

Theocracy and Gerontocracy: The Unhu/Ubuntu Requisites for Social Justice

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Abstract

The essence for judging the quality of a society with reference to social organisation is determined among other things by its jurisprudence. The societies influenced by the Unhu/Ubuntu philosophy were capable of executing the essence of social justice before emasculation of their socio-cultural and political values by Eurocentric values. Unhu/Ubuntu jurisprudence was hinged on theocracy and gerontocracy. The colonialist and imperialists employed the philosophy of modernism as hegemony to influence societies guided by Unhu/Ubuntu societies to despise their quintessential execution of social justice. A sample of ten elderly people of ages between sixty-eight and ninety-five were purposively sampled and interviewed. The informants were from Masvingo District in Zimbabwe. The research findings point to that social justice was an issue that brought together the whole community, the ancestral spirits of the land and The Creator. When one committed a crime the verdict came from all the stakeholders. The chief who was selected by the leading-clan ancestral spirits was their physical representative and mouthpiece on all jurisprudential issues. The “modernisation” of the traditional socio-cultural and political values was a gimmick employed by the colonialists and imperialists to perpetuate their interests through executing exotic deliverance of social justice which is largely considered as chaotic by the indigenous people. There is a dire need to be engaged in archaeology of Unhu/Ubuntu jurisprudence in an endeavour to share some insights with the formalised modern jurisprudence on some issues of executing social justice.

Keywords: Jurisprudence, Unhu/Ubuntu, Theocracy, Gerontocracy, Social Justice.

1. Introduction

The term jurisprudence sounds quite sophisticated and seems to be alien to the indigenous philosophy of the people of southern Africa. The etymology of the term is from the Latin maxim “jurisprudentia” which was coined by using two words “juris” and “prudentia”. The word “juris” is related to the word “jus” which means law and “prudentia” has an equivalence of the English word ‘prudence’ which inter alia means foresight, forethought, circumspection and makes reference to good judgement [1]. Thus jurisprudence is the science or philosophy of law or the deliverance of justice [2]. Despite having an etymological base that is alien to societies guided by Unhu/Ubuntu, the term ‘jurisprudence’ entails issues about justice deliverance that were realized by these societies. The ideas and values in traditional African jurisprudence must be thoroughly and critically examined so as to give them the contemporary explanations [3].

The scientific nature of law in jurisprudence as perceived in Unhu/Ubuntu had a focus on systemic deliverance of justice. There is a dearth of literature on the philosophical nature of jurisprudence and the anchorage of deliverance of justice on the Unhu/Ubuntu worldview. Unhu/Ubuntu worldview is unique in that there are convictions that the world is shared

by the living people, “living spirits of the dead” and The Creator [4]. Thus from this worldview, the deliverance of justice was a collective issue among the inhabitants of the world. Deliverance of justice in societies guided by Unhu/Ubuntu was not essentially the same in every aspect. The differences that existed were influenced by some historical-geographical factors and were of degree rather than of kind [5]. The similarities were influenced by the consideration of communalistic, theocratic and gerontocratic aspects in deliverance of justice. Thus Unhu/Ubuntu jurisprudence was influenced by some heteronomic formations such as religion, tradition and culture [6].

Since the intrusion by colonialism, jurisprudence guided by Unhu/Ubuntu has been discredited and marginalized by the colonial authorities and the missionaries (Ramosé). The marginalisation had been due to the whims of the intruders after failing to understand the nature of the societies guided by Unhu/Ubuntu. The Unhu/Ubuntu structures are not readily understood by philoso-cultural observers but participants. One of the criticisms that they raised was the absence of historical and philosophical documents from the indigenes of southern Africa about Unhu/Ubuntu jurisprudence [7]. Thus the people who denigrated Ubuntu/Unhu

jurisprudence confused the essence of philosophical world views with script centrism. Notwithstanding the vilification, Unhu/Ubuntu jurisprudence claims to have universal purchase since it can be employed to influence thinking about the universalistic nature of law and justice. It can be considered with almost the same status as the imported general common law in the form of Roman-Dutch law and its amendments [8].

