

Chapter 11

FROM UBUNTU TO *GROOTBOOM*: VERNACULARISING HUMAN RIGHTS THROUGH RESTORATIVE AND DISTRIBUTIVE JUSTICE IN POST-APARTHEID SOUTH AFRICA

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A defining feature of the human-rights movement is the claim to universality. The formation of the UN after World War II and the adoption of the Universal Declaration of Human Rights (UDHR) shortly afterwards, inaugurated a global human-rights movement premised on the notions of universality and inalienability. The UDHR outlined a regime of universal human rights and fundamental freedoms applicable to all the peoples of the world simply on the basis of their humanity. The rights outlined in the declaration were presented as values of human worth and dignity shared by peoples and cultures around the world. The declaration aspired to be 'a common standard of achievement for all peoples and all nations' (UN 1948). Since the adoption of the UDHR, the universality of human rights has also been affirmed at several international forums, notably the 1993 UN World Conference on Human Rights in Vienna, which validated human rights on a transnational and transcultural basis.

In spite of the transcultural claims of the UDHR, however, the universality of human rights remains in question. Universal human rights continue to be challenged on multiple fronts by proponents of varying degrees of cultural and political relativism, and by interpretative divergences and enforcement limitations. Even though most nations have signed the International Bill of Human Rights, the reality is that so-called 'universal' human rights are unevenly recognised, promoted and protected around the world.¹

The universality of human rights therefore remains largely aspirational. The gap between universal human rights idealism and universal human rights in practice raises crucial questions: what does the universality of human rights mean in local contexts where primary obligations for rights implementation and enforcement reside? How can the lofty idealism of

¹ The International Bill of Human Rights refers to the three key UN human rights instruments: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights. The two covenants entered into force in 1976, after a sufficient number of countries ratified them.

universal human rights be put into practice and made relevant to local contexts? If they are to be relevant to local contexts, the aspirational vision of universal human rights, espoused in international declarations and covenants, must gain local acceptance, ownership and legitimacy. To gain local legitimacy, which enhances the prospects of promotion and enforcement by state and non-state actors, universal human rights must be intelligible in local idiom and vernacular. In other words, universal human rights must be vernacularised.

The notion of vernacularising human rights has been used to describe the process by which universal human-rights norms are grounded in local communities. It requires seeing human rights in specific situations, rather than as the application of abstract principles. It also draws on similar arguments that have been made about the vernacularisation of modernity (Yavuz 2003:61). The localisation and vernacularisation of human rights is a constructive process that grounds and expands the scope of human rights in different cultural contexts (Merry 2006a:37).² In this sense, vernacularisation refers to the complex process by which universalist impulses intersect with local ideas and situations to produce hybridised understandings of human rights. The focus is not on challenging or repudiating universal human rights but on investing them with local meaning that can potentially strengthen global enforcement. In this way, vernacularisation of rights as product and process make meaningful the rights that obtain to membership of a particular polity.

Other scholars have expressed this idea as the culturalisation of human rights law which requires the reconceptualisation of international human-rights law through a culturally based approach. The goal is to improve the effectiveness of human rights through cultural acceptance and legitimation, leading to better balancing of conflicts of rights (Lenzerini 2014:44). Although the notion of vernacularising human rights is analogous to the notion of culturalising human-rights law, I prefer the former because it suggests a process of indigenisation that transcends law. The promotion and protection of human rights are determined not only by legal instruments, but also by historical and sociopolitical conditions. The notion of culturalising human rights is also too closely connected with the old debate on cultural relativism. Whereas cultural relativism fundamentally challenges claims of human-rights universality, the idea of vernacularising human rights does not. Rather, it proceeds from the premise that forging a core universal

2 For a discussion of the notion of vernacularising of human rights, also see Merry (2006b); and Ledger & Kheang Un (2003).

human-rights culture is necessary and desirable in our globalising world, but insists on attuning that universal culture to the peculiarities of local circumstances. The notion of vernacularisation therefore opens up new analytic space for conceptualising and theorising human rights.

