Recognising of the value of African indigenous knowledge system: The case of Ubuntu and restorative justice

Mofihli Teleki and Serges Kamga Djoyou

The ideals of globalization, depending on context and various settings may serve as a predicative tool in how countries manage their affairs in spite of the fundamental differences in cultures, philosophies and thought (Kellner, 1998:23). The latter variables, i.e. cultures, philosophies and thought are arguably the ontological make up of various societies around the world (Merriam-Webster.com, 2016). There have been much debates and scholarship, which explicate to how certain ontological and epistemological concepts that are non-western in nature can be applicable in the context of nuances and notions of globalization

This chapter aims to tap into the current discussions on several thoughts and ideas (or body of knowledge) on specific non-western philosophies, which have made significant impact on the discourse of jurisprudence and human rights, namely the Ubuntu philosophy found in Africa.

Ubuntu as an epistemological concept was used for purposes of restoring social order in ancient African societies and with the passage of time, this concept became a living principle upon which ordinary citizens adhere to. The shift in paradigms from colonial systems entrenched in non-western societies made it possible for ancient and indigenous methods to find expression in African countries in present times. In other words, this concept was arguably dissipated during the eras of colonialism (Membe, 2002:241).

The philosophy of Ubuntu carries specific elements that are almost identical to the nuances of restorative justice, a concept that has since emerged within the era of globalization. It is therefore ideal to interrogate how Ubuntu found ways and means of creating social order within the full or partial application of contemporary legal systems. The importance of this interrogation lies in the fact that whilst countries try to find solutions for maintenance of social order various social strata, perhaps some of the much- needed solutions could lie in the already existing epistemological philosophies of non-western countries. In other words, it is worth exploring how the notion of Ubuntu could be of assistance to current legal instruments in dealing with current problems.

There are ways and means of interpreting the functions of non-western concepts, and the disposition that prevails in this chapter posit that one cannot interpret non – western theory by simply comparing it to western thought. In other words, the chapter will not compare but rather explicate the utilization and practical application of *Ubuntu.*

Part of the reason why it may not bear any fruit in attempting to comparatively place western and non – western concepts beside each other for an assessment of their usages is largely due to the fact that the environments of western and non-western worlds are not the same. In essence, the discussions in this chapter contribute to additional knowledge on *Ubuntu* in how its purpose could be in the current spheres of societies but more importantly in the global world.

The question as to how an ancient epistemological concept is applied in current times is partly what this chapter will achieve. In other words, the illustration of the applications and shortcomings of the application referred to are important. The shortcomings in the application of this ancient notion are lessons for other countries that are still grappling with applying ancient concepts in current times. In certain respects, the ancient and non-western concepts such as *Ubuntu* also find expression in the legislative frameworks of countries that acknowledge their existence (Mokgoro, 1997). Even though the application of these concepts may find expression in the legislative frameworks, there could perhaps be a need for further evaluation of their outcomes in society at current times.

In terms of structure, the chapter is divided into six parts including this introduction. The second part examined how Ubuntu was operationalized in ancient Africa to prevent conflict. The third part focuses on the practical application of Ubuntu in contemporary time. It looks at its role in seeking justice and conflict resolution. The fourth part of the chapter examine the challenges facing Ubuntu in its search for truth, reconciliation and conflict resolution. The fifth part attempts to relativise these challenges by examining their contexts and the final part concludes the chapter by calling for the recognition of the value of African indigenous knowledge system with strong emphasis on the need to move to "pluriversalism" (Falola 2016,265) and not universalize Western values.

Reliance   on   Ubuntu   to   prevent   conflict   in   ancient   Africa
At the onset of this section, it is important to note that Ubuntu can be associated to what is known in modern time as restorative justice. Our illustration is significant as it follows the questions asked by many scholars in relation to the question of alternative forms of justice that can be explored in conflict situations. Fritz (2005:04) argues that restorative justice is a growing movement that seeks to be inclusive of grass roots issues, promoted by individuals in an effort to encourage alternatives to non-retributive justice.

In as much as we intend to illuminate non-western instruments that are almost identical to the current or modern day elements of restorative justice, it is also pertinent that we note that the concept of restorative justice in the western world has not yet been actively promoted in western countries even though an attempt has been made to drive the movement of restorative justice in western courts (Fritz, 2005:04). What is critical to note is that non-western countries have thus lived according to the philosophies that seem to have been less promoted in the current western dispensations. In other words, elements of restorative justice which seems to be less promoted in the western world had actually been part of the lives of Africans since a timeless era (Kamga, 2018).

Apart from interpersonal conflicts and group related problems, Fritz's (2005:04) assertion on restorative justice is aptly supported by other scholars (on the same topic) such as Liu and Palermo (Liu & Palermo, 2009:49):

> The restorative justice movement has grown rapidly in the past twenty- five years. It has been estimated that there are about 1,000 restorative justice programs in the world and at least eighty countries have adopted some form of restorative justice program in response to crime problems. As an important initiative for criminal justice reform, restorative justice has predominantly taken place in countries with Western legal systems, particularly those with common law and civil law traditions as a response to the limitations of the conventional Western criminal justice system.

