

Ubuntu and the law in South Africa: Exploring and understanding the substantive content of ubuntu

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Supposing some legal solutions lay in exploring and understanding the substantive content of ubuntu, what then? Is there no ground for suspecting that some legal scholars and courts, in so far as they have been dogmatists, have failed to understand ubuntu? That the terrible, seriousness and clumsy importunity with which they have usually paid their addresses to ubuntu have been unskilled and unseemly methods of solving some legal problems? Certainly, some legal problems have not rendered themselves to proper solutions through such methods.¹

Introduction

Ubuntu has been the subject of a continuous, intense debate among academic scholars (Nafukho 2006, 409; Tshoose 2009, 15; Mokgoro 2010, 224) and the courts alike (see for examples: *S v Makwanyane and Another* 1995, §223, 237, 263, §307–308; *The Citizen 1978 (Pty) Ltd and Others v McBride and Others* (CC) 2011, §164–165; 2010, §216–218, 243). This debate focuses on the meaning, application, and the place of ubuntu in the South African legal system and human rights space. The debate on whether there is such a value or African philosophy and way of living called ubuntu has seemingly become moot.

In attempting to explore and understand the substantive content of ubuntu, we first explore the meaning of ubuntu by looking at current definitions of the word, and then offer our own working definition. Second, we argue that ubuntu has been overlooked by some academic writers and courts because of their failure to provide its substantive content. To fortify our arguments in this regard, we explore the components of ubuntu, and attempt to make out a case for those components that form part of its substantive content. Third, we explore the relationship between ubuntu and the Constitution of the Republic of South Africa (1996), and submit that contrary to some academic writers, ubuntu has not reached its ending, but is in transition as it is still developing (Matolino and Kwindigwi 2013).² Fourth, we explore the question of whether ubuntu is misunderstood, leading to our conclusion.

The meaning of ubuntu

Ubuntu is difficult to pin down to one meaning or a series of meanings owing to its dynamic nature (Metz 2007, 323). We will therefore offer our own working definition and also provide some essential components of ubuntu. Ubuntu has variously been defined as an African philosophy which covers humanness, respect for humanity, moral virtue, interconnectedness, compassion, group

¹ The abstract is inspired by a passage from Nietzsche's *Beyond Good and Evil*.

² We address this critique below.

solidarity and group-centred individualism, prioritising the interests of the most vulnerable, among other aspects of the idea of ubuntu (Mokgoro 1998, 15). Ubuntu has also been defined in terms of popular African maxims such as *umuntu ngumuntu ngabantu* (roughly translated as “a person is a person because of other people”), *motho ke motho ka batho ba bangwe* (in a Sesotho translation) (Mokgoro 1998, 15).

The courts have also defined and interpreted ubuntu as a South African “culture” and philosophy of the African people which expresses compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community, and combines individuality with communitarianism (*Port Elizabeth Municipality v Various Occupiers* 2005, §37, 43; *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2006, §62–63). To a large extent, we agree with the courts’ understanding of ubuntu. This is so because, in our view, ubuntu is a way of life of the African people which is underpinned by certain components that make up its substantive content, and permeates every aspect of their everyday existence and interactions with each other and the world at large. Our own working definition of ubuntu seen in this context, such as community-building, goes hand-in-hand with the courts’ understanding of ubuntu, where the individual is seen as an integral part of the community and vice versa. However, this is where our association with the courts’ understanding of ubuntu ends. The definition and interpretation of ubuntu by the courts and most academic writers contains some of ubuntu’s components, but they fall short by overlooking many of the components that form part of the substantive content of ubuntu. We deal with these components later in the discussion.

Tshoose, on the other hand, defines ubuntu as “...an ancient African worldview based on the primary values of intense humanness, caring, sharing, respect, compassion and associated values, ensuring a happy and quality community life in the spirit of family (Mphahlele 2002a, 135; Tshoose 2009, 13). Tshoose, like Mokgoro, acknowledges the difficulty attendant in trying to define ubuntu. Tshoose, however, takes it a step further when he bemoans the unfortunate attempt of using a foreign language (English) to explain ubuntu, as English does not sufficiently capture the essence of ubuntu (Mokgoro 1998, 15–16; Tshoose 2009, 13–14). Tshoose’s view is understandable, taking into account that, there is no direct translation or equivalent words between English and many South African languages such as isiZulu or Setswana. For instance, there is no direct translation of the word ubuntu in the English language. We are not surprised then at the prevailing controversies and misunderstanding surrounding ubuntu. We address these below.

