms an unbroken and infinite chain of relations

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25 Ramose 2002:97.

26 M'Baye 1974:141.

27 Kagame cited in Mudimbe 1988:150 maintains African law is “primarily of a religious nature”.

28 M'Baye 1974:149.

29 Ebo 1995:39.

30 Ebo 1995:145. The dead implies the living dead or ancestors. M'Baye 1974 defines the ancestors as “those corporally dead but still living” who keep watch over the living and keep things the way they are.

which are characteristically a one-ness and a wholeness at the same time  
[...]. The authority of [African] law is justified by appeal to the living dead.<sup>31</sup>

Ojwang defines African law as the unwritten law of tribal African societies which reflects not only the social control systems and the cultural orientation of these societies, but also their shared values and beliefs.<sup>32</sup> According to Ojwang, African law “holds the seeds of local values and community morality”.<sup>33</sup> Ojwang maintains “the laws of various [African] tribes have a considerable basis of uniformity” and rests upon face-to-face relations, mediation, conciliation and a common ideology shared by the people.<sup>34</sup> Like Ojwang, Ebo avers certain principles of African law are common to all African societies, despite the fact that “a panorama of indigenous law would appear as a kaleidoscope of shifting types”.<sup>35</sup> Mutwa defines African law or the “High Laws of the Bantu” as hundreds of commandments from the ancestors which are “common to all Bantu races in Southern, Central and East Africa”.<sup>36</sup> These

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31 Ramose 2002:94, 96. According to Ramose 2002:47, this oneness or extended family involves “three interrelated dimensions” or the “inseparable trinity” (Ramose 2002:50-51,94) which consists of not only persons who are alive, but also those who have passed away and others yet to be born. Mbigi 1997:52 maintains 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, some spiritual sacrifices are made in honour of the spirit. People who were influential before their death may choose a suitable host or medium to possess regularly during appropriate ceremonies and rituals. In African Religion, reincarnation is viewed as an important opportunity for the spirit to return to its people, tribe and family.

32 Ojwang 1995:45.

33 Ojwang 1995:56.

34 Ojwang 1995:44,56.

35 Ebo 1995:139. Mamdani 1996:22 argues there was not one set of living customary rules for all Africans but as many laws as there were tribes and that whilst colonial authorities selected certain forms of customary law they suppressed others.

36 Mutwa 1998:624. According to Mutwa 1998:621-635, the High Laws include the following commandments: “The killing of one woman is so great a crime that it needs a thousand men to die in battle of vengeance ... The separation of a man from his wife by an external influence is listed as one of the Three High Crimes and calls for a war of vengeance and punishment ... if you touch a man’s wife, mother, sister, or daughter, call them names or refer insultingly to their womanhood, he is bound by law to kill you. If he fails he will make his children’s children take oaths to kill your children’s children ... There are only three grounds for divorce: frigidity (a refusal to carry on the ancestral name); adultery (excreting in the spirit hut); and sexual perversity (the madness to let outsider bulls graze in the green pastures of our ancestors) ... if one man of another race killed a member of your race, tribe or family, do not rest until you, or a descendant of yours, have killed a member of his race, tribe or family ... The African motto is ‘an eye for an eye’ and the Zulus have a saying; ‘once you poke me in the eye, I must not rest until I have gouged out one of yours’ ... a wizard shall die that particular kind of death set aside for wizards ... adulterers, perverts and rapists were given the ant death ... In the land of the Xhosa all witches were thrown from a high cliff and in Central Africa all adulteresses were fed to the crocodiles. Adulterers were castrated. In Lesotho and also in Zululand, witches were imprisoned in their own huts and burnt to death. Witchdoctors who broke the law were killed ... A thief caught stealing oxen was given an appropriate

sources confirm that certain principles, values and moral rules of African law are common throughout sub-Saharan Africa.

African law maintains the mystical and symbiotic relationship between the living and the living dead and provides the theoretical support for the African belief in natural justice.<sup>37</sup> Driberg defines African law as follows:

African law is positive and not negative. It does not say 'Thou shalt not', but 'Thou Shalt'. Law does not create offences, it does not create criminals; it directs how individuals in communities should behave towards each other. Its whole object is to maintain an equilibrium, and the penalties of African law are directed, not against specific infractions but to the restoration of this equilibrium.<sup>38</sup>

African law maintains order, peace and equilibrium between African communities and the African spirit world.<sup>39</sup> As law for the living and the living dead<sup>40</sup>, African law maintains the inseparable relationship between the living and living dead. This law consists of moral rules, taboos, principles, values and beliefs of which some are common to all traditional African societies throughout sub-Saharan Africa.

## 2.2 African law and legal thinking

In the imaginary chain novel, Sachs J contended in *S v Makwanyane and Another* that it was imperative to give "long overdue recognition to African law and legal thinking as a source of legal ideas, values, and practices".<sup>41</sup> Justice Sachs did not clarify what he meant by African law and legal thinking except that it had to be "subject to the fundamental rights contained in the Constitution and the legislation dealing specifically therewith".<sup>42</sup>

Various African sources distinguish between African law (also known as Bantu law, African customary law, African indigenous law, living customary law or unofficial customary law) and the codified version of African law known

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death ... when a man commits rape he is arrested and executed; a man must keep away [sexually] from his wife for at least a year whilst she is breast-feeding" etc. These laws are according to Mutwa, currently not "in full force" in South Africa.

37 Nduka 1995:25. Achebe 1986:67 states that judgment would only be given after "we have heard both sides of the case". Tempels 1969:123, Kamalu 1998:89, Bhengu 2006:13 and others state that African law is founded on natural law principles. Mbiti 1991:41 maintain "[t]hese laws of nature are regarded as being controlled by God directly or through his servants". Natural law implies law has a moral dimension. The characteristic feature of natural law is that a moral code exists irrespective of human interaction or positive law. Natural law contrasts positive law which is perceived as law separated from morality and laid down in statutes, rules and court decisions.

38 Cited in Ramose 2002:93.

39 See Tempels 1969:123, Kamalu 1998:89 and Bhengu 2006:13.

40 Viljoen 2007:304 maintains African jurisprudence concerns itself with living human beings, the ancestors and inanimate objects.

41 *S v Makwanyane and Another* para 365.

42 *S v Makwanyane and Another* para 366.

as codified customary law or official customary law.<sup>43</sup> Unwritten African law is perceived as living customary law and juxtaposes official or codified customary law. There is a clear distinction between “indigenous law for indigenous people and indigenous law of indigenous people”.<sup>44</sup> Indigenous law for the people signifies codified customary law as documented since the era of colonialism, whilst indigenous law of the people represents African law or living customary law practised in traditional African societies.

The alienation of African law since the colonisation of Africa is a fact. The alienation and compartmentalisation of African law is highlighted in *Bhe v Magistrate Khayelitsa and Others*; *Shibi v Sithole and Others*; *SA Human Rights Commission and Others v President of the Republic of South Africa and Others*.<sup>45</sup> In the *Bhe* case the Court contended that “although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins”.<sup>46</sup> The Court argued that the alienation of African law resulted in “the term ‘customary law’ emerg[ing] with three quite different meanings: the official body of law employed in the courts and by the administration (which ... diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually lived by the people”.<sup>47</sup> In contrast with codified customary law used by the courts and academics, African law is the living law actually lived by Africans in traditional African societies throughout sub-Saharan Africa. African law it is not a static or “fixed body of classified rules ... but a dynamic system of law which is continually evolving to meet the changing circumstances of the community in which it operates”.<sup>48</sup> The Court clearly distinguishes living African law from codified customary law used by the courts and academics for teaching purposes.

### 2.2.1 African law versus customary law

Africa prior to colonisation was not a lawless continent in a permanent state of anarchy. African jurisprudence existed since time immemorial and regulated African societies long before the first colonisers appeared on the African horizon.<sup>49</sup> African jurisprudence, with “*ubuntu* [as] the basis of African law”<sup>50</sup>, ensured social control, unity and cosmic harmony in African societies. It differed profoundly from the laws of the European colonial powers.

In colonial Africa a dual system of law lay at the heart of colonial rule: a European legal system and European-made customary law. This official codified form of customary law was documented by Western anthropologists and

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43 *Bhe* case at para 109 distinguishes between living and official customary law. Bekker *et al.* 2006:8 differentiate between unofficial and official customary law.

44 Bhengu 2006:131.

45 2005 (1) BCLR 1 (CC).

46 *Bhe v Magistrate Khayelitsa and Others*: para 151.

47 *Bhe v Magistrate Khayelitsa and Others*: para 151.

48 *Bhe v Magistrate Khayelitsa and Others*: para 153..

49 *Ubuntu* is a key term in African jurisprudence.

50 Ramose 2002:81.



academics “who lacked nuanced understanding of many of the rules and practices they were recording”.<sup>51</sup> Mamdani maintains codified customary law was an “administrative driven affair” which set Africans and their customs apart from the laws of civilised European society.<sup>52</sup> Whereas colonial laws regulated civil society, the codified version of African law regulated traditional African societies. Colonial laws regulated the private and public sphere and “customary law regulated non-market relations in land; in personal (family) and in community affairs”.<sup>53</sup> Not only was customary law perceived as “primitive law ascribed to pre-literate peoples”,<sup>54</sup> but it played an inferior role in relation to colonial laws in Africa as it juxtaposed the individual and the group, civil society and the African community, rights and tradition.<sup>55</sup> Kagame describes the confusion created by this dual system of law amongst the African people as follows:

First, there are juridical laws that the society controls through the judges and lawyers. They do not bind individual consciences, and whoever can escape them is considered intelligent. Second, there are taboo-laws, principally of a religious nature; these are generally negative and clearly specify what should be avoided. They contain in themselves an imminent power of sanction, and God is the sole judge. Therefore whatever the transgression, no human being — not even chief, priest, or king — can sanction or forgive the taboo sin. The problem and its resolution lie between the transgressor and God and also between his or her still existing family on earth and the departed ancestors.<sup>56</sup>

The colonial custodians of the law eroded African jurisprudence with their codified versions of customary law. Because of the inferior role customary law played during colonial rule (and later the apartheid regime) “its development as a formal legal discipline has been stifled, and the official version thereof is said to have little in common with the way that cultural practice and ritual manifests itself in reality”.<sup>57</sup> Roederer *et al.* heeds that codified or official customary law should be treated with suspicion if one attempts to ascertain the content of African jurisprudence for it is “both dysfunctional and distanced from the traditional values

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51 Roederer & Moellendorf 2004:449. In the *Bhe case* at para 43 the court maintains “this approach led in part to the fossilisation and codification of customary law which in turn led to its marginalisation. This consequently denied it of its opportunity to grow in its own right and to adapt itself to changing circumstances”.