Unhu/Ubuntu informed jurisprudence and the formal justice systems could be employed in a complementary consideration. The focus of formal justice systems is principally retributive in nature and the focus of Unhu/Ubuntu jurisprudence was essentially restorative and could now be realized in customary law [9, 10].

1.1. Nature of Unhu/Ubuntu Jurisprudence

The nature of Unhu/Ubuntu jurisprudence is understood when considered in relation to the general, formal, 'modern' jurisprudence that is informed by the Roman-Dutch jurisprudence. According to Mokgoro, Ubuntu is central to age-old southern-African indigenous customs and traditions which have influenced the indigenous African societies before colonialism [9]. Unhu/Ubuntu jurisprudence to some extent is comparable to modern jurisprudence in some societies which are influenced by the Roman-Dutch law. One of the key issues that modern jurisprudence focuses on is the deliverance of justice influenced by unwritten principles derived from theology, moral philosophy and historical practice [11].

There are three schools of thought on jurisprudence which can be employed to analyse jurisprudential issues in societies guided by Unhu/Ubuntu. Naturalism proposes that the law must reflect external principles of justice and morality that exist in society [12]. The proponents of natural law have a conviction that the heteronomic factors that influence jurisprudence are theology, moral philosophy and historical practice [12]. Natural law theorists are convinced that there are laws that are immanent in nature on which all laws are hinged. The theorists postulate that all the ramifications of law in different societies are a result of hermeneutical diversities of intentions of The Creator to direct human morality for the prosperity of society [12]. Thus an unjust law is not a genuine law and is the antithesis of natural law. Natural law is based on the premise that in society, good things should be done and promoted and that evil things should be avoided [13].

Unhu/Ubuntu jurisprudence has an inclination on heteronomic factors since it is believed that the "living spirits of the dead" and The Creator have a contribution to the deliverance of justice. Heteronomic factors have a focus on historical jurisprudence which is characterised by the deliverance of justice that considers history, tradition and custom. In contemporary jurisprudence in the former colonial states, Unhu/Ubuntu jurisprudence is embodied in customary law [9].

There are also autonomic factors that influence jurispru-

dence. These factors are concerned with rationality and individual conscience [14]. The autonomic factors are individualistic in nature and in some instances do not promote communality [15]. The community and a sense of belonging to it, constitutes the societal fabric of the indigenous people of southern Africa [16]. The autonomic traits are only acceptable in Ubuntu societies when they are used for the benefit of the whole society. They can be considered in the promotion of philosophical sagacity. The sage philosophers were highly regarded for example Tshaka the Zulu King and Nehanda and Kaguvi who were leaders in resisting colonial rule in southern Africa. The sage philosophers were believed to be inspired by the "living spirits of the dead ancestors" [12]. These leaders were not essentially autonomic since the rationality they showed was vicarious.

The other school of thought that could be employed to understand Unhu/Ubuntu jurisprudence is realism. Legal realism posits that the real life practices and interactions determine what is put in place as law [17]. Realists hold the thinking that realism has a lot to do with the politico-legal issues in society [18]. The Realists deny the fact that "a judge begins with some rules or principles of law as his premise, applies this premise to the facts, and thus arrives at his decision" [12]. Judges are not as impartial as is assumed because they are human who have their own predispositions that impact on the legal conclusions they make. Such predispositions account for their intuitive sense of what is right or wrong in a particular case before them. They have their own biases, stereotypes and preconceptions. The decisions judges make are influenced by their views of public policy and personality. Public policy in modern jurisprudence equates to the Unhu/Ubuntu constructions of jurisprudence in indigenous African societies of Southern Africa. Realists believe that a judge is likely to settle cases under conscious or sub-conscious influence of political, economic, psychological and cultural movements coupled with the judge's own individual temperament, personal impulses and lifelong experiences which together create predispositions for certain judicial decisions to be made [12]. The principal tenet of realism is that law is made by human beings and thus is prone to human error due to some biases.