Components of ubuntu

Ubuntu comprises many unlimited components which are common to many indigenous African people, and ubuntu does not begin and end with the broad maxims *umuntu ngumuntu ngabantu* or *motho ke motho ka batho ba bangwe*. These components are peculiar in their similarity among African people in South Africa and Africa. In this discourse, we deal with the concept of ubuntu as understood in South Africa and Africa. Components such as *ingane yami yingane yakho* (roughly translated as “my child is also your child”). Tied to this saying is a necessary distinction between a child and an adult; the former owes respect to the latter. For example, a child is expected to give his or her seat to an adult when in a full bus, train or community hall. Herein lies the similarity between ubuntu and communitarianism in that the child owes this duty to all adults in the community, not just those that share affinity with the child.

At the heart of this component of ubuntu is that a child belongs to the community, and as such can be looked after by any parent or adult in the community in the absence of that child’s biological parents (Nafukho 2006, 412). This would entail disciplining that child in the event that he or she misbehaves or refuses to carry out a lawful and reasonable instruction given by an adult other than his or her parents. In this context, the child is expected to respect every adult, not just his or her parents and members of his or her immediate family (see for example, articles 28 and 29 of the African Charter on Human and Peoples’ Rights [1986], which places obligations on individuals to respect others, including parents).

These values underpinning the relationship between adults and children ensure that children behave accordingly, even in the absence of their parents and guardians, who may be away on

business or at work at that time. In this way, a socially and morally acceptable conduct and way of life is instilled in children when they are still young, and this would be passed on to their own children in the future.

The other component is captured in the obligations of family members towards other family members in that family members are morally obliged to assist one another (Mokgoro 1998, 15–16). Family, in the context of an African family, is broad enough to include a nuclear family and an extended family. This means that a family member is usually expected to consider his needs in light of the broader reasonable needs of other family members, who may from time to time be in need of assistance with, for example, school fees and other reasonable needs, where that family member is in a position to assist. This component is also often expressed in the maxims *umuntu ngumuntu ngabantu* or *motho ke motho ka batho ba bangwe*. This literally means that I am because we are, and dovetails with the obligations of individuals in African societies to help others, which obligations carry a heavier moral obligation than in Western societies, where individual rights tend to determine one's possessions (Metz 2007, 326). Menkiti favourably captures the maxims as embodying the African view that it is the “community which defines the person as a person, not some isolated static quality of rationality, will or memory...” (Menkiti 1984, 171). There is therefore no doubt that in African societies communitarianism plays a major role compared to individualism.

In addition, ubuntu is also captured in the manner in which the African people live with each other, for instance, the sharing of vegetables growing in the neighbour's garden, without your neighbour asking for them. This also includes helping a neighbour or someone in the community to plough their garden without expecting payment in return, as this is understood to benefit the whole community, who will share in the harvest. In this respect, the welfare of an individual family becomes the welfare of the community and/or that of the nation (Mokgoro 1998, 16).

Furthermore, the collegial relationship maintained between neighbours is such that the neighbours are not afraid to seek assistance from each other, in the form of asking for salt, maize meal and other necessities when they have temporarily fallen on hard times or do not have that particular good for many reasons such as affordability. Herein lies *masakhane* (an isiZulu word roughly translated as “let us build each other”), another component of ubuntu which resonates with the family relations of the people of Africa, and the spirit of community that underpins the relationships between the African people of Africa.

The other component of ubuntu, which has found its way into government policies on service delivery, at least in theory, is *Batho Pele* (a Sesotho saying roughly translated as “people first”) (*White Paper on Transforming Public Service Delivery* 1997, §1.3.2, 1.3.4).³ *Batho Pele* is used in this context to capture a commitment to deliver basic public services to all South African citizens and others in the country. The White Paper provides that the words customer and citizen are interchangeable in the context of public service delivery (*White Paper on Transforming Public Service Delivery* 1997, §1.3.4). This is because the people who use public services have little or no choice over the service provider or the services provided to them (*White Paper on Transforming Public Service Delivery* 1997, §1.3.2). *Batho Pele* was endorsed by the Constitutional Court as a practical component of the constitutional value of ubuntu, and as an expression of the relational nature of rights (*Joseph and Others v City of Johannesburg and Others* 2010, §46). The Court reasoned further that “[c]ourts must move beyond the common law conception of rights as strict boundaries of individual entitlement (*Joseph and Others v City of Johannesburg and Others* 2010, §45).

