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## LOCALIZING THE HUMAN RIGHTS-BASED APPROACH TO FIGHT CORRUPTION: THE ROLE OF UBUNTU

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### ABSTRACT

*Claims by many experts on the connection between corruption and human rights, and especially the realization that corruption undermines the enjoyment of human rights, have led practitioners to advocate a human rights-based approach to corruption. However, it comes at a time where the global human rights movement is under assault, this contribution addresses the emerging localization discourse in human rights. Researchers and campaigners are adapting the international human rights system to local institutions and meanings in a process of “vernacularization”. This is by taking the needs of the community and the language that makes sense locally as the entry point of human rights advocacy. The question that arises is what role can the local understanding of human rights play? This contribution suggests answers to this question by using the African concept of ubuntu (humanness) to reinforce measures against corruption.*

### KEYWORDS

Africa, Corruption, Human Rights-Based Approach, Localization, *Ubuntu*

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## 1. INTRODUCTION

Over the past decade, human rights activists and anti-corruption campaigners have been occupied with the connection between corruption and human rights. Albiny-Lackey is correct when he points out that practitioners from both the field of human rights and anti-corruption “have grown increasingly comfortable on one another’s turf, and the lines that divide their work have become quite porous.”<sup>1</sup> This is because, “human rights activists are learning to grapple with the human rights impacts of corruption, and anti-corruption campaigners frequently deploy a human rights analysis to bolster their case for reform.”<sup>2</sup>

On the international plane, in 2019 the UN High Commissioner for Human Rights (OHCHR) in collaboration with the Geneva based Centre for Civil and Political Rights developed a *Practitioners Guide on Human Rights and Countering Corruption* that “provides guidance as well as practical recommendations on effectively integrating human rights into anti-corruption efforts.”<sup>3</sup>

Similarly, international non-governmental organizations such as Transparency International (TI), the world’s largest anti-corruption watchdog, have been leading the campaign to mainstream anti-corruption into human rights work.<sup>4</sup> In a 2009 joint publication with the now defunct International Council on Human Rights Policy (ICHRP), TI issued a thorough publication that focuses on “where and how the use of a human rights framework might strengthen national and local anti-corruption programmes and at how key human rights principles can be operationalized in anti-corruption work.”<sup>5</sup>

What is more, legally binding international instruments are also reflecting the human rights-based approach in their texts. For instance, consider the 2003 United

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<sup>1</sup> Chris Albin-Lackey, ‘Corruption, Human Rights, and Activism: Useful Connections and Their Limits’ in Dustin Sharp (ed) *Justice and Economic Violence in Transition* (Springer 2014) 139.

<sup>2</sup> Ibid 139.

<sup>3</sup> Divya Prasad and Lázaree Eeckeloo, *Corruption and Human Rights Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities* (Centre for Civil and Political Rights 2019).

<sup>4</sup> See TI website on <<https://www.transparency.org/en/>> [last accessed 24 September 2020].

<sup>5</sup> International Council on Human Rights Policy, *Corruption and Human Rights: Making the Connection* (International Human Rights Council 2009).

Nations Convention Against Corruption (UNCAC). Although the UNCAC does not explicitly mention the words “human rights” in its text there are allusions to some rights language in the preamble and articles.<sup>6</sup> By way of illustration, the first paragraph of the UNCAC Preamble expresses concern about the seriousness of problems and threats posed by corruption to the stability and security of communities, by undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law.<sup>7</sup> Similarly, UNCAC’s Article 11 refers to the independence of the judiciary and Article 13 calls for “respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption...”.<sup>8</sup> These provisions impliedly protect fundamental rights recognized by international treaties and domestic constitutions of many states such as the right to justice,<sup>9</sup> right to development,<sup>10</sup> right to information,<sup>11</sup> right to judicial independence,<sup>12</sup> and freedom of association.<sup>13</sup>

Academics claim mainstreaming corruption in human rights can assist to humanize anti-corruption. For instance, longitudinal studies by de Castro e Silva, comparing the rationality and the values addressed in both corrupt and non-corrupt cases revealed that, including a human rights-based approach can reinforce measures

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<sup>6</sup> UN Coalition Against Corruption, ‘A human Rights-Based Approach to Corruption’ Document submitted by the UNCAC Coalition, a non-governmental organization not in consultative status with the Economic and Social Council on 31 August 2018 < <https://uncaccoalition.org/wp-content/uploads/HR-based-approach.pdf>> [last accessed 28 September 2020] 2.

<sup>7</sup> UN Coalition Against Corruption 2003 Preamble.

<sup>8</sup> UN Coalition Against Corruption (n 6) 2.