The global is often constructed in opposition to the local. Yet the notion of localised (vernacularised) universal human rights is not an oxymoron. Universal human rights have an intrinsically local dimension, since they are only meaningful when applied to local contexts. What use is a legal and normative universal human-rights regime that does not address local social challenges or promote local humanist aspirations? The universal, (properly so called) is meaningless if it is not the aggregate of local perspectives and experiences. The obligation to promote and protect human rights at national, local and personal levels requires indigenising and vernacularising human rights. This is particularly true in the global South, where historical experiences of colonisation and domination reinforce the notion that the universal human-rights agenda reflects Western values and undermines local cultures. This, in turn, entrenches the narrative of inherent conflict between universal human rights and local culture. It is therefore important to explore how universal human rights can find local meanings and how local interpretations of human rights can expand the global scope of universal human rights.

This chapter explores the process of vernacularising or indigenising universal human rights in South Africa. Certain key political and legal developments in the country since the end of apartheid reflect an attempt to indigenise universal human-rights norms. I argue that these developments, as vernacularising processes, mark normative contributions to expanding the scope of universal human rights. I do this by looking at two examples. First, I examine ubuntu as a traditional African ethical concept, focusing on how it was invoked and deployed to legitimise the Truth and Reconciliation Commission (TRC) and the post-apartheid restorative transitional justice project. Secondly, I examine the use of ubuntu as a legal concept in the jurisprudence on the justiciability (ie legal enforceability) of economic and social rights in South African courts. The landmark case of *Government of the Republic of South Africa v Grootboom*³ is significant in this regard because it was the first major case in which the Constitutional Court, in upholding the socio-economic rights provisions of the Constitution of the Republic of South Africa, 1996, delivered a judgment against the state

3 *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

(McLean 2009:148). The central argument here is that the deployment of ubuntu in the context of the TRC and socio-economic rights jurisprudence represents a distinctive vernacularisation process that legitimises universal human rights in South Africa and marks a normative contribution to the global human-rights ideology.

Ubuntu as a paradigm for restorative transitional justice

The philosophy of ubuntu was a central theme in the work of the TRC, established by the South African government in 1994 to deal with human-rights abuses perpetrated under apartheid and to help the country come to terms with its past by advancing the cause of reconciliation. The role and relevance of ubuntu as the philosophical foundation of the TRC and the transition from apartheid to multiracial democracy have been well studied (Cornell 2014; Cornell & Muvangua 2012; Graybill 2002; Wilson 2001). The focus here is not primarily the work of the TRC or assessing how successful it was in the task of bringing justice to the victims of apartheid and forging national reconciliation. The emphasis here is on the articulation of ubuntu as a traditional African form of justice and how it was deployed to legitimise the TRC as a restorative transitional justice model within and beyond South Africa.

The term 'transitional justice' here refers to judicial and non-judicial measures implemented to redress legacies of human-rights abuses in the aftermath of conflict and repression. Transitional justice seeks recognition and justice for victims while promoting peace and reconciliation. National transitional-justice projects typically include one or more of five key features: criminal investigations and prosecutions of human rights violations; truth commissions established to investigate and report on abuses; reparation programmes involving state-sponsored initiatives to repair the material and moral damages of past abuse; institutional reforms aimed at transforming security and legal systems to prevent future abuses; and memorialisation projects in the form of museums and memorials that preserve public memory of victims and raise moral consciousness about past abuse (International Center for Transitional Justice 2009). As a national transitional-justice project, the mandate of the South African TRC centred primarily on truth finding and national reconciliation.

Ubuntu, as defined by its chief proponent, Archbishop Desmond Tutu, who headed the TRC, represents an indigenous African philosophy of justice centred on healing, forgiveness and reconciliation aimed at restoring the humanity of both victim and perpetrator (Tutu 2000:50–52). It encapsulates the notion of an interdependent humanity that is at the core of traditional

African cosmology. The essence of ubuntu is captured in the famous phrase *umuntu ngumuntu ngabantu* (a person is a person through other people). The humanness of the person who has ubuntu comes from knowing that the fate of each person is inextricably intertwined with his or her relationship with others. Ubuntu, in Tutu's words, is to say: 'My humanity is caught up in your humanity, and when your humanity is enhanced — whether I like it or not — my humanity is enhanced. Likewise, when you are dehumanized, inexorably, I am dehumanized as well' (Tutu 2000:31). Tutu draws an analogy between ubuntu and the Christian values of confession, forgiveness and clemency (Tutu 2000:81).