The discourse on restorative justice is found in current scholarship of law and thus the world is bound to find mechanisms or methods that are necessary to apply them in different settings. What is currently missing from these discussions is the scholarship and studies on non-western countries,

and this should be viewed with a considerable amount of concern. Liu and Palermo further assert this notion in the following manner: "The fact that in the past few decades the restorative justice movement has developed faster in Western countries indicates the possibility of different path-ways under different political and cultural contexts. The motivation or impetus for restorative justice may be different in Eastern countries"(Liu & Parlemo, 2009:50). The differences in the world – views on the methods applied or the manner in which restorative justice finds space in world societies should therefore be interrogated outside of the common thought around issues of globalization, wherein people of world nations are either seen to be the same or where the practices non-western countries have not yet been assessed thoroughly in order to bring about a variety of meanings in different contexts.

The concept of justice in the African sense for instance, differed with the western way of law, inclusive of how the law was actually enforced in ancient times. For example, historically, the concept of a typical prison was almost non-existent in the African setting in the way it is understood today, be it from the perspective of corrections or reformation. The concept of prisons modeled in times of colonialism reflected the common colonial strategy wherein colonialists built structures that were meant to confine people into specific spaces for their wayward behaviours (Nagel & Cortland, 2014:02). Ntsebeza argues that the colonialist ideal in this instance negated the concept of traditional reconciliation which ancient Africans had practiced and that the harshest punishment (as can be compared to the death penalty) was exile or banishment as opposed to death (Ntsebeza, 2009:376).

In ancient societies in non-western countries, restitution or restoration to victims and their kin took priority over retribution of the alleged offender by virtue of the fact that the creation of peace and harmony was deemed of paramount importance in non-western cultures (Choi & Severson, 2009:400).

The philosophy of reconciliation amongst Africans was not only a state of mind but it was practically put in place in symbolic rituals to create a top of mind in regards to the actual practice of reconciliation as a concept. For instance, the Acholi peoples of Uganda used a ritual from which a victimizer would consume a bitter herb to symbolize that the act of the victimizer was bitter

towards the his/her victim and it was believed that this act would help to let go of the bitterness as well as possible resentment from victims (Allen, 2008:48).

The common understanding of attainment of justice around the world has always been based retributive justice and in many ways, those who fall outside the moral order and codes could be punished for their acts. The more the gruesome the crime, the more society responds in a retributive manner. This is rather interesting because the stance on individual rights have always been placed on the corpus of individual rights and as such individual rights have found expression in constitutions which are highly regarded, like in the case of America (Ntsebeza, 2009:379).

The other critical issue in relation to western jurisprudence is that the prosecution process may thwart any possibility of reconciliation to take place between the victim and the offender. In recent post -colonial conflicts in the African continent, it has been accepted as the norm that the national concern for past national atrocities should be dealt with through reconciliation (Ntsebeza, 2009:376).

The one common challenge associated with retributive justice is that it is believed that it is in certain instances the arm of law might be too long and costly, even though in the end those who have face the might of the law are eventually punished for their own deeds (Ntsebeza, 2009:376). For Choi & Severson (2009:400):

> The practice of restorative justice offers an opportunity to highlight the humanity of both the victim and the offender, highlighting the victim's experience within a process that is both personal and justice-oriented. The victim's voice is at the fore, and the centrality of the interpersonal dimension—that relationships among people are important, particularly the relationship between the offender and the victim—is at the heart of the process" When one looks into the current concept of restorative justice in the way that is understood today, one could closely link this concept to certain elements of *Ubuntu*. In the context of *Ubuntu*, it is said that there is an understanding from those who have long practiced *Ubuntu* that compassion, is one of the ingredients of the ethic of *Ubuntu*.

As for *Ubuntu*, it would almost seem incomprehensible that "vengeance" would apply in scenarios that *Ubuntu* functions by virtue of the fact that compassion falls directly opposite to the notion of avenging a crime, a bad deed or action that seems untoward within society. Within the setting from which *Ubuntu* is practiced, it could be argued that the principle of an eye for an eye would probably negate the principle of being compassionate. The same principle of an eye for an eye has been used globally in legal and justice systems of various countries. There has been a call for the reformation of this principle within the human rights arena, i.e. the idea that ordinary people are to be given opportunities to restore peace and relations between themselves in a conscious manner. This principle is steeped in the current understanding of restorative justice.

In current and recent years, restorative justice has come about more often than not as the justification for truth commissions and development of transitional justice in certain African countries. In previous times, truth commissions were never formed on the basis of restorative justice (Frederiksen, 2008:03). The African continent has had a number of truth commissions that were largely aimed at restoring order in post conflict situations and in some cases these truth commissions were able to lay foundations for the establishment of transitional governments. According to (Ntsebeza, 2009:379).

> restorative justice prioritises beneficence to victims and survivors. What was different in these truth commissions is that the victim-centred justice required Truth Commissions to approach even the task of listening to victims' accounts of their suffering with care and dignity, and in a manner that restored to the victims of human rights abuses the dignity which they had lost in their previous dealings with officialdom

Human dignity, care and humaneness are deemed important for the advancement of *Ubuntu* as a living principle practiced by those who believe in it. As the world progressed and the world nations began to create interdependency, mutual cooperation and control over social problems were to become common, leaning on the principle of globalization or the idea that all nations around the world are the same in spite of their locations or roots belong to one common universal village (Liu, 2009:01).