Some aspects of legal realism are alien to Unhu/Ubuntu jurisprudence which has a focus on communal deliverance of justice. The arbitrary settlement of cases was not the practice in Unhu/Ubuntu societies. There was not a single person to give his/her decisions in the settlement of cases hence the judicial decisions under Unhu/Ubuntu jurisprudence is believed to be free from the influences of individual predispositions such as may be obtained in modern jurisprudence. The aspect of realism that was relevant to Unhu/Ubuntu jurisprudence is utilitarianism. This aspect is about the view that the laws should be crafted so as to produce the best judgement for the majority of the people in a society [19]. Thus according to this perspective, justice was considered as fairness. The notion of justice as fairness portrays that the principles of justice were agreed upon by the community as a whole [20]. Thus utilitarian decisions on cases were made in order to promote the prosperity of society [21]. In other

words, Unhu/Ubuntu jurisprudence was communal jurisprudence that emphasized on decisions that were meant to promote prosperity of society and can be described as liberal and egalitarian [22].

The other school of thought that helps the understanding of Unhu/Ubuntu jurisprudence is legal pragmatism. According to the pragmatists, the judges set the goals that they hope to achieve when resolving particular legal disputes. Some of the goals are the preservation of societal stability and the protection of individual rights [23]. Unhu/Ubuntu jurisprudence was to some extent pragmatist in that it aimed to promote social stability through the conciliatory nature of its adjudication process. Unhu/Ubuntu jurisprudence was meant to promote peace and harmony in society because it valued human dignity [24].

To a larger extent, Unhu/Ubuntu jurisprudence was divinely informed. The spirit mediums played an important role in justice deliverance. The Creator and the “living spirits of the dead” also influenced the deliverance of justice. The laws that were applied in society were like the Mosaic laws that were believed to have come from The Creator. However the Unhu/Ubuntu laws were not inscribed anywhere. These laws were passed from generation to generation by oral tradition.

2. Research Methodology

The study employed the qualitative research methodology.

The research paradigm that guided the study was phenomenological hermeneutics. The paradigm is concerned with the interpretation of the realities of life [25]. The study focused on an understanding of the world in which the informants lived. Thus the paradigm was hybridized, combining both phenomenology and hermeneutics. The aim of phenomenology is to understand the lived experiences of the informants [26]. These lived experiences were expressed in the informants’ own words [27, 28].

In phenomenology, researchers generally use interviews [29]. There are generally two parties that interpret situations or experiences when interviews are used. The parties are the informants and the researcher. The informants’ interpretations of experiences in their own words are known as the emic interpretations. These provide the basis for more accurate etic interpretations (that is the researchers’ interpretations) [30]. The etic interpretations are obtained by analysing the emic interpretations (interview data) by employing the Johnson and Christensen method [31, 32]. Thus the Johnson and Christensen method was used in the analysis of data.

The sample of the informants was purposively selected. The criterion for selection was the chronological age. The table below shows the gender and ages of the informants.

Table 1: Informants by Gender and Age.

Informant	Male	Female	Age
Informant 1		X	85
Informant 2		X	76
Informant 3		X	69
Informant 4	X		65
Informant 5	X		90
Informant 6		X	68
Informant 7		X	95
Informant 8	X		75
Informant 9	X		82
Informant 10	X		91

3. Results and Discussions

The worst crime in societies guided by Unhu/Ubuntu was murder. In these societies, murder was understood as the malicious termination of one’s life. Murder had finely nuanced considerations and was distinguished from societal human sacrifices for communal rituals. For example in some communities the people with albinism were said to ‘disappear in the forests’ and one of the twins was ‘expected not to live’. Though it was suspected that there was murder in these cases, the ‘disappearance’ and ‘failure to live’ were considered as such and not as murder.

