

# Introducing *Ubuntu* to Property Law: A Case for Environmental Stewardship

Sfiso Benard Nxumalo\*

*'If you sell your father's land to buy a trumpet, where will you stand to blow it.'*

- African Proverb

## A. INTRODUCTION

*Ubuntu* refers to humanness.<sup>1</sup> Although it is difficult to translate *ubuntu* into Western epistemological thought easily, it posits that a human being is a human being because of other human beings.<sup>2</sup> It is a relational perspective in which individual identities are inextricably linked to the well-being of the collective.<sup>3</sup> At its core, *ubuntu* encompasses, *inter alia*, values of group solidarity, community, sharing, compassion, respect, and human dignity. It is a meta-concept, a worldview rooted in African societies, that recognises the interdependence of the members of a community. Contradistinguished from individualism, it places primacy on community. In *Makwanyane*, a seminal South African case in which the Constitutional Court declared the death penalty to be unconstitutional, Mohamed J described *ubuntu* as expressing —

‘the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; the joy and the fulfilment involved in recognizing their innate humanity; the reciprocity this generates in interaction within the collective community; the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by.’<sup>4</sup>

In this paper, I argue that *ubuntu* offers an alternative and attractive understanding of property and property law. I argue that currently understood property is based on the right to exclude. This right to exclude enjoys a high premium in a capitalistic society. Property, built on the right to exclude and market efficiency, has demonstrably failed

---

\* Stipendiary Lecturer, Brasenose College, University of Oxford; DPhil in Law Candidate (University of Oxford); BCL (University of Oxford); and LLB (University of Witwatersrand).

<sup>1</sup> It is derived from the isiZulu saying ‘*umuntu ngumuntu ngabantu*’, which means that a person is person because of others. See Lucy Allais, ‘Humanness and Harmony: Thad Metz on *Ubuntu*’ (2022) 51 *Philosophers Papers* 203-237.

<sup>2</sup> Leyla Tavernaro-Haidarian, ‘Deliberative Epistemology: Towards an *ubuntu*-based epistemology that accounts for a priori knowledge and objective truth’ (2018) 37 *South African Journal of Philosophy* 229-242.

<sup>3</sup> Ellen Fungisai Chipango, ‘Why do Capabilities need *Ubuntu*? Specifying the relational (im)morality of energy poverty’ (2023) 96 *Energy Research and Social Science* 1-9 and Adrian D. van Breda, ‘Developing the notion of *Ubuntu* as African theory for social work practice’ (2019) 55 *Social Work* 439-450.

<sup>4</sup> *S v Makwanyane and Another* 1995 (3) SA 391 [263].

to address environmental challenges. The dominant view, emphasising private ownership of resources with minimal state intervention, incentivises unsustainable exploitation. This approach has led to deforestation, land degradation, and the depletion of natural resources.

*Ubuntu* represents a normative break from abstract, hierarchical property rights arrangements centred around the right to exclude. Property generally follows an abstract, syllogistic logic predicated on an immutable, hierarchal rights arrangement. *Ubuntu* challenges the hegemonic hierarchical rights arrangement, privileging the right to exclude.

Under *ubuntu*, the environment is an integral part of the community. Individuals and nature are seen as interconnected and interdependent. *Ubuntu* imbues moral value to nature and inanimate objects. Land is seen as connecting all living forms. Nature and humans form a coherent whole. Under *ubuntu*, the premise of human action is interrogated. It questions whether one's actions are motivated by selfishness and resource-depleting actions. These types of actions would be at odds with *ubuntu*. Simply put, the senseless (read selfish) depletion of natural resources means the destruction of humanity itself.

The point of the argument is captured in the opening proverb. The proverb 'If you sell your father's land to buy a trumpet, where will you stand to blow it?' illustrates the dangers of absolute ownership. Selling the land, a valuable resource for future generations, for a fleeting pleasure like playing the trumpet represents disregarding one's responsibility as a custodian. On the other hand, *ubuntu* emphasises responsible use of resources for the benefit of present and future generations.

In the following few pages, I will argue the following. First, I contend that the dominant understanding of property has adverse environmental ramifications. This dominant understanding, perhaps most strongly articulated by William Blackstone, is predicated on the right to exclude over a thing.<sup>5</sup> Under a political economy that prizes capitalism and individualism, this has contributed to deleterious climate change and unsustainable practices. Secondly, I sketch the normative content of *ubuntu* as a legal philosophy. *Ubuntu* is notoriously difficult to define and has shifting meanings. However, this does not denude its significance. It remains an attractive relational, multi-dimensional worldview of 'African ontological values of interconnectedness, common humanity, collective sharing, obedience, humility, solidarity, communalism, dignity, and responsibility to one another.'<sup>6</sup> Thirdly, I propose *ubuntu* as an alternative legal philosophy to underpin our understanding of property. Under *ubuntu*, property ownership is seen as custodianship, with responsibility for future generations. This contrasts with individual ownership (with the right to exclude), where the owner has unfettered rights to exploit the resource. Custodial ownership necessitates sustainable practices that ensure the long-term viability of the resource.

For clarity, this paper does not propose that *ubuntu* can rescue the right to exclude over a thing and its shortcomings. *Ubuntu* and the right to exclude over a thing are conceptually distinct concepts, which are mutually exclusive at worst or not easily

---

<sup>5</sup> William Blackstone, Commentaries on the Laws of England (vol 2, Liberty Fund 1765) 2.

<sup>6</sup> Ndjodi Ndeunyema, 'Re-Invigorating *Ubuntu* Through Water: A Human Right to Water under the Namibian Constitution' (PULP 2021) 68-69.

reconcilable at best. In addition, this article should not be understood as suggesting that *ubuntu* will solve all environmental issues that may arise. Its contribution is less ambitious. All I seek to do is suggest a different way of understanding property, which may have less adverse impact on the environment. I do not offer *ubuntu* as a perfect theory or 'way of knowing'. It has been criticised, and I will turn to these criticisms later. But these criticisms, I think, are not fatal to *ubuntu* and do not detract from its attraction.

The attraction of *ubuntu* lies in its emphasis of understanding the world through the lens of community, shared stewardship and its emphasis on our collective responsibility to take care of our resources. This appeal is particularly strong in the case of land, a finite resource. While the Earth itself may not be shrinking, the amount of usable and productive land certainly is. Desertification, soil erosion, rising sea levels, and unsustainable practices all contribute to this ongoing loss. Imagine a finite pool of fertile soil constantly under pressure - *ubuntu's* emphasis on shared stewardship encourages practices that maintain, and even improve, this vital resource for future generations..

Two caveats are necessary. First, while in this paper I extrapolate and engage with the philosophical of property generally, I am specifically concerned with land as the anchoring for the arguments I seek to make. Despite this paper being concerned with property in the form of land, the arguments I present will have purchase in other forms of property. I say this because I am particularly concerned with property, which refers to legal relationships between individuals and a thing, and my arguments go the DNA of the property. These arguments are relevant to property broadly, despite my focus on land.

Secondly, the paper is not jurisdictionally restricted. While *ubuntu* is an African concept, I do not present an African-based focus but aim to demonstrate that *ubuntu* is a universally attractive point. It is an attempt to engage with the theoretical underpinnings of property by introducing a different lens from which to understand property. *Ubuntu*, which emphasises communal relationships, mutual respect, and collective well-being, transcends geographical and cultural boundaries. By situating *ubuntu* within a global context, the paper seeks to illustrate its relevance and applicability to various legal systems and societal structures worldwide. The idea is to move beyond the traditional, often Western-centric, perspectives on property and to offer a more holistic and inclusive approach.

This broader perspective allows for a richer, more nuanced discussion about property rights and obligations. It challenges the conventional notions of individual ownership and private property by highlighting the importance of community and shared resources. In doing so, it provides a fresh and innovative framework for rethinking how property is conceptualised and managed in different contexts.

Moreover, this approach aligns with contemporary global challenges, such as environmental sustainability and social justice, where collective action and shared responsibility are crucial. By integrating the principles of *ubuntu*, the paper advocates for a more equitable and sustainable model of property relations that can resonate with diverse cultures and legal traditions. This exploration also opens up new avenues for interdisciplinary dialogue, inviting insights from anthropology, sociology, environmental studies, and beyond. It underscores *ubuntu's* potential to contribute to

a more inclusive and equitable understanding of property that benefits not just individuals but communities and societies at large. This also leads me to the following related point.