As the idea of globalization continued to soar around world nations, applications of some of these non-western concepts of restorative justice then found expression into transitional forms of disputes and in some cases some of these ancient, non-western concepts are even used as alternative dispute resolution methods (Hamlin, 2014:43).

Having cited this ancient principle of Africa in the justice arena, it could beg the question as to why it serves any importance for this concept to find expression and application in the current realms of law. In an attempt to answer this question it becomes important to highlight the fact that over time, several paradigms have existed from which norms were created and cemented in the ideologies of governance and law worldwide in at least the last hundred years or so. The colonial era has for instance provided a certain frame of thought from which those who were colonized were forced to adapt to world – views and philosophies that did not reflect their cultures and ontological way of being.

Within the past eras of governance especially those of the colonial times, several mistakes, or problems were created willingly and unwillingly by those who were in the forefront of systematizing colonial rule. As the paradigms shifted, it was acknowledged that the manner in which the human order was organized at the time of colonization was undesirable and therefore remedies were to be applied in order to redress the mistakes of the past colonial rule in many respects. For this to happen, it was important for the world to acknowledge these mistakes and problems. This is then followed by the question of whether corrections are made to redress or restore order in countries that were affected by colonial problems.

Meiring (2002:730) argues that forgiveness seems to be an ideal consonance to restoration of past problems of mistakes in post colonial dispensations. As to whether countries who unduly benefited from these past mistakes play part in the redress of those that they took advantage of will differ from one country to the next. In certain countries, reparations were paid for the past atrocities which framed the colonizer in a negative light within the context human rights issues while in some countries, after forgiveness, follows joint efforts in rebuilding countries that suffered from colonial rule as a means of redress. This aptly makes reference to the need for redress and restoration on key fundamental issues that cut across the nuances of undoing the things that were done in the past, especially in non-western countries.

There are several examples from which we find that world leaders for one reason or the other were forced to seek forgiveness for their countries' role in past atrocities. Former chancellor of Germany Willy Brandt, knelt at the Warsaw War Memorial, as an act of confession and repentance for German offences against the Polish nation in 1970 (Giesen, 2009:1114; Engert, 2014:96). In 2006, former minister of the law and order of South Africa, Adriaan Vlok was forced to apologize for the bombing of Khotso House (headquaters of South African Council of Churches) as well as his role in the planned assassination of political activist Frank Chikane (Boswell, 2012:05). In 1976, former president of the United States, Gerald Ford made an apology to people of Japanese descent on the humiliation suffered by Japanese – Americans in response to the Pearl Harbour attacks (Stone, 2006:1324).
.

As Ntsebeza (2009:381) remarks that retributive justice does not give one an opportunity to offer forgiveness to those who are victims in the justice system. This then arguably forces the world to find other means of find other methods of restoring order and dignity of those who had been wronged in the past. Restorative justice makes this possible. However, context is important. In the contexts Africa, the method used in paving the way for restorative justice was to find mechanisms, concepts and epistemological concepts that were steeped in cultures of respective countries in applying specific elements of restorative justice. Firtz (2009:05) asserts that "restorative justice encourages the collaboration and reintegration of both victim and offender, rather than the use of coercion and isolation, to make right the wrongs. Violations create obligations for all stakeholders in the criminal justice system, including communities. The most important of these obligations is the need to put right the wrongs".

Practical Application of Ubuntu in contemporary time: Its role in seeking justice and conflict resolution

There are many descriptions, definitions and ways or means of explaining the concept of *Ubuntu*. A number of scholars make several assertions, dispositions on the meaning of *Ubuntu* and we shall look into a number of them. Ubuntu is a word found amongst the Bantu peoples in countries such as Tanzania, Southern African region, Angola, and Mozambique, amongst others (Hailey, 2008:23).

The obvious interpretation of the meaning of the word is "people" or human beings (Mucina, 2013:21).

The role of Ubuntu in the truth and reconciliation in South Africa

Ubuntu was used as a tool to examine the truth about human rights violations in post- apartheid era in South Africa. The post- apartheid era in South Africa was a period of reflection, and a time at which the country was to interrogate the past in order to establish the truth about human rights violations that occurred during the apartheid period (Kamga 2018). *Ubuntu* was used as a tool to encourage the perpetrators of human rights abuses in South Africa to speak about their acts in the public domain through hearings that were attended by families of victims and the perpetrators. The perpetrators were both black and white South African counterparts who participated willingly or unwillingly in the human atrocities that were instigated by the former white regime in order to (amongst other things) suppress anti-apartheid activism and to infiltrate liberation parties locally and internationally. The instructions of the then state, particularly the security branch and other state intelligence organs were maiming and torturing people from the period of the banning of liberation movements in South Africa.

After the fall of the apartheid system in South Africa, the state established the Truth and Reconciliation Commission (TRC) in order to eke out information about the extent of the human rights abuses as well other important information that ought to be hidden. The TRC used the principle of *Ubuntu* as a guiding principle to attain the truth, encourage reconciliation, and healing to both the victims and perpetrators. Swanson points out that in this context, Ubuntu as an African philosophy was used beyond the "forensic" functions of fact – finding about the atrocities committed by the former regime (Swanson, 2007:55).

