

# **A CRITICAL REVIEW OF UBUNTU: A COMPARATIVE ANALYSIS WITH KANT'S RETRIBUTIVISM**

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## **ABSTRACT**

This paper charts out the political and historical circumstances that evinced the creation of *Ubuntu* as a socio-legal concept in South African jurisprudence. By analyzing the content of this ideology, and by interrogating the conceptual substance of it, the paper will try to delineate and posit *Ubuntu* as a formidable contender for Immanuel Kant's conception of retributivism as a categorical imperative. A comparative reading of The South African Constitution and the decisions of the South African Constitutional Court with that of the works of Immanuel Kant will be undertaken to show the sophistry and maturity of the former, albeit undermined, ignored and sidestepped.

In doing so, this paper will challenge the hegemonic conceptualization of Kant's model, by the Western World, as idealistic in penology. Vide case laws from South Africa, and scholarly work across jurisdictions, this paper will attempt to argue why *Ubuntu* has in it the potential to radically reform the modern frameworks of justice, punishment and penology.

## INTRODUCTION

Ubuntu is an indigenous South African ideology. In simple terms, it is the belief that a universal bond connects all humanity. Ubuntu branches out to constitute two necessary, and interconnected, ideas. Firstly, that all human beings are interconnected in a common bond and there is no scope for individual destiny without the influence or support of others. Second, the fulfillment of being human is not contingent merely upon enacting social roles, but in fulfilling obligations of those who have supported us and even to the world at large.<sup>1</sup> Together, the conception stems from the fundamental African belief- *motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu* which, literally translated, means a person can only be a person through others and not by himself.<sup>2</sup> This is strikingly the opposite of Kant's assertions of individual autonomy that a person can only fulfill and realize himself through reasoned, rationalized autonomy.

This paper will attempt to closely understand the concept of Ubuntu. The paper is divided into two interconnected parts. The first part of this paper will engage in understanding the historical evolution and circumstances that warranted Ubuntu, creation of systems and authorities based entirely on Ubuntu and how Ubuntu has shaped and influenced South African socio-judicial politics till date. The second part of this paper will juxtapose two conflicting ideological positions on justice. It will look at Kant's assertions for retributive justice through his conception of a categorical imperative, and also look at Ubuntu's calls for restorative and reconciliatory justice. This part will contextualize what has been enunciated about Ubuntu in the first part and compare this conception of Justice with that of Kant's retributivism, to give an alternative understanding of justice to Kant's assertions.

The objective of the paper is to present an alternative mechanism and methodology to understand justice and justice-oriented legal systems and institutions. Given the tremendous scope of research and importance afforded to Kant's, and other western, conceptions of Justice, this paper hopes to introduce the possibility of truncating such conceptions with indigenous

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<sup>1</sup> Drucilla Cornell, *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* (New York: Fordham University Press, 2014).

<sup>2</sup> Mbigi L and Maree J, *Ubuntu: The Spirit of African Transformation Management* (Sigma Press Johannesburg, 1995) 1-7.

alternative conceptions which have entirely different orientations and outlooks towards the idea of justice, in and of, itself.

## **HISTORICAL EVOLUTION AND CONCEPTUALIZATION OF UBUNTU**

As Mokgoro, interestingly, highlights that owing to language limitations, the African conception of Ubuntu cannot be sufficiently translated or explicated, but can only be simplified. It is his strong belief that any, and all, such translation is only a simplification of a more *expansive, flexible and philosophically accommodative idea*.<sup>3</sup>

Although Ubuntu has been prevalent as an ideology for quite some time, its relevance and popularity arose alongside its use in the anti-apartheid struggle, especially in the 70s and 80s and its popularity continued post-apartheid as well. It was greatly significant, as a key guiding spirit, in the institutionalization of the Truth and Reconciliation Commission in 1996.