To be sure, the meaning of ubuntu and its congruence with restorative justice remain deeply contested. Some scholars have challenged the notion that ubuntu is an indigenous African justice system that has deep historical roots in African cultures or that it reflects principles of restorative justice. Some critics have suggested that ubuntu was used by Tutu and the ascendant ruling elites of the ANC to represent a romanticised but ahistorical vision of the rural African community based on reciprocity, community cohesion and solidarity. The connection between ubuntu and the concept of restorative justice, one scholar suggests, is 'less straightforward and unproblematic than often assumed' (Gade 2013:10). Other critics have argued that ubuntu, invoked as a nation-building philosophy, mandates conformity and a form of social cohesion that denies individual participatory difference.

Although the question of whether ubuntu is an authentic or invented African philosophy remains open to debate, what is evident is that it was invoked frequently in the work of the TRC and provided the basis of its restorative-justice mandate. The section in the Constitution of the Republic of South Africa Act 200 of 1993 (the interim Constitution) titled National Unity and Reconciliation references ubuntu to justify the formation of the TRC. Ubuntu was the grounding ideal of the black majority that made the Constitution possible. Central to the TRC's mandate was ensuring respect for victims and their experiences in a way that corresponded to its understanding of the victim-centred approach of restorative justice (Promotion of National Unity and Reconciliation Act 34 of 1995:s 11). In the TRC process, apartheid perpetrators were offered conditional amnesty if they could show that their individual acts of gross violations of human rights for which they sought amnesty were politically motivated. Amnesty applicants also had to disclose the full truth about their violations, normally during public hearings.

The TRC sought to balance the victims' need for justice with the fair and respectful treatment of perpetrators. By most accounts, this was largely achieved through the public's involvement in the process and the recurring invocation of ubuntu as a guiding philosophy behind the commission's work

(Llewellyn 2007:363). The TRC Report devotes an entire section to affirming ubuntu as the guiding principle for its work. In a section titled 'Ubuntu: Promoting Restorative Justice', the TRC foregrounds its work in ubuntu. The report states that the commission's central concern was not retribution or punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances and the restoration of broken relationships. Its principal task was to 'restore the dignity of all South Africans' based on respect for human life, 'revival of ubuntu' and a commitment to 'strengthening of the restorative dimensions of justice' (TRC Report 1998, vol. 1:125). Restorative justice in this context required that the accountability of perpetrators be extended to making a contribution to the restoration of the well-being of their victims (TRC Report 1998, vol. 1:131).

The TRC explicitly framed its amnesty provisions in terms of ubuntu and restorative justice, which it presented as a more desirable option to retributive justice. According to the TRC Report:

Amnesty cannot be viewed as justice if we think of justice only as retributive and punitive in nature. We believe, however, that there is another kind of justice — a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships — with healing, harmony and reconciliation. (TRC Report, vol. 1:9)

The offer of amnesty in return for public and full disclosure was framed in terms of a restorative understanding of justice centred on the healing of victims and perpetrators, and on communal restoration.

References to ubuntu in the context of the work of the TRC were not limited to official discourse. Several African participants at the TRC public hearings invoked ubuntu in testimonies and amnesty applications. For example, making his case for amnesty, one applicant proclaimed: 'I have a sense of ubuntu with me and I also respect the concept of ubuntu' (SABC 1999a). At the Faith Community Hearings in East London, a 'representative of the African Traditional Religious Community' claimed that the atrocities perpetrated under apartheid happened because the perpetrators did not have 'a humanness; they did not have ubuntu' (SABC 1999b). Others, however, doubted whether the constitutional injunctions about ubuntu and reconciliation could be achieved within the framework of the TRC proceedings where there had been 'absolutely no remorse and no repentance' (SABC 1999c).