This paper is decolonial.<sup>7</sup> Property and the law of property served to exclude and diminish the lives (not just modes of living) of colonised peoples. This was achieved by introducing the concept of possession and ownership being dependent on improvement of the land.<sup>8</sup> Central to this was the idea of property being crucial to forming someone as a legitimate legal subject.<sup>9</sup> In the colonies, being a property owner and having the ability to acquire property were seen as essential prerequisites for someone to be considered a proper legal subject, or a fully recognised citizen-subject under the law.<sup>10</sup> This demonstrates, as Fanon argued, that property law functioned as a tool of colonial domination.<sup>11</sup>

A decolonial approach to property provides a way for us to (re)think the racialised notion of use and improvement and reconfigure and transform the grammar of property itself. Reconstructing use and improvement enables us to defang property's racialised, exploitative and exclusionary nature. In other words, property is conceived outside of predatory colonial-capitalistic relations. In a decolonial context, property is recognised as being more than a commodity to be exploited – it has a significant social component.

## **B. DOMINANT CONCEPTS OF PROPERTY: THE *SINE QUA NON* OF PROPERTY – THE RIGHT TO EXCLUDE**

The aim of this section is to discuss the dominant conception of property. The argument is that the right to exclude [over a thing] is at the heartland of property. When one speaks of property, they are speaking of the right to exclude, which is the 'the right to prohibit one or more persons from using a particular resource, either at all or in some category of way.'<sup>12</sup>

### **(1) The Right to Exclude As the Necessary and Sufficient Condition of Property**

Property is ubiquitous.<sup>13</sup> Hammond J in *White v Chandler* stated that property rights, next to constitutional rights, are the strongest interests recognised in law.<sup>14</sup> Despite

---

<sup>7</sup> See Margaret Davies, 'Decolonising Property Justifications' (2019) 4 *Journal of Global Indigeneity* 1-5.

<sup>8</sup> Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes* (Duke University Press 2018) 3.

<sup>9</sup> *Ibid* 4-5.

<sup>10</sup> Sfiso Benard Nxumalo, 'The Role of Property in Postcolonial Contexts' (2022) 10 *African Law Review* 31, 32.

<sup>11</sup> Franz Fanon, *The Wretched of the Earth* (Penguin Classics 1961) 109-111.

<sup>12</sup> James T. Stern, 'What is the Right to Exclude and Why does it Matter?' in James Penner and Michael Otsuka (eds), *Property Theory: Legal and Political Perspectives* (Cambridge University Press 2018) 39.

<sup>13</sup> JW Harris, *Property and Justice* (Oxford University Press 1996) 4 and 6.

<sup>14</sup> *White v Chandler* [2001] 1 NZLR 28 [67].

the ubiquitous nature of property and its importance as a social institution, there is marginal agreement on what constitutes property. Some property scholars eschew a rigid definition of property. For instance, Harris notes that there is no true definition of property and that what might constitute property in one jurisdiction might not be considered property in another.<sup>15</sup> As Digest 50.17.202 cautions, any definition in law is dangerous as it may easily be subverted (*omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset*).<sup>16</sup> The abstruse peregrination of defining the nature of property is not prompted by abstract academic curiosity but because defining property, which is a significant component of society's social relations, has practical implications. To this end, the South African Constitutional Court recognised that: 'The land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it; and we are buried in it.'<sup>17</sup> Though this was about land, the sentiment applies to property broadly.

However, this has not detained political philosophers and scholars from debating the philosophical justifications of property and the essence of property law.<sup>18</sup> On the one hand, Hugo Grotius,<sup>19</sup> John Locke<sup>20</sup> and Georg W.F. Hegel<sup>21</sup> argue that property is pre-social, a natural right that came into existence prior to the emergence of the State and law. On the other hand, Thomas Hobbes,<sup>22</sup> David Hume<sup>23</sup> and Jeremy Bentham<sup>24</sup> contend that property is social, a positive right created by the State, the community or the law to secure other objectives. For economic property theorists, property comprises an authoritative list of recognised and permitted uses of a specific valuable resource, which is indispensable for well-functioning markets.<sup>25</sup>

Even with these debates, there generally appears to be some consensus on certain aspects of property. First, in a legal sense, property goes beyond a physical thing and concerns a person's rights and the legal relationships that flow from such rights. Second, property is more than mere possession or control over a thing. Third, property involves rights over tangible and intangible things. Fourth, there must be some way to enforce property rights.<sup>26</sup>

---

<sup>15</sup> Ibid 139-140.

<sup>16</sup> *National Stadium South Africa (Pty) Ltd v FirstRand Bank Ltd* 2011 (2) SA 157 (SCA) [30].

<sup>17</sup> *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) [1].

<sup>18</sup> Richard Schlatter, *Private Property: The History of an Idea* (George Allen & Unwin 1951); Felix Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers Law Review 357; Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988); Stephen Munzer, *A Theory of Property* (CUP 1990); John Christman, *The Myth of Property* (OUP 1994); James Penner, *The Idea of Property in Law* (Clarendon Press 1997); Thomas Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 730.

<sup>19</sup> Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (FW Kelsey tr, Clarendon Press 1925),

<sup>20</sup> John Locke, *Second Treatise of Government* (OUP 1690).

<sup>21</sup> Georg WF Hegel, *Philosophy of Right* (CUP 1821).

<sup>22</sup> Thomas Hobbes, *Leviathan* (Clarendon Press 1651).

<sup>23</sup> David Hume, *A Treatise of Human Nature* (Clarendon Press 1739).

<sup>24</sup> Jeremy Bentham, *The Theory of Legislation* (Kegan Paul, Trench, Trubner & Co. 1802).

<sup>25</sup> Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26 The Journal of Interdisciplinary History 639. Also see Thomas Merrill and Henry Smith, 'What happened to Property in Law and Economics?' (2001) 111 Yale Law Journal 357 and Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

<sup>26</sup> Thomas Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska Law Review 729, 731-733.

Historically, property was regarded as a collection or bundle of rights between persons involving a 'thing', which are enforceable against the world.<sup>27</sup> Thus, property rights are *in rem*.<sup>28</sup> Stated differently, property refers to a legal relationship between persons over a thing, which conferred rights to a particular individual to exclude a large and indefinite category of other people (that is, the world) from the thing. This can be contrasted with a right *in personam*, which refers to a right against a specific or small number of identified persons.<sup>29</sup> Consider this example: X owns a manor house and can occupy and use the house. There is a *prima facie* duty on the world to not interfere with X's rights to own, occupy, use and sell his manor house. This can be understood to be a right *in rem*. In contrast, X may lease his property to Y and demand Y to pay him monthly rent. This right to rent from Y is a right *in personam*.

The bundle of rights thesis as an explanation is wanting. The bundle of rights thesis implies that property is a concept without a core – different arrangements of the incidents may all constitute property, but no particular arrangement is definitive. The bundle thesis, metaphorically speaking, does not have a soul. As Penner states, the bundle of rights thesis claims that property is without a definable essence.<sup>30</sup> Related to this point, Shroader states that under the bundle of rights thesis, 'property does not, or at least should not, exist'.<sup>31</sup> Property loses objectivity and can only be a myth without unity and physicality. Because property is everything, property is nothing.

Further, the bundle of rights thesis does not distinguish property from other contracts or torts. Contract and tort can equally be defined as a bundle of rights. The law of tort, which upholds the right not to be harmed, or conversely, the duty not to cause harm, encompasses numerous rights or duties. Similarly, the law of contract emerged historically from combining various actions with distinct conceptual foundations.<sup>32</sup>

Van der Walt has argued that, generally, property has been characterised by an abstract ownership paradigm underpinned by a syllogistic relationship between

---

<sup>27</sup> Wesley N Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale Law Journal. Hohfeld provides a compelling quadrumvirate explication of property, which involves rights, power, liberties and immunities. These are understood as forming the basis of the 'bundle of rights' thesis. A M Honoré, 'Ownership' in Anthony Guest (ed), *Oxford Essays in Jurisprudence* (OUP 1961) is generally perceived as the source for the modern 'bundle of rights' thesis. Honoré identifies eleven 'standard incidents of ownership', which explicate an understanding of ownership. An owner has rights to possession, use, management, income, capital, security and transmissibility, duties to prevent harm, liabilities to the execution of judgment debts and on insolvency and rights to the residue when lesser interests end, all for an indefinite term. See further James Penner, 'The "Bundle of Rights" Picture of Property' (1995-96) 43 UCLA Law Review 711; and Eric Claeys, 'Property 101: Is Property a Thing or a Bundle?' (2008-09) 32 Seattle University Law Review 617.