52 Mamdani 1996:2.

53 Mamdani 1996:211.

54 Ebo 1995:139.

55 Mamdani 1996:22. Hlope cited by Bhengu 2006:129 states that “Africans had no choice but to obey the white man. This meant that their own systems of life, including their laws, were regarded as backward and irreconcilable with civilisation. Whites could just not tolerate any moral values which were in conflict with what they perceived to be right or wrong according to their standards”. Mamdani 1996:211, 29 is of the opinion that the compartmentalisation of customary law and civil law institutionalised racism in Africa and perceives apartheid as “the upgrading of indirect rule authority in rural areas to an autonomous status combined with police control over ‘native’ movement between the rural and urban areas”.

56 Kagame cited in Mudimbe 1988:150.

57 Roederer *et al.* 2004:450.

it is meant to represent".<sup>58</sup> The notion that codified customary law represents corrupted versions of African law and African jurisprudence was confirmed in the *Bhe* case. In the *Bhe* case the Court contended that official customary law has failed to keep pace with changing social conditions; that it contrasts living African law; that it is generally a poor reflection, if not a distortion of African law and that official customary law emphasises African law's patriarchal<sup>59</sup> features whilst minimising its communitarian features.<sup>60</sup> The fact is that codified customary law has become so distorted that it is perceived as out of step with the real values, cultural practices and ritual manifested in African law.

Sachs J contended in *S v Makwanyane and Another* that African law and legal thinking is "a source of legal ideas, values, and practices".<sup>61</sup> African sources, however, maintain *ubuntu* is the source of shared values and beliefs for all "Bantu speaking peoples of Africa"<sup>62</sup> and that these shared beliefs and values are grounded in African Religion.<sup>63</sup> Ramose posits that *ubuntu* is grounded in African Religion as "*umuntu* cannot contain *ubuntu* without the intervention of the living dead".<sup>64</sup> As the basis of African law, *ubuntu* and African Religion represent an inseparable oneness.<sup>65</sup>

## 2.2.2 African law versus Western law

European colonial laws confronted urban African people with the police, arrests, detentions, court procedures, imprisonment and capital punishment. Codified customary law confronted rural Africans with native courts, appeals and imprisonment. In African law, justice is not served by the prescription of penalties but by the "restoration of the balance upset by an unjust act".<sup>66</sup> In contrast with Western law, a crime or dispute in rural Africa secured a process which involved the community of the living and the living dead. Mutwa maintains "[t]he Bantu consider it utterly ridiculous for a judge or a state executioner to punish a person who had done them no wrong. Bantu execution is not merely punishment; it is a sacrifice to appease the ancestral spirits of a family, who cry out for revenge".<sup>67</sup> As not only man but also ancestral spirits punish an

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58 Roederer *et al* 2004:45.

59 Patriarchy is the institutionalised social hierarchy in traditional African societies whereby the extended family grants males authority and power over women. Akatsa-Bukachi 2005:6 defines patriarchy as "the organisation of social life and institutional structures in which men have ultimate control over most aspects of women's lives and actions".

60 *Bhe* case at paras 84,86,87,89.

61 *S v Makwanyane and Another* para 365.

62 Ramose 2002: 8,43. Abraham 1962; Mbiti 1991, 1992; Broodryk 1997, 2002 and Bhengu 2006.

63 Mbiti 1991:179.

64 Ramose 2002:51.

65 See Keevy 2009.

66 Ebo 1995:34. Driberg 1934:232 maintains African law is always constructive and palliative.

67 Mutwa 1996:18. According to Mazrui 1998:257, "[t]he substitution of the cage for the villain to replace compensation for the victim, the insistence on objective guilt as against subjective shame, the focus on personal individual accountability as

offender, African law, in contrast with Western law, has a spiritual dimension that has to be attended to before a matter can finally be set to rest.

In contrast with Western law, the primary aim of African law is not punishment, but the “restoration of the balance upset by an unjust act” and to maintain equilibrium between the community and African spirit world.<sup>68</sup> As the aim of African law is not to create criminals, imprisonment is deemed senseless. Achebe, for example, narrates how African prisoners “who had offended against the white man’s law” in the colonial era had to clear government compounds, fetch firewood for the white Commissioner or perform other menial tasks whilst serving prison sentences. According to Achebe:

[s]ome of the prisoners were men of title who should be above such occupation. They were grieved by the indignity and mourned their neglected farms.<sup>69</sup>

Western law and justice embrace individual rights, liberties and punishment and juxtapose African law and justice which focus predominantly on group rights,<sup>70</sup> duties,<sup>71</sup> consensus, reconciliation (restorative justice)<sup>72</sup> and the sense of shame instilled in the offender and his family. Mazrui argues the emphasis in African law lies firstly, in the protection of the innocent; secondly, in compensation of the victim; and thirdly, in the sense of shame the community instils in offenders.<sup>73</sup> African justice ensures the guilty person is shunned, ostracised and ridiculed or “regarded as a non-person” or outcast. As an outcast the offender loses not only his status in the community but also his ability to participate in communal activities until his offence is purged and his status restored.<sup>74</sup> Collective shame serves as an effective deterrent for

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against collective responsibility have all resulted not only in escalating violence, and criminality, especially in African cities, but also in the relentless decay of the police, judiciary, legal system and prison structures”.

68 Ebo 1995:34.

69 Achebe 1986:125.

70 Sebidi 1998:63 states that “[u]buntu is more than just an attribute of individual human acts that builds a community. It is a basic humanistic orientation towards one’s fellow human beings ... one’s humanity; one’s personhood is dependent upon one’s relationship with others. Therefore *ubuntu*, however inchoate in terms of strict philosophical formulation, certainly rejects the rugged individualism that seems to be encouraged by some philosophical systems and ideological persuasions. *Ubuntu* is anti-individualism and pro-communalism”.

71 Article 27(1) of the African (Banjul) Charter on Human and Peoples’ Rights which provides that every individual shall have duties towards his family and society. Article 29(1) stipulates that individuals have the duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect their parents at all times, and to maintain them in case of need.

72 Restorative justice is a characteristic of African law. Tutu 2006:347 states “[u]buntu-botho did not allow perpetrators to escape the necessity of confessing and making restitution to survivors since it placed the needs of society – the restoration of relationships – at the heart of reconciliation”.

73 Mazrui 1998:256.

74 Ebo 1995:39.

potential offenders as it does not only affect the offender but also shames his peer group and family who have to take collective responsibility for him.

In contrast with Western law, African law is inseparable from its patriarchal basis<sup>75</sup>, the ancestors and group solidarity or strong communitarianism.<sup>76</sup> Western law and justice do not propound these ancient African ideals and remain a foreign concept in traditional African societies.

### 2.2.3 African law and the ancestors

African law is an unwritten moral code which is inseparable from African Religion, its ancestors and the African spirit world. According to Mutwa, the African “High Law of Life” states:

Man, know your life is not your own. You live merely to link your ancestors with your descendants. Your duty is to beget children even while you keep the Spirits of your Ancestors alive through regular sacrifices. When your ancestors command you to die, do so with no regrets.<sup>77</sup>

The elders and the living dead or ancestors of the clan are respectively the creators and custodians of African law.<sup>78</sup> The ancestors play a central role in legislation, tribal courts, judgments and punishment in traditional African societies. Various African sources maintain the ancestors are regarded as the legislators in traditional African societies. The ancestors hand down moral rules, values and beliefs.<sup>79</sup> Community members have to carefully follow these rules, taboos, guidance and supervision of the ancestors in order to avoid punishment by them.<sup>80</sup> Ramose seems to disagree with these sources as he avers the living and not the living dead are the legislators who lay down norms and rules in these societies.<sup>81</sup> Ramose does however seem to agree with these sources that societal norms and rules can only come to force once the ancestors have authorised it, for according to him, “[t]he authority of [African]

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75 Nhlapo 1995:162. See *Bhe case* at para 89.

76 Strong communitarianism is the cornerstone of *ubuntu*. African communitarianism is portrayed in the Xhosa proverb *umuntu, ngumuntu ngabantu* affirming “I am because we are, and since we are, therefore I am.” Biko 2007:113 describes the African community as a “true man-centred society whose sacred tradition is that of sharing. We must reject, as we have been doing, the individualistic, cold approach to life that is the cornerstone of the Anglo-Boer culture”.

77 Mutwa 1998:625.

78 According to M’Baye 1974:141-142, African “Gods, Genii [spirits] and Ancestors’ act as African legislatures; they lay down the laws and guide man to survival. M’Baye describes genii as spirits superior to men. “They have rights which must be scrupulously respected ... Genii intervene continually in daily life, and wisdom dictates a sacrifice to them either before or after every event in life of however little importance”.

79 M’Baye 1974:141; Khapoya 1994:49; Turaki 1997:66; Mutwa 1998:78; Somé 1999:88 and Head cited in Arndt 2002:138.

80 Somé 1999:88. Somé 1999:89 states that “[i]n Africa people’s welfare and rights are safeguarded by the Ancestors. It is the ancestors who ultimately punish wrongdoing, by sending trouble or illness, even death to the transgressors”.

81 Ramose 2002:97.

law is justified by appeal to the living dead”.<sup>82</sup> Ramose maintains that all norms and rules have to be communicated to the ancestors for their approval as the ancestors are perceived as “the basis for the authority of law in *ubuntu* philosophy ... Because the living dead must always be honoured and obeyed, law justified in their name also deserves respect and obedience”.<sup>83</sup> Whether African law will be able to sustain peace and harmony between community members or communities depends solely on whether the ancestors gave their approval of the laws in question.<sup>84</sup>

Laws and taboos serve the purpose of keeping moral and religious order in African societies. The violation of African law “is an offence against the departed members of the family and against god and the spirits, even if it is the people themselves who may suffer from such a breach and who may take action to punish the offender”.<sup>85</sup> Whereas taboos “strengthen the keeping of religious order”, the violation of taboos disturbs the peace and harmony between the community and the African spirit world. The violation of taboos results in punishment by both the community and the “invisible world” or ancestors and may manifest in social ostracism, misfortune, death, sickness, poor harvest or poverty for the transgressor.<sup>86</sup>

Mutwa maintains African law and African spirituality are inseparable and that matters of law and justice are only deemed settled after the spiritual dimension has been attended to.<sup>87</sup> Mutwa explains that if a man seeks to divorce his wife, for example, he is compelled to confer with both his and his wife’s ancestors on the reasons why he wants to dissolve the marriage. Only after consultation with the ancestors could the man take his problem to his family for advice.

The aim of justice in traditional African societies is to maintain equilibrium in the African flow of life.<sup>88</sup> In the case of minor offences which are “not considered aggravation of the ancestral spirits of the family” judgment will be passed on behalf of the complainant to restore peace in the community.<sup>89</sup> In

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82 Ramose 2002:94,96.