<sup>9</sup> Article 7 of the African Charter on Human and Peoples’ Rights 1981 (African Charter); Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950; Article 14 of the International Covenant on Civil and Political Rights 1966.

<sup>10</sup> Article 22 of the African Charter (n.9), See also the UN Declaration on the Right to Development 1986.

<sup>11</sup> Article 9 of the African Charter (n.9); Article 10 of the ECHR (n.9).

<sup>12</sup> Article African Charter on Human and Peoples’ Rights, Article 47 European Charter on Human Rights.

<sup>13</sup> Article 10 African Charter on Human and Peoples’ Rights, Article 12 European Charter on Human Rights.

against corruption.<sup>14</sup> Such approach (i) enhances the justiciability of economic and social rights; (ii) it is a radical shift from the insufficient criminal approach to a focus on the social harm; and (iii) it is a more satisfactory approach to the far-reaching effects of corruption and inequality.<sup>15</sup> De Castro e Silva believes by treating anti-corruption and human rights as mutually reinforcing, practitioners can create a 'legal empowerment strategy', that focuses particularly on the social accountability dimension. It strengthens the disadvantaged, and fights the encroachment caused by corruption on the enjoyment of human rights, especially economic and social rights.<sup>16</sup>

The inclusion is not without opposition. Peters has summarized some of the critical accounts:

Some international lawyers might complain that this smacks of 'human rightism' or of a 'hubris' of international human rights. Indeed, there is a risk of overusing human rights language. Therefore, the human rights-based approach to corruption should not be employed as a panacea. The language of law generally (and of rights, more particularly) is a limited one, as the critique of the human rights-based approach to corruption points out.<sup>17</sup>

Moreover, other commentators like Pellet have argued that human rights law "is, and can only be, the art of the possible, and by wanting to ask the impossible of it, the 'human rightists' harm the cause that they intend to defend more than they serve it."<sup>18</sup> Pellet further describes the processes of incorporating human rights approaches as a dangerous tendency of human rightism, which he compares to "wishful thinking."<sup>19</sup> Similarly, Rose emphasizes that, applying a human rights lens to combating corruption might not be the best approach, "because human rights law has its

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<sup>14</sup> Bruna de Castro e Silva, 'Humanizing (Anti)Corruption: The Socio-Legal Values of a Human Rights-Based Approach to Corruption' [2019] *Kyiv-Mohyla Law and Politics Journal* 59, 60.

<sup>15</sup> *ibid* 62-64.

<sup>16</sup> *Ibid* 67.

<sup>17</sup> Anne Peters, 'Corruption as a Violation of International Human Rights' (2018) 29 *European Journal of International Law* 1251, 1286.

<sup>18</sup> Alain Pellet, "'Human Rightism' and International Law' (2000) 10 *The Italian Yearbook of International Law* 1, 5.

<sup>19</sup> *ibid*.

limitations as a vocabulary describing the harms of corruption, there is potential for lawyers and activists to overuse or misappropriate [...] this rhetoric.”<sup>20</sup>

Aside from these criticisms, there is indeed, an unambiguous relationship between corruption and human rights. To this end, this contribution will not focus so much on illuminating the link between the two as this has been thoroughly discussed elsewhere.<sup>21</sup> However, it will discuss the potential of localizing human rights - one of the emerging discussions in the field of human rights - in particular within the concept of *ubuntu* and how it can be used in context of anti-corruption.

## 2. CORRUPTION AND THE HUMAN RIGHTS-BASED APPROACH

How does the human rights-based approach to anti-corruption work? By and large, the human rights-based approach and the criminal justice-based approach complement each other because they emphasize different harms and responsibilities. Below are some of the oft cited benefits of a human rights-based approach to corruption.

First, the human rights-based approach advocates recognition of corruption as a human rights concern. The implication of this is that it complements existing anti-corruption efforts by enabling international and regional human rights courts, as well as domestic courts, to hear cases concerning the rights of individuals that have been violated by corrupt acts.<sup>22</sup>

In addition to international and regional human rights courts, there are several other relevant mechanisms and processes in the human rights system, such as special rapporteurs, national agencies and non-governmental organizations that can be harnessed to fight corruption. Davis explains how these other different mechanisms have varying capacity, expertise and claims to legitimacy, but, collectively, they can

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<sup>20</sup> Cecily Rose, ‘The Limitations of a Human Rights Approach to Corruption’ (2016) 65 *International and Comparative Law Quarterly* 405, 438.

<sup>21</sup> International Council on Human Rights Policy (n 5); Martina Boersma, *Corruption: A Violation of Human Rights and a Crime under International Law?* (Intersentia 2012); Kolawole Olaniyan, *Corruption and Human Rights Law in Africa* (Hart Publishing 2014); Peters (n 17).