The other component of ubuntu is captured in the saying *izandla ziyagezana* (roughly translated as “hands wash each other”), which means that people help each other when the other is in need or in trouble. There is an expectation here that this would be reciprocated in the future when the other person finds himself in a spot of bother, or sometimes with no expectation at all. The typical examples of this are practices when a family has been visited by death, neighbours would step in to contribute necessities such as vegetables, chairs and tables, plates, pots and cutlery. Included in

3 A good case in point of the government paying lip service to *Batho Pele* is its failure to deliver basic services such as water, housing, sanitation, health services to the majority of the people in the country, which regularly leads to violent protests.

this form of help is the week-long, free human capital needed in the preparations for the funeral. This usually entails men availing themselves to slaughter the goats and cows, fetching the necessary furniture needed for the funeral, and doing everything necessary to assist, while the women would be peeling assortments of vegetables, cooking, preparing traditional beer, cleaning and assisting in any other way they can.

Linked to this, is the belief and way of life according to African traditional and cultural values that view a funeral as affecting the whole community, not just one particular family. In this context, the whole community would then respect this occasion by, for instance, playing their music in a considerate manner and not make unreasonably loud noise, and by suspending all planned celebrations in close proximity to the funeral. This is one of the community's ways of mourning with the affected family. Sadly, there is now, for example, a new culture, called "after tears", whose origins are unknown but is now practised in townships around Johannesburg, like Soweto. In terms of this so-called culture or sub-culture, the funeral is followed by loud music and copious consumption of alcohol. We submit that this emerging urban culture or sub-culture is inimical to ubuntu. Closely related to this is the belief that human life is sacred and foundational (*Makwanyane* 1995, §225–227). As such it should be accorded the respect it deserves by affording the deceased a dignified funeral, even in cases where the deceased was not what others would call an upstanding citizen, and in cases where the deceased was a poor person or died under what some would call morally depraved circumstances. This is largely because when a person passes away in African society, it is believed that they have joined the world of their immediate ancestors (*Mphahlele* 2002a, 138).

By the same token, a crime is viewed as a wrong committed not only against the individual who was wronged, but also against the whole community (*Mphahlele* 2002b, 146). The perpetrator would be required to offer atonement not only to the wronged individual, but also to the community as a whole to remove the insult or dark cloud caused by his or her misconduct. This reparation usually takes the form of goats and cows offered to the community and the wronged person. It would then be followed by a cleansing ceremony to remove the dark cloud hanging over the community as a result of the perpetrator's wrongdoing. The Western idea or way of life in which the wrongdoer would ask for forgiveness to someone who is supposedly in the metaphysical world (God, or some other deity) for offences committed in the physical world is a strange idea in African societies (*Mphahlele* 2002b, 154). This punishment or recompense in the afterlife or metaphysical realm for misdeeds committed in the physical world as embodied in the Western way of life is inimical to the African way of life (*Mphahlele* 2002b, 154).

Ubuntu, like *Mphahlele's* African humanism, is also captured in the differences between the Christian religious beliefs and African religious beliefs. African religious beliefs are contrary to Christian beliefs, as African religious beliefs are not rooted in the view that man will be saved, because African humanism or ubuntu does not present choices between the promised land (heaven) and hell (*Mphahlele* 2002b, 146). In the African humanism or ubuntu context, a person's moral and spiritual being in the physical world matters the most. It is not the reward or fear of future punishment by some God or other deity who supposedly exists in the metaphysical world, and who preoccupies himself with controlling human life and apportioning either punishment or rewards, depending on how man/woman behaved while in the physical world that mediates a person's moral and spiritual compass (*Mphahlele* 2002b, 146).

Linked to the above is *Mphahlele's* distinction between "African humanism and scientific humanism", *Mphahlele* argues that scientific humanism is misguided in its view that a man holds his own destiny, and that religion plays no role in this, but is something forced on man from without. African humanism has religion as its foundation, with morality still used as a barometer of acceptable human ethical conduct in the physical world (*Mphahlele* 2002b, 154–155).