83 Ramose 2002:97.

84 According to Ngubane cited in Bhengu 2006:24, “the person was created according to the Law; he was conceived according to the Law; he was born, fed and clothed according to the Law; all he did; all his thinking and behaviour; all his hopes, victories, fears and defeats translated the Law into action. He could not violate the Law because he incarnated it. Nothing could oppose the Law because everything in the cosmic order conformed to the Law. Conflict itself was a translation into action of the Law. The person grew up and thrived in terms of the Law; he matured, aged and died according to it; he evolved perpetually into eternity according to Law”.

85 Mbiti 1991:41.

86 Mbiti 1991:41.

87 Mutwa 1998:627.

88 Ramose 2002:95 maintains the “*ubuntu* legal philosophical principal seek[s] the restoration of disturbed equilibrium regardless of the time when the disturbance occurred. Driberg cited in Ramose 2002:95 states: “A debt or feud is never extinguished till the equilibrium has been restored, even if several generations lapse”.

89 Mutwa 1998:632. Bekker *et al.* 2006:118 maintain all adult men are members of the court council but that only the chief and elders of the patrilineage fulfill court duties.

more serious offences the ancestors have to be invoked prior to the meeting or tribal court to affirm the infallibility of the elders and to serve as witnesses at the trial.<sup>90</sup> After lengthy deliberation by all adult males present, the elders and chief have to reach consensus before judgement will be given.<sup>91</sup> Ephirim-Donkor emphasises the importance of not dismissing the ancestors before the court is adjourned as they serve as witnesses of the judgment. On their departure after the judgment “the ancestors take with them the verdicts of their earthly counterparts. This ensures that what is legal and binding on earth is also binding in the ancestral spirit world. When finally the deceased appear before the ancestors for accountability and judgment, there would be no room for error”. In contrast with Western jurisprudence, African jurisprudence is not isolated from the African spirit world. African law and justice stands in relation to community,<sup>92</sup> the ancestors and God, for “[t]o do wrong is to insult the spirit realm. Whoever does this is punished by the spirits”.<sup>93</sup>

“African law and legal thinking” is based upon *ubuntu*; is inseparable from African religion; has a patriarchal basis; involves the living and the living dead; applies traditional African values; aims at restoring equilibrium in the physical and spiritual realms by appeasing ancestral spirits; propounds group rights and duties and utilises collective shame as deterrent for offenders.

#### 2.2.4 African law and *ubuntu*

It is generally accepted that *ubuntu* is a very difficult concept to explain in a Western language. In *S v Makwanyane and Another* the Court contended *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”.<sup>94</sup> Broodryk defines *ubuntu* as an

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90 Ephirim-Donkor 1998:124. According to Ephirim-Donkor 1998:126, 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.

91 Ephirim-Donkor 1998:124-125. Ephirim-Donkor argues freedom of expression is paramount during court deliberations.

92 According to Mangena 1996:59, the community knows the various forms of punishment for different forms of misbehaviour. “This in itself shows that there is no separation between the theory and practice in these systems. Sex groups consulted with each other when one of their lot had to be judged and punished for misconduct. For instance, a young man could be punished by being ostracised by his group for a defined period. The young women of that particular age group would be consulted in the judgment of the case and they would participate in carrying out the punishment against the culprit. The young man would therefore be ostracised also by the women of his age group”.

93 Somé 1997:50,10,53. Somé maintains African villages have no police force as the ancestors of these villages protect all homes. He accentuates the dire need for communities to invoke the spirits of the ancestors to create safety for themselves.

94 Mokgoro J on *S v Makwanyane*: para 308.

ancient collective African worldview which exists amongst all African cultures and African languages.<sup>95</sup> Broodryk maintains that despite the fact that different African languages have different names for *ubuntu* its basic meaning and worth remains the same for all Africans. Various sources contend *ubuntu* is the ancient collective philosophy of traditional African people which represents the African subcontinent's shared traditional value and belief system,<sup>96</sup> or "common spiritual ideal"<sup>97</sup> of all "Bantu speaking peoples".<sup>98</sup>

Despite cultural differences this ancient worldview is "fundamentally holistic"<sup>99</sup> and engenders a spirit of community, mutual support, sharing, interconnectedness and respect for one another. As this worldview is essentially spiritual, traditional African communities have a collective "moral obligation to conform to traditions and conventions and override any desire for change or nonconformity. The conception is that the best in life lies in the past; the world of the ancestors and the origin".<sup>100</sup> This philosophy of collective solidarity or strong African communitarianism rejects Western atomistic individuality as it ultimately results in the disintegration of *ubuntu* and the spirit of African brotherhood.<sup>101</sup>

Ramose maintains "*ubuntu* philosophy of law is the continuation of [African] religion"<sup>102</sup> and that "*ubuntu* is the basis of African law".<sup>103</sup> By applying the rhetoric of the Greek Sophists the following syllogism can be deduced: because *ubuntu* is regarded as the continuation of African Religion and the basis of African law, African law too is the continuation of African Religion. Ramose, however, did not utilise the rhetoric of the Greek Sophists to come to a similar conclusion, viz. that African law, like *ubuntu*, is inseparable from African Religion and that

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95 Broodryk 2002:17. Broodryk 2002:27 states that the Zulu refers to the philosophy of African collective unity or brotherhood as *ubuntu*; *ubuntu* or *umuntu* in Xhosa; *botho* in Sesotho; *bunhu* in Tsonga; *vhuthu* in Venda; *numunhu* in Shangaan; *nunhu* in Shona; *utu* in Swahili and *abantu* in Ugandan. According to Kamwangamalu 1999:25, *ubuntu* is known in Kenya as *umundu* in Kikuyu; as *ununtu* in Kimeru; in Tanzania it is known as *bumuntu* in kiSukuma and kiHaya; in Mozambique it is known as *vumuntu* in shiTsonga and shiTswa; in the Democratic republic of Congo *ubuntu* is called *gimuntu* in kiKongo and in Angola it is known as *gimuntu* in giKwese.

96 Broodryk 1997, 2002; Mbiti 1991; Ramose 2002. Gyekye 1996:55-56 maintains "the moral values of various African societies are the same across the board; that most values can be said to be shared in their essentials by all African societies ... and derived from African religion."

97 Khanyile cited in Broodryk 2005:14.

98 Ramose 2002:43.

99 Ramose 2002:93.

100 Turaki 1997:81,49.

101 Bhengu 2006:129 argues that human rights remain a creation of Western civilisation and that it is foreign to African law. "The 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". See also Broodryk 1997:97 and M'Baye 1974:143-145.

102 Ramose 2002:81,97.

103 Ramose 2002:81. M'Baye 1974:141.

the metaphysics of *ubuntu* underlies the philosophy of African law.<sup>104</sup> African law is grounded in the shared values and beliefs of its basis, *ubuntu*, — and the ancestors form “the basis for the authority of law in *ubuntu* philosophy”.<sup>105</sup>

### 3. *Ubuntu*

#### 3.1 *Ubuntu* as ethnophilosophy

Senghor’s *Negritude*<sup>106</sup> and Tempels’ *Bantu Philosophy*<sup>107</sup> introduced the unique collective African worldview of African societies to the West.<sup>108</sup> The notion that all traditional African people of sub-Saharan Africa share a collective philosophy of shared values and beliefs has been confirmed by Kagame, Mbiti, Abraham, Nkrumah, Nyerere and others.<sup>109</sup> As an ancient collective philosophy, *ubuntu*’s shared traditional African values and beliefs are regarded as sacred and unique. This unique collective African worldview is generally regarded as an “African World View [... which] runs through the veins of all Africans”.<sup>110</sup> Houtondji coined this unique collective African worldview as ethnophilosophy.<sup>111</sup>

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104 Ramose 2002:92.

105 Ramose 2002:97.

106 Leopold Senghor 1963:13 defines Negritude as “the sum total of African cultural values” which emphasise the uniqueness of African racial and cultural consciousness. According to Senghor: “Negritude is the whole complex of civilized values, economic, social and political — which characterize the black peoples, or more precisely, the Negro-African world. All these values are essentially informed by intuitive reason. Because this sentient reason, the reason which comes to grips, expresses itself emotionally, through the self-surrender, that coalescence of subject and object, through myths, by which I mean the archetypal images of the collective soul”.

107 Placide Tempels 1969:75 described the most fundamental and basic concept in Bantu thought as “vital force” or African spirituality, saying that “mythological Bantu philosophy, namely the wisdom of the Bantu based on the philosophy of vital force is accepted by everyone; is not subjected to criticism, for it is taken by the whole community as the imperishable truth”. Tempels maintains ethnophilosophy is based on African Religion.

108 According to Oruka 1990{2}:9, the works of Tempels, Kgame, Senghor, Mbiti, Horton, Ruch, Onyewuenyi and Anyanwu are perceived as ethnophilosophy.

109 See Kagame’s *La philosophie Bantu-Rwandaise de l’être* (1956); Abraham’s *The Mind of Africa* (1960); Mbiti’s *African Religion and Philosophy* (1991); Nkrumah’s *Consciencism* (1998) and Nyerere’s *Ujamaa: Essays in Socialism* (1968). According to Carel & Gamez 2004:101, Nkrumah and Nyerere “developed ethnophilosophical observations about the communal character of African societies into African socialism which they used to solve concrete political problems in Ghana and Tanzania”.

110 Makudu 1993:40. Broodryk 1997:198-199 describes *ubuntu* as “a worldview transferred verbally through generations”.

111 What Tempels called *Bantu Philosophy* in 1969 and Oruka 1990{2}:23 “folk wisdom” was coined as ethnophilosophy by Houtondji. Houtondji cited in Oruka 1990(2):164 categorises works of anthropologists, sociologists, ethnographers and philosophers based on the myths and folk wisdom of the collective worldview of African peoples as ethnophilosophy.