<sup>28</sup> Jürgen Kohler, 'The Law of Rights *In Rem*' in Werner Ebke and Matthew Finkin (eds), *Introduction to German Law* (Kluwer Law International 1996) 227, 23. Blackstone famously described property as 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe' in *Commentaries on the Laws of England* (1753) (J.B. Lippincott Co., 15<sup>th</sup> edn, 1809). Blackstone's view was that property is a real right but the reference to the "sole and despotic dominion" was a hyperbole or overstatement.

<sup>29</sup> Robert Stevens, 'When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?' (2012) 92 Boston Law Review 919, 920.

<sup>30</sup> James E. Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA Law Review 711, 723.

<sup>31</sup> Jeanne L. Schroeder "Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property" (1994) 93 Michigan Law Review 239, 240.

<sup>32</sup> Penner (n 30) 739.

property rights and remedies.<sup>33</sup> The common conception is that ownership is usually regarded as the most comprehensive right one can have over property. Thus, ownership is considered to be the most superior right in property. Incidental to ownership is eviction, which logically flows from the right to exclude. The right to exclude an intruder from one's property is vital to the ownership and property. Merrill contends that it is the *sine qua non* of property.<sup>34</sup> Without the right to exclude, there is no property. In other words, or one to claim that they own property, the right to exclude is a necessary and sufficient condition.<sup>35</sup> Badenhorst and his co-authors note that the exclusionary focus of property demonstrates that ownership is the vertex of property.<sup>36</sup> They also recognise that inherently, in property, there is a hierarchy of rights, with superior rights on one end of the spectrum and weaker ones on the other.<sup>37</sup>

Thus, a property holder's rights, such as the right to own, will generally trump weaker rights or interests not recognised under property law, such as a personal right. As van der Walt notes, 'this syllogistic logic locks the adjudication of property disputes into an abstract doctrine that ranks various rights and interests in an immutable hierarchy that allows no or little room for considerations of context or fairness.'<sup>38</sup> This preoccupation with ownership and the right to exclude demonstrates that property primarily protects property holders from non-owners. It also evinces that property has a particular problem with non-owners.<sup>39</sup>

Thus, the dominant conception of property involves the protection of individual control over valuable resources.<sup>40</sup> It is commonplace that, as Merrill and Smith aver, the right to exclude is at the core of property rights.<sup>41</sup> Douglas and McFarlane asseverate that the distinctiveness of property is that it confers a right on the property-owner (or holder) to exclude non-owners and the correlative duty it imposes on the rest on the rest of the world to not deliberately or carelessly interfere with the owner's property. Van der Walt remarks that property acts as a fence that protects and safeguards owners against external threats and that the exclusionary nature of property triggers a legion of legally conclusive results.<sup>42</sup> In *Wolf*, Mauceri J enunciated that the property owner may exclude anyone and everyone from her property for any reason whatsoever.<sup>43</sup> And this is the central fault line of property and property law.

---

<sup>33</sup> AJ van der Walt, *Property and Constitution* (PULP 2012) 114 and AJ van der Walt, 'Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation' (2002) 2 *Journal of South African Law* 254, 255.

<sup>34</sup> Merrill (n 26) 730.

<sup>35</sup> *Ibid* 731.

<sup>36</sup> PJ Badenhorst, Juanita Pienaar, Hanri Mostert, *Silberberg and Schoeman's The Law of Property* (LexisNexis Butterworths, 4th edn, 2003) 93.

<sup>37</sup> *Ibid*.

<sup>38</sup> Van der Walt, *Property and Constitution* (n 33).

<sup>39</sup> Rashmi Dyal-Chand 'Sharing the cathedral' (2013) 46 *Connecticut Law Review* 647, 651 and Rashmi Dyal-Chand, 'Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law' (2014) *American University Law Review* 1683, 1687.

<sup>40</sup> Gregory S. Alexander, Eduardo M. Peñalver, Joseph W. Singer and Laura S. Underkuffler, 'A Statement of Progressive Property' (2009) *Cornell Law Faculty Publications* 743, 743.

<sup>41</sup> Thomas W. Merrill and Henry E. Smith, 'The Morality of Property' (2007) 48 *WM & Mary Law Review* 1849, 1849, 1857, 1861-1862.

<sup>42</sup> Van der Walt, *Property and Constitution* (n 33) 82-83.

<sup>43</sup> *People v Wolf* (1970) 63 *Misc.2d* 178

## (2) Recognising Other Progressive Forms of Property

The fact that I have labelled the right to exclude as the dominant conception means that there are other conceptions, which are axiomatically not dominant. One such conception is the bundle of rights, which I discussed above.

Other conceptions see property as being underpinned by human values. Accordingly to the progressive theory, property has to be informed by human values. The values underlying rights and property law are various and incommensurable. A non-exclusive list of values that may be associated with property includes the following: human dignity, fairness, social justice, economic efficiency and social welfare.<sup>44</sup> As Singer argues, the social quality of property rights should be emphasised.<sup>45</sup> Every legal right should be construed not merely with reference to the rights, liberties, privileges and immunities it gives the property owner. Rather, it should be understood with reference to the impact of the exercise of those powers on non-owners and the shape and character of the social relationships generated by those rights and powers.<sup>46</sup>

There is also a theory of sustainable webs of interests, which argues that property can be understood as a web of interests.<sup>47</sup> Under this theory, property interests are defined and perceived through certain characteristics of the object of the property (which includes natural features and environmental carrying capacity) and the interconnected relationships that people, entities and institutions form with respect to the particular object.

There are clearly other conceptions of property that try to numb the harshness of the dominant conception. However, none of these alternative conceptions emphasise the importance of community (past, present, and future) and duties (shared responsibility) in the same way as *ubuntu*—this will be discussed later.

Largely, property law falls within private law and is generally divorced from environmental law and environmental issues, which fall within public law.<sup>48</sup> Property, arguably, forms the basis of modern-day capitalism. This is because capitalism is dependent on property rights and their robust protection. This provides a plausible explanation for why most states place strong protection against property – to ensure that capitalism persists. But this can be traced back several centuries. In the 18<sup>th</sup> century, Adam Smith built upon these ideas propounded by Locke and Hobbes when formulating his theory of capitalism. Essentially, Smith argued that individuals,

---

<sup>44</sup> Joseph William Singer, 'Property and Social Relations: From Title to Entitlement' in G. E. van Maanen and A. J. van der Walt (eds), *Property Law on the Threshold of the 21<sup>st</sup> Century* (Maklu 1996) 69-90.

<sup>45</sup> Joseph William Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 *Cornell Law Review* 1009, 1046-1047.

<sup>46</sup> *Ibid* 1047.

<sup>47</sup> Craig Anthony Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *Harvard Environmental Law Review* 281-364 and Craig Anthony Arnold, 'Sustainable Webs of Interests: Property in an Interconnected Environment' in David Grinlinton and Prudence Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff 2010).

<sup>48</sup> David Grinlinton, 'The Intersection of Property Rights and Environmental Law' (2023) 25 *Environmental Law Review* 202, 202.



motivated by rational self-interest, would direct their efforts towards maximising the value of their output. This necessitates efficient accumulation of capital, which can be exchanged in a competitive marketplace, ultimately fostering economic growth.<sup>49</sup> Central to this model is the importance of secure property rights, serving as a dependable store of wealth and a means to mobilise financial resources. It is to this relationship I turn to next and its impact on the environment.

## C. ON PROPERTY RIGHTS, CAPITALISM AND ENVIRONMENTAL LAW

Having established that the right to exclude is central to property, it is important to consider how property fits into the capitalism puzzle. Once this is shown, I move on to making an argument about how the relationship between capitalism and property has had detrimental effects on the environment.

### (1) Property Rights and Capitalism

Capitalism is an 'ism'. It is an ideology. It is an ideology and economic system predicated on the notion that specific individuals should possess capital while others labour for them. Within the classical Marxist paradigm, this arrangement entails workers receiving wages while capitalists accrue a disproportionate surplus value, owing to their ownership of the means of production.<sup>50</sup> The worker produces while the capitalist owns the means of production. Capitalism requires class stratification on the basis of money. Property law, employment contract law and corporate law are central to maintaining that stratification because they fix ownership of assets within one class while organising the obligations of the other classes as different types of workers.<sup>51</sup>

Property rights are a necessary but insufficient condition for capitalism. Or at least that is what Rubin and Klumpp argue.<sup>52</sup> Other ingredients for capitalism include the enforcement of contractual arrangements, free markets and competition to organise exchange, and the existence of profit-maximising firms and so-called entrepreneurs to organise and drive production. Property rights, orientated around the right to exclude,<sup>53</sup> are instrumental: for the use and development of resources; for trade and alienation; for capital accumulation and growth and; for the resolution of conflict.<sup>54</sup> I expand on why this is so below. However, in setting this out, I do not endorse capitalism as indispensable and vital to the functioning of society. I make these observations without any endorsement. I also do not set out all the criticisms of

---

<sup>49</sup> Adam Smith, *Wealth of Nations* (New York, P.F. Collier & Son, 1909-14).