As the reader might be aware, South Africa was torn apart by institutionalized racial discrimination and segregation, which is Apartheid, from 1948 till mid-1990s. Laws and regulations were formed keeping in mind the need for white supremacy, and thereby enacting black, colored and indigenous oppression. The conception of Ubuntu as a philosophy of humanism emerged at this juncture, vigorously, wherein it was asserted that oppression should be ended and racial discrimination should be killed given that every human being is interconnected in a common shared bond. In this, Ubuntu was actively used as an anti-apartheid, anti-race and anti-discrimination weapon. Broodryk asserts that Ubuntu is not an easily definable concept, although it is safe to claim that it influences and guides a major portion of South African knowledge systems and epistemology.<sup>4</sup>

However, as we shall see now, the influence and ramifications of Ubuntu does not stop just there but continues to influence law, legal frameworks, legal ideologies, legal thinkers and even socio-economic politics till date, within and outside South Africa. Drucilla Cornell, in *Law and*

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<sup>3</sup> Justice Y Mokgoro, *Ubuntu and the Law in South Africa*, 4 Buff. Hum. Rts. L. Rev. 15 (1998)

<sup>4</sup> Broodryk J, *Ubuntu in South Africa* (LLD thesis UNISA 1997)

*Revolution in South Africa*<sup>5</sup>, notes as to how her position on the AZAPO case<sup>6</sup> changed, and had a different outlook, seen through the lenses of Ubuntu and Dignity<sup>7</sup>. It is important to mention here that Ubuntu and Dignity are core features and principles that govern constitutional jurisprudence in South Africa.

Cornell, in this context, highlights how the concept of dignity was primarily conceptualized by the left in terms of taking from those who can afford inasmuch as they can, and giving to those who needs it. Take for example the conceptualization by German Marxist philosopher Ernst Bloch. As per Bloch, dignity and happiness as phenomena and concepts cannot be actualized unless and until human servitude and misery in all forms is eradicated.<sup>8</sup> However, as Cornell historically charts out, the collapse of the Berlin Wall was celebrated across the global capitalistic market as the end of socialism (or what was considered as *socialist nightmare*)<sup>9</sup>. An example of this sort of belief can be seen in the work of Francis Fukuyama who conceptualized the fall of the Berlin Wall as the victory of the western liberal democracy, and that through this, mankind has entered its last phase of historical evolution.<sup>10</sup> Cornell highlights how this conception of a liberal democracy eventually became equated to privatization and private markets. She notes how even the African National Congress (ANC), through its neoliberal initiatives such as Growth, Employment and Redistribution (GEAR) distanced itself from indigenous concepts such as Ubuntu. This is a pertinent point for the Indian context as well, to interrogate how indigenous conceptions of dignity- such as Ubuntu- can be situated in a post 1991 neoliberal, privatized, liberalized and globalized Indian market society. In *No Future without Forgiveness*, Archbishop Desmond Tutu defines Ubuntu as '*My humanity is caught up, and is inextricably bound up, in what is yours*'.<sup>11</sup> Cornell uses this conception to portray how the idea of socialism is inherent in a conception such as Ubuntu. By changing the course of how justice is carried out, the Truth and Reconciliation Commission was heavily influenced by African indigenous thought such as Ubuntu. The focus was severely upon

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996)

<sup>7</sup> Drucilla Cornell, *Dignity Violated: Rethinking AZAPO through uBuntu*, in *Law and Revolution in South Africa: uBuntu, Dignity and the Struggle for Constitutional Transformation* 47–75 (2014).

<sup>8</sup> Ernst Bloch, *Natural Law and Human Dignity*, trans. Dennis J. Schmidt (Boston: MIT Press, 1987), 20.

<sup>9</sup> *Supra* Note 3, at Page 50.

<sup>10</sup> Francis Fukuyama, *The End of History and the Law Man* (London: Hamish Hamilton Press, 1992).

<sup>11</sup> Desmond Tutu, *No Future without Forgiveness* (New York: Doubleday Press, 1999).

reformation and reconciliation as opposed to other post war retribution oriented trials such as the Nuremberg trials. Cornell calls for a *re-inclusion* of these ideals such as Ubuntu for a real democratic governance in South Africa as opposed to a market-oriented understanding of liberal democracy, as currently conceived by the ANC. Ubuntu is not just required in the domain of law and justice, but its significance is deeply relevant for those who wish to re-conceptualize and rework socialism amidst empires of privatization, private markets and globalization, couched in terms of *liberal democracy*. The very existence and proliferation of Ubuntu becomes a critique of those who believe in the fall of socialism, given how Ubuntu's ideas of society and socialism have revolutionized systems of justice, politics and economics.