Ubuntu was also invoked to rationalise the anti-apartheid struggle. During the TRC Armed Forces Hearings in Cape Town, for example, the delegates of the Pan Africanist Congress (PAC) were asked whether the

PAC, in its armed struggles against apartheid, was guided by the ethical standards stipulated in the Geneva Convention on the conduct of war. One PAC delegate responded thus:

... [W]e did observe ethics. The only difference is that we did not extract those from the international documents that you are talking about, because we had them in ubuntu. There was no African State in 1952 ... there was no African state which contributed to that [international law], but this does not mean that the Africans, themselves, did not have a code of ethics and a set of morals. We had them in the PAC and we were exercising our leadership, therefore, in terms of ubuntu, which, actually, goes even beyond those pieces of paper that you are talking about. (SABC 1999d)

This response typifies the role that ubuntu came to play in official and public discourse on the TRC project. Ubuntu became a way of asserting congruence between traditional African moral philosophy of restorative justice, and universal human rights and humanitarian norms. Ubuntu was constructed as an indigenous expression of collective humanism and an affirmation of the principle of human dignity, which is at the core of the universal human-rights regime.

The invocations of ubuntu within the TRC mirrored earlier attempts by postcolonial African leaders to indigenise Western political ideologies. In the 1960s, African leaders, such as Julius Nyerere of Tanzania and Kenneth Kaunda of Zambia, used the concepts of *ujamaa* (African socialism) and so-called Zambian humanism, respectively, to describe their home-grown nationalist-socialist philosophies and to distinguish them from doctrinaire Marxist/Leninist socialism. *Ujamaa*, Nyerere declared, is opposed to capitalism, which ‘seeks to build its happy society on the exploitation of man by man.’ It is also opposed to doctrinaire socialism, which seeks to build its happy society on the basis of the ‘inevitable conflict between man and man’ (Nyerere 1968:170). For Nyerere, *ujamaa* represented a third way — a synthesis of what he considered best in traditional African peasant society and the best of what the country had acquired from its colonial experience (Nyerere 1967:7).

Like *ujamaa*, ubuntu represented an attempt to draw on traditional African norms to rationalise and legitimise a national ideological project. Ubuntu also represented something of a synthesis of the universal idea of restorative justice and what was viewed as a uniquely African expression of that idea. The distinction here is not simply between a focus on the individual (in European rights tradition), as opposed to a focus on the community (in African rights tradition). Rather, ubuntu represents a unique paradigm for understanding and articulating the notion of human dignity. To its

proponents, ubuntu cannot be reduced to secular or religious European conceptions of dignity or to a simple-minded communitarianism. To do so would be to miss its own contribution to giving shape and meaning to the very concept of dignity (Cornell & Muvangua 2012:xi).

In spite of the contestations over its meaning and historicity, ubuntu served to legitimise the work of the TRC, especially among Africans. A study that examined public attitudes toward the TRC by interviewing Africans, showed that most Africans believed that the TRC did a good job in making sure that those guilty of atrocities were punished, despite the fact that the commission had only the power to grant amnesty. A third of African respondents claimed that the amnesty process was fair to the victims, leading one scholar to the conclusion that 'the amnesty process of the TRC may indeed have matched, to some extent, traditional African concepts of justice and humanity (ubuntu). Ubuntu gave the whole amnesty process a certain moral legitimacy in the eyes of most African respondents' (Theissen 2008:207).

The question has often been raised whether the South African TRC was a miracle or model for the rest of the world. Can it serve as a model for other countries in the aftermath of serious human-rights abuses? Or was it a 'miracle' of the sort that occurs but rarely in the life of nations, one that was dependent solely on the compelling personalities of extraordinary leaders? (Graybill 2002:xi) These questions are partly addressed by the TRC's deputy chairperson, Alex Boraine, when he states that the TRC provided the only justice available in the context of a traumatic transition. 'The South African model,' Boraine argues, is 'not an abdication of justice, it is a form of justice particularly suited to the uniqueness of the transitional context, and this is the signal contribution it makes to the ongoing debate concerning transitional justice' (Boraine 2000:427).