The Kenyan, Henry Odera Oruka, identified six trends in African philosophy, viz. ethnophilosophy, sage philosophy, political philosophy, professional philosophy the hermeneutical trend and literary trend. Oruka defined the collective philosophy of traditional African people or ethnophilosophy as “a world outlook or thought system of a particular African community or whole of Africa”.<sup>112</sup> *Ubuntu*’s “indigenous, purely African, philosophy of life”<sup>113</sup> is not only regarded as the basis of African law and the “root of African philosophy”<sup>114</sup> but also “the philosophical foundation of African practices among the Bantu speaking peoples of Africa”.<sup>115</sup> Broodryk maintains *ubuntu* represents “the recovery of the logic of brotherhood in ethnophilosophy”, for it represents the collective personhood and collective morality of the African people best described by the Xhosa proverb *umumtu, ngumuntu ngabantu*; I am a person through other persons.<sup>116</sup>

*Ubuntu* or ethnophilosophy is a collective or “folk philosophy [... where] communality as opposed to individuality is brought forward as the essential attribute of African philosophy.”<sup>117</sup> Ethnophilosophy represents the ancient worldview of traditional African societies; a collective philosophy which does not entertain individual philosophies or individual critique. Oruka argues ethnophilosophy represents the group’s mythical, uncritical and emotive part of African philosophy.<sup>118</sup> His critique of ethnophilosophy lies therein that he regards it as “a communal consensus. It identifies with the totality of customs and common beliefs of a people. It is a folk philosophy [...] it is not identified with any particular individuals [...] It is at best a form of religion”.<sup>119</sup> It is said that this worldview only exists in traditional African societies as “[t]hat which is indigenous can only survive in a land that is indigenous”.<sup>120</sup>

African feminists maintain this “folk philosophy” oppresses, marginalises and stereotypes African women:

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112 Oruka 2002:121.

113 Dlomo cited in Broodryk 1997:33.

114 Ramose 2002:40.

115 Ramose 2002:8,43.

116 Broodryk 1997:33.

117 Oruka 2002:121.

118 Oruka 2002:121. Oruka 2002:121,120 describes ethnophilosophy as “emotive, mystical and unlogical” and juxtaposes it with philosophy in the strict sense which exhibits “the method of critical, reflective and logical enquiry.” Hallen 2002:50 states the sources of ethnophilosophy are “authentic traditional culture of the pre-colonial variety of Africa prior to modernity.” Kapagawani 1991:182 cites ethnophilosophy’s sources as traditional wisdom, institutions, myths, folktales, beliefs and proverbs of Africa.

119 Oruka 1990(2):43. Temples maintains ethnophilosophy is based on African Religion. According to Tempels 1969:55, everything in Baluba reality interacts with the metaphysical. For Tempels 1969:71 Bantu wisdom or knowledge consists of the “Bantu’s discernment of the nature of beings, of forces; true wisdom lies in ontological knowledge”. Tempels 1969:73, 121 sees Bantu knowledge as metaphysical in nature and Bantu moral standards dependent “on things ontologically understood.”

120 Somé 1997:57-58; Mutwa 1998:691; Smit, Deacon & Schutte 1999:32 and Khumalo cited in Bhengu 2006:58. Bhengu 2006:101-102 states “the majority of the population of Southern Africa today cannot be properly said to know and live *Ubuntu* by virtue of any continuity with village life”.

To uncritically accept those belief systems is to take an approach that ignores the experience of women in patriarchal and male dominated societies. In societies that have been dominated by men, dehumanising and oppressive customs, taboos and traditions are the 'normal' cultural elements. African women have suffered from these patriarchal structures.<sup>121</sup>

African feminists maintain that because of this collective "folk philosophy" traditional African women are not permitted to question or critique the status quo in their societies and that this "folk philosophy" condones and sustains firmly entrenched sexism. African feminists, viz. Oduyoye, Ramodibe and Zoe-Obianga state that it resulted in African men being regarded as superior to African women and that women are therefore, kept in a state of submission whilst oppressive gender stereotyping perpetuates.<sup>122</sup> According to them, this collective worldview has a general disregard for the human rights of African women, viz. their rights to equality and human dignity.

### 3.2 *Ubuntu*, hierarchy and status

As unique collective African worldview, *ubuntu* sustains the deep-seated patriarchy in traditional African societies. Traditional African communities consist of patriarchal hierarchies<sup>123</sup> which assign rights "on the basis of communal membership, family, status or achievement".<sup>124</sup> Because status and hierarchy are justifiable in African law, the legal status of each person depends upon his/her position and status within the hierarchy.

Various sources confirm that rights in traditional societies are assigned on the basis of communal membership, family, status or achievement.<sup>125</sup> Within these hierarchies "everyone in the community has an assigned place and must do what he must do without any demands; everyone must obey the elders according to strict rules".<sup>126</sup> Any challenge to the hierarchy disturbs the balance, peace and harmony of the community. The concept of *uMona* is used to control individuals within the patriarchal hierarchy.<sup>127</sup>

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121 Imbo 1999:68.

122 Imbo 1999:68.

123 Khumalo & Wieringa cited in Morgan & Wieringa 2005:261 state that these societies "are hierarchical and strongly patriarchal. Those at the bottom, women and particularly lesbians, get the rawest deal".

124 Bhengu 2006:129.

125 M'Baye 1974:143-145; Broodryk 1997:97 and Bhengu 2006:129.

126 M'Baye 1974:141.

127 Boon 1996:107-108. According to Boon, *uMona* implies that if an individual suddenly acquires material wealth it is deemed to be the result of magic, and dealt with accordingly. Vilikazi cited in Broodryk 1997:11 considers a person who suddenly acquires wealth for himself as a danger to society and comments that the Zulu, for example, regard such a person as a sorcerer. Somé 1997:15 contends that abundance amongst the Dagara people "insulted the entire setup of the tribe. People waited for the inevitable. It [death] occurred quickly". Broodryk 1997:42 states that what Western culture explains as a lack of initiative by Africans is in fact a result of the latter's view that a person should not aspire to more status or power than that accorded to him by the specific position of seniority he occupies. Ambition is traditionally not viewed as a virtue.

Traditional African societies do not exist only of the material or visible world but also the invisible world. Therefore, the patriarchal hierarchies within these communities include the spiritual dimension, living people, animals, plants and material things. Hierarchy and status within the community is maintained as follows from top to bottom:<sup>128</sup>

- At the top of the societal hierarchy is the African spirit world.<sup>129</sup> Communities are represented and guided by God(s) and the ancestors.<sup>130</sup> The king or chief holds all religious, political, judicial and military powers in the community.
- Elders act as sages and judges of the community.
- Adult males are held in high esteem and have much higher status than younger males or women.
- Women are regarded inferior to men.<sup>131</sup> Gender equality does not exist in these societies.
- Children<sup>132</sup> under age are completely dependent on the chief of the group as he holds every right over them. The age of majority is not fixed. Should a girl marry, she finds herself under the authority of a new patriarch, the head of the husband's family. Notwithstanding a man's circumcision and

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128 M Baye 1974:143, 145. M'Baye 1974:144 states that women, strangers, children, sick men and slaves have very low legal status, if any, in traditional African societies.

129 According to Mbigi 1997:53, 56-59, the African spirit world consists of God, the ancestors, nature spirits and evil spirits. The hierarchy within the African spirit world, from top to bottom, constitutes rainmaker spirits (regarded as representatives of God on earth), hunter spirits, clan spirits, spirits of divination, war spirits, wandering spirits, avenging spirits and witches who have the lowest status in the African spirit world.

130 Nyirongo 1997:104 posits that the souls of women and daughters do not qualify as ancestors, except in a few matrilineal tribes where inheritance falls in female lines. This would explain why elders are men.

131 Broodryk 1997:24 states: "Traditionally, the husband is the head of the household and the wife realises that she is not equal to the husband. She addresses the husband as 'father' and by doing this the children are given an example of how to behave. A woman does not cross words with a man and should she do this it reflects a bad image of her – a poor development sense of *Ubuntu*". Idowu 1975:77 states that "[w]here she [a woman] behaves herself according to prescription and accepts an inferior position, benevolence, which becomes her 'poverty', is assured, and for this she shows herself deeply and humbly grateful. If for any reason she takes it into her head to be self-assertive and claims footing of equality, then she brings upon herself a frown; she is called names; she is persecuted openly or by indirect means; she is helped to be divided against herself ... a victim who somehow is developing unexpected power and resilience which might be a threat to the erstwhile strong". Women in Africa are perceived inferior to men. African feminist, El Sawaadi, cited in Stewart 2005:205 argues that "[w]omen are at the rock bottom of society, of the family unit, of the home, the connective tissue of society, the mainstay of economic life, the producers and reproducers. They shoulder 90% of all work but own only 10% of what is owned".

132 Menkiti cited in Gyekye 2002:302 argues that "the absence of ritualised grief over the death of a child in African societies contrasts with the elaborate burial ceremony and ritualised grief of deceased older persons" who have attained personhood and status.

initiation he only reaches true majority once he either becomes the head of a family by succession, or sets up his own “family house”.

- Slaves and their descendents are not subjects of law.
- Mentally ill persons have no legal status.
- Strangers are rarely assimilated in the community and are situated at the outer edge of the village.

Turaki confirms the existence of these patriarchal hierarchies which have “at the top, the ancestors, the aged [elders], [male] heads and leaders, men, women, children and the unborn”.<sup>133</sup> Broodryk also acknowledges the existence of these hierarchies and states that “[a] witchdoctor, sangoma, chief and elderly people [for example] are treated on different levels of status and in some cases it appears as if the families of these figures are also more respected and treated differently. The formation of classes is a known phenomenon in Africa societies”.<sup>134</sup> Uninitiated persons for example are regarded as outcasts or “its” and do not have the same status as the initiated in their age group.<sup>135</sup> Turaki maintains “[e]very individual or group have their own destiny decreed for them by the Creator [...] Destiny is meant to be in gratitude. It is one’s lot. Thus one’s place in human society has been determined and fixed”.<sup>136</sup> As all individuals are subordinate to the collective or community, the law of kinship defines that:

[t]he individual self does not exist in itself and has no social life of itself nor determines its course of life on its own. The individual takes his/her life and entire existence from the kinship foundations he/she belongs to in the community of kinships and of common ancestry. He/she is owned by his/her bloodgroup.<sup>137</sup>

Turaki argues, “[w]e do not only have a hierarchy of human beings but also that of people groups. Human beings at times assume themselves or their ethnic or racial or tribal group to be higher or superior to others”. This explains why ethnicity, racism and tribalism are deeply rooted in the community’s beliefs, values, morals and ethics.<sup>138</sup>

Like M’Baye, Broodryk and Turaki, Nyirongo maintains a person’s status in these societies depends on his place within the patriarchal hierarchy. Gender, age and seniority in birth determine the individual’s place in this hierarchy. It is a fact that circumcised males and females are more senior and privileged than their uninitiated peers; that younger brothers have to carry the weapons of older brothers; that a younger brother cannot marry before his older brother does for “to do so is not only a sign of disrespect, but a sin against the community and ancestors” which will require an offer or sacrifice to appease them”.<sup>139</sup> According to Nyirongo, children of the most senior wife of a polygamous marriage are

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133 Turaki 1997:57; Stewart 2005:205; Morgan et al. 2005:261.