The TRC was able to impress upon the perpetrators to express themselves in a dialogical forum for the purpose of reconciliation families of victims and perpetrators. The TRC was not similar to a typical court in that through *Ubuntu* people or perpetrators were encouraged to divulge the truth in return for amnesty. The notion of *Ubuntu* in this case was used to promote goodwill amongst participants, especially those who would have been found guilty in a court of law for their deeds.

The TRC in South Africa extolled the merit of *Ubuntu* ethics, wherein all participants of the TRC were encouraged to acknowledge that by virtue of the fact that their lives were inextricably linked, it was important to ensure that forgiveness becomes a key factor in finding reconciliation and in this context, Nagel & Cortland (2014:03) argues that this is a universal practice of indigenous justice   worldwide.

In the same way that apartheid dissipated the African indigenous systems and the traditional forms of the African being, the same system of *Ubuntu* was what the oppressed people of South Africa held onto during the time of apartheid and fought collectively and against the then repressive regime. The post apartheid period in South Africa was imbued with a climate of reconciliation, peace, forgiveness with the understanding that this is done in goodwill. The opposite of this would have arguably been a spirit of vengeance, a divided nation, and a possible civil war. It is possible that had the opposite occurred further human rights abuses may have occurred as it is the case in many civil wars that have occurred elsewhere in the continent.

Subsequent to South Africa's first democratic elections, the interim constitution of South Africa was drafted with the backdrop of *Ubuntu* in order to pave the way for socio-political transformation. Mokgoro (1997) remarks "the interim constitution of South Africa created a historic bridge between the past of a deeply divided society, characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of peaceful co-existence for all South Africans". In the same manner that *Ubuntu* was used a concept in paving the way for transformational justice and restorative justice in South Africa, the principle was also applied in Rwanda.

The role of Ubuntu in seeking justice and reconciliation in Rwanda
In the subsequent weeks, following South Africa's successful democratic elections, further a field, in Rwanda, President Juvenal Habyarimana died in an airplane crash. His death sparked a genocide from which it was believed that Hutus were indifferent to the prospects of sharing power in governance with the Tutsis. The killing spree of Tutsi culminated in what is now known as the fastest recorded genocide with over 900 000 Tutsis killed in a short period of time, i.e. in three

months. In the months that followed the genocide, it became apparent that the Tutsi led Patriotic Front had defeated the remnants of the interim government and as a result the conflict subsided (Graybill, 2004:1120).

In pursuit of justice Rwandans were demanded punishment through International Criminal Tribunal of Rwanda for the genocide. However, a number of challenges or problems had befallen the Rwandans in pursuit of justice and it was therefore necessary to first attempt to solve the eminent problems which were linked to the justice system prior to the bringing perpetrators of the conflict to book. One of these problems was that after three months to genocide, Rwandan prisons were full to the brim and it proved difficult to bring to book thousands of prisoners who were linked to one massive crime, i.e. genocide. A resolve was to only take those who were masterminds of the genocide to the western judicial system. As for the rest of the perpetrators of the those who committed the killings were tried in the traditional gacaca courts.

The approaches used in the truth commissions in South Africa and Rwanda were similar in that they opted for remembering the past. "Rwandans became disenchanted with "international justice" and resurrected a reconciliatory kind of justice, gacaca, which shares many features associated with *Ubuntu*" (Braybill, 2004:1128). The gacaca courts were traditional village courts which had been used in pre-colonial times to solve major and minor disputes between villagers. The courts were modest in that laypersons who presumably understood the culture of Rwandans became judges during the period of the Truth Commission in Rwanda (Chakravarty, 2005:134). These very courts were to meet the needs of both restorative and retributive justice into one setting in dealing with their own problems in a peaceful manner (Clark, 2007:07).

In their inception, there was great support from the public, and this was motivated by the fact that it was believed that the method to be used wherein the perpetrators were to ask to forgiveness was symbolic by shifting power relations from the perpetrator to the victim. It is recorded that the turnout for the court proceedings was an overwhelming 90% and thus 87 % of the public expressed their eagerness to participate in the process. From this process, it was expected that once the perpetrator apologized for the crime, there would then be amnesty granted to the victimizer (Graybill, 2004:1123).

By reopening the gacaca courts Rwanda took into account cultural institutions within the process of reconciliation in their country, and thus through this process, traditional leaders were brought together in order to unite people who are within the grassroots of the country. "While the gacaca process in Rwanda could certainly use some modifications because of inherent flaws, it is a great example of how a country managed to use an existing cultural institution to aid in reconciliation and justice on a more personal, individual level" (Sowers, 2008:). The gacaca courts were legitimized by government processes in 2001 wherein government and other civil society organizations made an effort to re-educate citizens of Rwanda about its functions, purposes and intended outcomes as Clark (2007:07) asserts:

> Soon after passing the gacaca Law, the government, with the assistance of the DCHR, ran a nationwide education campaign explaining the new law to the population. Once the government believed that the population was sufficiently sensitised, it ran a .pre-gacaca. programme of displaying genocide suspects before their home communities in what was billed as a dress rehearsal for a more fully-fledged gacaca to be activated countrywide in 2002. Various local and international NGOs were permitted to observe the hearings and to provide analyses for further government consideration

The Rwandan genocide occurred as a result of ethnic cleansing and in the process of reconciliation through the gacaca courts, very little was taken into account in relation to the ethic issues which had divided the country in the first place (Sowers, 2008:03). In this instance, Tutsi victims were given the platform to confront their abusers (who were largely the Hutus) but the Hutu victims were rarely allowed to face their own victims who were Hutus (Sowers, 2008:03).