<sup>22</sup> Peters (n 17) 1278; Gillian Dell, ‘Addressing Impunity for Grand Corruption: What Are the Options?’ *Transparency International*, 04 March 2020, <<https://www.transparency.org/en/blog/addressing-impunity-for-grand-corruption-what-are-the-options#>> [last accessed 24 September 2020].

bring impressive resources to bear.<sup>23</sup> For instance, Davis is of the view that some mechanisms that have fact-finding powers and capacities can help to gather information about corruption.<sup>24</sup> Alternatively, other processes can be employed to engage with the regular monitoring of particular public entities or topics.<sup>25</sup> Moreover, human rights actors can play a useful role in checking information gathered from other sources.

Second, the human rights-based approach moves the victim from the periphery to the centre. Whereas the criminal justice based-approach is centered on the State and the public it represents, on the other hand, a human rights-based approach to corruption means adding a perspective that moves the victim to the centre of the fight against corruption. It does so by highlighting the negative impacts that corruption has on an individual; on groups of individuals typically affected by corruption such as the most vulnerable or marginalized groups; and on society overall.<sup>26</sup>

Thus, addressing corruption through a human rights-based approach as envisioned by Rothstein and Varraich, pays special attention to the victims and the human cost that is at stake.<sup>27</sup> Such a holistic approach focuses not only on the economic and criminal consequences of corruption, but also on the victims, especially those belonging to vulnerable or marginalized groups. It also helps to empower the individuals affected by corruption and to transform them from being bystanders into actors in the fight against the scourge.<sup>28</sup> In this sense, a human rights-based approach

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<sup>23</sup> Kevin E Davis, 'Corruption as a Violation of International Human Rights: A Reply to Anne Peters' (2019) 29 *European Journal of International Law* 1289–1296.

<sup>24</sup> *ibid* 1295.

<sup>25</sup> *Ibid*.

<sup>26</sup> UNHRC, Final Report of the Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights, A/HRC/AC/12/CRP.3.

<sup>27</sup> Bo Rothstein and Aiysha Varraich, *Making Sense of Corruption* (Cambridge University Press 2017) 60.

<sup>28</sup> United Nations Development Programme Oslo Governance Centre 'The Impact of Corruption on the Human Rights Based Approach to Development' September 2004, <[http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30538/0284The\\_Impact\\_of\\_Corruption\\_on\\_the\\_Human\\_Rights\\_Approach\\_to\\_Development\(2005\)r.pdf?sequence=1](http://www.albacharia.ma/xmlui/bitstream/handle/123456789/30538/0284The_Impact_of_Corruption_on_the_Human_Rights_Approach_to_Development(2005)r.pdf?sequence=1)> [last accessed 23 September 2020].

to corruption lays bare the cumulative damages of corruption such as oppression and inequality.<sup>29</sup>

Put differently, if done carefully, bringing claims and cases related to corruption before international and regional human rights processes and mechanisms could help to address corruption by providing adequate remedies for the victims.<sup>30</sup> Spalding has written extensively on similar arguments, such as focusing on the need for restorative justice and victim reparation approaches to anti-corruption efforts in the private sector.<sup>31</sup>

Third, and more importantly, the human rights-based approach puts emphasis on how the State has breached its obligations under international human rights law towards the public by failing to protect it from corruption.<sup>32</sup> The aforementioned groundbreaking research by TI and ICHRP sets out an operational framework that attempts to establish when a corrupt act leads to a violation of human rights.<sup>33</sup> In other words, the framework provides a technique for analysing corruption in human rights terms.<sup>34</sup>

According to the ICHRP corruption-related human rights violations can be summarized as follows:

- (1) Identify the corrupt practice and establish what corrupt act is involved (bribery, embezzlement, etc.).
- (2) Identify perpetrator(s): state actor or someone acting in partnership with a government official (e.g. if a private party commits the violation).

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<sup>29</sup> Peters (n 17) 1252.

<sup>30</sup> Divya Prasad and Lázaree Eeckeloo (n 3) 9.

<sup>31</sup> Andrew B Spalding, 'Restorative Justice for Multinational Corporations' (2015) 76 *Ohio State Law Journal* 357-407.

<sup>32</sup> International Council on Human Rights Policy (n 5); Angela Barkhouse, Hugo Hoyland and Marc Limon, *Corruption and Human Rights* (Universal Rights Group and Kroll 2018); Julio Bacio-Terracino 'Linking Corruption and Human Rights' (2010) 104 *Proceedings of the Annual Meeting* (American Society of International Law 243-246).