<sup>50</sup> Karl Marx, *Capital: A Critique of Political Economy* (Penguin Classics 1990) 293.

<sup>51</sup> Alaster Hudson, 'Law as Capitalistic Technique' (2018) 29 *King's Law Journal* 58, 58-59 and Geoffrey M. Hodgson, *Conceptualizing Capitalism: Institutions, Evolution, Future* (University of Chicago Press 2015) 120-124.

<sup>52</sup> Paul H. Rubin and Tilman Klumpp, 'Property Rights and Capitalism' in Paul H. Rubin, Tilman Klumpp and Dennis C. Mueller (eds), *Property Rights and Capitalism* (OUP 2012) 204.

<sup>53</sup> Katharina Pistor, 'Liberal Property Law vs. Capitalism' *LPE Project* (27 January 2021) <<https://lpeproject.org/blog/liberal-property-law-vs-capitalism/>> accessed 13 May 2024.

<sup>54</sup> See Timothy Besley and Mitreesh Ghatak, 'Property Rights and Economic Development' in Dani Rodrik and Mark Rosenzweig (eds), *Development Economics* (Elsevier 2005) 4526-4589.

capitalism in this paper. It is beyond my expertise to do so. I observe the adverse impact capitalism has on the environment.

Without private property rights, there would be a lack of incentive for the efficient use and development of resources. Or so the argument goes. Property rights affect resource allocation by encouraging people to carry out productive activity involving the asset, undertake investments that maintain or enhance its value, and also to trade or lease the asset for other uses.<sup>55</sup> It is said that without private property rights, the tragedy of the commons arises. Consider this example. Imagine a pasture that is open to all local farmers for grazing their animals. Each farmer wants to maximise their own benefit, so they keep adding more animals to the pasture to increase their own profit. However, as more animals graze on the pasture, the grass becomes overgrazed, leading to soil erosion and eventually rendering the pasture unusable for everyone.<sup>56</sup>

The tragedy of the commons is that they face two dangers: overuse (that is, a demand-side failure) and underinvestment (that is, a supply-side failure).<sup>57</sup> This is because people with unfettered access to a finite, valuable resource (goods with rivalry and excludability) will generally overuse and underdevelop them. After all, they do not incur any costs or losses. This echoes Aristotle's caution that:

'For that which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest, and only when he is himself concerned as an individual. Besides other considerations, everybody is inclined to neglect something he expects another to fulfil.'<sup>58</sup>

Thus, property held in common is likely to be neglected by everyone because the benefit to any one particular individual of maintaining or caring for the commons will not be significant enough for them to do so.<sup>59</sup> Consider the deterioration of grazing fields as an instance of the tragedy of the commons. Farmers are motivated to

---

<sup>55</sup> Maitreesh Ghatak, 'Property Rights and Productivity of Resource Allocation in Developing Countries' *London School of Economics* (5 February 2020) available at: <<https://personal.lse.ac.uk/ghatak/PropertyRightsEDI.pdf>> accessed 13 May 2024.

<sup>56</sup> Marcel Fafchamps, 'The Tragedy of the Commons, Livestock Cycles and Sustainability' (1998) 7 *Journal of African Economies* 384-423.

<sup>57</sup> Ibid 209. For a broader discussion on the tragedy of the commons, Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243-1248.

<sup>58</sup> Aristotle, *Politics* (T. A Sinclair translated, Penguin 1981) 1261.

<sup>59</sup> It must be noted that the tragedy of the commons has been robustly challenged. Chomsky has questioned whether the tragedy of the commons are based on lived experiences and how the world works. He said, 'The tragedy of the commons [is] a doctrine which holds that collective possessions will be despoiled so therefore everything has to be privately owned. The merest glance at the world shows that the opposite is true. It's privatisation that is destroying the commons'. See Nomi Chomsky, 'The U.S Behaves Nothing Like a Democracy, But You'll Never Hear About It in Our "Free Press"' *DW Global Media Forum* (15 August 2013) <<https://lorenzohagerty.com/blog/chomsky-the-u-s-behaves-nothing-like-a-democracy/>> accessed 13 May 2024.

The premise of the tragedy of the commons was also disproven in Elinor Ostrom, 'Public Entrepreneurship: A Case Study in Ground Water Management' (Doctoral thesis, University of California, Los Angeles, 1968).

maximise their earnings by grazing numerous animals on communal land. Nevertheless, if all farmers pursue this strategy, the land will suffer from overgrazing, resulting in soil erosion and decreased productivity.

A possible solution that has been proposed is private property rights—particularly the right to exclude. As a result of the right to exclude, *res* (things) that are part of the common pool are converted into private goods and assets. The argument here is that the right to exclude encourages the efficient use and development of property, thus demonstrating that private property is a necessary condition for capitalism. A private property right will allegedly incentivise investing and looking after the resource because they will be adequately compensated. Therefore, private property fuels businesses and resource development as long as enforcing ownership rights is cost-effective.<sup>60</sup>

Furthermore, a robust property rights system is the linchpin of a thriving market economy.<sup>61</sup> Trade flourishes, and long-term prosperity takes root through the secure recognition and enforcement of these rights. Specialisation, the cornerstone of a state's wealth, thrives when individuals and businesses focus on their areas of expertise.<sup>62</sup> However, this very specialisation necessitates exchange – the ability to trade goods and services to unlock the benefits of such focused activity.<sup>63</sup> In a market economy, prices act as crucial signals, guiding production, consumption, and investment decisions.<sup>64</sup>

For exchange to flourish, however, individuals must possess unwavering confidence that their property rights will be respected.<sup>65</sup> This confidence hinges on two fundamental pillars. First, secure ownership: individuals must be assured of a valid title upon acquiring property through a legitimate transaction. They require the unfettered ability to possess and utilise their property, free from the threat of interference by third parties.<sup>66</sup> Secondly, the enforcement of rights requires more than a mere governmental declaration protecting property rights. The legal system must inspire public faith in its unwavering commitment to upholding these rights.<sup>67</sup>

Additionally, stable property rights serve as a powerful incentive for saving and investment, both critical drivers of economic growth. Without secure property rights, the very act of saving becomes a precarious venture, fraught with the fear of arbitrary appropriation. This principle is particularly germane to the development of the modern capitalist firm.<sup>68</sup> Investment, in essence, is a form of a delayed exchange. The entrepreneur commits resources to the firm in exchange for a claim on future returns, which can be either positive or negative. Property rights act to solidify this claim for the investor. They bear the inherent risk associated with the business itself, but not the

---

<sup>60</sup> Rubin and Klumpp (n 52) 209.

<sup>61</sup> Armen A. Alchian, 'Property Rights' *Econlib* <https://www.econlib.org/library/Enc/PropertyRights.html> accessed 10 May 2024. See also Armen Alchian and Harold Demsetz, 'The Property Rights Paradigm' (1973) 33 *Journal of Economic History* 16-27.

<sup>62</sup> Rubin and Klumpp (n 52) 209.

<sup>63</sup> *Ibid* 210.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid*.

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

<sup>68</sup> *Ibid*.

additional risk of losing their investment due to an arbitrary seizure in the event of success. In this context, property rights operate in tandem with contracts, which guarantee payments to those who provide labour or loan capital to the firm.<sup>69</sup> But this is not all.

Property rights play a pivotal role in mitigating conflicts that often arise from competing claims over scarce resources or one individual's imposition of negative externalities onto others. Resolving such disputes typically incurs substantial costs for the involved parties and society, from safeguarding possessions against appropriation to litigation expenses and even to the extremes of violence. These cumulative costs represent a welfare loss from an aggregate economic standpoint.<sup>70</sup>

The Coase Theorem, a fundamental economics principle, asserts that with clearly defined property rights and absent transaction costs, the allocation of externalities<sup>71</sup> in an economy will be Pareto-efficient,<sup>72</sup> irrespective of the initial distribution of entitlements.<sup>73</sup> In essence, this theorem underscores the potential of a well-enforced system of private property rights to diminish the costs associated with conflict resolution.<sup>74</sup>

I hope I have demonstrated the role of property rights in protecting and advancing capitalism, particularly the right to exclude. In the next section, I argue that capitalism, coupled with the right to exclude, has adversely affected the environment. The argument is not that capitalism is the sole or primary driving factor for environmental degradation.