It is important, at this juncture, to showcase how the conception of Ubuntu has not just limited itself to the socio-politic sphere, but has deeply percolated into the legal system of South African Courts. South African Courts have interpreted, used and actively implemented Ubuntu's assertions of Justice in cases that come before it.

Take for instance how the Constitutional Court of South Africa, in the landmark judgment of *S v. Makwanyane (1995)*<sup>12</sup> that abolished death penalty and held it to be unconstitutional, invoked the ideals of Ubuntu to invalidate death penalty. Contrasting with how the western notion of retributive justice works, the South African court looked at Ubuntu and restorative justice in the following fashion:-

*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."<sup>13</sup> The ethos of the new culture is expressed in the much-quoted provision on National Unity and Reconciliation which forms part of the Constitution..... it suggests a change in mental attitude from vengeance to an appreciation of the need for understanding, from retaliation to reparation and from victimisation to ubuntu<sup>14</sup>*

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<sup>12</sup> *S v. Makwanyane* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995)

<sup>13</sup> *Ibid*, at ¶ 131

<sup>14</sup> *Ibid*, at ¶ 223

It uses such an understanding of reparative and restorative justice encapsulated within Ubuntu to invalidate the death penalty and hold it unconstitutional:-

*As observed before, the death penalty rejects the possibility of rehabilitation of the convicted persons, condemning them as "no good", once and for all, and drafting them to the death row and the gallows. One must then ask whether such rejection of rehabilitation as a possibility accords with the concept of Ubuntu.<sup>15</sup> Against ubuntu must be seen the other side, the inhuman side of mankind, in terms of which the death penalty violates Section 11(2) of the Constitution in that it is "cruel, inhuman or degrading treatment or punishment"<sup>16</sup>*

However, there are some concerning critiques as well of the judicial system for not underscoring the importance of Ubuntu enough in legislative enactments and doctrinal South African Law. Mokgoro argues how South Africa reneged on the opportunity to crystallize the conception of Ubuntu and embed it more prominently within South African Jurisprudence. Mokgoro shows, for instance, how although opportunities present itself during the reforms of the *Special Courts for Blacks Abolition Act 34 of 1986* and the *Law of Evidence Amendment Act 4 of 1988* for the legislature of the South African Judiciary to take cognizance of Ubuntu directly within secondary legislations as well, it was passed over for English connotations such as dignity, respect et al. Mokgoro argues that whilst Ubuntu can roughly be translated to conceptions of mutual dignity and respect, in order to maintain the indigenous authenticity of the concept, the law-making and/or adjudicating bodies must not shy away from using *Ubuntu* directly instead of English, somewhat similar, synonyms.<sup>17</sup> He further grounds his point by interrogating the interim South African Constitution of 1993. He looks at the following two stanzas from the Constitution's preamble:

- 1. Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African Citizenship ... where there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms .....*

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<sup>15</sup> *Ibid*, at ¶ 240

<sup>16</sup> *Ibid*, at ¶ 244

<sup>17</sup> *Supra* Note 3, at pg. 4

2. ....it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa.

He argues that whilst these are translatable ideas of Ubuntu, the conspicuous absence of the word itself may produce more harm than good. For Mokgoro, all of what Ubuntu stands for can be accurately and significantly represented by the usage of that, and only that, word alone. He is cautious, and forewarns, the dilution of the values and everything that it encapsulated in the pursuit of translation.

This is an important injunction even in the context of the current paper. Understanding Ubuntu, for purposes of juxtaposition with Kant's retributivism, requires a socio-ethnic understanding of the South African commune. Given the introduction to it by way of the post-apartheid state, and the institutionalization of the Truth Commission, one needs to distinguish Ubuntu from Eurocentric, western superpowers. At the cost of simplification due to identities, one needs to also give due credence to the political environs owing to historical traumas and violence. It is in this context, that one needs to be cautious of equating Ubuntu with more familiar conceptions of dignity, respect, liberty and justice, but rather understand it for what it truly entails and not for what it seems, or sounds, like. Although the intention of doing so may be innocent, the effects of dilution that it may cause may have serious ramifications for how posterity remembers, and understands the concept. Before, moving on to the next section, it is pertinent to mention that Mokgoro's views are not received without critique. As a matter of fact, Mokgoro's conceptions are received with more critique than deserved. Take for example the Lassiter's injunctions.<sup>18</sup> As per Lassiter, the formulations and assertions about Ubuntu, the legacy of it, the need to preserve it in originality does not fit the growing, developing South African nation. The author believes that what is being proposed is fit for the early pastoral communities, but not the growing nation-state. We will return to this critique after we look at Kant.