Beyond its domestic impact, which remains open to debate, one of the key legacies of the South African TRC is that it served to popularise and mainstream the restorative transitional-justice model globally. The global interest in the South African TRC brought new focus to the possibilities and limitations of the restorative-justice approach to addressing the legacies of gross human-rights abuses at a national level. There was an unprecedented level of global interest and approval for the TRC. Although the granting of amnesty was contentious, the international community largely favoured the TRC model as a concept and as a compromise way forward for societies in transition where an amnesty is the pragmatic choice (Sarkin-Hughes 2004:6). The TRC was seen as reinforcing the vision of the human world of the twenty-first century as one in which peace among nations is a practical necessity, and not merely an elusive, optional ideal (Maluleke 2012:283; Shriver 1995:5). According to one European theologian, the work of the TRC

was an ‘unprecedented exercise of deep remembering’ and an approach that is relevant not only in South Africa, but all over the world. ‘It is a challenge to the realists who say that the only criterion for politics should be the interest of the nations ... the South African approach is an important experiment in relating ethics to politics’ (Müller-Fahrenheit 1996:99).

South Africa is not the first country to adopt a truth commission as part of a national transitional-justice project. Argentina established the Commission on Forced Disappearances in the 1980s, and Chile established its National Commission for Truth and Reconciliation in 1991 to investigate human-rights abuses under the rule of Augusto Pinochet. In fact, the South African TRC was inspired by the Chilean Commission for Truth and Reconciliation. However, the proliferation of national truth commissions since the mid-1990s is largely attributable to the global interest generated by the South African TRC. From 1974 to 2007, 32 truth commissions were established in 28 countries. More than half of these were established in the decade following the South African TRC. These include truth commissions established in Democratic Republic of the Congo, Ecuador, Ghana, Grenada, Guatemala, Indonesia, Liberia, Morocco, Nigeria, Panama, Peru, Sierra Leone, South Korea, Sri Lanka, East Timor, Uruguay and Yugoslavia (Amnesty International 2014).

It can therefore be argued that the South African TRC brought global legitimacy to the restorative transitional-justice model. Although many of the global truth commissions omit the explicit reconciliation mandate of the South African TRC, they were all concerned with the same core principles of restorative justice — accountability and upholding human dignity — that guided the work of the South African TRC. One of the unique attributes of the South African TRC, however, is the unprecedented level of transparency and public exposure that it brought to the truth commission process. The earlier national truth commissions, such as those in Argentina, Bolivia, Uruguay, Chile and the Philippines, did not even hear testimonies in public out of concern that this would be too inflammatory or might provoke retaliatory action. The reports of these commissions reflected a ‘reticent approach to the testimony by offering only distilled, carefully edited summaries and cautious interpretations of what happened in the past’ (Niezen 2013:11). The South African TRC broke with this tradition by opening up testimony to public view, permitting press and television cameras into hearings, widely disseminating verbatim reports, making the testimonies the subject of national spectacle and encouraging its report to be the subject of open debate (Niezen 2013:11).

Some later national truth commissions were directly inspired by the South African model and the philosophy of ubuntu that underpins it. One example is the Indian Residential School Truth and Reconciliation

Commission, established in Canada following the settlement arising from the abuses by the state against indigenous people in the residential school system. The leaders of the Canadian TRC specifically referenced the South African TRC as the inspiration for their work, acknowledging that their understanding of the purpose and value of truth-telling and reconciliation 'owe a great deal' to the South African TRC (Sinclair, Littlechild & Wilson 2013). Even the UN, which has historically been more inclined towards the retributive-justice model in the form of war crimes tribunals, has begun to advocate restorative justice as a viable transitional-justice option for post-conflict societies. The Vienna Declaration on Crime and Justice, adopted by the UN General Assembly in 2000, encouraged the 'development of restorative justice policies, procedures and programmes that are respectful of the rights, needs and interests of victims, offenders, communities and all other parties' (UN 2000:31, s 28). The UN Economic and Social Council subsequently adopted a resolution containing specific guidance for member states on restorative justice policy and practice (UN 2002:54–59).