The end result of the Rwandan peace and reconciliation process was the culmination of the Arusha Peace and Reconciliation Agreement by "promoting a national inter-ethnic resistance front" and in the process associations that promoted ethnic discrimination were banned. The Arusha agreement was by and large a regional process which included other countries such as Burundi due to the shared ethnic heritage and relations between the people of Rwanda and that of Burundi. The scenario of Rwanda typified the relationship between justice and reconciliation. There are those who believe that reconciliation efforts were never well received at first by virtue of the fact

that Rwanda had been a country that was regarded as 'lawless' and many people felt that forgiveness was never possible (Meiring, 2002:727).

Apart from the reconciliation aspect of the gacaca legal system, the issue of compensation or reparation was also added on the system and this emanated from the traditional system which had stood the test of time. Those who were found guilty were therefore ordered to pay reparations which were structured into a fund that was controlled by the government. What is even more interesting is that those who had destroyed houses were to rebuild houses that were destroyed during the genocide (Graybill, 2004:1128).

Challenges in the application of Ubuntu with Truth Commissions as vehicles
From the previous sections of this chapter, it has been clearly ascertained that *Ubuntu* can be used as a vehicle to motivate for the practical application of restorative justice. It should also be noted that a number of elements of *Ubuntu* directly relate to the nuances of restorative justice, in a prevailing conflict situation and thereby seek to create social order in society. The South African and Rwandan scenarios from which edifices of *Ubuntu* and restorative justice worked hand in glove presents situations where *Ubuntu* was the means to the end for restorative justice even though *Ubuntu* as a concept contains elements that can be equated to those of restorative justice.

There are a number of challenges that were prevalent in the implementation of *Ubuntu* principles which gave way for the practical implementation of restorative justice. For both South Africa and Rwanda *Ubuntu* as a driver to notions of restorative justice occurred in settings and climates from which retributive justice and western courts were functioning as a result of colonialism. This means that the prevailing climate and environment of jurisprudence was adapted to western philosophies over time. It can be argued that in both instances, elements of hybridity became normalized in situations of conflict resolution. For instance, in as much as South Africa implemented the *Ubuntu* principles, this was done using a hybrid system wherein cultural, ontological concepts were used as well as the contemporary legal instruments. The same can be said about the Rwandan scenario, wherein the gacaca courts existed alongside.

There are several theories and studies that suggest that the perceived notions of reconciliation in Rwanda and South Africa were far from being achieved in post truth commission periods. This then begs the question as to whether the aspect of truth in restorative justice, especially in the application of *Ubuntu* leads to reconciliation as a means to restore social order in society. Gibson (2004:215) posits that amongst white South Africans (who were believed to be the benefactors of apartheid) there is a common belief that"truth leads to reconciliation, but those more reconciled are also more prepared to accept the truth. Thus, truth and reconciliation go together, but the causal relationship appears to be reciprocal. Still, among whites, accepting the truth does indeed contribute to reconciliation. Among blacks, truth does not lead to reconciliation; nor does reconciliation lead to truth".

(Gibson, 2004:215) further states that this poses a disappointing scenario many white people "feared that the revelations of the TRC would harden black attitudes toward whites, making coexistence in the New South Africa even more difficult. That the truth and reconciliation process seem not to have had a negative influence among Africans, while having positive influences on whites, Coloured people, and those of Asian origin, indicates that the process has clearly been a net   benefit   to   South   Africa".

The fact that there would seem to be a disjuncture in relation to how racial groups in South Africa perceive the notion of reconciliation in post truth commission period, and this remains a concern due to the fact that there is an absence of common thought in relation to the notion reconciliation. This concern is heightened by the fact that the *Ubuntu* principles were meant to create social order between the various racial groups that form part of South Africa's populace by the struggle against apartheid was itself a struggle from which there was beneficiation of the country's resources by white people whilst the majority of the black African population, coloureds and Indians became disenfranchised. The disparities on the country's beneficiation to wealth became part of the discontent and uprising to fight apartheid. This notion is supported by other scholars such as Mbembe & Rendall (2002:05):

> After the formal abolition of apartheid, South Africa is no longer what it used to be. It is coming out of the dark age of white supremacy. Whether by design or not, the country is

undergoing multiple and systemic transitions, at different paces and rhythms. In an age that has witnessed an exacerbation of historically entrenched racial hierarchies, it is involved in one of the few contemporary global experiments with a view of creating the first credible nonracial society on the planet. To a large extent, this involves deracializing the ownership of assets and cultural capital while reconciling the principles of equal protection, affirmative action, and nondiscrimination. This experiment's chances of success cannot be ruled out. But nor can they be taken for granted, so paradoxical and contradictory are, in this instance, the relations between the "forces of capital and cultural production known as globalization and the processes of subject articulation known as racialization

It is therefore argued that the lack reconciliation as a living principle that ought to reverberate throughout South Africa amongst all racial groups could lead to further discontent as a result of the fact that there was either little reconciliation achieved through the TRC or reconciliation itself did not extend to other forms of social spheres that affect humanity, i.e. poverty alleviation, equity of resources, to name but a few.