The settlement of cases was a two tier system. There was the spiritual sub-system which comprised of the “living spirits of the dead” and The Creator. There was also the secular sub-system which was comprised of the village head or chief or king, the councillors and the members of the entire community. Thus Unhu/Ubuntu jurisprudence was communalist and egalitarian [22]. The interests of the whole community were considered [6]. The elderly people were regarded as the sages and considered to be the custodians of values and norms. They were considered to have gained their wisdom through their vast experiences of life and through legends and folklores passed onto them by their grandfathers and grandmothers. The reference to the wisdom of the elderly

implies that Unhu/Ubuntu jurisprudence was to a large extent influenced by gerontocracy. Gerontocracy is the influence by elders who are significantly older and wiser than most of the adult population [33, 34]. Even though there were the chief and village heads in communities, these had ceremonial authority only.

Informant 4 explained: "That boy (meaning the chief) has not yet been contaminated by the Anglican culture. He respects the elderly people and seeks their wisdom. Obviously he is going to be prosperous. He is like his father who became wise by considering the advice from the elderly. During settlement of disputes at his court, it appeared like he was dumb. He spoke at last when consolidating the elders' decisions". Corroborative remarks were given by informant 9; "He (the chief) is only a child ..."

In societies guided by Unhu/Ubuntu, the very elderly people consider members of the younger generation as children even when they are adults. In these societies, a person is incomplete unless he or she maintains an active connection with the society or culture of which he or she is a part [35]. Various African scholars and philosophers have long argued that in traditional, indigenous societies a person is defined by his/her communal relations and attachments to a community [20].

In societies guided by Unhu/Ubuntu chronological age really matters. Despite one's ascribed status, one should always consult with the elderly concerning the governance of society. The serious crimes like murder needed to be handled with the advice of the elders. The chief was there as the ceremonial figure head. Because of his/her age, the elderly people referred to him/her as a boy or girl. Such references were out of the realization of the limited life experiences of these figure heads. The young chiefs were expected to be respectful to the traditions and this was realized through the respect for the elderly. The "boy" labels were not outright derogative remarks but were the indirect encouragement for one to be accommodative of advice from the elders.

The chief was believed to be a leader with spiritual inspirations from the ancestors. The settlement of cases was guided by the ancestral spirits of the community. Thus to a large extent, Ubuntu jurisprudence was theocratic. A theocracy is a form of government in which leaders could be religious leaders or are people influenced by their religious beliefs [36].

Informant 1 explained: "It was believed that the Creator's will about the harmony that prevailed in society was passed onto the ancestral spirits who then through spirit mediums conveyed the Creator's will to the community." Informant 2 gave concurring remarks; "The chief got revealed knowledge from the spirit mediums".

In societies guided by Unhu/Ubuntu, the primogeniture of males was valued. In very rare cases there was primogeniture of chieftaincy of females and it was believed to be the will of the ancestral spirits.

Informants 10 explained about a chief who was a woman: "The inauguration of this girl-child (the chief) was seriously problematic, some people did not want – including her own extended family. But most of the elderly people said that it was okay, and they let the child lead – she was then supported by almost everyone after the proclamation by spirit mediums that by then she was the anointed one."

The support from the elderly people is very important in gerontocratic societies. From the explanations of the informant, gerontocratic and theocratic influences were profoundly revered. The elders as custodians of values and norms were considered to render valuable advice for the prosperity of society. Thus to a greater extent the elders in societies guided by Unhu/Ubuntu have a sense of deontology. According to Garner deontology is the theory of duty or moral obligation [37]. The elderly people in a gerontocracy are obliged to ensure that the traditional moral fabric is maintained. Thus to some extent there was virtue jurisprudence in gerontocratic societies. This is the view that the laws should promote the development of virtuous characters in citizens [13]. Thus jurisprudence guided by Unhu/Ubuntu enabled the development of capacities in people for them to become cooperating members of society.

Unhu/Ubuntu jurisprudence had no distinction between civil and criminal law and had a focus on restorative justice [38]. All cases were treated in almost the same way, focusing on restorative justice. The person who committed a crime was supposed to accept responsibility and make restitution so as to promote harmony in society. According to Mokgoro, restorative justice is described as [9].