The South African TRC and the role of ubuntu within it represent a uniquely South African normative contribution to the universal human-rights idea, and specifically the discourse on human dignity and transitional justice. Notwithstanding its well-documented shortfalls, the TRC brought visibility and some level of domestic and international legitimacy to the restorative paradigm of transitional justice. The TRC, and the philosophy of ubuntu mobilised to support it, offered a compelling alternative to the retributive transitional-justice paradigm. This alternative was necessitated by South Africa's unique post-apartheid nation-building challenge — the quest for accountability for historical wrongs and the simultaneous need for collective healing. Ubuntu, as deployed within the TRC, therefore represents a distinctive human-rights vernacularisation process informed by local exigencies. Besides serving to validate South Africa's transitional-justice project, ubuntu also represents an African-inspired contribution to the discourse on human dignity and a legitimisation of the universalist model of restorative transitional justice. Similar normative contributions in vernacularising human rights are evident in South Africa's post-apartheid jurisprudence on economic and social rights.

Vernacularising economic and social rights

The judicial enforcement of international and domestic socio-economic rights provisions is contentious. On matters relating to issues of distributive justice, as opposed to than clear-cut civil and political rights, there is often no clarity on how the state's obligations can be enforced through the courts. Economic and social rights have therefore long been assumed to be inherently

non-justiciable (ie unenforceable in court) because their fulfilment is contingent on limited state resources. In the Indian Constitution, for example, the economic and social obligations of the state towards citizens are articulated as ‘directive principles of state policy’, which broadly enjoins the state to strive to promote the welfare of the people and to minimise inequalities (Constitution of India 2012:Art 38). The Indian Constitution also states clearly that these principles, though fundamental to the governance of the country, shall ‘not be enforceable in court’ (Constitution of India 2012:Art 37). This Indian model is replicated in several postcolonial African constitutions (Constitution of the Republic of Ghana 1992: Chapter 6; Okere 1983).

In contrast, South Africa’s Constitution provides explicitly for legally enforceable economic and social rights. It protects the rights to housing, healthcare, food and water, social security and education. Section 26 of the Constitution states: ‘Everyone has the right to have access to adequate housing’ and ‘the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right’. Section 27 stipulates the right to healthcare, food, water and social security.

The inclusion of justiciable socio-economic rights in the Bill of Rights is one of the most notable features of the Constitution. The inclusion of these rights demonstrates the Constitution’s transformative agenda, which goes beyond abstract notions of equality and distributive justice. The provisions also reflect a commitment to transform society from one based on exclusion and socio-economic deprivation to one based on equal distribution of resources. Although the Constitution does not, in express terms, prescribe distributive justice, it is implicit in its provisions that this is the ideal form of justice that is envisioned (Mbazira 2009:132).

Several cases decided by the Constitutional Court of South Africa have laid the groundwork for the jurisprudence of economic and social rights globally. Some scholars have made the case for exporting South Africa’s groundbreaking social rights jurisprudence to other national jurisdictions (Christiansen 2007:33; Yigen 2002:13). In such landmark cases as *Soobramoney v Minister of Health, KwaZulu-Natal*⁴ and *Government of the Republic of South Africa v Grootboom*,⁵ the Constitutional Court has tackled problematic issues of distributive justice and provided useful directions for developing the jurisprudence on economic and social rights guaranteed

4 *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17, 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC).

5 *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

in the Constitution. The philosophical foundations of the constitutional provisions of socio-economic rights and the court's interpretation of these provisions lie partly in the notion of human dignity expressed in ubuntu.

In the legal arena of the new South Africa, ubuntu represents the recognition and respect of African ideals and notions of law. It represents the evolving indigenisation of a historically colonial and exclusionary legal culture. Ubuntu has helped in defining constitutional obligations and working through the conflict-ridden situations often found in the demand for socio-economic rights (Cornell & Muvangua 2012:xi). In its politico-ideological sense, ubuntu has proved useful in bridging the conceptual divide between civil-political rights, on the one hand, and economic-social rights on the other. As a principle for all forms of social and political relationships, ubuntu enjoins and makes for peace and social harmony by encouraging the practice of sharing in all forms of communal existence. As a result, doing justice under ubuntu does not make a rigid distinction between civil-political rights and social-economic rights (Cornell & Muvangua 2012:7). Rather, ubuntu, as a jurisprudential principle, affirms the interdependence and indivisibility of all the dimensions of universal human rights.