The notions of restoring order in pre- democratic elections of South Africa only addressed an element of social order which are largely to ensure that there is peace prior to the democratic elections in South Africa, and that former perpetrators of apartheid regime told the truth about their acts in order to be granted amnesty. What did not happen was the process from which other possible forms of discontent that could have emerged from the pre- and post- apartheid dispensations were arguably not addressed in the TRC. For instance, the truth about how land was illegitimately moved from the black to white populations was never addressed in an orderly fashion, but was only part of the sunset clauses from which the entire country was never part of.

The practical application of gacaca courts in the judicial system of bears almost similar challenges to those of South Africa. There are a number of factors that negatively affected the functioning of the gacaca courts. The gacaca courts were reportedly fraught with corruption, a number of key witnesses were killed during the period of court proceedings and those who survived or managed to give evidence in the courts were faced harassment and intimidation (Le Mon, 2007:17). Outside of the gacaca courts, the citizens of Rwanda faced criticism from the state that the population

became disloyal to the state during the court proceedings and as such "gacaca courts have not led to the sort of "democratic dialogue" between the governed and the government that they might otherwise have fostered" (Le Mon, 2007:17).

Nevertheless, strides were made in ensuring that the period from which the gacaca operated, in making sure that some of the principles of restorative justice are met. For example, in the seven year period at which the gacaca courts were in operation, there were signs "that harsh, retributive punishment is not the way forward. After many decades of impunity, Rwanda has embarked upon a course of transitional justice that seems committed to leaving no serious crime unpunished" (Schabas, 2005:890).

The importance of Nation-State in implementing epistemological concepts

The challenges presented above, pertaining to the implementation of *Ubuntu* could exist as a result of the lack of nation-statehood amongst the countries that practice these ancient concepts. Looking into South Africa for example, the concept of *Ubuntu* is one that has been part of parcel of African life and society and it is very little evidence to show that the concept was either borrowed from Europeans or any other continent for that matter. *Ubuntu* as an African concept is thus originated and owned by Africans and possibly not by South Africans of European decent. This reality is a testament to the fact that nationwide concept was applied to a populace that differed in terms of thought and frame of reference and it is arguably the reasons why black Africans would therefore perceive the attainment of reconciliation in the context of racial issues will differ from the view of their white counterparts as we have explored in the previous section of this essay.

The same could be said about Rwanda whose genocide was started by conflict that divided the nation along ethnic lines. The fight over Rwanda's polity prior and subsequent genocide occurred as a result of the struggle for power along ethnic lines. This of course does not necessarily reflect a scenario where unity became the precursor in the application of gacaca courts in Rwanda. In other words, there ought to have been a common vision that should have united the nation of Rwanda prior to the application of gacaca courts in the same that there ought to have been a common vision that is clearly identifiable by all citizens (and not only a fragment of majority) before the implementation of *Ubuntu* in post- apartheid era in South Africa so that citizens clearly understand the objective of applying *Ubuntu*. Meyer et al (1997:145) argue that the cognitive and

ontological models of reality specifying the nature, purposes, technology, sovereignty, and control of countries ought to be carried by a typical nation state. He claims that these models ought to give direction and adequate functioning of nation states and that these same model tend to be more cognitive than expressive.

Robinson (1998:65) ascertains that nation state paradigms give a description of how movement occurs in a set of ancient structures from one point to the next. In other words, the ontological comprehension of fundamental transformation in the historical structures upon which the analysis of motion is predicated through the movement of ancient structures. Therefore, this means that the movement of ancient structures could require movement from thought to practice over a period of time. It is therefore argued that the successful transposition of thought to practice may be critical in any nation state, though it still remains important for the citizens of a country to be united in common thought in an effort to see transformation of thought into practice in real life.

Meyer et al (1997:146) further state that State action reflects inherent needs and interests; culture is largely irrelevant, though it may be invoked to explain particular, often historically rooted patterns of policy or behavior. Therefore, the notions of nation state can make sense "only if nation-states are understood as, in part, constructions of a common wider culture, rather than as self-directed actors responding rationally to internal and external contingencies". The state would be an actor that seeks to drive the vision of country towards a certain trajectory on behalf of the people, with a common understanding (from the state and citizens) of the goals and visions of that state in its totality. It is also in this context that states who are defined as nation states hold the power formal rules and rights of a citizenship and to shape institutions that provide differentiated access to participation and belonging (Bloemraad et al, 2008:153). The Rwandan case in this instance becomes important as we have described elsewhere in this essay that power plays a key fundamental role in the running of any nation state and that if the country is divided between ethnic lines in relation to who holds the power to implement ancient concepts, the situation might present undesirable results. If for instance, the minority of ethnic groups cannot be given adequate participation in societal issues that ought to shape the vision of the state, then this means that adequate access to participation which could lead to a sense of belonging will not be a reality.

