



# Beyond Retribution: Truth and Reconciliation in South Africa as Universal Paradigm for Restorative Transitional Justice

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**Abstract:** This paper examines the articulation of *Ubuntu* as a traditional African form of justice and how it was deployed to legitimize the Transition and Reconciliation Commission (TRC), as a restorative transitional justice model within and beyond post-apartheid South Africa. 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. It seeks recognition and justice for victims while promoting peace and reconciliation. In the final analysis, it is observed that the deployment of *ubuntu* in both the context of the TRC and socioeconomic rights jurisprudence represents a vernacularisation process that has served to legitimize universal human rights in South Africa. It also marks a distinctive South African and African normative contribution to the discourse on human dignity and the global fulfilment of universal human rights.

**Keywords:** Transitional Justice, Ubuntu, Truth, Reconciliation

## Introduction

The South African Truth and Reconciliation Commission (TRC) marked a paradigmatic shift in the global restorative transitional justice movement. Following the end of Apartheid and the establishment of constitutional democracy in 1994, the ruling government of the African National Congress led by Nelson Mandela initiated a transitional justice project founded on the principles of human rights and national reconciliation. When the TRC was set up in 1995, its mandate was to bear witness to, record and in some cases grant amnesty to the perpetrators of crimes relating to human rights violations. The TRC

was also mandated to explore reparation and rehabilitation for the victims of apartheid (Promotion of National Unity and Reconciliation Act, No. 34 of 1995). Given South Africa's difficult and complicated history of apartheid and the anti-apartheid struggle, the TRC model of transitional justice was aimed at mobilizing the processes and symbols of racial reconciliation and reparations in a manner that accommodated the aspirations of the society and that utilized indigenous notions of humanity (termed *ubuntu*) in its operations and procedures. The proceedings of the TRC provided the first occasion for a postcolonial government in Africa to consider the

consequences of racism in the context of national transformation and to institute procedures that would deter its recurrence (Andrews, 2009: 486).

The philosophy of Ubuntu was a central theme in the establishment of the TRC and its focus on dealing with human rights abuses perpetrated under apartheid. The goal was 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 foundations of the TRC and the transition from apartheid to multi-racial democracy has been well studied (Cornell, 2014; Cornell and Muvangua, 2012; Graybill, 2001; Wilson, 2001). By opting for a model that leads to national reconciliation as well as providing reparations for victims, the TRC embraced restorative justice as a guiding principle in its procedures. While a fervent debate continues as to whether the TRC achieved its twin goals of "Truth" and "Reconciliation" there appears to be a general consensus in the country that the TRC was an essential precondition for moving the country from apartheid to democracy. It is clear that the transition could not have occurred in the relatively peaceful manner that it did without the existence of the TRC.

The paper attempts to determine effectiveness of the articulation of *Ubuntu* as a traditional African form of justice and how it was deployed to legitimize the TRC as a restorative

transitional justice model within and beyond South Africa. 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. It 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; reparations programs 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 memorialization projects in the form of museums and memorials that preserve public memory of victims and raise moral consciousness about past abuse (International Centre for Transitional Justice, 2009). As a national transitional justice project, the mandate of the South African TRC focused 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, 1999: 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 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 remains deeply contested. Some scholars have challenged the notion that Ubuntu is an indigenous African justice system which 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 African National Congress to represent a romanticized but ahistorical vision of 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'.

While the question of whether ubuntu is an 'authentic' or 'invented' African philosophy remain 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 1999 Interim Constitution's section titled 'National Unity and Reconciliation' references ubuntu to justify formation of the TRC (Republic of South Africa, 1993). 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 (TRC Act, 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 entitled '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 focused on the healing of victims and perpetrators and on communal restoration.

References to Ubuntu in the context of the work of the TRC was not limited to official discourse. Several African participants at the TRC public hearing invoked ubuntu in testimonies and amnesty applications. 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 TRC Hearings, 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 TRC Hearings: 1999b). Some others, however, doubted whether the constitutional injunctions about Ubuntu and reconciliation could be achieved within the framework of the TRC proceedings where there has been 'absolutely no remorse and

no repentance' (SABC TRC Hearings, 1999c).

Ubuntu was also invoked to rationalize the anti-apartheid struggle. During the TRC Armed Forces Hearings in Cape Town, the delegates of the Pan African Congress (PAC) were asked whether the PAC, in its armed struggles against apartheid, was guided by the ethical standards stipulated in 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 (TRC Hearings, 1999d).

This response typifies the role that ubuntu came to play in official and public discourse of 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 human dignity which stands at the core of the universal human rights regime.

The invocations of ubuntu within the TRC mirrored earlier attempts by post-colonial African leaders to indigenize 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 '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 represent 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 draw on traditional African

norms to rationalize and legitimize 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) versus 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 (Drucilla and Muvangua, 2012, xi).

In spite of the contestations over its meaning and historicity, ubuntu served to legitimize the work of the TRC especially amongst Africans. Africans interviewed for one study of public attitude towards the TRC showed that most Africans believed that the TRC did a good job in making sure that those guilty for atrocities were punished, despite the fact that the commission had only the power to grant amnesty. A third of African respondent 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: 2017).