<sup>33</sup> International Council on Human Rights Policy (n 5) 24-29; See also Angela Barkhouse, Hugo Hoyland and Marc Limon (n 32) 4-5.

<sup>34</sup> International Council on Human Rights Policy (n 5) 24.



- (3) Identify the state's human rights obligations, study the scope and content of the human right in question and establish what acts or omissions of the state were required by the right in question.
- (4) Evaluate the causal link between the corrupt practice and the harm; establish how direct the connection is between the corrupt act and harm suffered by the victim on the one hand, and the content of the human right and the obligation required from the state on the other hand.
- (5) Evaluate the responsibility of the state for the damage caused; and determine if the state had undertaken an effective investigation and prosecuted those found responsible; further determine which forms of reparation would be adequate for the given case (e.g. restitution, compensation, satisfaction, etc.).<sup>35</sup>

This framework provides a helpful and detailed clarification on how the human rights-based approach works in relation to anti-corruption. It demonstrates the normative potential for human rights to assist in the fight against corruption. I will now analyse how such human rights-based approach can be localized through the concept of *ubuntu*.

### 3. LOCALIZING HUMAN RIGHTS: THE ROLE OF UBUNTU

Despite the efforts that were made since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, to apply human rights on a global or universal scale,<sup>36</sup> attention has turned to the adaptation of human rights to local conditions. The reasons are varied. De Feyter and Parmentier have summarized this in their influential book *The Local Relevance of Human Rights*, as follows:

It is, however, unclear whether the global regime that was so painstakingly developed over the last few decades is of much practical use at the local level to people confronted with the abuse of power and/or inhumane living conditions. This question is

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<sup>35</sup> International Council on Human Rights Policy (n 5) 28-29.

<sup>36</sup> Koen De Feyter and Stephan Parmentier, 'Introduction: Reconsidering human rights from below' in Koen De Feyter, Stephan Parmentier, Christiane Timmerman, and George Ulrich (eds), *The Local Relevance of Human Rights* (Cambridge University Press 2011) 1.



particularly important in the current era of globalisation, when economic and political institutions of different kinds shape and reshape the world at a rapid pace.<sup>37</sup>

Hence, globalization, among others has sparked an important impetus for the localization of human rights. Ako defined localization as:

a process that examines how local communities engage with issues from a rights-based context, particularly from (but not limited to) deprived or disadvantaged positions, in order to seek relevance in a globalised context.<sup>38</sup>

Indeed, the discourse for the localization of human rights is not only coming from the hitherto deprived and disadvantages communities. The discourse has attracted its own specialized working papers series, *Localizing Human Rights Working Paper Series*.<sup>39</sup> This correctly identifies the importance of “the local relevance of human rights, particularly but not exclusively in non-Western contexts.”<sup>40</sup> For instance, the experiences of localization are showing that human rights can make a difference even in England, “a country badgered by widespread skepticism towards anything international.”<sup>41</sup>

In the same vain, African scholars have been working on the concept of *ubuntu* as an entry point for the localization of human rights in the continent. Whilst large numbers of empirical researches into *ubuntu* and human rights are present in South Africa, few and far between are seen in the rest of the continent. Although the African Charter on Human and Peoples Rights is being considered the main source of the

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<sup>37</sup> *ibid.*

<sup>38</sup> Rhuks Ako, ‘Enforcing Environmental Rights under Nigeria's 1999 Constitution: The Localisation of Human Rights in the Niger Delta Region’ in Koen De Feyter, Stephan Parmentier, Christiane Timmerman, and George Ulrich (eds) *The Local Relevance of Human Rights* (Cambridge University Press 2011) 270-294.

<sup>39</sup> See Localising Human Rights Working Paper Series, <<https://www.uantwerpen.be/en/research-groups/law-and-development/publications/localising-human-rights/>> [last accessed 24 September 2020].

<sup>40</sup> *ibid.*

<sup>41</sup> Casla and Dalmeny, ‘What Does this Mean Here? Localizing Human Rights in the UK’ Open Global Rights, October 31, 2019 <<https://www.openglobalrights.org/localizing-human-rights-in-the-UK/>> [last accessed 25 September 2020].

concept of ubuntu, the South African constitution has become associated with the concept.<sup>42</sup> *Ubuntu* embraces all the notions of universal human interdependence, solidarity, and communalism which bolster collective survival. Values of *ubuntu* are known in other systems of jurisprudence although by different names.<sup>43</sup> As Granger observed:

Though it is a South African philosophical terminology, the fundamental epistemological elements of Ubuntu are shared by all Africans communities, with some varying peculiarities due to space and time. Scholars (other scholars) have articulately identified [*Ubuntu*] as the concept [t]hat adequately encapsulates the African indigenous and traditional philosophy.<sup>44</sup>

The dominant script of *ubuntu* has been shaped by the Nguni languages (and cognate terms such as *botho* in *Sotho-Tswana* and *hunhu* in *Shona*).<sup>45</sup> There has been a steady stream of scholarship and popular writing that is promoting *Ubuntu* as a plausible local response to the global human rights standards.<sup>46</sup> Murithi argues that *ubuntu* advances a framework of human dignity or 'humanness' that resonates with the

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<sup>42</sup> Marius Pieterse 'Traditional African Jurisprudence' in Christopher Roederer and Darrel Moellendorf (eds) *Jurisprudence* (Kluwer Academic Publishers 2004) 438, 438.

<sup>43</sup> Dial Dayana Ndima, 'Reconceiving African Jurisprudence in a Post-Imperial Society: The Role of *Ubuntu* in Constitutional Adjudication' (2015) 48 *The Comparative and International Law Journal of Southern Africa* 359, 366.

<sup>44</sup> Peter Genger, 'Combating Corruption with African Restorative Justice Tradition: Suggested Steps for Nigeria' (2011) 11 *African Journal of Criminology and Justice Studies* 20, 24.

<sup>45</sup> Thaddeus Metz, '*Ubuntu* as a Moral Theory and Human Rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532, 533.

<sup>46</sup> Tim Murithi, 'A Local Response to the Global Human Rights Standard: The *Ubuntu* Perspective on Human Dignity' (2007) 5 *Globalisation, Societies and Education*, 277, 281; Nokulunga Queeneth Mkabela, '*Ubuntu* as an Axiological Framework for Human Rights Education' (2014) 13 *Journal of Indigenous Knowledge Systems* 283 -291; Yusef Waghid, 'African Philosophy of Education as a Response to Human Rights Violations: Cultivating *Ubuntu* as a Virtue in Religious Education' (2014) 27 *Journal for the Study of Religion* 267-282; In contrast see Antony Oyowe, 'Strange Bedfellows: Rethinking *Ubuntu* and Human Rights in South Africa' (2013) 5 *African Human Rights Law Journal* 103-124.

notion of human rights.<sup>47</sup> Homonga has also argued that, “[a]rguably, concepts such as [*ubuntu*], which mitigates against western individualism, have the potential to enhance the cultural legitimacy of human rights and their enforceability in African societies.”<sup>48</sup> In his advice to President Barak Obama, Campbell put forward that “a new concept of social collectivism [*Ubuntu*] must be the basis of economic, social, and political organisation if humans are to survive the challenges of the 21st century”.<sup>49</sup> It is my attempt here to contribute to the body of scholarship that advocates for the inclusion of localized and cultural experiences in the concept of universal human rights. One of the major aims in this column piece is to consider the role *ubuntu* plays, or ought to play, in applying a human rights-based approach, in its interpretation and implementation against corruption.

It is therefore appropriate to define the concept of *ubuntu* here. Not everyone means the same thing by ‘*ubuntu*’. However, Muller et al have offered a succinct definition of *ubuntu* “as the African idea of personhood: persons depend on other persons in order to be”.<sup>50</sup> This is summarized in the expression: *umuntu ngumuntu ngabantu*, that is to say, a person is a person through persons.<sup>51</sup>

That said, the concept of *ubuntu* remains one of the misunderstood topics in the African human rights discourse. For instance, its legal meaning is not settled. Indeed, as political commentator McKaiser observes, what:

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<sup>47</sup> Murithi (n 46 ) 5.

<sup>48</sup> Chuma Himonga, ‘The Right to Health in an African Cultural Context: The Role of Ubuntu in the Realization of the Right to Health with Special Reference to South Africa’ (2013) 57 *Journal of African Law* 165, 165.

<sup>49</sup> Horace Campbell, *Barak Obama and 21<sup>st</sup> Century Politics: A Revolutionary Moment in the USA* (Pluto Press 2010) quoted in Horace Campbell, ‘Human Rights, Livelihood and Ubuntu for the 21<sup>st</sup> Century’ *Pambazuka News*, December 09, 2010 <<https://www.pambazuka.org/pan-africanism/human-rights-livelihoods-and-ubuntu-21st-century>> [last accessed 23 September 2020].

<sup>50</sup> Julian Muller, John Eliastan and Sheila Trahereds (eds) *Unfolding Narratives of Ubuntu in Southern Africa* (Routledge 2018) 1.