## **(2) Capitalism and Environmental issues**

Capitalism was designed to efficiently allocate scarce resources, encourage human ingenuity, and improve the quality of life for those willing and able to participate in the system. This economic model has been prodigiously effective at enabling people to convert natural resources into fungible commodities and monetary wealth. Capitalism has generated wealth (significant inequality) and prosperity by transmuting vast natural resources into marketable products. In theory, the production of wealth and the collective quality of life can be constantly enhanced under this economic model. Although wealth accumulation has hitherto entailed the unsustainable depletion of natural resources, capitalism maintains that when a commercially viable resource is

---

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> An externality refers to an indirect cost or benefit that arises from the production or consumption of a good or service and is experienced by a third party not directly involved in the transaction. These external costs or benefits are not reflected in the market price of the good or service.

<sup>72</sup> Pareto efficiency refers to an economic condition in which no feasible reallocation of resources can enhance the position of one party without a corresponding decline in the position of another. See Andrea Ventura, Carlo Cafiero and Marcello Montibeller, 'Pareto Efficiency, the Coase Theorem, and Externalities: A Critical View' (2016) 50 *Journal of Economic Issues* 872-895.

<sup>73</sup> Ronald Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1-44.

<sup>74</sup> Rubin and Klumpp (n 52) 210.

exhausted, the market will produce an alternative. Thus, capitalism is supposedly an indefatigable method for perpetually generating more wealth (and inequality).<sup>75</sup>

Whilst capitalism has yielded numerous socio-economic benefits over its relatively brief tenure,<sup>76</sup> it has also precipitated undesirable consequences.<sup>77</sup> Each product comes with a corollary by-product, and our capacity to extract and consume vast natural resources has generated a correspondingly significant volume of waste, manifesting in physical refuse, atmospheric pollution, and other forms of environmental degradation. The most severe consequence of our society's excessive atmospheric pollution is unequivocally global climate change.<sup>78</sup>

The unyielding pursuit of economic growth and profit under capitalism has propelled industries to exploit natural resources at an unprecedented pace.<sup>79</sup> This has fuelled innovation; enhanced living standards for many; and continuous creation of consumer protection, but it has also led to the depletion of finite resources and irreversible harm to ecosystems. Forests have been depleted, rivers contaminated, and habitats decimated to satisfy consumer demands. Moreover, the linear model of production and consumption inherent in capitalist systems fosters a 'take-make-dispose' mentality, exacerbating resource scarcity and waste generation.<sup>80</sup>

Furthermore, capitalism's emphasis on short-term gains often undermines long-term sustainability. Enterprises singularly focused on maximising shareholder returns may overlook environmental externalities and neglect investment in cleaner technologies or sustainable practices. This myopic approach not only perpetuates environmental degradation but also undermines economic resilience in the face of climate-related risks and disruptions.<sup>81</sup> In addition to environmental concerns, capitalism's unequal distribution of wealth and power exacerbates susceptibility to the impacts of climate change. Low-income communities and marginalised groups, who contribute the least to atmospheric pollution, frequently bear the brunt of its consequences. They are disproportionately affected by extreme weather events, food and water shortages, and displacement due to rising sea levels. This exacerbates social inequalities and widens the affluent and impoverished gap.<sup>82</sup>

---

<sup>75</sup> Geoffrey Jones, 'Capitalism and the Environment' in Catherine Casson and Philipp Robinson Rössner (eds), *Evolutions of Capitalism: Historical Perspectives: 1200-2000* (Bristol University Press 2022) 188-190.

<sup>76</sup> See Jeffery D. Sachs, 'Twentieth-Century Political Economy: A Brief History of Global Capitalism' (1999) 15 *Oxford Review of Economic Policy* 90-101.

<sup>77</sup> Friedrich Lenger, 'Wallerstein on Early Modern Capitalism and Global Inequality: A Reevaluation' (2021) 15 *Socio* 49-70; Jonathan T. Park, 'Climate Change and Capitalism' (2015) 14 *Consilience* 189-206; Dylan Sullivan and Jason Hickel, 'Capitalism and Extreme Poverty: A Global Analysis of Real Wages, Human Right, and Mortality Since the Long 16th Century' (2023) 161 *World Development* 1-18; Paul Collier, Diane Coyle, Colin Mayer and Martin Wolf, 'Capitalism: What has gone wrong, what needs to change, and how it can be fixed – global propositions, national initiatives, local authority' (2021) 37 *Oxford Review of Economic Policy* 637-649.

<sup>78</sup> Park (n 77) 191-192.

<sup>79</sup> *Ibid.*

<sup>80</sup> Karen Bell, 'Can the Capitalistic Economic System Deliver Environmental Justice' (2015) 10 *Environmental Research Letters* 1, 2-3.

<sup>81</sup> David M. Ong, 'The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives' (2001) 12 *European Journal of International Law* 685, 703-704.

<sup>82</sup> Leslie King, 'Environmental Justice and Capitalism' in Katherine Legun, Julie C. Keller, Michael Carolan and Michael M. Bell (eds), *The Cambridge Handbook of Environmental Sociology* (CUP 2020) 452-455.

Addressing these challenges necessitates a paradigm shift towards a more sustainable and equitable economic system. This entails reassessing the tenets of capitalism and integrating environmental and social considerations into economic decision-making. Policies such as carbon pricing,<sup>83</sup> incentives for renewable energy, and measures to enforce corporate accountability can help internalise environmental costs and promote responsible business conduct. Furthermore, fostering international cooperation and solidarity is imperative to ensure a fair transition to a low-carbon economy and support vulnerable communities adapting to climate change impacts.

While capitalism has propelled economic progress and innovation, it has also contributed to environmental degradation and social inequality, culminating in the existential threat of climate change. Mitigating these challenges requires concerted efforts to reform capitalist structures, prioritise sustainability, and address systemic injustices. Only through reimagining our economic systems and collaborating towards a more equitable and resilient future can we hope to surmount the crises confronting humanity.

I interpose at this juncture to reiterate that I recognise that one can claim that other areas of the law, such as tort, international environmental law, and corporate social responsibility, may provide some tools to address some of the harsh consequences of capitalism on the environment. I do not deny the value of those mechanisms and their value. What I propose is fundamentally how we think about property itself and its role in a capitalist society.

## **D. WHAT DOES *UBUNTU* ADD TO OUR UNDERSTANDING OF PROPERTY**

### **(1) Situating and Understanding Ubuntu**

*Ubuntu* reflects African cultural commons, predicated on communal co-existence and respect towards nature and its resources. But this is only one facet of *Ubuntu* as a meta-seminal concept. In addition, it functions as a principle in public policy,<sup>84</sup> as a constitutional value,<sup>85</sup> as a means of resolving conflicts,<sup>86</sup> as a guiding principle in

---

<sup>83</sup> To combat climate change, a carbon price is a fee placed on the cost of emitting greenhouse gases (GHGs) like carbon dioxide. This financial incentive encourages polluters to find cleaner ways to operate, ultimately reducing their overall GHG emissions..

<sup>84</sup> Gessler Muxe Nkondo, '*Ubuntu* as public policy in South Africa: A conceptual framework' (2007) 2 International Journal of African Renaissance Studies 88-100.

<sup>85</sup> Yvonne Mokgoro, '*Ubuntu* and the law in South Africa' (1998) 15 Buffalo Human Rights Law Review 1-6 and Thino Bekker, 'The re-emergence of ubuntu: A critical analysis' (2006) 21 South African Public Law 333-344.

<sup>86</sup> Tim Murithi, 'African approaches to building peace and social solidarity' (2006) 6 African Journal on Conflict Resolution 9-34.

business and education,<sup>87</sup> and as the cornerstone of moral theory in Africa.<sup>88</sup> From an *ubuntu* perspective, as Murithi contends, a community's prosperity hinges on the well-being of all its members.<sup>89</sup> At its core, it is about the interdependence of humanity.<sup>90</sup> It concerns the capacity to 'express compassion, reciprocity, dignity harmony, and humanity in the interests of building and maintaining community with justice and mutual caring.'<sup>91</sup> *Ubuntu* thrives in fostering sustainable communities.