... an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his/her actions by providing an opportunity for the parties directly affected by the crime – victim(s), offender and community to identify and address their needs in the aftermath of the crime and seek a resolution that affords healing, reparation and reintegration and prevents further harm.

Unhu/Ubuntu jurisprudence was more conciliatory in nature. The purpose for the settlement of cases was to restore peace and harmony in the community. The victim and the offender had to work towards the restoration of peaceful relationships. The other members of the community played an arbitration role. Thus belonging to a community constituted the very fabric of traditional harmonious interactions guided by Unhu/Ubuntu [16].

3.1. Restorative Justice on Murder Cases

Even though murder was the worst crime in Ubuntu societies, there was no capital punishment that was meted out on the culprit by the secular courts.

Informant 3 Explained: No secular court had the power to sanction capital punishment on a person who had committed murder. The offender sanctioned capital punishment for himself or herself by committing suicide or it was like he was

inspired by ancestral spirits to take away his life. It was also that the murdered person's spirit was avenging for his or her death. So capital punishment came from The Creator and the "living spirits of the dead"

General contemporary jurisprudence the world over is focusing on the contention of capital punishment. There seems to be no agreement. To some extent Unhu/Ubuntu jurisprudence could be used to inform the discourses about such issues [8]. There is a dire need to rethink the value of indigenous Unhu/Ubuntu jurisprudence in the meta-theoretical perspective of post modernism. The thrust of post modernism is on particular situations that would be used to inform general situations (Higgs & Smith). Post modernism perceives the world as in a state of incompleteness and thus promotes the notion of radical pluralism which states that there are many ways of knowing, and many truths to a fact. Thus knowledge is relative to sceptical interpretations of culture, philosophy and history [39, 40]. Even though Unhu/Ubuntu jurisprudence was denigrated and vilified by the missionaries and the colonialists it was virtuous on issues that are contentious globally.

Informant 8 Posited: "About murder cases, seeking arbitration was the first step to be taken by the offender towards conciliation of the spirit of the murdered person. The offender could go to the elderly people in the community or the chief. The spirit of the murdered person if not conciliated through some reparations by the offender, it became an avenging spirit (ngozi). After the reparations, families of the offender and the victim made a covenant of permanent settlement of the case. If the offender refused to recompense, the spirit of the murdered person haunted the family members of the offender by causing mysterious deaths".

In Further Elaboration of the Settlement of Murder Cases, Informant 7 Explained: "For murder, the perpetrator had to recompense since he/she was afraid of the wrath of the avenging spirits. The chief acted as an arbitrator. The perpetrator - under the auspices of his/her relatives were the ones who reported the case to the chief or the elderly people in the community."

The perpetrator bore the responsibility of the crime committed. The admission of guilt was done since the perpetrator wanted conciliation of the spirit of the victim. In Unhu/Ubuntu societies there was no need for the cross examinations of cases. The offender volunteered all the details of the murder he committed.

Reparations for murder cases were expressed by Informant 6: "Long ago it used to be that whoever committed murder was supposed to recompense with a human being. If one murdered a male being he was supposed to recompense with a young girl and a herd of cattle".

Informant 2 corroborated the above explanation: "In the Karanga cult it's known that if you commit murder, serving a jail sentence is not enough. One is supposed to recompense to the deceased's family. "Mushonga wengozi kuripa" [SIC].

(The solution for conciliating an avenging spirit is to recompense for the murder committed). The relatives of the victim demanded a herd of ten or eleven cattle and a human being. If the human being was a girl – She became the wife of the avenging spirit. When the girl got secularly married --- the dowry was for relatives of the deceased. If the being was a boy, he was servant of the family --- when he got married, the family of the deceased paid for the dowry for his wife. His wife became the daughter-in-law of the deceased family. That was how the avenging spirit was conciliated.