<sup>51</sup> *ibid.*

[*ubuntu* means in a legal context] depends on what a judge had for breakfast, [and it is] a terribly opaque notion not fit as a normative moral principle that can guide our actions, let alone be a transparent and substantive basis for legal adjudication.<sup>52</sup>

Aside from the definitional problems, *ubuntu* has been further criticized even as a human rights concept. Among the criticisms brought forward are:

- (1) its vagueness: although the word literally means humanness, it lacks the precision required in order to render a publicly-justifiable rationale for making a particular decision;
- (2) its apparent collectivist orientation: with many suspecting that it requires some kind of group-think, uncompromising majoritarianism or extreme sacrifice for society, which is incompatible with the value of individual freedom that is among the most promising ideals in the liberal tradition; and
- (3) its traditional origin: in that ideas associated with *ubuntu* grew out of smallscale, pastoral societies in the pre-colonial era whose world views were based on thickly spiritual notions such as relationships with ancestors (the 'living-dead').<sup>53</sup>

Despite this, Metz has convincingly defended the concept of *ubuntu* against some unsubstantiated, sometimes unscholarly attacks, through empirical research that shows how *ubuntu* can provide a "promising foundation for human rights".<sup>54</sup> To support this assertion it could be argued that, generally human beings find dignity by virtue of their capacity to belong to a community, being identified with and exhibiting solidarity with others.<sup>55</sup> The concept of *ubuntu* promotes solidarity through its values of "communality, respect, dignity, value, acceptance, sharing, co-responsibility, humaneness, social justice, fairness, personhood, morality, group solidarity, compassion, joy, love, fulfilment, conciliation, et cetera."<sup>56</sup> The recognition of the close

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<sup>52</sup> Eusebius McKaiser, Public Morality: Is there Sense in Looking for Unique Definition of Ubuntu? Business Day 2 November 2009.

<sup>53</sup> Metz (n 45) 53.

<sup>54</sup> *ibid.*

<sup>55</sup> *ibid.*, 60.

<sup>56</sup> Irma J. Kroeze, 'Doing Things with Values: The Case of Ubuntu' (2002) 2 Stellenbosch Law Review 252, 260.

link between the respect for human rights and human dignity count as a strong impetus that *ubuntu* can be a basis for the local strengthening of human rights. It thus seems reasonable to suggest that the concept of *ubuntu* in certain ways can be part of the ‘localizing’ solution to contemporary moral dilemmas in the fight against corruption.<sup>57</sup> The next section examines the use of *ubuntu* for the purposes of anti-corruption.

#### 4. UBUNTU AND ANTI-CORRUPTION

The basis of using the concept of *ubuntu* as a stratagem against corruption is based on the understanding of the concept of *people first*. The concept of putting people first to fight corruption has been used in other jurisdictions. For instance, in Ireland the *Action Programme Putting People First* is a government policy for reform and development that puts a strong emphasis on accountability, as the bedrock of a properly functioning system of local democracy. It provides for better engagement with citizens and introduces new degrees of accountability, transparency and external scrutiny, as essential pillars of local democracy.<sup>58</sup> Likewise, in the US the recent anti-corruption legislation, “For the People Act” aims to give power back to the people as envisaged in the US Constitution.<sup>59</sup>

In South Africa, some experts familiar with *ubuntu* have convincingly argued that *ubuntu* can be used to fight corruption. Dumisa and Amao are of the view that using the concept of *ubuntu* to fight corruption “is achievable through the promotion of a stable and ethical leadership complemented with strong institutions and structures to detect and eliminate corruption.”<sup>60</sup> Furthermore, they propose that, “the

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<sup>57</sup> See Campbell (n 49).

<sup>58</sup> See Baile Atha Cliath et. al., *Putting People First - Action Programme for Effective Local Government* (Government of Ireland 2012) i.

<sup>59</sup> See Michael Sozan and Will Ragland, Recent Political Scandals the ‘For the People Act’ Would Prevent From Recurring’ Center for American Progress, February 4 2019 <<https://www.americanprogress.org/issues/democracy/news/2019/02/04/465792/recent-political-scandals-people-act-prevent-recurring/>> [last accessed 21 September 2020].

<sup>60</sup> Siphesihle Dumisa and Olumuyiwa Babatunde Amao, ‘The Utility of Moral Philosophy and Professional Ethics in the Fight against Corruption in South Africa: Any Role for Ubuntu?’ (2015) 4 *Journal of Conflict and Transformation* 83, 105.

formation of a strong anti-corruption regulatory institution, premised on the philosophical foundation(s) of Ubuntu”<sup>61</sup> could help foster transparency and accountability in the public sector. It would do so by ensuring adherence to high moral standards such as common good, human dignity and mutual respect, all which militate against corrupt behavior. Coupled with the fact that the concept of *ubuntu* conveys amongst other attributes, ‘humanness’, ‘good moral disposition’ and ‘a capacity of social self-sacrifice on behalf of others’, this will arguably assist in putting people first as a method of fighting corruption.