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<sup>18</sup> J Lassiter 'African culture and personality' (2000) 3 African Studies Quarterly 10-11

## KANT'S CATEGORICAL IMPERATIVE versus UBUNTU'S RESTORATIVE JUSTICE

As per Kant, the principle of punishment is a *categorical imperative*<sup>19</sup>. His injunction goes straight to the heart of the belief that retribution is the only form of justice. For Kant, dignity of the other is recognized and ideals of respect understood only if violators of dignity are punished. The dignity of the individual is fulfilled subject to the satisfactory execution of retribution. In contrast, Ubuntu believes in amnesty under circumstances that necessitates amnesty and does not believe in the stringent Kantian injunctions. The Kantian perspective is deeply influenced by notions of predominance for autonomy.<sup>20</sup> As per this position, individuals necessitate and claim rights and dignity, based on their superlative worth for autonomy.<sup>21</sup> Contrasting with this position is the position of Ubuntu which recognizes these ideals and notions based on the ability and capacity to relate with others, through mutual relationship.<sup>22</sup>

For Kant, even at the brink of a civil society dissolution, the last man or woman must uphold dignity by enacting retribution. For proponents of Ubuntu, it is always a duty to emphatically understand the other and work in harmony to prevent future crime. In this context, it is important to know that Ubuntu is not another mediocre conception that claims rights are predetermined, pre-existent and pre-structuralized. It's most primal and forceful claim is that claiming of rights radically dispossesses the claimant and the claimed from. Ubuntu, herein, instigates radical disappropriation. It does not ground rights in juxtaposition with duties and responsibilities, but expects an entire systematic change when rights are beckoned, with an overarching spirit of Ubuntu always to judge the tenacity of the right.

Interestingly enough, there exists a school of thought that believes that the conceptions of Ubuntu is linked to, or is just another version of, Kant's notions of dignity.<sup>23</sup> Take Taylor<sup>24</sup> for example who closely looks at the following statement by Kant:

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<sup>19</sup> Immanuel Kant, *The Metaphysics of Morals*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 105-06.

<sup>20</sup> I Kant, *Groundwork of the metaphysics of morals* (1785)

<sup>21</sup> I Kant, *Metaphysics of morals* (1797).

<sup>22</sup> Thaddeus Metz, *Ubuntu as a Moral Theory and Human Rights in South Africa* (African Human Rights Law Journal, Volume 11, Issue 2, Jan 2011) p. 532 - 559

<sup>23</sup> Douglas F P Taylor, *Can Ubuntu Provide the Ethical basis for King III?* (Johannesburg 2012)

<sup>24</sup> *Ibid.*

“Act in such a way that you treat humanity, whether in your own person or the person of any other, never simply as a means but always at the same time as an end”.

Taylor argues that this co-relationship drawn between persons in the spirit of achieving a common end is akin to the aspirations of Ubuntu as well. As per Taylor, Kant’s assertions to look at humanity through the lens of oneself, or through the lens of the other, is immaterial insofar as the end is the same. He explains Kant’s position as being one that individuals have intrinsic or inherent values merely by virtue of being rational beings. For Kant, conceptions of worth are equal, unconditional, non-contingent and distinctive to all rational beings. This, as asserted by Taylor, is a common thread between Ubuntu and the Kantian notions of dignity.<sup>25</sup>

However, while these assertions might seem acceptable, there exists a conspicuously serious lack in them. For both Woolman and Taylor have not emphasized, juxtaposed and compared Ubuntu with Kant’s retributivism at all. They have merely interrogated the nuances and similarities between Kant’s notions of intrinsic worth and inherent dignity with that of Ubuntu’s notions of relatedness and shared respect, but have missed out an important facet of Kant- his desire, injunction and predominance for retribution as a legitimate form of justice. This is called as Kant’s retributivism.