Serious cases like murder required restorative justice that involved reparation in the form of a human being. In most cases, girls were used as reparation packages. The paying of reparations was not the sole responsibility of the perpetrator but was an issue addressed by all members of the paternal extended family. Conciliation of the avenging spirit needed the cooperation of the members of the extended family. Every member of the extended family was for the socialization of the other members. Thus when a family member committed a crime, everyone was accountable and this helped in some way to consolidate the cohesion of the extended family.

3.2. Involvement of Ancestral Spirits in Ubuntu Jurisprudence

The Ancestral Spirits were Involved in the Settlement of cases. Informant 5 Explained: "When a family member committed a crime privately and kept it to himself, one of the ancestral spirits possessed a grown up woman, man or even a child who revealed the details about the crime committed. The perpetrator was then made to pay a fine to the other family members. The fine was about incurring costs in hosting the other family members. A beast was slaughtered and beer was brewed."

The members of the extended family assembled for a cleansing ceremony of the whole extended family and some rituals were performed. In societies guided by Unhu/Ubuntu, the value of conviviality was highly regarded. The coming together of people when feasting enhanced social cohesion. Thus in these societies rituals and ceremonies played very important roles in the governance of the people. They provided platforms which contributed to the unity of the family structures and fostered cooperation, a sense of responsibility and belonging in the members of the family or community [6, 9, 10, 12].

In Unhu/Ubuntu Societies, One was Supposed to Respect and Protect One's Parents. Slapping a Parent or Scolding a Parent was a Serious Offence. Informant 6 Explained: "If one slapped a parent or scolded a parent that was a regrettable offence. One was supposed to ask for forgiveness not only from the offended parent but from the whole community. One was supposed to move in the whole community from homestead to homestead explaining his offence and begging for grain which he/she put in a pouch. The elders at each homestead took the opportunity to explain to him/her the value of parents. The grain that was got from begging was used to brew some beer for the whole community. This was done to conciliate the offended parent and the ancestral spir-

its. If one did not perform such a ritual one was going to get retribution from ancestral spirits and from the spirit of the parent when the parent died.

The other informants gave similar explanations. The offender had to get into destitution as a form of retributive punishment. This was considered as a deterrent measure to the community folk about similar offences. The ritual was known as “kutanda botso” in ChiShona. Such a ritual could help in informing effective ways of offering correctional services in the contemporary societies.

3.3. Retributive Justice in Unhu/Ubuntu Jurisprudence

In Unhu/Ubuntu societies, meting out retributive justice varied from one community to the other. Amongst the Karanga people in Masvingo province in Zimbabwe, retribution was in the form of incurring some costs in organising a cleansing ceremony. The attendants were members of the extended family or the whole community depending on the gravity of the crime that was committed. Thus retribution was conciliatory in nature. Amongst the Karanga communities it was believed that retribution mostly came from the “living spirits of the dead”. In the case of murder, retribution came from the avenging spirit. In instances when one worked on the sacred day of the week (usually a Wednesday) referred to as “chisi” in ChiShona retribution came from ancestral spirits.

It was Proclaimed by Informant 1: “If one worked on the sacred day, punishment came from the ancestral spirits. One met with some mishaps for example his cattle died mysteriously. The ancestral spirits could also punish the whole community by a drought or by pests that destroyed the crops.”

Informant 9 Substantiated: “If people worked on that day (sacred day of the week) the rains did not fall or if they fell, they were violent or pests failed the crops”

There was also Retribution from the Community Members. Informant 3 remarked: “If one worked on the traditional sacred day, the community confiscated the farming equipment of the transgressor or one was barred from tilling the fields for the whole season”.

Secular retribution guided by Unhu/Ubuntu was not meted out maliciously. It was done to show that societal values and norms should not be transgressed easily. The retribution by the members of the community was meted out to subvert the wrath of the ancestral spirits. The rehabilitation of the offender in the community was the responsibility of everyone.

3.5. Unhu/Ubuntu Secular Jurisprudence Procedures

The secular subsystem of Ubuntu jurisprudence was structured hierarchically.