*Ubuntu* can be understood in several ways. *First*, it is a social philosophy. This philosophy is deeply embedded in African culture and stresses the interdependence of human beings. As alluded to in the introduction, *ubuntu* is derived from the isiZulu saying, *umuntu ngumuntu ngabantu*, which roughly means that a person is a person because of others. It provides that I am because we are.<sup>92</sup> As a social philosophy, it is underpinned by normative values of trust, care and sustainable communities to foster harmony.

*Secondly*, it has ontological consequences. From this perspective, it recognises the interdependent relationship between humans, animals and plants. These entities have to co-exist. The ontological facet of *ubuntu* underscores a paradigm wherein individual advancement is nurtured through interrelation and mutual engagement, diverging from the notion of oppressive communalism while accentuating the value of communal interaction in personal development.<sup>93</sup> According to African ontology, our existence unfolds within a fluid realm of vital energies, choreographed by the harmonious rhythms of a cosmic symphony. This ever-evolving cosmos defies confinement within rigid analytical constructs. In this African worldview, distinctions between subject and object, body and mind, reason and emotion, or contemplation and action blur into a seamless unity.<sup>94</sup>

Connected to this is the view that *ubuntu* is a cosmological ideal. This is the *third* facet of *ubuntu*. It embodies indigenous knowledge about the physical

---

<sup>87</sup> Moeketsi Letseka, 'In Defence of *Ubuntu*' (2012) 31 *Studies in Philosophy and Education* 47-60; Elza Venter, 'The notion of *ubuntu* and communalism in African educational discourse' (2004) 23 *Studies in Philosophy and Education* 149-160; Phillip Higgs, 2003, 'African philosophy and the transformation of educational discourse in South Africa' (2003) 30 *Journal of Education* 5-22; and Andrew West, '*Ubuntu* and business ethics: Problems, perspectives and prospects' (2014) 121 *Journal of Business Ethics* 47-61.

<sup>88</sup> Thaddeus Metz, 'Toward an African moral theory' (2007) 15 *The Journal of Political Philosophy* 321-341. See also Kyriaki Topidi, '*Ubuntu* as a Normative Value in the New Environmental World' in Domenico Amirante and Silvia Bagni (eds), *Environmental Constitutionalism in the Anthropocene* (London, Routledge 2022) 51.

<sup>89</sup> Tim Murithi, 'A Local Response to the Global Human Rights Standards: The *Ubuntu* Perspective on Human Dignity' (2007) 5 *Globalization, Societies and Education* 277, 277.

<sup>90</sup> Barbara Nussbaum, '*Ubuntu*: Reflections of a South African on Our Common Humanity' (2003) 4 *Reflections* 21, 21-22.

<sup>91</sup> Barbara Nussbaum, 'African Culture and *Ubuntu*: Reflections of a South African in America' (2003) 17 *Perspectives* 1, 3.

<sup>92</sup> Fidele Mutwarasibo and Abelheid Iken, 'I am because we are - the contribution of the *Ubuntu* philosophy to intercultural management thinking' (2019) 18 *Interculture Journal* 15, 15.

<sup>93</sup> Thembisile Molose, Geoff Goldman and Peta Thomas, 'Towards a Collective-Values Framework of *Ubuntu*: Implications for Workplace Commitment' (2018) 6 *Entrepreneurial Business and Economics Review* 193, 196.

<sup>94</sup> Mogobe B. Ramose, *Ubuntu: stroom van het bestaan als levensfilosofie* (Ten Have 2017) 59 writes: 'For the Africans, the invitation of the dance of be-ing is indeclinable since it is understood as an ontological and epistemological imperative...To dance along with be-ing is to be attuned to be-ing.'

environment, such as land, and the interaction between humans and such an environment. In this sense, *ubuntu* acknowledges and accepts that humans' existence is related to and dependent on the spiritual and material environment.

*Fourthly, ubuntu* may be seen as a moral theory. As a moral theory, *ubuntu* relates to the process by which one becomes 'an ethical human being by promoting the cosmic balance in just and caring dependency of relationships.'<sup>95</sup> It underscores the idea that individuals exist within a network of relationships and are intrinsically tied to one another.<sup>96</sup> This moral philosophy promotes empathy, compassion, and communal responsibility. It suggests that one's humanity is enhanced and realised through interactions and relationships. *Ubuntu*, as a moral concept, encourages individuals to prioritise the community's well-being and recognise the inherent dignity and worth of every person. It emphasises cooperation, mutual support, and the idea that one's actions have ripple effects on the broader community.<sup>97</sup>

*Ubuntu* underscores the significance of interconnectedness and communal welfare, supported by five fundamental principles. These principles include: (i) reverence for the innate dignity of individuals; (ii) a collective orientation towards survival; (iii) a sense of unity in pursuing objectives; (iv) the crucial role of empathy in fostering relationships; and (v) the symbiotic relationship among these principles.<sup>98</sup> This comprehensive framework accentuates the importance of acknowledging the intrinsic value of individuals (that is, respect for their inherent human dignity), a shared dedication to survival, the recognition that collaborative efforts are essential for attaining ambitious goals, and the significance of nurturing connections through empathy. In short, these fundamental principles are espoused by the following [correlating] values: (i) dignity, (ii) survival, (iii) solidarity, (iv) compassion, and (v) respect.<sup>99</sup>

Transversing these definitions of *ubuntu* reveals the centrality of community. It is important to note that 'community' includes the living and the 'living dead'.<sup>100</sup> The latter refers to those yet to be born and the spirits of the deceased ancestors. Good relations between the living and the living dead are vital as they are a necessary condition for justice and peace.<sup>101</sup>

---

<sup>95</sup> C. W. Maris, 'Philosophical racism and *ubuntu*: In Dialogue with Mogobe Ramose' (2020) 39 South African Journal of Philosophy 308, 316.

<sup>96</sup> Victor C. A. Nweke, '*Ubuntu* as a Plausible Ground for a Normative Theory of Justice from the African Place' in Jonathan O. Chimakonam, Edwin Etieyibo and Ike Odimegwu (eds), *Essay on Contemporary Issues in African Philosophy* (Springer 2021) 174 and Leonard T. Chuwa, 'Interpreting the Culture of *Ubuntu*: The Contribution of a Representative Indigenous African Ethics to Global Bioethics' (Doctoral dissertation, Duquesne University 2012) 2-27;

<sup>97</sup> Benjamin Elias Winks, 'A covenant of compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) African Human Rights Law Journal 447-464.

<sup>98</sup> Paul Terngu Haaga, '*Ubuntu* Philosophy as Archetype in Resolving Conflict in 21<sup>st</sup> Century Africa' (2022) *Theology, Philosophy and Education in the 21<sup>st</sup> Century* 103-117.

<sup>99</sup> Molose, Goldman and Thomas (n 93) 199. Lovemore Mbigi and Jenny Maree, *The Spirit of African Transformation Management* (Sigma 1995);

<sup>100</sup> Maris (n 95) 316.

<sup>101</sup> Ramose (n 94) 64. See also Maris (n 95) 316.



## (2) Ubuntu: Fact or Fiction?

It would be remiss to ignore some shortcomings of *ubuntu*. While Ubuntu is not fiction, the writings on *ubuntu* have some characteristics of creative writing. The claims of its impact and significance are sometimes overstated and exaggerated. *Ubuntu* also risks being a normatively empty rhetoric, similar to the rule of law and intersectionality, which have become buzzwords in legal academic discourse.

The first criticism is that *ubuntu* is normatively unattractive as it is too open-ended and vague. It may be manipulated to further a collectivist philosophy that is patriarchal, discriminatory, homophobic and deeply unequal. Oyowe and Yurkivska offer a feminist critique of *ubuntu*, claiming that the predominantly male theorists who defend Ubuntu ignore how profoundly unequal African traditions are.<sup>102</sup> In their view, *ubuntu* reproduces and perpetuates gender inequality. Those who defend *ubuntu* overlook the role that gender plays in the conception of personhood through the lens of *ubuntu*.<sup>103</sup> Oyowe and Yurkivska assert that African philosophy often overlooks feminist concerns like gender-based violence due to its perceived gender neutrality. They argue that despite being framed as gender-neutral, the African communitarian concept of personhood inherently carries gendered implications due to its relational and community-centric nature.<sup>104</sup> This is what they write:

‘the African communitarian concept of personhood as it is envisioned by African communitarian philosophers speaks neither of women nor for them and as ‘gender-blind’ intellectual and analytical perspectives, continue to hold central stage the impact of persisting male domination on all aspects of social and political life remains unproblematised and normative.’<sup>105</sup>

Oelofsen, a feminist philosopher, argues against this characterisation.<sup>106</sup> She contends that *ubuntu* and Afro-communitarian conceptions and understandings of personhood and ethics would not, at least in principle, condone the subordination and oppression of women. Afro-communitarian neither requires nor thrives on the oppression of women.<sup>107</sup> She posits that, notwithstanding the centrality of gender disparities to the conception of personhood within the framework of African communitarianism, it remains plausible to forestall the subjugation of women by embracing the concept of gender complementarity.<sup>108</sup> This proposition underscores the potential of Afro-communitarianism to foster gender egalitarianism.