However, more recently, cross-national research projects are attempting to isolate the direct correlation between the culture of *ubuntu* and corrupt practices in Africa.<sup>62</sup> In particular, factors found to be influencing corruption as a result of *ubuntu* have been explored by Van der Walt who argued that communalism as a cornerstone of *ubuntu*, can potentially make African societies prone to corruption,<sup>63</sup> for the following two reasons.<sup>64</sup>

First, communalism causes the distinction between private and public funds to become vague.<sup>65</sup> This is possibly due to the inherent philosophy in communalism that is against private property and supports collective ownership. Corruption becomes a matter of culture in general, in the sense that culture represents a set of informal institutions adopted by the population of a country. Corruption also becomes a matter of culture in particular, as a consequence of the cultural embodiment of the formal institution of “property rights”.<sup>66</sup> In other words, because public authorities are left with discretionary powers over property ownership this may breed corruption.

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<sup>61</sup> *ibid.*

<sup>62</sup> See for example Colm Allan, Roberts Mattes and Unathi Millie, ‘Government Corruption Seen from the Inside: A Survey of Public Officials’ Perceptions of Corruption in the Eastern Cape’ (PSAM Research Paper 1 2002)

<sup>63</sup> B.J Van der Walt, *Understanding and rebuilding Africa* (ICCA 2003) 406.

<sup>64</sup> *ibid.*

<sup>65</sup> *ibid.*

<sup>66</sup> Davor Mance and Mario Pecaric, ‘Relationship Between Property Rights Enforcement and Corruption’ paper presented at the 16th International Scientific Conference on Economic and Social Development – The Legal Challenges of Modern World – Split, 1-2 September 2016, 777.

Therefore, clear and unambiguously defined property rights can help to reduce corruption.

Second, communalism puts people under enormous financial pressure.<sup>67</sup> Partly because of the concepts of loyalty and reciprocity, an individual is beholden to other members of the community. The far-reaching implication of this is that people are responsible to take care of their immediate and extended family.<sup>68</sup> This in turn leads to corruption.<sup>69</sup> Van der Walt's reveals that pressure exerted by the extended family system, might cause some people to engage in acts of corruption in order to meet their obligations.<sup>70</sup> The social moral code that underpins the doctrine of *ubuntu*, it has been argued, 'requires' of people to render 'services' and 'counter-services'.<sup>71</sup> This practice often gives rise to several typologies of corruption such as favoritism, nepotism, tribalism.<sup>72</sup>

In studies conducted in South Africa, participants at a workshop made surprising admissions that some senior officials are under pressure to appoint 'struggle-comrades' in jobs, regardless of their skills or qualifications.<sup>73</sup> This is in consonance with a study done in Benin, Niger and Senegal by Blundo and De Sardan which revealed that corruption is often tolerated, because it is legitimised by social practices such as favours, string-pulling, professional protectionism and nepotism, especially when family, neighbours or friends are involved.<sup>74</sup> Grobler and Joubert add that, although nepotism is unethical, African cabinets and public offices are often filled

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<sup>67</sup> Van der Walt (n 63) 406.

<sup>68</sup> Petria M Theron, 'Corruption in Sub-Saharan Africa: A practical-theological response'(2013) 47 In *die Skriflig/In Luce Verbi* 1, 3.

<sup>69</sup> Van der Walt (n 63) 406.

<sup>70</sup> Maurice O. Dassah, 'Is there a Hole in the Bucket? Identifying Drivers of Public Sector Corruption, Effects and Instituting Effective Combative Measures' (2008) 43 *Journal of Public Administration* 37–62.

<sup>71</sup> Theron (n 68) 5.

<sup>72</sup> For a contrary view see in general Tokunboh Adeyemo, *Is Africa cursed?* (Christian Learning Materials Centre 1997); See also Wilbur O'Donovan *Biblical Christianity in modern Africa* (Paternoster Press 2000) 11; Mustafa Hussein, 'Combating Corruption in Malawi: An Assessment of the Enforcing Mechanisms' (2005) 14 *African Security Review* 91, 95.

<sup>73</sup> Theron (n 68) 7.