The Informants Gave convergent Information about this issue. Informant 1 made the Remark: “There were structures in society for the settlement of disputes. There was the village head, chief and king”

Each of the figure heads had some councillors. Most of the disputes in communities were resolved at the chief’s court.

The elderly people and the adults in the community were invited to the settlement of disputes.

The Settlement of Disputes was Described by Informant 10 as Follows: “The councillors interrogated the person who was a suspect. The chief and the elderly people listened carefully weighing the evidence. The councillors then suggested the verdict and the chief and the elderly people then considered the fairness of the verdict. The chief then finalized the case consolidating the judgement. The convicted person was supposed to pay reparations. The dates for payment of reparations were agreed upon.”

The chief never acted without the advice and concurrence of his councillors who acted as representatives of the people [20]. Thus autonomic factors were alien to societies guided by Unhu/Ubuntu. There was an adage in some Unhu/Ubuntu societies that, “A chief is a chief by the people” [20]. The adage implies that there was consensual egalitarian jurisprudence rather than coercive autocracy. Traditional chiefs guided by Unhu/Ubuntu were bound by customary obligation to rule with the consent of the people [20].

The people who came to help the settlement of a dispute were supposed to be impartial. Whoever showed bias was removed from the court.

The Informants Agreed with Informant 4 who Proclaimed: “If one was biased in the settlement of a dispute he was asked by the councillors to slaughter a goat for the court. Both the complainant and the victim each brought a goat to the chief’s court”.

The person who showed bias was considered to be an obstacle to justice and hence societal peace and harmony. Thus the assignment of slaughtering a goat while others were settling a dispute was considered to be very derogatory. Thus Unhu/Ubuntu jurisprudence was very much against realist inclination in the deliverance of justice. Justice was perceived as the gem for societal prosperity in the indigenous societies guided by Unhu/Ubuntu [41-45].

4. Conclusion

The etymology of the term ‘jurisprudence’ is alien to Unhu/Ubuntu. Nevertheless since it is concerned with a synopsis of reality in the global governance of society, it is relevant to societies guided by Unhu/Ubuntu. Unhu/Ubuntu is a philosophy which guided the livelihoods of the indigenous people of southern Africa before colonialism. The jurisprudential issues guided by Unhu/Ubuntu were influenced by heteronomic factors since they involved the living, ‘living spirits of the dead’ and The Creator. Unhu/Ubuntu jurisprudence has been discredited and marginalised by the colonial authorities who failed to understand the jurisprudential structures in societies guided by Unhu/Ubuntu.

These Unhu/Ubuntu philosophical observers had biases in confusing the essence of philosophical world views with script-centric values. Despite the vilifications, some aspects of Unhu/Ubuntu jurisprudence are comparable to modern

jurisprudence that is guided by the Roman-Dutch law. The concept of public policy in modern jurisprudence equates with Unhu/Ubuntu jurisprudence as both are based on principles that are often unwritten but are viewed by the community as acceptable. There are schools of thought on modern jurisprudence that can be employed to clarify Unhu/Ubuntu jurisprudence applicable in Southern African societies. The schools are naturalism, realism and pragmatism. They help to explain the nature of Unhu/Ubuntu jurisprudence as a two-tier system comprised of the secular sub-system influenced by the elders and the spiritual sub-system influenced by the “living spirits of the dead” and The Creator.

Thus the jurisprudence in societies guided by Unhu/Ubuntu was both gerontocratic and theocratic. The worst crime in Unhu/Ubuntu societies was murder. Settlement of murder cases was conciliatory with less emphasis on retribution. It focused more on restorative justice which was dispensed by the secular courts guided by the wisdom of the elderly people. If the perpetrator did not pay reparations, it was believed that retributive justice would be meted out by the spiritual sub-system. There is a lot to borrow from traditional indigenous jurisprudence especially on the contentious issue of the death penalty. Dealing with murder cases might require a blend of modern jurisprudence and Unhu/Ubuntu jurisprudence. The retributive nature of modern jurisprudence is then moderated with the restorative nature of Unhu/Ubuntu jurisprudence to attain social justice.

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