---

<sup>102</sup> Oritsegbubuemi A Oyowe and Olga Yurkivska, ‘Can a communitarian concept of African personhood be both relational and gender-neutral?’ (2014) 33 *South African Journal of Philosophy* 85-99.

<sup>103</sup> *Ibid* 85.

<sup>104</sup> *Ibid* 87.

<sup>105</sup> *Ibid* 87.

<sup>106</sup> Rianna Oelofsen, ‘Women and *ubuntu*: Does *ubuntu* condone the subordination of women?’ in Jonathan O. Chimakonam and Loïuse du Toit (eds), *African Philosophy and the Epistemic Marginalisation of Women* (Routledge 2018) 42-56.

<sup>107</sup> *Ibid* 54.

<sup>108</sup> *Ibid* 52-53. It must be noted that ‘gender complementarity’ is a contested concept and has been subject to criticism.

Nevertheless, notwithstanding this contention, certain challenges persist concerning gender complementarity. For instance, there exists apprehension regarding the veneration of motherhood, which may lead to women being assessed solely on the basis of their reproductive capacities, thereby potentially circumscribing their autonomy, particularly in electing to eschew childbearing without encountering societal censure.<sup>109</sup> Moreover, the accentuation of a binary gender paradigm and complementarity raises concerns of heteronormativity and heterosexism, as individuals are expected to conform to socially and biologically prescribed gender roles. Nonetheless, it merits consideration that Amadiume's portrayal of the adaptable nature of gender roles in traditional African societies suggests that such constraints may not be as immutable as in societies where gender roles are strictly delineated by biological sex.<sup>110</sup>

Matolino and Kwindingwi argue that *ubuntu* is dead. According to them, *ubuntu* is outdated and appropriate for small, undifferentiated, and close-knit communities, which, in any case, have their own flaws. These communities are known for their aversion to outsiders, lack of tolerance for differing opinions, and significant emphasis on blood relations as the primary means of acknowledging others.<sup>111</sup> Thus, *ubuntu* is at odds with tolerance, democracy, and cosmopolitanism.

In reply to this article, Metz disagrees with this argument.<sup>112</sup> Metz himself develops a contemporary ethical theory founded on *ubuntu*, departing significantly from Ramose's interpretation. Metz abstracts more from African traditions, stressing normative philosophy over descriptive cultural anthropology.<sup>113</sup> He aims to reframe the understanding of *ubuntu* by current moral standards. Referred to as 'Afro-communitarianism', Metz's approach differs from Ramose's *ubuntu* on two key points: it excludes ancestors from ontology. It introduces individual human rights into ethics, albeit within a communitarian context.<sup>114</sup> In Metz's modernised account of *ubuntu*, human dignity arises from the capacity to participate in a community. This capability comprises two aspects: first, the ability to empathise and share a way of life with others (identity); second, the capacity to uphold the well-being of those others (solidarity).<sup>115</sup> Metz introduces a systematic approach to African oral traditions academically, distilling them into a central principle that encompasses and elucidates prevailing moral intuitions.<sup>116</sup> At the core of Metz's *ubuntu* ideal lies the principle of friendship or love, characterised by a sense of solidarity identity. According to Metz, this entails the typically African model of consensual democracy alongside recognition of individual human rights. Indeed, transgressions against human rights are viewed as acts of

---

<sup>109</sup> Ibid 54.

<sup>110</sup> Ibid 51-52. See also, Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed Books 1989).

<sup>111</sup> Bernard Matolino and Wenceslaus Kwindingwi, 'The End of *Ubuntu*' (2013) 32 *South African Journal of Philosophy* 197, 202.

<sup>112</sup> Thaddeus Metz, 'Just the beginning of *ubuntu*: Reply to Matolino and Kwindingwi' (2014) 33 *South African Journal of Philosophy* 65-72.

<sup>113</sup> Maris (n 95) 317.

<sup>114</sup> Thaddeus Metz, 'African Communitarianism and Difference' in Elvis Imafidon (ed), *Handbook of African Philosophy of Difference* (Springer 2020) 35-41.

<sup>115</sup> Thaddeus Metz, '*Ubuntu* as a Moral Theory and Human Rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532, 536.

<sup>116</sup> Metz (n 114) 48.

hostility and consequently immoral.<sup>117</sup> As Metz grounds human dignity and rights in a universal human capacity, they are not contingent upon membership in any specific community.<sup>118</sup>

Another criticism relates to the tension between *ubuntu* and individual human rights. Oyowe views individual human rights and *ubuntu* as strange bedfellows.<sup>119</sup> The tension, Oyowe argues, is because *ubuntu's* focus on communities and duties is antithetical to human rights, which are concerned with individuals and entitlements. *Ubuntu* prioritises and privileges communal goods rather than individual ones.<sup>120</sup> The onus is on the proponents of *ubuntu* to demonstrate that communal harmony and individual freedom are compatible.<sup>121</sup> According to Oyowe, Metz and other scholars failed to do this.<sup>122</sup>

Metz mounts a response against this argument. First, he argues that Oyowe does not understand his articulation of *ubuntu*.<sup>123</sup> He contends that Oyowe is attacking a strawman and does not engage with salient elements of *ubuntu*.<sup>124</sup> Oyowe interprets Metz's theory as suggesting promoting two separate ultimate goods: individual freedom and communal relationships. However, Metz proposes a unified fundamental good: human dignity, which is defined as the ability to engage in communal relationships and should be upheld. Metz argues that human rights should be viewed as ways of acknowledging individuals as unique due to their capacity for communion rather than as mechanisms for balancing conflicting interests in freedom and community.<sup>125</sup> By misunderstanding Metz's theory, Oyowe's criticisms fall short.<sup>126</sup>

## **E. MAKING A CASE FOR AN UNDERSTANDING OF PROPERTY UNDERPINNED BY *UBUNTU* AND HOW IT RELATES TO ENVIRONMENTAL JUSTICE**

So the question becomes, what does *ubuntu* contribute to our understanding of property? As alluded to earlier, the right to exclude is the *sine qua non* of property. That is the dominant conception of property. *Ubuntu* displaces this concept. In a South African case concerning evictions, Sachs J held:

'[W]e are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of

---

<sup>117</sup> Ibid 70.

<sup>118</sup> Metz (n 112).

<sup>119</sup> Anthony Oyowe, 'Strange bedfellows: Rethinking *ubuntu* and human rights in South Africa' (2013) 13 African Human Rights Law Journal 103-124.

<sup>120</sup> Ibid 104.

<sup>121</sup> Ibid 112.

<sup>122</sup> Ibid.

<sup>123</sup> Thaddeus Metz, 'African values and human rights as two sides of the same coin: A Reply to Oyowe' (2014) 14 African Human Rights Law Journal 306, 307.

<sup>124</sup> Ibid 307.

<sup>125</sup> Ibid 308.

<sup>126</sup> Ibid 307-308.

the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.<sup>127</sup>

*Ubuntu* represents a normative break from abstract, hierarchical property rights arrangements centred around the right to exclude. Property generally follows an abstract, syllogistic logic predicated on an immutable, hierarchical rights arrangement. *Ubuntu* challenges the hegemonic hierarchical arrangement of rights, privileging ownership and the right to exclude.

Under *ubuntu*, the environment is an integral part of the community. Individuals and nature are seen as interconnected and interdependent. *Ubuntu* imbues moral value to nature and inanimate objects. Land is seen as connecting all living forms. Nature and humans form a coherent whole. Under *ubuntu*, the premise of human action is interrogated. It questions whether one's actions are motivated by selfishness and resource-depleting actions. These types of actions would be at odds with *ubuntu*. Simply put, the senseless (read selfish) depletion of natural resources means the destruction of humanity itself.