Bloemraad et al (2008:158) posit that the relationship between rights and community membership is also at the core of theoretical debates on multiculturalism, which ask to what degree rights should

inhere in individuals or be granted to ethnic, religious, or other culturally differentiated groups within the nation-state. The nation state therefore ought to ensure that there is adequate participation in social issues of a country, there is adequate access in that participation by all citizens and that for this to become a reality if common constructions of culture of a country are identified.

The project of nation and state building in South Africa took place with the existence of the TRC (Wilson, 2001:01). Mangena argues that within the three normative theories of morality (Universal Law, Respect for Persons and Kingdom of Ends), Ubuntu seems to be the only suitable for African moral requirements through dialogical systems in the consolidation of state power in South Africa (Mangena, 2016:02). In other words, the concept of Ubuntu becomes transferrable in society through dialogue in traditional systems of Africans (Mangena, 2016:02). This was discernible during South Africa's TRC process from which the promotion of dialogue was encouraged to solve South Africa's past social problems (Swanson, 2007:58). It was in this vein that the tone and ethos of the TRC was meant to enable the recovery of truth telling in a manner that is ethical manner, this with the intention of "state-building" processes.

The transposition of the moral (moral good of individuals) philosophy of Ubuntu into the government systems intended to create peace in a country such as South Africa (through the TRC) is sometimes classified as ethical considerations in the usage of *Ubuntu* in a social setting. For example, the notion of "doing good by others" as a moral consideration of Ubuntu creates an impression that Ubuntu is an ethic that provides a guide on how people in society ought to behave in "doing good by others" (Metz, 2011:539).

Even though there is a disposition amongst scholars on the moral objectives of the concept of Ubuntu, steeped into the spiritual framework of Africans, there is also a belief that the moral values ascribed to by those who are advocates of Ubuntu are universal in nature. To position Ubuntu as a concept that promotes common moral position of people in state-making processes, the ethical grounding of *Ubuntu* could convey similar aspects of postmodern Western theories of "Aristotelian eudaimonism, Platonic justice, Kantian deontology and Hobbesian egoism", amongst others (Mangena, 2016:05).

The exploration on Ubuntu's contribution on global issues could mean that there are attempts to either compare Ubuntu to existing non-African frames of thought to find ways and means of justifying why Ubuntu needs to be defended as a global or universal concept whose philosophical aspects are found in Universal Declarations of the United Nations. This exploration could perhaps become important in dealing with the challenge of attempting to locate, reshape, reframe the ancient African practices such as Ubuntu in current times, where life has evolved from the epoch to a more globalised form of life (Louw, 2010:05).

The connection and proceeds of *Ubuntu* through its application in post apartheid South Africa could elicit varying perceptions in terms of meaning. There are those who question the application of *Ubuntu* in current times due to the fact that *Ubuntu* is an ancient African concept (Tshoose, 2009:13) which may lose its relevance if it is not applied in line with the vision of a nation state, (Louw, 2010:06). It can be argued that what would have been common in the application of *Ubuntu* would have been a practice that was synonymous with African ontological aspects but not those of South Africans of European descent, hence the disjuncture in thought and practice of the concept of *Ubuntu* in the South African social system.

Based on the above discussions, in the process of attaining principles of democracy in South Africa's state-building (post - 1994), the country used an African concept to do so. In the consolidation of power in South Africa, nuances of peace and reconciliation were advanced with the framing of Ubuntu in the texts that helped to shape peace and reconciliation. Apart from the framing of Ubuntu into quasi – legal and human rights corpus of South Africa (Kamga,2018) it is important to note that its theories became important in the building of the "new state" (post 1994) through national policy. Ubuntu has been used as a stimulus in South Africa's public service policies through which its values were referenced in order to improve public services to ordinary citizens (Moodali, 2010:10).

Conclusion

Social order, harmony, equality and inclusion are some of the key ingredients found in the principles of jurisprudence and democratic states. These very same elements have been reflected upon as we illustrated the ancient principles of *Ubuntu.* Although the world is globalised, non-western countries are still applying their own epistemes in their legal frameworks, in a manner that suits their environments. The possible mistake that could be made in various settings of scholarship is to compare the non – western concepts when environments differ. It is rather important to recognize the value of each system and provide a conducive environment for its efficient application. In other words, it is imperative to recognize "pluriversalism" (Falola 2016, 265) and not universalize western approach to life.

References

Allen, T., 2008. Ritual (ab) use? Problems with traditional justice in Northern Uganda. *Courting conflict*, pp.47-54.

Bloemraad, I., Korteweg, A. and Yurdakul, G., 2008. Citizenship and immigration: Multiculturalism, assimilation, and challenges to the nation-state. *Annual review of sociology*, *34*.

Boswell, V., 2012. Adrian Vlok and the truth and reconciliation Commission. SAHistory.org.za

Chakravarty, A., 2005. Gacaca courts in Rwanda: explaining divisions within the human rights community. *Yale J. Int'l Aff.*, *1*, p.132.