134 Broodryk 1997:97.

135 Somé 1997:87; Ramose, 2002:65; Nyirongo, 1997:72;101.

136 Turaki 1997:55.

137 Turaki 1997:61.

138 Turaki 1997:45.

139 Nyirongo 1997:104.

regarded as more senior than those of junior wives; “daughters are worth less than sons”; husbands are superior to their wives and African men who belong to secret societies are perceived to be closer to the ancestors and can therefore punish or reward ordinary community members.<sup>140</sup>

Children in these societies have little or no life force and can, therefore, not become ancestors upon death. Nyirongo states that “[a] child’s worth is judged by his potential to live an adult life rather than by the mere fact that he too is a full person. In other words, because a man’s soul is worth much more when he qualifies as an ancestor, it follows that unless he grows up he is worth less than an adult”.<sup>141</sup> Whilst African patriarchal hierarchies are renowned for their African brotherhood, little is said about the discrimination and human oppression associated with these patriarchies. Such “[o]ppression is not always overt, physical violence<sup>142</sup> [...] oppression is anything that limits the freedom or development of the individual or community”.<sup>143</sup> As individuals in these societies are not equal, *ubuntu*’s patriarchal hierarchy juxtaposes the core values of the South African Constitution, viz. the rights to equality and human dignity.

### 3.2.1 *Ubuntu*, justice, hierarchy and status

In *ubuntu* jurisprudence restorative justice<sup>144</sup> and consensus<sup>145</sup> are paramount. Because traditional African societies are based upon solidarity and consensus

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140 Nyirongo 1997:104-105.

141 Nyirongo 1997:103. Mutwa 1998:568-569 maintains a child is born without a soul or ena which only “builds up slowly of the memories and thoughts and the experiences as it grows up into a man or woman”. A child who dies without an ena cannot become an ancestor.

142 According to Liking cited in Stewart 2005:196, “Africa has a repressed memory. Why is there so much silence in Africa? If African women started remembering all of the violence that they experienced, well, it would be an explosion. Is this really a good thing? I believe that they succeed in killing the event by silence, and perhaps in our case it is for the better”.

143 Nyirongo 1997:151.

144 In *Dikoko v Mokhatla* 2006 (6) SA 235 (CC), Mokgoro and Sachs JJ linked *ubuntu* to reconciliation and restoration. Tutu 1999:51-52 describes restorative justice as a strongpoint of indigenous African culture. Naude 2006:10 maintains 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 indigenous communities in Canada, Australia, New Zealand, Africa as well as the ancient Greek, Roman and Arab civilisations. Naude 2006:102 points out that reconciliation is not always sought where disputes involve strangers or outsiders in traditional African societies.

145 Mangena 1996:58 states: “This [consensus] was the African form of democracy. According to Kenyatta, among the Gikuyu there was a ‘spirit of collectivity’ in the council’s meetings. No one spoke in terms of the personal pronoun ‘I’. Instead each individual reverted to the ‘WE’. The ‘we’ stood also for the members of the lineage represented by the elders because ‘it was the voice of the people or public that ruled the country. Individualism and self-seeking were ruled out, for every respective elder spoke in the name of his particular group”. According to Mbigi 1997:28, “[t]raditional African political systems and values treasured democracy, freedom of expression, consensus, grass-roots participation, consultation and institutionalization to preserve the collective solidarity of *ubuntu* above confrontation, foreign ideologies and personal

(not majority rule), reconciliation is paramount in restoring equilibrium within traditional African communities. Group solidarity requires the restoration of peace and win-win situations between conflicting parties.

Rights and justice are assigned on the basis of communal membership, family, status or achievement.<sup>146</sup> Whether damages will be compensated to an afflicted party depends largely upon the legal status of the person. The more influential the person against whom the injustice is committed, the more serious the injustice.<sup>147</sup> Nyirongo states that an injustice is perceived more serious when committed against a chief than against a man of lesser status; it is more severe to offend an elder than a child with less vital force; a teenager is expected to be less offended when antagonised by an elder than by another teenager; and when “a person of influence and status commits an offence against a poor man, it not as serious as when the poor man commits the same sin against him [...] This is because the older you get the more potent your words or dispositions are”.<sup>148</sup> In contrast with *ubuntu* jurisprudence, section 9(1) of the South African Bill of Rights guarantees every person equality before the law.

The fact that *ubuntu* jurisprudence permits revenge in traditional African societies<sup>149</sup> juxtaposes African and Western notions of justice. In African societies, retribution is viewed as a collective right which permits members to avenge offences or crimes committed against any member of their clan.<sup>150</sup>

### 3.3 *Ubuntu* and the oppression of women

In *Port Elizabeth Municipality v Various Occupiers* Sachs J describes *ubuntu* as “a unifying motif of the Bill Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving society of the need

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cults; this ensured political stability and unity. These elements remain crucial and relevant to the task of nation building in modern Africa”. Mandela 1994:21 describes consensus democracy as follows: “(E)veryone who wants to speak is entitled to do so and everyone is heard whether it is chief or subject, warrior or medicine man, shopkeeper or farmer, landowner or labourer. In the African environment, people spoke without interruption and meetings lasted for hours since all men were free to voice their opinions and were equal in their value as citizens. Such meetings would continue until consensus was reached. They ended in unanimity or not at all. “Democracy meant all men were to be heard and a decision was taken together as a people. Majority rule was a foreign notion”. Mangena 1996:56 states that, according to the oral tradition, women are not necessarily refused attendance at communal gatherings. They are however expected to listen and not talk.

146 Bhengu 2006:129.

147 Mbiti 1992:208.

148 Nyirongo 1997:63. “This is so because the greater a person is; the closer he is to the ancestors”.

149 Mutwa 1998:630.

150 M'Baye1974:146. According to Mutwa 1998:632, “Bantu execution is not merely punishment; it is a sacrifice to appease the ancestral spirits of the family, who cry out for revenge”. Mutwa 1998:630 maintains “the Black man is the most ardent of grudge bearers and revenge-lovers ... the black man of Africa has not learnt the meaning of the word forgiveness. His mind cannot fathom that there are other races that can fight today and be friends tomorrow”.

for human interdependence, respect and concern”.<sup>151</sup> In line with the court’s “social engineers and social and legal philosophers” who contend *ubuntu* is “a unifying motive of the Bill of Rights”, Bhengu maintains that if a nation lives by the principles of *ubuntu*, there is no discrimination.<sup>152</sup>

African feminists and gender activists, however, oppose such utopian views and disclose that *ubuntu* represents an oppressive reality: it fosters a deep-seated patriarchy that entrenches gender inequality and disregard for the dignity of African women.<sup>153</sup> Though individual critique against this ancient collective African worldview is perceived as interference with age-old African practices and not tolerated<sup>154</sup>, African feminists and gender activists criticise its oppression of African women, its entrenched gender inequality and violation of women’s human dignity.<sup>155</sup>

*Ubuntu’s* deep-seated patriarchy can be defined as the institutionalised social hierarchy in African societies whereby the extended family grants males authority and power over women. Head criticises these patriarchal structures sharply and laments the fact that African women have to comply with and obey their rules, without thought or critique:

[W]hen the laws of the ancestors are examined, they appear on the whole to be vast, external disciplines for the good of the society as a whole, with little attention given to individual preferences and needs. The ancestors made so many errors and one of the most bitter-makings was that they relegated to men a superior position in the tribe, while women were regarded, in a congenital sense, as being an inferior form of human life. To this day, women still suffer from all the calamities that befall an inferior form of human life.<sup>156</sup>

Volumes of texts by African feminists and gender activists speak out against this ancient oppressive collective worldview with its shared traditional values and beliefs in which women play a central but inferior role.<sup>157</sup> For African women, gender based violence<sup>158</sup> (viz. marital rape, and wife beating

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151 2005 (1) SA 217 (CC) at para 37. See *Union of Refugee Women and Others* 2007 (4) SA 395 (CC) at para 145.

152 Bhengu 2006:38. The Moral Regeneration Movement, *Ubuntu* Pledge, Heartlines Project, *Ubuntu* Project and African Renaissance aspire to rekindle ancient *ubuntu* values.

153 Kunene cited in Mokgoro 1997: 2 states: “*Ubuntu* is the very quality that guarantees not only separation between men, women and the beast, but the very fluctuating gradations that determine the relative quality of that essence. It is for that reason that we prefer to call it the potential of being human”.

154 Mbiti 1991:15, Turaki 1997:61 and Akatsa-Bukachi 2005:11.

155 Mdluli 1987:67.

156 Head cited in Arndt 2002:138.

157 Dangerembga cited in Stewart 2005:173 states: “The victimization I saw, was universal. It didn’t depend on poverty, on lack of education or on tradition. It didn’t depend on any of the things I had thought it depended on. Men took it everywhere with them ... femaleness as opposed and inferior to maleness”.

158 Violence against women is endemic in Africa. The UN defines violence against women broadly as “any act of gender based-violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in

or “correction”), rape, polygamy, virginity testing<sup>159</sup>, FGM<sup>160</sup>, child marriages<sup>161</sup>, abduction or forced marriages, widow inheritance and other forms of oppression are the order of the day.<sup>162</sup> Despite the fact that the African Women’s Protocol prohibits harmful traditional practices, FGM, “virginity testing, dry sex, abduction or forced marriages, ukungena, and the burning and victimization

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public or private life”. It includes FGM and rape. See [www.un.org/womenwatch/daw/beijing/platform/violence.htm](http://www.un.org/womenwatch/daw/beijing/platform/violence.htm). UNICEF describes violence against women as “one of the most pervasive of human rights violations, denying women and girls equality, security, dignity, self-worth and their right to enjoy fundamental freedoms”. See Domestic violence against Women and Girls. *Innocenti Digest*. UNICEF. 2000:2,6. There is a strong connection between violence and the spread of HIV/AIDS, dubbed the dual epidemics in women’s lives (Banda 2005:170; Terry 2007:137). Otive-Igbuzor 2007:210 maintains women infected with HIV/AIDS “face new forms of violence — accusations, battery, being made homeless, being poisoned and killed — the list goes on”.

159 Leclerc-Madlala 2000 and Rankhotha 2004:87 outlaw virginity testing as weapons men use to enforce patriarchal masculinity over women. According to Rankhotha, patriarchal masculinity is forced on women through physical violence and rape. Virginity testing of young girls under sixteen continues in the Eastern Cape, Limpopo, Kwa-zulu Natal and other regions in South Africa. This violation of their human rights denies them their rights to autonomy and human dignity (Mukasa 2008:149). Though section 12(4) of the *Children’s Act* 38 of 2005 prohibits virginity testing of children under the age of 16, the Bill of Rights has been unable to guarantee human dignity to girls who are still subjected to the violation of their human rights through virginity testing. Moody 2008:70 states that virginity testing “merely serves to promote patriarchal interests by keeping women inferior, marginalised and subservient”.