In simple terms, a retributive theory of punishment believes in proportionate punishment as the best, if not only, means of response to crimes and offences committed. As per Kant, if there is one thing that a criminal deserves- it is unequivocally punishment. Kant was further go ahead to claim that if not punished, the state does not perform its duty. For Kant, retribution is the act of punishment and it is in this act, alone, that a sense of justice is carried out.<sup>26</sup> Contrastingly Ubuntu believes in the act of reconciliation and reformation as responses to crime. As portrayed above, this has not just functioned and exercises itself at the theoretical and intellectual domain, but has also practically manifested itself in the domains of reality and praxis- the institutionalization of the truth commission being an example. But one need not go all the way to South Africa to dismiss Kant’s retributivism as impulsive, momentary and intuitive satisfaction. As a matter of fact, a strong critique comes from Kant’s own nation of Germany itself- from that of Friedrich Nietzsche. As per Nietzsche, the idea of retributive punishments stem from a desire for *excess* that captivates all of the human psyche. According to him, it is this excess desire also that pushes the human intuition towards retributive justice:

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<sup>25</sup> *Supra* Note 23, atpg 28.

<sup>26</sup> *Foundations of A Kantian Retributivism*. In: Corlett J.A. (eds) Responsibility And Punishment. Library of Ethics And Applied Philosophy, vol 9. Springer, Dordrecht ( 2009)

*a witches brew [of] resentment, fear, anger, cowardice, hostility, aggression, cruelty, sadism, envy, jealousy, guilt, self-loathing, hypocrisy and self-deception.*<sup>27</sup>

The purpose of my invocation of Nietzsche must not be misunderstood as the need invoke another Western theorist to dismiss a western theorist. It is merely to showcase that looked at closely, there emerges strong, rigorous and interesting critiques within the western tradition itself for existing claims. Nietzsche's claim is a direct criticism of the retributivist approach. Ubuntu's call is a hope for reconstruction of existing orders into more refreshing and accommodating societies. Such a task is imperative for the reader interested in reforming, reconceptualizing and reconstituting law and order to a more just form in the society. As Jiddu Krishnamurthy will claim- it is no measure of good health to be well adjusted in a profoundly sick society. For Ubuntu, and to Nietzsche, retribution emerges from the sick desire of suffering- which Nietzsche terms as a festival of cruelty. A need to see suffering in celebration of *apparent justice*, what Michel Foucault would later call the celebration of cruelty, has become the unfortunate domain of law and order in most modern nation-states, especially pioneered by the western tradition.

For Morrison, Kant was perhaps the first writer to explicate the modern man as a self-defining, rationalizing and enlightenment- capable individual<sup>28</sup>. In so dismissing the possibility of a cosmic other, Kant invokes the ever knowing rationality (capable by men) as the seed that guides men. In this context, his theory of retributivism follows a similar teleological trajectory as a required norm by *modernity*. Modern nation-states believe this exaction to be in the direction of development and requirements of law and order. But, as Boaventura de Sousa Santos would show us in *Epistemologies of South*<sup>29</sup>, *reason, rationality, modernity and enlightenment* are western conceptions which are not totalizing universal conceptions, although couched and portrayed to be so. Given this context, it becomes pertinent for the reader investigating diverse conceptions of justice to not only look at western conceptions of dignity, respect, penology and justice but also indigenous conceptions of justice- such as Ubuntu. If the reader does undertake this exercise, then a greater realization of justice maybe understood from

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<sup>27</sup> M S Moore, *Placing Blame: A Theory of Criminal Law* (Oxford University Press, 1997) at pg. 120.

<sup>28</sup> Wayne Morrison, *Jurisprudence: From the Greeks to post-modernism* (Cavendish Publishing Limited, London 1991).

<sup>29</sup> Boaventura de Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Abingdon: Routledge Press, 2014).

alternative epistemologies, as opposed to mere western rationale ones. Therefore, the importance in invoking Ubuntu in discussions and possibilities in thinking about justice is as important, if not more, than mere western conception such as the Kantian categorical imperative and retributive notion. It is pivotal to remember that the distinction between savagery and sophistry does not exist anymore in institutional glamour or infrastructural grandiose.<sup>30</sup> It exists in the purity of thought and the need to care and accommodate. Seen in this light, Ubuntu- following South African tribes- becomes all the more sophisticated and interesting than the retributivist-oriented barbarous modern states. Therefore, given this disposition, Lassiter's comments on Ubuntu being fit only for early pastoral communities falls flat.

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<sup>30</sup> Claude Levi Strauss, *The Savage Mind* ( 1966)

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