The jurisprudence of ubuntu has been described as the 'law of laws of the new South Africa,' which seeks to restore human dignity and ethical relationships between human beings. The Constitutional Court of South Africa has used ubuntu to support major decisions, and has affirmed ubuntu as an active and central constitutional principle (Ngcoya 2009:138). Nowhere is this more evident than in the 2004 case of *Port Elizabeth Municipality v Various Occupiers*.⁶ In this case, the Constitutional Court had to decide whether a municipal authority had acted lawfully when it evicted residents who had occupied privately owned land in the municipality. Some of the evicted occupiers had lived on the land for eight years, having been previously evicted from other land.

Two lower courts held that because the occupiers were in unlawful occupation of the land, the municipal authority could evict them in the public interest. This ruling was ultimately reversed by the Constitutional Court. In a unanimous judgment against the eviction, Justice Albie Sachs emphasised the importance of interpreting and applying constitutional provisions in the 'light of historically created landlessness in South Africa.' He stressed the need to deal with homelessness in a sensitive and orderly manner, and the special role of the courts in managing complex and socially stressful situations. Invoking the philosophy of ubuntu, Justice Sachs stated:

⁶ *Port Elizabeth Municipality v Various Occupiers* (2004) (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268.

The spirit of ubuntu which is part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern. (Port Elizabeth Municipality)

In what may be considered an exercise in judicial activism, Justice Sachs argued that the judiciary had an important role to play in redressing historical injustices in South Africa. ‘The inherited injustices at the macro level,’ he stated, ‘inevitably makes it difficult for the courts to ensure immediate present-day equity at the micro level.’ The ‘judiciary cannot of itself correct all the systemic unfairness to be found in our society. Yet, it can at least soften and minimise the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails’ (*Port Elizabeth Municipality*).

The Constitutional Court took the same approach in a similar case concerning the eviction of impoverished squatter residents by the City of Johannesburg in 2006.⁷ The evictions, which were carried out as part of the city’s urban renewal strategy, was challenged by the evicted residents. The residents, who were represented by several public-spirited attorneys offering pro bono services, challenged the eviction on two main grounds: first, that their right of access to adequate housing guaranteed in the Constitution would be infringed if the eviction order was granted; and, second, that the city had failed to meet its positive obligations to achieve the progressive realisation of the right of access to adequate housing, and should therefore be prevented from evicting them (McLean 2009:148). A compromise resolution proposed by the city authorities to relocate the residents to an informal settlement far away from the city centre was rejected by the Constitutional Court as being inconsistent with the concept of ubuntu. Ubuntu, the court held, ‘pervades the Constitution and emphasises the interconnectedness of individual and communal welfare, and the responsibility to each that flows from our connection’ (*City of Johannesburg*).

The court noted that the eviction of the residents would deprive them of their livelihood, since many of them eked out a living in informal economic activities linked to the city centre. It ruled that the city had an obligation to engage meaningfully with the occupiers before taking a decision to evict

⁷ *City of Johannesburg v Rand Properties (Pty) Ltd* (253/06) [2007] ZASCA 25; [2007] SCA 25 (RSA).

them. This obligation, it held, was founded both within constitutional socio-economic rights provisions and the ‘need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity’ (*City of Johannesburg*). The court also rejected the idea that the municipality could simply rely on its statutory powers to evict people from unsafe buildings and ignore the effect of eviction on the residents. The city, it deemed, must simultaneously take responsibility for safe and healthy buildings, and for the welfare of its residents: it could not simply carry out the one obligation and ignore the other (Van der Walt 2011:89).

Significantly, the Constitutional Court anchored this landmark ruling not only in the philosophy of ubuntu and the constitutional obligations of the state, but also in international human-rights law. Affirming that the right to housing is a basic human right, the court referenced international human-rights instruments, such as the UDHR and the International Covenant on Economic, Social and Cultural Rights, which stipulate that states have a minimum core obligation to ensure conditions necessary to fulfil the right to housing. This minimum core requirement with respect to the right to adequate housing entails a state’s duty to address the housing needs of its population, especially if a significant number of individuals are deprived of basic shelter and housing. The failure to do so, the court held, constitutes a prima facie violation of the right to adequate housing (*City of Johannesburg*).