160 Female Genital Mutilation (FGM) or clitoridectomy is currently practiced in 28 African countries and constitutes a rite of passage which imparts the future roles and positions of young girls in the patriarchal hierarchy as wives and mothers. FGM’s additional role is to curb the sexual desires of women. Most girls are circumcised between the ages of four and twelve to alleviate the trauma associated with the surgery and to circumvent governmental intrusion (Moodley 2008:67-69). Despite the fact that Article 5 of the African Women’s Protocol (Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 2005) prohibits FGM, it is widespread in sub-Saharan Africa (Terry 2007:48-50). Section 12(3) of the *Children’s Act* 38 of 2005 prohibits FGM in South Africa.

161 In spite of South Africa’s Constitutional guarantees of gender equality; prescriptions in the *Sexual Offences Amendment Act* 32 of 2007 which deems sex with children under 16 as statutory rape; provisions in the *Children’s Amendment Act* 38 of 2005; CEDAW (United Nation’s Convention on the Elimination of all Forms of Discrimination Against Women, 1981) and the African Women’s Protocol which outlaw marriage to girls under 18, the ancient cultural practice of *ukuthwawlwaw* still prevails in traditional societies in South Africa. Thirty one African girls between 14 and 16 years were recently abducted from their houses in the Eastern Cape under the pretext of age-old custom. These girls were traded by their families “for as little as three sheep apiece” to men “between 55 and 70 years old, widowed and HIV positive”. Whilst twenty of the thirty one girls were fortunate enough to manage to flee, eleven of these girls “were raped and forced into domestic chattelhood by their new husbands” (*Sunday Times* May 31, 2009:1,12).

162 Aidoo 1991; Akatsa-Bukachi 2005:11. Section 5 of the *Prevention of Family Violence Act* 113 of 1993, South Africa, provides that a man can be found guilty of raping his spouse. SA is one of the few countries in the world that criminalised marital rape.



of women called witches” persist in sub-Saharan African.<sup>163</sup> African feminists maintain African traditionalists retain these patriarchal privileges to control women. The patriarchy maintain hegemonic masculinity and utilise violence to control female behaviour to ensure chastity, abstinence, copulation and deny the existence of sexual violence in Africa “as part of patriarchal power and socio-cultural norms reinforced by religious beliefs and injunctions to suppress, in particular, girls and women from the free expression of their sexuality”.<sup>164</sup> The struggle of African feminists and gender activists to reclaim the bodies of women “from virginity-testers, rapists and abusers indicate that cracks in the structures of patriarchal femininity have begun to appear”.<sup>165</sup>

*Ubuntu's* “fundamental African value” of hospitality<sup>166</sup> is well-known and generally associated with reciprocity, openness and acceptance of others. In *ubuntu* reality it is considered a moral evil to deny relatives, friends and strangers hospitality.<sup>167</sup> This fundamental African value is regarded as a sacred duty which ensures that guests would be protected from harm during their length of stay in the community. African feminists, however, perceive this fundamental value as a form of oppression and state that it regulates female-male relationships, ignores the welfare of women and exploits their sexuality.<sup>168</sup> According to Lala, the fundamental value of hospitality also encompasses the following<sup>169</sup>,

- Men who went to the same school of initiation can exchange wives.<sup>170</sup>
- 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.

Oduyoye argues this fundamental African value is “incompatible with the dignity of women”.<sup>171</sup> She accuses “African male models of manhood” and “leaders of public opinion in African societies” of being the guilty ones who erode the human dignity of women.<sup>172</sup> Moyo embroiders on this fundamental value of hospitality and adds that African chiefs offer male visitors women of honour

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163 Mukasa 2008:147.

164 Makinwa-Adebusoye & Tiemoko 2007:7,13.

165 Rankhota 2004:85.

166 Oduyoye 2001:93.

167 Mbiti 1991:176. Mnyaka & Motlabi 2005:230 contend hospitality was “a public duty where the honor of the community was at stake and reciprocity was more likely to be communal than individual ... hospitality was a sacred duty”.

168 Oduyoye 2001:101.

169 Cited in Oduyoye 2001:101-102.

170 Cited in Oduyoye 2001:103 states that in many villages there is a *femme du village*, a collective wife of a known group of men. This practice is called polyandry and not prostitution. “The men are not clients and do not remain anonymous. They are known and the relationship is approved. Lala maintains prostitution and celibacy as modes of expressing sexuality were unknown in Africa”.

171 Cited in Oduyoye 2001:103,104.

172 Cited in Oduyoye 2001:104.

to keep them company for the duration of their visit<sup>173</sup>, or to be taken away as wives.<sup>174</sup> These and other sexual practices threaten women's reproductive rights, exacerbate their vulnerability and inability to negotiate and engage in safer sex.<sup>175</sup> Oduyoye maintains the low social status and gender inequality of African women impact also on economic injustice against women.<sup>176</sup>

It has become popular to make great emphasis only of positive traditional African values, conveniently ignoring the dark side of *ubuntu* which erode the human rights of women and others.<sup>177</sup> The collective philosophy's condoning of ancient "harmful traditional practices in South Africa, and its resultant loss of life and/or abuse of women's human rights, is an area that urgently needs attention".<sup>178</sup> Despite the fact that the South African Constitution guarantees human rights for all and that Article 2(b) of the African Women's Protocol prohibits all forms of discrimination against women, harmful traditional practices continue to endanger the health and general well-being of African women. For millions of African women in South Africa (and SADC) *ubuntu* has been unable to liberate them or bring *uhuru* into the private sphere or family.

### 3.4 *Ubuntu* versus homosexuals, lesbians and witches

Section 9(3) of South Africa's Bill of Rights guarantees homosexuals and lesbians the right not to be unfairly discriminated against on the ground of their sexual orientation. Africans in same-sex sexual relationships, however, experience discrimination, gang rape, hate speech, harassment, murder<sup>179</sup> and stigmatisation because of their alternative sexual orientation. Throughout sub-Saharan Africa, *ubuntu's* shared values and beliefs regard homosexuality and lesbianism as "unAfrican" and alien to African culture. Homosexuals are regarded as "subhuman" and "worse than dogs and pigs".<sup>180</sup>

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173 Wamue cited in Oduyoye 2001:102 reports that "among the Agikuyu this practice is euphemistically associated with making a bed for a guest ... the women, wife or daughter can refuse to make the bed and the guest can also decline the honour".

174 Cited in Oduyoye 2001:102.

175 Malera 2007:134.

176 Oduyoye 1989:443. Osei-Hwedie cited in Jacques *et al.* 2005:154,155 argues that "[g]ender inequality is one of the most pressing problems in contemporary Africa, because it is one of the major causes of the low status of women and the poverty characteristic of the majority of women ... patriarchy remains the overarching obstacle to women's advancement and equality with males".

177 Ebeku 2004:1 states: "African women have for too long suffered a great deal of human rights abuses".

178 Mukasa 2008:149. Rankhotha 2004:80 maintains the current reintroduction of "outdated cultural practices is not only unfounded, but that traditionalists want to cling to patriarchal privileges in the context of the new culture of human rights and gender equality seems tilted against them and self interest".

179 The 19-year-old Zoliswa Nkonyane was stoned to death by twenty males of a Khayelitsha gang because of her sexual orientation. *Mail and Guardian*, October 30 to November 5, 2009:14.

180 Nkabinde 2008:131; Morgan & Wieringa 2005:17; *The Economist*, April, 2007:46.

Despite the fact that the South African Constitution guarantees everyone equal enjoyment of rights and freedoms and non-discrimination on the basis of sexual orientation, homosexuals and lesbians in South Africa and other sub-Saharan African countries experience homophobia, discrimination, hate speech and hate crimes.<sup>181</sup> “This homophobia is based on the perception that same-sex relations are alien to African culture and an import from the depraved West”.<sup>182</sup> African lesbians are regularly murdered and gang raped as punishment for their deviant behaviour to reinforce male control over women: the “[r]ape of black lesbians is a weapon used to discipline our erotic and sexual autonomy”.<sup>183</sup> Despite the fact that South Africa’s Bill of Rights enshrines fundamental human rights, Nkabinde maintains lesbians in South Africa are raped “to teach them a lesson”. According to Nkabinde, this violation of female human dignity is called “corrective rape”.<sup>184</sup> The fact that the shared values and beliefs of *ubuntu* declared same-sex relations taboo and “unAfrican” makes “lesbian women doubly oppressed”.<sup>185</sup> In these “hierarchical and strongly patriarchal [societies] ... particularly lesbians get the rawest deal”.<sup>186</sup>

*Ubuntu’s* shared values and beliefs perceive witches a reality in the African spirit world. Witches are among the most hated people in sub-Saharan Africa.<sup>187</sup> Witches are usually women and frequently killed by their communities.<sup>188</sup> Any person “identified as a witch, is under intense pressure to accept responsibility. This is why ordinary people with no supernatural history and no guilt beyond ill-temper sometimes concede guilt when accused of witchcraft” and killed.<sup>189</sup> The Provincial Commission of Inquiry of the Limpopo

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181 Morgan & Wieringa 2005. Reddy 2004:7 states most African states are homophobic, criminalises homosexuality and withdraws rights of citizenship to gays and lesbians. “This is, in part, fuelled by the notion of the ‘un-Africanness’ of homosexuality, despite the overwhelming evidence of its existence. Baraka *et al.* cited in Morgan *et al.* 2005:25 states that Kenya’s president Moi has verbally attacked homosexuals and lesbians on various occasions saying “Kenya has no room or time for homosexuals and lesbians. Homosexuality is against African norms and traditions, and even in religion it is considered a great sin”. The International Lesbian and Gay Association (ILGA), based in Brussels, estimates that Africa has more than 24 million active homosexuals (*The Economist*, April, 2007:46) and reports that 38 African countries still criminalise consensual same-sex activity between adults (*The Mail & Guardian* 2008, May 16-22:32).

182 Morgan *et al.* 2005:13.

183 See Muholi 2004:116-124 for an account of hate crimes against African lesbians.

184 Nkabinde 2008:145. *Die Burger By*, Augustus, 2009:11-12 quotes an African lesbian who maintains 99% of African lesbians who come out of the closet in South Africa are either raped or sexually assaulted.

185 Morgan *et al.* 2005:11.

186 Khumalo *et al.* cited in Morgan *et al.* 2005:261.

187 Mutwa 1998, Holland 2001; Mbiti 1991.

188 Hallen and Sodipo 1997:88. Hallen *et al.* see witchcraft as an explanation to be used when no other explanations are forthcoming. Witchcraft provide the type of explanation “that provides for the victims doing something concrete about their misfortunes”.