Choi, J.J. and Severson, M., 2009. Toward a culturally competent restorative justice practice framework: A focus on Asian Americans. *Families in Society*, *90*(4), pp.399-406.

Clark, P., 2007. Hybridity, holism, and traditional justice: the case of the Gacaca courts in post-genocide Rwanda. *Geo. Wash. Int'l L. Rev.*, *39*, p.765.

Falola, T. 2016. *The humanities in Afric*a, Pan-African University Press, Austin, Texas

Frederiksen, E.A., 2008, June. Reconstituting Political Community: Truth Commissions, Restorative Justice and the Challenges of Democratic Transition. In *meeting of the Canadian Political Science Association*.

Fritz, D., 2005, October. Restorative justice. In *National American Association of Christians in Social Work. Grand Rapids, Michigan: NACSW Convention*.

Giesen, B., 2009. From denial to confessions of guilt: the German case. *Remembering the Holocaust: A Debate*, pp.114-122.

Graybill, L.S., 2004. Pardon, punishment, and amnesia: three African post-conflict methods. *Third World Quarterly*, *25*(6), pp.1117-1130.

Gibson, J.L., 2004. Does truth lead to reconciliation? Testing the causal assumptions of the South African truth and reconciliation process. *American Journal of Political Science*, *48*(2), pp.201-217.

Hailey, J., 2008. Ubuntu: A literature review. *Paper Prepared for TUTU Foundation*. London.

Hamlin, J.B., 2014. Nurturing the West from a Well in the East: The Integration of East Asian Spiritual Philosophy in Western Conflict Transformation. *World Journal of Social Science*, *2*(1), p.42.

Kamga, SD., 2018. Cultural values as a source of law: Emerging trends of ubuntu jurisprudence in South Africa. *African Human Rights Law Journal* , 18 (2) pp 625-649

Kellner, D., 1998. Globalization and the postmodern turn. *Globalization and Europe*, UCLA. pp.23-42.

Le Mon, C.J., 2007. Rwanda's troubled Gacaca courts. *Human Rights Brief*, *14*(2), p.4.

Louw, D., 2010. Power sharing and the challenge of ubuntu ethics.

Liu, J., 2009. Asian criminology–challenges, opportunities, and directions. *Asian Journal of criminology*, *4*(1), pp.1-9.

Liu, J. and Palermo, G.B., 2009. Restorative justice and Chinese traditional legal culture in the context of contemporary Chinese criminal justice reform. *Asia Pacific Journal of Police & Criminal Justice*, *7*(1), pp.49-68.

Mangena, F., 2016. African Ethics through Ubuntu: a postmodern exposition. *Africology: The Journal of Pan African Studies*, *9*(2), pp.66-80.

Mbembe, J.A. and Rendall, S., 2002. African modes of self-writing. *Public culture*, *14*(1), pp.239-273.

wa Mberia, K., 2015. UBUNTU: LINGUISTIC EXPORATIONS. *International Journal of Research and Innovative technology*, *2*(1), pp.103-115.

Merriam – Webster.com, 2016. Definition of Ontology. Available online: http://www.merriam-webster.com/dictionary/ontology. Accessed (10 October 2016).

Meyer, J.W., Boli, J., Thomas, G.M. and Ramirez, F.O., 2003. *World Society and the Nation-State*. na.

Metz, T., 2011. Ubuntu as a moral theory and human rights in South Africa. *African Human Rights Law Journal*, *11*(2), pp.532-559.

Meiring, P.G.J., 2002. Leadership for reconciliation: a Truth and Reconciliation Commission perspective: words on leadership. *Verbum et ecclesia*, *23*(3), pp.719-735.

Mucina, D.D., 2013. Ubuntu Orality as a Living Philosophy. *Journal of Pan African Studies*, *6*(4).

Moodali, T., 2009. *The Ethical Import of the Batho Pele White Paper* (Doctoral dissertation).

Nagel, M. and Cortland, N.Y., 2014. Ludic Ubuntu: An Appeal toward Transformative Justice. Papers.com.

Robinson, W.I., 1998, December. Beyond nation-state paradigms: Globalization, sociology, and the challenge of transnational studies. In *Sociological Forum* (Vol. 13, No. 4, pp. 561-594). Kluwer Academic Publishers-Plenum Publishers.

Schabas, W.A., 2005. Genocide trials and gacaca courts. *Journal of International Criminal Justice*, *3*(4), pp.879-895.

Stone, G.R., 2006. Civil Liberties v. National Security in the Law's Open Areas. *BUL Rev.*, *86*, p.1315.

Swanson, D.M., 2007. Ubuntu: An African contribution to (re) search for/with a'humble togetherness'. *Journal of contemporary issues in education*, *2*(2), pp.53-67.

Sowers, C.B., 2008. *The Impact of Culture on the Truth and Reconciliation Commission in Sierra Leone* (Doctoral dissertation).

Tshoose, C.I., 2009. The emerging role of the constitutional value of ubuntu for informal social security in South Africa. *Afr. J. Legal Stud.*, *3*, p.i.

Wilson, R., 2001. *The politics of truth and reconciliation in South Africa: Legitimizing the post-apartheid state*. Cambridge University Press.