*Ubuntu* emphasises interconnectedness and communal well-being, offering a stark counterpoint to the dominant paradigm. That paradigm often frames human-environment relations as inherently conflictual and driven by self-interest. *Ubuntu*, however, rejects this rigid compartmentalisation of nature and society. Instead, it advocates for integrating scientific knowledge with political action to pursue sustainable development. Western property law emphasises individual ownership and the right to exclude others. This creates a sense of alienation from the environment and encourages a focus on individual gain, often at the expense of the collective good. *Ubuntu* disrupts this by emphasising interconnectedness. Property, under *ubuntu*, becomes a form of stewardship, with a responsibility to use resources to benefit the community and future generations. This reframing challenges the notion of property as a purely individual right, introducing a concept of communal ownership and responsibility.

Central to *ubuntu* is the concept of collective agency. Sustainability is not achieved by isolated individuals but necessitates a shared responsibility and a collaborative decision-making process. This fosters ecological intelligence, which is characterised by inclusivity, adherence to ethical principles, and the application of creative problem-solving. This intelligence extends beyond the human sphere, recognising the inherent value and interconnectedness of all elements within the natural world, both animate and inanimate.

This framework necessitates a fundamental shift in resource management practices. *Ubuntu* rejects the exploitative utilisation of natural resources, advocating instead for their mindful utilisation solely to meet essential needs. Such an approach inherently discourages waste and environmental destruction. Moreover, the pursuit of sustainable development becomes intricately linked with the preservation of cultural

---

<sup>127</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [37].

diversity. *Ubuntu* recognises that diverse communities hold valuable knowledge and practices that contribute significantly to responsible environmental stewardship.

This reframing offers a compelling addition to the legal discourse on environmental governance. By emphasising collective responsibility, ethical considerations, and the intrinsic value of nature, *ubuntu* provides a framework for legal systems to promote sustainable practices and foster a deeper connection with the environment. This philosophical underpinning can inform the development of robust legal instruments that encourage responsible resource use, promote environmentally sound decision-making, and ultimately, foster a more ecologically responsible future. A central tenet emerges from recognising the perils of prioritising individual interests over collective welfare, often leading to overexploiting natural resources.

The fundamental proposition of the tragedy of the commons, as set out above, is misplaced and a myth.<sup>128</sup> *Ubuntu* demonstrates that humans have a capacity for sharing resources with generosity and foresight. *Ubuntu* supports the survival of shared resources, provided that certain characteristics exist: clearly defined boundaries for the managing community, effective monitoring of the shared resource, a fair distribution of costs and benefits among participants, a reliable and equitable process for resolving conflicts, a system of escalating penalties for rule-breakers, and strong connections between the community and various levels of authority, from local leaders to international organisations.

However, *ubuntu* underscores the importance of collective responsibility towards environmental stewardship, advocating for regulating resource exploitation through cooperative and solidary efforts. When juxtaposed with Amartya Sen's Capabilities Approach,<sup>129</sup> *ubuntu* assumes a heightened significance in the realm of environmental law.<sup>130</sup> This juxtaposition elucidates a critical implication: ensuring the survival and equitable access to basic necessities for all individuals becomes non-negotiable. This linkage underscores *ubuntu's* inherent commitment to promoting the well-being of all humanity and reinforces the imperative of sustainable environmental practices.

The principles of *ubuntu* can be applied to various legal issues surrounding property and resources. For instance, disputes over land use could be approached through the lens of community needs and environmental sustainability. Additionally, *ubuntu* could inform the development of regulations for resource extraction, ensuring such practices benefit the community and minimise environmental damage. By incorporating these considerations, legal frameworks can move beyond a strict focus on individual rights and profits, promoting a more holistic approach to property management.

---

<sup>128</sup> Michelle Nijhuis, 'The Miracle of the Commons' *AEON* (4 May 2021) <<https://aeon.co/essays/the-tragedy-of-the-commons-is-a-false-and-dangerous-myth>> accessed 18 May 2024.

<sup>129</sup> Capacities are defined as the capacity for a person to determine their own conception of the 'good life', and to have real freedoms enabling them to achieve this conception. See Amartya Sen, *Development as Freedom* (OUP 1999) and Martha Nussbaum, *Creating Capabilities* (HUP 2011).

<sup>130</sup> Mashele Rapatsa, 'Ubuntu and the Capabilities Approach: Basic Doctrines for Calibrating and Humanitarian Action' (2016) 9 *European Review of Applied* 12- 19.

While *ubuntu* emerges from a specific African context, its core values are relevant to global environmental challenges. The emphasis on collective action and responsible resource use resonates with contemporary climate change and biodiversity loss concerns. Integrating *ubuntu* principles into international environmental law could foster greater cooperation between nations and encourage a shift towards sustainable development practices. This cross-cultural exchange of ideas can enrich legal frameworks for property rights, promoting a more just and ecologically responsible future.

The concept of *ubuntu* prompts a fundamental re-evaluation of our understanding of property rights, particularly in its departure from the prevailing emphasis on exclusion. Sachs J's reflections in *PE Municipality* underscore *ubuntu*'s transformative potential within constitutional frameworks, infusing individual rights with a communitarian ethos. This departure from rigid property arrangements challenges entrenched hierarchies and privileges collective well-being over individual ownership.

Furthermore, *ubuntu*'s holistic ethos extends beyond property rights to encompass environmental stewardship. Within the *ubuntu* framework, the environment is not merely a resource to be exploited but an intrinsic part of the community. This perspective fosters a profound appreciation for the interconnectedness of all living beings and imbues moral value to nature itself. By reframing human-nature relations as symbiotic rather than adversarial, *ubuntu* advocates for a paradigm shift towards sustainable environmental practices rooted in respect and interconnectedness.

In contrast to conventional Western paradigms, which often frame human-environment interactions as zero-sum games driven by self-interest, *ubuntu* promotes collaboration and mutual respect. This collective approach to environmental management recognises that sustainability cannot be achieved through isolated actions but requires concerted efforts and shared responsibility. By prioritising ethical decision-making and inclusivity, *ubuntu* offers a framework for fostering ecological intelligence and promoting harmony between humans and their environment.

Moreover, *ubuntu*'s emphasis on collective agency underscores the need for inclusive decision-making processes in environmental governance. Sustainability initiatives under *ubuntu* are characterised by their participatory nature, involving diverse stakeholders and communities in decision-making processes. This inclusive approach not only enhances the legitimacy of environmental policies but also ensures that they are rooted in the needs and values of local communities.

As a legal concept, *ubuntu* provides a fertile ground for developing innovative environmental laws and policies. By prioritising collective well-being and ethical considerations, *ubuntu*-inspired legal frameworks can pave the way for more equitable and sustainable resource management practices. These legal instruments can incentivise responsible behaviour, discourage environmental degradation, and promote the preservation of ecosystems for future generations.

Ultimately, *ubuntu* offers a compelling vision for a more harmonious relationship between humanity and the environment, one that recognises the interconnectedness of all life forms and prioritises collective well-being over individual gain. As we confront

the urgent challenges of environmental degradation and climate change, embracing *ubuntu's* principles can guide us towards a more sustainable and equitable future.

## F. CONCLUDING REMARKS

*Umhlaba ubonke*, the land belongs to all. This paper articulates a vision for reforming property law inspired by *ubuntu*. It calls for a critical re-evaluation of legal systems to incorporate principles that prioritise intergenerational justice, community well-being, and responsible interactions with the natural world. This reimagined legal framework aims to contribute significantly to the global discourse on environmental justice, proposing a model where legal systems actively support sustainable and equitable relationships with the environment.

This paper posits that *ubuntu*, with its emphasis on community, shared stewardship, and collective responsibility, offers a transformative perspective on property and property law. By challenging the individualistic and exclusionary notions that currently dominate property rights, *ubuntu* introduces a relational and holistic understanding that prioritises the well-being of both the environment and future generations. This alternative framework underscores the interconnectedness of humans and nature, advocating for sustainable practices and custodial ownership. Although *ubuntu* is rooted in African societies, its principles have universal applicability and relevance, offering valuable insights for addressing global challenges like environmental sustainability and social justice.

The integration of *ubuntu* into property law not only proposes a shift from the exploitative tendencies of individual ownership but also aligns with contemporary movements toward decoloniality. By redefining property through the lens of *ubuntu*, we can dismantle the colonial-capitalistic structures that have historically marginalised communities and exploited resources. This decolonial approach reconceptualises property as a social institution imbued with moral and communal responsibilities, fostering a more equitable and sustainable model of resource management.