<sup>74</sup> Giorgio Blundo and Jean-Pierre Olivier De Sardan, *Everyday corruption and the state: Citizens and public officials in Africa* (David Philip Publishers 2006) 9, 12.



with members of the presidents' tribes to ensure the perpetuation of their power base.<sup>75</sup>

The results from these studies all seem to demonstrate the role of culture in ethnic ties and the possible influence it has on corruption. In particular, the social pressure that is placed on individuals as members of a community may force them to behave unethically. To give an illustration, a public official who shows favour to his own kith and kin may not consider this an act of corruption, nor as a deviation from rules, but as a family obligation. This is in line with studies revealing that corruption strongly correlates with "cultural variables", like family ties.<sup>76</sup>

Despite the criticisms levied against the role of culture and communalism within the concept of *ubuntu*, there is ample empirical research determined to demonstrate a neutral correlation between culture and corruption. These show that depending on the social and cultural context in which the transactions take place, "participants in these exchanges are rather nuanced about the activities they are involved in."<sup>77</sup> That is to say, the distinction between what is good and bad cultural practices is not always as straightforward or clear-cut.<sup>78</sup> Therefore, it seems plausible that "any definition of corruption should reflect cultural differences."<sup>79</sup> For instance, Kubiciel has warned against the imposition of "a one sided", Western definition of

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<sup>75</sup> Elana Grobler and S Joubert S.J., 'Corruption in the Public Sector: The Elusive Crime' (2004) 17 *Acta Criminologica* 90, 94.

<sup>76</sup> Robert Klitgaard, 'On Culture and Corruption' paper was presented at the Public Integrity and Anti-Corruption workshop at Nuffield College, Oxford in June 2017 <<https://www.bsg.ox.ac.uk/research/publications/culture-and-corruption>> [last accessed 19 September 2020].

<sup>77</sup> Henk van de Bunt and Hans Nelsen, 'Corruption in Various Shapes and Sizes—Some Criminological Reflections' in Henk van de Bunt et. al. (eds) *International Law and the Fight Against Corruption* (Asser Press 2012) 10.

<sup>78</sup> *ibid* 10-11.

<sup>79</sup> Xandra E. Kramer, 'Private International Law Responses to Jurisdiction and Foreign Judgements and the International Fight against Corruption' in Henk van de Bunt et. al. (eds) *International Law and the Fight Against Corruption* (Asser Press 2012) 59.

corruption that seems to imply that citizens of less developed countries are more corrupt than citizens of more developed countries.<sup>80</sup>

Moreover, on the recognition of cultural roles in the determination of corruption, article 15 of the UNCAC, takes a flexible reference to ‘undue advantage’.<sup>81</sup> Similarly, the explanatory report to the Council of Europe Criminal Law Convention “equally reflects the moral imperialist objection and excludes socially acceptable gifts from its coverage.”<sup>82</sup> As Xander aptly puts,

An undue advantage implies that the official would have acted differently in the absence of the advantage [and] is thus linked to an official’s specific behavior. Cultural gift-giving practices, however, are deemed to be a matter of social courtesy: they do not necessarily constitute corruption as they are not aimed to alter a specific act of a public official. Hence, even the traditional definition of corruption could allow for the exclusion of social courtesy practices.<sup>83</sup>

Thus, understanding the cultural background of an action can impact whether it is considered corrupt. Arguably then, a tempered approach to *ubuntu* is necessary when employing it in the fight against corruption.

## 5. CONCLUSION

This contribution draws attention to the need to make human rights more locally relevant in the fight against corruption. If made more locally relevant, the human rights-based approach can be an effective tool to fight against the adverse effects of corruption on the enjoyment of human rights. In the context of Africa, the concept of *ubuntu* can be the most plausible way to localize human rights. The concept of *ubuntu* conveys among others the idea of ‘humanness’, ‘good moral disposition’ and ‘a capacity of social self-sacrifice on behalf of others’ which can help with putting

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<sup>80</sup> Michael Kubiciel, ‘Core Criminal Law Provisions in the United Nations Convention against Corruption’ (2009) 9 International Criminal Law Review 139, 145.

<sup>81</sup> UN Coalition Against Corruption (n 6).

<sup>82</sup> Council of Europe, ‘Explanatory Report to the Criminal Law Convention on Corruption’ European Treaty Series No. 173, 8 para 9.

<sup>83</sup> Kramer (n 79) 60.

people first as a method of fighting corruption.<sup>84</sup> While the focus on culture and communalism within the concept of *ubuntu* is argued by some as fueling corruption, this column suggests that this should not always be the case. Actions have diverse meaning across different cultural contexts, which should be borne in mind when deciding if an action is corrupt.

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<sup>84</sup> See Christian B.N. Gade, 'The Historical Development of the Written Discourses on Ubuntu' (2011) 30 South African Journal of Philosophy 307–308.