189 Holland, 2001:9. Holland 2001:18-20 states that where witchcraft is suspected, strict procedures for accusation are to be adhered to. The family first has to consult a traditional healer who has to confirm a witch’s involvement. “But once the healer

Province and a research team appointed by the Human Sciences Research Council found “executions of witches without formal trials by members of the community increased dramatically over the past ten years”. The research team concluded that witchcraft and the killing (burning)<sup>190</sup> of witches are factors that have to be reckoned with in all regions of South Africa.<sup>191</sup>

In contrast with the equality clause of the South African Constitution, *ubuntu* jurisprudence ranks the status of homosexuals, lesbians and witches very low within its patriarchal hierarchy. Despite claims of equality<sup>192</sup> in *ubuntu*, in reality the violation of human rights of individuals in same-sex relations and witches throughout sub-Saharan Africa remains realities human rights

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names a witch, invariably someone living in the same village as the victim, the family declares its accusation by leaving a small heap of ash or some other token in the doorway of the accused’s house during the night. When the suspect awakes and acknowledges the accusation, often amid strenuous protests, he or she goes to see the headman who arranges a trial by order”. If the accused is found guilty after various tests, she can either confess and be spared or protest and be killed in a ceremony at sunrise, or be beaten and driven away like a wild animal. Oduyoye 2001:26 maintains exile is deemed worse than judicial execution. Many witches are burned alive in their huts.

190 According to Mutwa 1998:629;632 “it is believed that burning a person to death not only destroys the body but also the *ena* and the soul — fire itself being a ‘spirit’ capable of dissolving other kinds of spirits”.

191 Teffo & Roux 2002:169. According to Mukasa 2008:148, the Executive Council of the Northern Province (currently Limpopo) appointed a Commission into Witchcraft Violence and Ritual Murders in March 1995. Police statistics revealed that 445 cases of witchcraft were reported between 1990 and 1995 in this province and that during 1 April 1994 and 16 February 1995, 97 women and 46 men were killed as a result of accusations of witchcraft. Currently the killing of witches prevail in South Africa. The reality of the belief in witchcraft was recently highlighted when the South African Defense Force’s first black female judge, Colonel Nomoyi, allegedly doused herself in petrol and set herself alight. Her defence was that she was bewitched when she attempted to kill herself. Despite the fact that attempted suicide is deemed a serious offence in the SA military, the judge escaped prosecution because “some of the SA National Defence Force’s top brass allegedly believed her claim that she was bewitched” (*Sunday Times* November 9, 2008:9).

192 The notion of equality in traditional Africa societies differs profoundly from the Western notion of equality. Muendane 2006:91 describes *ubuntu* equality as follows: “[E]veryone in the group complies with the dictates and standards set by the particular group; everyone in the group is simply expected to do that. When an individual belonging to the group deviates from the cultural standard or norm, everyone else becomes disturbed and that can result in isolation, ostracism, condemnation, criticism or censure of the deviating individual. At any rate, that individual will forfeit something of benefit, as members of the group with whom the particular cultural behaviour is associated, withdraw different forms of cooperation and other benefits from him or her. This response to the deviating person by the group is normal within all groups as it is intended to protect group cohesion. Group cultural practices have the function of helping members of the group to easily identify one another because individuals in any group use the properties of the custom or culture as *reference* for action within the group to ensure cooperation and harmony. Without the cooperation of others, one can never accomplish anything in life. The groups we belong to are the first port of call in our endeavour to seek cooperation to achieve our goals. This is as things should be, and is applicable universally” throughout sub-Saharan Africa.

and gender activists cannot conveniently ignore. Although *ubuntu* is generally associated with African brotherhood and the spirit of “sharing, caring, kindness, forgiveness, sympathy, tolerance, respect, love, appreciation [and] consideration”<sup>193</sup> within the clan, Nyirongo states: “[T]hey have said nothing at all about the violence that goes on within the tribe because of its faulty view of office, authority, power and irresponsibility. This in my view is an illusion [...] the caring and sharing atmosphere we see is not as innocent as it appears!”<sup>194</sup> Little is ever said about this violence or dark side of *ubuntu* — for the collective “folk philosophy” has cultivated a cult of silence which does not tolerate individual critique.<sup>195</sup>

Silence also surrounds the fact that *ubuntu's* shared beliefs and values accommodate sangomas<sup>196</sup> who are renowned for muti-murders. Sangomas are spiritual leaders in traditional Africa who maintain a unique relationship with the ancestors.<sup>197</sup> Sangomas can cure spirit-possessed persons and can contact and interact with the ancestors who also assist them in their work.<sup>198</sup> Despite having the South African Constitution hailed as the most advanced Constitution in the world, guaranteeing human rights for all, muti-murders have not ceased since the dawn of South Africa's new democracy. This ancient practice where body parts are taken to make muti or medicine “remain[s] disturbingly common” and continues year after year.<sup>199</sup>

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193 Broodryk 2002:33.

194 Nyirongo 1997:149. Violence is also evident during male initiations. Despite the fact that section 12 of the *Children's Act* prohibits circumcision of boys under 16, the traditional ritual in preparation for manhood continues. Van Zalm 2009:907 states “[p]roblems arise when circumcisers are blunt ... and when punishments for such lapses as forgetting words of a chant become too severe- some boys are literally beaten to death”. Nyirongo 1997:132 confirms 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”.

195 Mbiti 1991:15, Turaki 1997:61 and Akatsa-Bukachi 2005:11. Mutwa 1996:9; 2003:xv maintains Africans who disclose secrets of traditional African societies to outsiders are despised by their people.

196 Mutwa 2003:xxii-xxiv distinguishes between *inyangas* and *sangomas*. According to Mutwa, *inyangas* or herbalists inherit their profession from their relatives, but *sangomas* receive “a call from the spirits”. The *sangoma* understands and controls the same occult forces as the sorcerer and can cure persons affected by the magic spells of the sorcerer. The *sangoma's* power however transcends that of the sorcerer. Broodryk 2005:123 maintains *sangomas* “are more often than not the murderers of people and young children, or the instigators of such murders, in order to obtain human parts for *muti* (medicine)”.

197 Mutwa 2003:27.

198 Mutwa 1996:xv; Nkabinde 2006:11; Broodryk 2007:127-128. Mutwa 1998: 627 maintains “[a]n African can lie with great ease to any missionary, chief, magistrate or judge. He can lie without winking an eye. But no African will dare to lie to a witchdoctor” or sangoma.

199 Van der Zalm 2009:909. Dynes cited in Van der Zalm 2008:911 states that “South Africa has the only specialized investigation force in the world dealing specifically with muti murders” and that “up to 300 muti killings occur each year”. During *muti*-murders the body parts of victims are harvested for use in traditional healing practices. Body parts will usually be removed whilst the victim is still alive as the victim's screams invoke the ancestors and makes the *muti* or traditional

### 3.5 *Ubuntu*, strangers and outsiders

African societies are founded on shared traditional African values, beliefs, rules, taboos, customs, elders, ancestors and the African spirit world.<sup>200</sup> The “universal brotherhood for all Africans” embraces a spirit of group solidarity, conformity, sharing, caring, respect and hospitality within these societies.<sup>201</sup> But neither the African brotherhood nor African law guarantees strangers or outsiders the right to equality, for African law like African Religion applies only to the African community or clan and not to strangers or outsiders.<sup>202</sup>

A stranger in African societies is defined as “one who comes in from outside; another continent, another race, another civilisation, another worldview. Strangers are people with other values, other perspectives, other objectives, other principles of life”.<sup>203</sup> The fundamental African value of hospitality entails that “[a]s long as you [the stranger] stay in the village you are cared for as a spirit envoy and respected. This is the law”.<sup>204</sup> Strangers are entitled to hospitality and respect for as long as they stay in these communities but are perceived as “a form of second-class citizen. They are seen as outsiders, as ‘other’, since they have a different culture and a language which are different from the ‘norm’”.<sup>205</sup>

Turaki avers that the law of kinship in traditional African societies is the most powerful and pervasive of all African laws and that it creates two types of morality and ethics: firstly, morality and ethics for the community, and secondly, morality and ethics for strangers and outsiders.<sup>206</sup> Turaki describes the “law of kinship” ‘which regulates African societies as follows,

The law of kinship defines in unequivocal terms those who are ‘insiders’ and ‘outsiders’. Outsiders and strangers do not belong, for this reason

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medicine more powerful. Broodryk 2005:123 maintains *sangomas* are “more often than not the murderers of people and young children, or the instigators of such murders, in order to obtain human parts for *muti* (medicine)”. According to Mutwa 2003:xxii, *sangomas* receive their gift of healing from the African spirit world. *Sangomas* understand and control the same occult forces as sorcerers but the powers of *sangomas* transcend those of sorcerers. Mbiti 1992:68-70; Mbigi 1997: 56-59; Mutwa 2003:xxii; and Broodryk 2007:127-128 maintain *sangomas* are intermediaries of God and regarded as scientists, psychologists, parapsychologists, clairvoyants, artists, diviners, doctors, purifiers of age sets; predictors and solicitors of rain; curers of spirit-possessed persons and communicators with the dead in African societies. According to Mutwa 2003: xxii, *sangomas* fulfil the same role as priests and psychiatrists in Western societies.

200 Wiredu 1980:4.

201 Mdluli 1987:64.

202 Mbiti 1992:5, Turaki 1997:63 and Mbigi 1997:56 confirm that African Religion is inaccessible to outsiders; M'Baye 1974:142 and Turaki 1997:61,139 maintain African law does not apply to outsiders; Naude 2006:102 states African justice does not apply to outsiders; and Mutwa 1998:555-556 avers sacred knowledge is never revealed to outsiders.

203 Oduyoye 2001:95.

204 Somé 1999:88.

205 Monyaka *et al.* 2005:123.

206 Turaki 1997:61.

they are not entitled to (1) equal treatment; (2) ownership; (3) affinity, loyalty and obligation; (4) community rights and protection and (5) they are not people, they are outside of the commonwealth, they are strangers [...] Those who belong are to be treated equally and preferentially as against outsiders and strangers.<sup>207</sup>

In contrast with *ubuntu's* loving and caring atmosphere which prevails in the brotherhood, “[a]nything outside the kinship system is labelled ‘outside world’ ... In this sort of place, kinship or tribal rules do not apply. In fact there is no set of rules to govern its operation or control”. “In such a place ‘might is right’; ‘the end justifies the means’; ‘it is a war zone’”.<sup>208</sup> This attitude towards outsiders is confirmed by Nyirongo who maintains that outsiders are not looked upon as equals or brothers.<sup>209</sup> According to Nyirongo, African law permits differential treatment of outsiders; African law permits discrimination and the oppression of outsiders. The attitudes of traditional African societies towards outsiders are closely related to value systems of closed societies<sup>210</sup>. In closed societies all people who are not community members are perceived as outsiders. Not only do traditional African values or *ubuntu* values “enhance ethnic or group harmony [but] traditional African values [also] promote ethnic or group superiority over others, parochialism, dominance, subordination, prejudice and discrimination”.<sup>211</sup>

In contrast with Western jurisprudence which guarantees individual rights and liberties, *ubuntu* jurisprudence guarantees group rights and duties. *Ubuntu* does not guarantee fundamental human rights for individual members, strangers or outsiders<sup>212</sup>, as the concern for societal survival is greater than the concern for individual rights. What is perceived as equality in *ubuntu* reality is fundamentally different from the right to equality as comprehended

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207 Turaki 1997:61.