This Constitutional Court’s judgment in the *City of Johannesburg* case epitomises the legal process of vernacularising human rights in the new South Africa. By grounding its ruling both in ubuntu and international human-rights law, the Constitutional Court proffered a hybridised understanding of human rights defined by the intersection of universalist norms and local values. The judgment in the *City of Johannesburg* case also exemplifies the underlying complementarity between local cultures and universal human rights, which are often overshadowed by the discourse of cultural relativism and the conflict of rights.

In the earlier case of the *Republic of South Africa v Grootboom*,⁸ the Constitutional Court held that organs of the state have a special duty towards persons experiencing housing crisis or living in intolerable situations. *Grootboom* was the first major socio-economic rights case adjudicated by the court in which it gave a judgment against the state (McLean 2009:148). In this case, which addressed the right to housing for squatters in an informal settlement, the court ruled that governmental housing programmes violated

8 *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

the Constitution where they failed to develop and implement a 'comprehensive and coordinated program' to advance that right, particularly if the programmes failed to address the housing needs of the poorest South Africans (Christiansen 2007:33). Similarly, in the *Treatment Action Campaign* case,⁹ the Constitutional Court declared unconstitutional a government programme that significantly restricted distribution of medication that dramatically decreased the likelihood of mother-to-child transmission of HIV. The court ruled that the government had a legal obligation to extend HIV treatment beyond pilot research sites that had demonstrably reduced mother-to-child transmission, to benefit the population as a whole (Haywood 2003; *Treatment Action Campaign*).

In addition to cases dealing explicitly with economic and social rights, the Constitutional Court has also invoked ubuntu in its criminal and civil-law jurisprudence. In the landmark case of *S v Makwanyane*,¹⁰ the court invoked ubuntu explicitly in striking down the legality of the death penalty under the interim Constitution. In this case, the court stated: 'To be consistent with the value of ubuntu, ours should be a society that wishes to prevent crime ... [not] to kill criminals simply to get even with them.' In her judgment, Justice Yvonne Mokgoro argued that life and dignity are like two sides of the same coin, and that the concept of ubuntu embodies them both (*S v Makwanyane*). It is noteworthy, however, that in some other significant cases, the Constitutional Court took more deferential and conservative approaches to socio-economic rights, passing judgments that critics considered a rejection of pro-poor jurisprudential options that might have improved the living conditions of poor and vulnerable claimants (Dugard 2007:973).

Fulfilling the constitutional socio-economic rights obligations imposed on the state is ultimately a question of distributive justice and depends on the resources available for such purposes. Nonetheless, the jurisprudence of the Constitutional Court advancing the justiciability of socio-economic rights in South Africa demonstrates that the state can be held legally responsible if it fails to create broad policy-based programmes that address the basic social needs of its most vulnerable citizens. The state and its agents have an obligation to take all reasonable steps necessary to initiate policies and sustain programmes that advance constitutionally guaranteed socio-economic rights (Christiansen 2007:33). Within and beyond South Africa, these cases herald a new paradigm in the judicial interpretation and fulfilment of socio-economic rights.

9 *Minister of Health and Others v Treatment Action Campaign and Others No 1* [2002] (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (2002).

10 *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665.

Discussion about human rights in post-apartheid South Africa tends to be insular and focused predominantly on the internal dynamics of the human-rights movement within the country. This trend is linked to the widely held view that South Africa is unique because of its apartheid past and its complex colonial history. But, as other scholars have pointed out, this notion of South African exceptionalism has led to 'an intellectual and political parochialism that restricts both understanding of the specificity and the commonality of South Africa's democratisation process in the era of globalization' (Buhlungu et al 2006:199). This trend towards historical and political parochialism can be partly remedied by paying attention to how human-rights developments in South Africa since the end of apartheid reflect the indigenisation or vernacularisation of universal human-rights norms, and how these processes inspire and influence developments beyond South Africa. The deployment of ubuntu in both the context of the TRC and socio-economic rights jurisprudence represents a vernacularisation process that has served to legitimise universal human rights in South Africa. It also marks a distinctive South African normative contribution to the discourse on human dignity and the global fulfilment of universal human rights.

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