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, 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 popularize 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 not merely an elusive, optional ideal (Shriver, 1995: 5; Madukele, 2012: 283). 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 a Commission on Forced Disappearances in the 1980s while Chile established a National Commission for Truth and Reconciliation in 1991 to investigate human rights abuses under the rule of Augusto Pinochet. In fact, it has been suggested that the South African TRC was inspired by the

Chilean TRC and the report it produced in 1991 (The Rettig Report). However, the proliferation of national Truth Commissions since the mid-1990s is partly 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 Commissions were established in the decade following the South African TRC. These include Truth Commissions established in 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 these 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 earliest 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 it 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 and Wilson, 2013). Even the United Nations 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' (United Nations, 2000: Sec. 28). The UN Economic and Social Council subsequently adopted a resolution containing specific guidance for member states on restorative justice policy and practice (United Nations 2002: 54-59).

The South African TRC and the role of ubuntu within it represents 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 mobilized 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 legitimation of the universalist model of restorative transitional justice. Similar normative contributions in vernacularising human rights are evident in South African's post-apartheid jurisprudence on economic and social rights.

### **Vernacularising Economic and Social Rights**

The legal enforcement of international and domestic socioeconomic rights provisions is contentious. On matters relating to issues of *distributive justice* rather 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* (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 States Policy' which broadly enjoins the state to strive to promote the welfare of the people and to minimize inequalities (Constitution

of India, 2012: Art. 38). The Indian constitution also states clearly that these principles, through 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 post-colonial African constitutions (Okere 1983; Constitution of the Republic of Ghana, 1992: Chapter 6).

In contrast, the South African Constitution provides explicitly for legally enforceable economic and social rights. It protects the right to housing, rights to 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 health care, food, water and social security.

The inclusion of justiciable socioeconomic rights in the Bill of Rights is one of the most notable features of the 1996 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 South African 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 ground-breaking social rights jurisprudence to other national jurisdictions (Christiansen, 2007: 33; Yigen, 2002: 13). In such landmark cases as *Soobramoney v. Minister of Health* (Constitutional Court of South Africa, 1997) and *Government of RSA v. Grootboom* (Constitutional Court of South Africa, 2000) the Constitutional Court has tackled problematic issues of distributive justice and provided useful directions for developing the jurisprudence on economic and social rights guaranteed in the constitution. The philosophical foundations of the constitutional provisions of socioeconomic rights and the Courts 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 indigenization 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 (Drucilla and Muvangua, 2012: xi). In its politico-ideological sense, Ubuntu has proved useful in bridging the conceptual divide between civil-political rights on 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 (Drucilla and 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 Elisabeth Municipality v Various Occupiers*. 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 since the occupiers were in unlawful occupation of the land, the Municipal Authority could evict them in the public interest. This ruling was ultimately reversed at the Constitutional Court. In a unanimous judgment against the eviction, Justice Albie Sachs emphasized the importance of interpreting and applying constitutional provisions in the 'light of historically created landlessness in South Africa' (Constitutional Court of South Africa, 2004). 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: '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' (Constitutional Court of South Africa, 2004)

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 minimize the degree of injustice and inequity which the eviction of the weaker parties in conditions of inequality of necessity entails' (Constitutional Court of South Africa, 2004).

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 (Constitutional Court of South Africa, 2007). 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 realization 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 emphasizes the interconnectedness of individual and communal welfare, and the responsibility to each that flows from our connection' (Constitutional Court of South Africa, 2007). The Court noted that the eviction of the residents would deprive them of their livelihood since many of whom 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 prior to taking a decision to evict 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' (Constitutional Court of South Africa, 2007). 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 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, 2013:89).

Significantly, the Constitutional Court anchored this landmark ruling not only on the philosophy of Ubuntu and the constitutional obligations of the state but also on 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 Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights which stipulate that states have a minimum core obligation to ensure conditions necessary to fulfill 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' (Constitutional Court of South Africa, 2007).

This Constitutional Court's judgment in the City of Johannesburg case epitomizes 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 hybridized understanding of human rights defined by the intersection of universalist norms and local values. The judgement 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 *RSA v. Grootboom*, 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 socioeconomic 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 programs violated the Constitution where they failed to develop and implement a comprehensive and coordinated program' to advance the right, particularly if the programs failed to address the housing needs of the poorest South Africans (Christensen, 2007: 33). Similarly, in the *Treatment Action Campaign* case, the Constitutional Court declared unconstitutional a government program which 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 AIDS treatment beyond pilot 'research' sites that had demonstrably reduced mother-to-child transmission to benefit the population as a whole (Constitutional

Court of South Africa, 2002; Haywood, 2003).

Apart from 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*, 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 the concept of ubuntu embodies them both (Constitutional Court of South Africa, 1995). It is noteworthy, however, that in some other significant cases, the Constitutional Court took more deferential and conservative approaches to socioeconomic rights, passing judgments that critics considered a rejection of pro-poor jurisprudential options which might have improved the living conditions of poor and vulnerable claimants (Dugard, 2007: 973).

Fulfilling the constitutional socioeconomic rights obligations imposed on the state is ultimately a question of distributive justice and depends upon the resources available for such purposes. Nonetheless, the jurisprudence of the Constitutional Court advancing the justiciability of

socioeconomic rights in South Africa demonstrates that the state can be held legally responsible if it fails to create broad policy-based programs 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 programs that advance constitutionally guaranteed socioeconomic rights (Christensen, 2007: 33). Within and beyond South Africa, these cases herald a new paradigm in the judicial interpretation and fulfillment of socio-economic rights.

### **Conclusion**

Discussion about human rights in post-apartheid South Africa tends to be insular, 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 indigenization 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 socioeconomic rights jurisprudence represents a vernacularisation process that has served to legitimize universal human rights in South Africa. It also marks a distinctive South African and African normative contribution to the discourse on human dignity and the global fulfilment of universal human rights.

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