208 Turaki 1997:63.

209 Nyirongo 1997:139.

210 Popper cited in Broodryk 1997:88 defines a closed society as a society characterised by belief in magical taboos and superstitions. Open societies give preference to reason. Turaki 1997:49 maintains that because the *ubuntu* worldview is “essentially spiritual”, the community has a “moral obligation to conform to traditions, and conventions override any desire for change or nonconformity. The conception is that the best in life lies in the past; the world of the ancestors and the origin”. Biakolo 2002:17 states that the model of traditional African thought “is a closed system because unlike the open scientific culture neither understands nor tolerates alternative thought ... In the event, traditional African thought turns out to be lacking in logic”. Biakolo maintains “all traditional African thought [is] based on religion”.

211 Turaki 1991:173.

212 Turaki 1997:68. Turaki maintains “[w]hat is right and wrong can only be committed against a member of the own ethnic group, race or tribe, but not against a stranger or an outsider. An outsider has no rights or protection and anything done to him has no moral or ethical value. It is an insider who has rights, privileges and protection under racial and tribal laws. Thus killing or discriminating against an outsider is not a crime”.

in Western jurisprudence.<sup>213</sup> Human rights law is fundamentally at odds with traditional African values.<sup>214</sup>

### 3.6 *Ubuntu* as African Constitution

African sources confirm that the laws which regulate traditional African societies in sub-Saharan Africa are “unquestionably similar to one another”<sup>215</sup>; that *ubuntu* constitutes the basis of African law and that “*ubuntu* philosophy of law is the continuation of religion”.<sup>216</sup> *Ubuntu* is generally perceived as the ancient collective philosophy of sub-Saharan African traditional societies which regulates the African flow of life. Ngubane, Ramose and Bhengu however, contend *ubuntu*'s collective philosophy is more than a mere ancient collective African worldview. They aver *ubuntu* is not only the basis of African law but that *ubuntu* constitutes sub-Saharan Africa's highest law.

*Ubuntu* jurisprudence is well-known throughout sub-Saharan Africa. Though *ubuntu* is perceived as the basis of African law, Ngubane, Ramose and Bhengu maintain *ubuntu* functions as highest law or African Constitution in traditional African societies.<sup>217</sup> As highest law, the African Constitution structures African societies by means of shared traditional values, beliefs, customs, laws, taboos and traditions.<sup>218</sup> According to Ramose, *ubuntu* functions as “constitutional law” in African societies — it commands obedience from the people and protects all traditional African communities.<sup>219</sup> Bhengu maintains “[t]he function of the [African] Constitution is to create, regulate and perpetuate a social order in which the person could realise the promise of being human”.<sup>220</sup>

Ngubane, Ramose and Bhengu divulge very little about the African Constitution, leaving much open to speculation. There is no written evidence that such an ancient African Constitution exists. This article postulates the following about the African Constitution: As *ubuntu*, the African Constitution consists of uncodified moral rules, passed on orally from generation to generation. As highest law, the African Constitution (like African law) functions as private law. Its function is to regulate interpersonal relationships by way of shared customs, rules, taboos, values, beliefs and traditions. The African Constitution or *ubuntu* constitutes the basis of African law and is inseparable from African Religion, the ancestors and the African spirit world.<sup>221</sup> The ancestors play a central role as legislative and executive authorities who make

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213 Nyirongo 1997:139. Nyirongo, M Baye 1974:141 and Turaki 1997:61 maintain the right to equality does not exist in traditional African societies because every person fits into a social hierarchy. See also Mqoke 1996:365.

214 Viljoen 2007:305.

215 Ramose 2002:81; Mutwa 1998:624; Ebo 1995:40; Ojwang 1995:56 and M'Baye 1973:139.

216 Ramose 2002:81, 97.

217 Ramose 2002:97; Ngubane 1979:78 and Bhengu 2006:33.

218 Bhengu 2006:33.

219 Ramose 2002:97.

220 Bhengu 2006:33.

221 Ramose 2002:97 states “*ubuntu* philosophy of law is the continuation of religion”.



and enforce law. Whereas the African Constitution is group-orientated and gives preference to group rights and duties, the South African Constitution is codified; individualistically orientated; guarantees fundamental human rights; regulates state power, relationships between citizens and the state, and relationships between individuals. The South African constitution is based upon a jurisprudence of equality and its legislative, judicial and executive authorities are independent of the African spirit world.

As the basis of African law, the African Constitution assigns rights on the basis of communal membership, family, status or achievement. It sustains patriarchal hierarchies and does not guarantee the rights to equality, human dignity and life to women, homosexuals, lesbians, witches and others. Whilst the African Constitution does not guarantee individuals equality before the law, the South African Constitution guarantees everyone fundamental human rights: equality before the law; their rights to life, equality and human dignity. It has to be seriously questioned whether *ubuntu* is “a unifying motif of the Bill Rights” as contended in *Port Elizabeth Municipality v Various Occupiers*.<sup>222</sup>

### 3.7 *Ubuntu* versus regional human rights mechanisms

In 2007, South Africa and other SADC<sup>223</sup> member states signed the Draft SADC Protocol on Gender and Development (GAD). Not only did member states commit themselves to enshrine gender equality in their constitutions by 2015 but also that gender equality would take precedence over customary, religious and other laws.<sup>224</sup> Member states undertook to eliminate all practices which negatively affect the rights of women, men, girls and boys in SADC.<sup>225</sup> The implication for South Africa is that the South African Constitution, African law and *ubuntu*'s collective worldview of shared values and beliefs will have to comply with the Draft SADC Protocol on GAD and the Protocol to the African Charter on the Rights of Women. Discourse on *ubuntu* is essential in order to align *ubuntu* with international and regional human rights mechanisms.

## 4. Conclusion

The Constitution of South Africa imposes the duty on South African Courts to promote values which underlie a democratic society based on human dignity, equality and freedom.<sup>226</sup> Section 39 (3) of the Constitution implies that more than one system of law operates in South Africa and that African law, customary law and religious laws may at times conflict with the democratic values of the Constitution. It is imperative, as emphasised by the Constitutional Court in *S v Makwanyane and Another*, that recognition be given to African law and legal

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222 2005 (1) SA 217 (CC) at para 37.

223 Southern African Development Community.

224 Article 4(1).

225 Article 4(2).

226 Section 39(1). Osei-Hwedie cited in Jacques *et al*/2005:154 maintain equality (and specifically gender equality) and human dignity are the most pressing humanitarian problems in sub-Saharan Africa.

thinking as part of the source of values section 39 of the 1996 Constitution requires courts to promote. As in the case of religious and customary laws, African law has to be brought in consonance with the Constitution; Draft SADC Protocol on GAD; the Protocol to the African Charter on the Rights of Women and international human rights mechanisms.

It is argued that *ubuntu* is an ancient collective worldview of shared traditional values and beliefs which constitutes not only the root of African philosophy but also the basis of African law. As a moral philosophy, *ubuntu* is inseparable from African Religion and regulated by the interplay of spiritual forces of the African spirit world. As a form of religion<sup>227</sup>, *ubuntu* constitutes the core of African law and sustains the deep-seated patriarchy throughout sub-Saharan Africa. Although *ubuntu* values and beliefs have sustained traditional African societies since time immemorial, the fact that it entrenches discrimination and erodes the non-derogable rights of South Africa's Bill of Rights, viz. the rights to equality, human dignity and life has been conveniently ignored by the Court. As a collective philosophy<sup>228</sup>, *ubuntu* sustains not only communities, extended families, values, beliefs, tradition, morals, law and justice in these societies but also the patriarchal hierarchy, discrimination, inequality and stereotyping of women, children homosexuals, lesbians, witches, strangers and other.

"[S]ocial engineers and social and legal philosophers"<sup>229</sup> have equated the prized values<sup>230</sup> of *ubuntu* with "the values of the Constitution generally and the Bill of Rights in particular"<sup>231</sup>, ignoring the fact that "sexism and patriarchy are so ancient, all pervasive and incorporated into the practice of daily life as to appear socially and culturally normal and legally invisible".<sup>232</sup> In their effort to legitimise the South African Constitution, judges equated *ubuntu* with the Constitutional values "human dignity, the achievement of equality and the advancement of human rights and freedoms [...] and non-sexism."<sup>233</sup>

The "seamless text"<sup>234</sup> of constitutional theory on *ubuntu* jurisprudence obscures the fact that *ubuntu* is inseparable from African Religion; that it sustains a deep-seated patriarchy; discrimination, inequality and the violation of human dignity. Neither "African law and legal thinking"<sup>235</sup> nor its basis, *ubuntu*, is in compliance with international human rights notions of equality and human dignity or the African Women's Protocol. In order to meet the SADC goals for gender equality by 2015, "social engineers and social and legal philosophers" need to break the cult of silence and start asking probing questions regarding *ubuntu*. Fact is *ubuntu* is not in consonance with the values

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227 Oruka 1990:43.

228 Oruka 1990:43; Ngubane 1979:78; Bhengu 2006:33.

229 *Baloro and Others v University of Bophutatswana and Others* 1995 (940) SA 197 (B) p235 E-F per Friedman JP.

230 Mokgoro 1998:21.

231 Mokgoro 1998:22. Bhengu 2006:8, 206 propounds that *ubuntu* is "Africa's key to freedom and equality for all ... [embodying] the spirit of human dignity, justice and equality".

232 *Volks NO v Robinson* 2005 (5) BCLR 466 (CC) at para 163 as per Sachs J.

233 Section 1 of the 1996 Constitution.

234 Van Blerk 2004:92.

235 *S v Makwanyane and Another* para 366.

of the Constitution in general and the Bill of Rights in particular. *Ubuntu's* shared traditional African values and beliefs trump and erode the core values of the South African Constitution.<sup>236</sup>

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236 At an *imbizo* of the National Heritage Council 2006, it was emphasised “that *ubuntu* is competing and is being dislodged and undermined by foreign values”, National Heritage Council Report 2006: 13.

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