Ubuntu or African humanism is also rooted in the belief and way of life that everything is related to human beings, not other things (*Mphahlele* 1984, 199–202). As part of this belief and way of life, Africans do not treat animals better than human beings, unlike in other cultures. This is not to say that Africans treat animals badly, but that human beings are placed at the centre of everything. This is echoed by *Ramose*, who captures this in the context of the current economic system

which he argues lacks a human face. He further argues that in African traditional culture, everything revolves around human beings as the centre (Ramose 2002, 111–115). Ramose captures this with the Sesotho aphorism *Feta kgomo o tshware motho*. This means that when one is faced with a situation wherein one is required to choose between wealth acquisition and the preservation of another human being's life, one should choose to preserve the life of another human being (Ramose 2002, 114–115). Closely linked to this belief and way of life are Africans' modes of relaxation; when Africans go on holidays, they go on holiday not just for the beautiful scenery, but to visit other people too, unlike Westerners who mostly go on holiday to lonely places (Mphahlele 1974, 71–72).

Tshoose also describes ubuntu as a value which, although encouraging generosity, discourages idleness and laziness (Tshoose 2009, 13). He locates some of ubuntu's components within the informal social security system of stokvels, co-operative community farming (*letsema* in Southern Sotho), burial societies (known as *masingcwabisane* in isiZulu, translated as "let's help each other in burying one another") and various informal social security schemes (Mokgoro 1998, 15; Tshoose 2009, 14–16). Tshoose, like Mokgoro, holds that ubuntu is based on group solidarity, and also values individual needs and independence within the well-being of the community (Mokgoro 1998, 14–15; Tshoose 2009, 14). This does not mean that the individual has no room or some form of independence from the community, but that his or her space and individual autonomy is respected and valued in the spirit of community (Nafukho 2006, 410–411).

Nafukho argues that ubuntu is underpinned by three tenets, "religiosity (spirituality), consensus building and dialogue" (Nafukho 2006, 409–411). Ubuntu is based on religion; it focuses on character-building as a cornerstone of African traditional learning passed on through traditional education. Spirituality played a vital role in society and united ancestors with the living and extended family. The living took care of the dead and vice versa. In this sense, death is regarded as an ultimate homecoming (Nafukho 2006, 409–411). Ubuntu in this context also means that traditional African culture is based on an infinite capacity for the pursuit of consensus and reconciliation. An African-styled democracy operates in the form of lengthy discussions (Nafukho 2006, 409–411). Dialogue, on the other hand, stresses the inborn capacity and willingness of the African people to talk to each other in order to resolve problems (Nafukho 2006, 410–411).

Most importantly, in an African culture and way of living, unlike in Western culture and its conceptions of property, no single individual or group of individuals enjoyed complete ownership of property, such as land. Property is collectively owned by the community, and not the individual. Land is merely under the custodianship of the Chief/King/Queen on behalf and for the benefit of his/her people (Nyerere 1974, 9–15). In this context, poverty was foreign to Africans since the community collectively owned everything, which was shared among them, no matter how insignificant (Metz 2007, 325–326; Mogoboya 2011, 47–48). For instance, when livestock was grazing on land, it grazed on common land, not someone else's land. This is

one reason why so many African societies adopted (quasi-)socialist economic systems after independence in the post-war era; free markets seemed, if not inherently wrong, then at least something that would hinder morally desirable behaviour (Metz 2007, 326).

Land is also essential to Africans because it serves many connected purposes beyond economic or material gain, including building shelter (Mogoboya 2011, 40–41). Land is intertwined in Africans' identity and spirituality. This is because Africans also practise certain traditional customs or ceremonies related to land, including the right of passage, welcoming a new family member into the family, appeasing the ancestors, performing marriage and birth ceremonies, burials, and more. Land ownership is also important because it links the living and those who passed on, which serves to bring unity and cohesion between families and tribes (Williams 1974, 181; Mogoboya 2011, 41). This is why when Africans were dispossessed of their land, they were also robbed of their identity, unity, spirituality, and ways of life (Mogoboya 2011, 41).

Notwithstanding the communal ownership of land in African societies, there is a clear tension between communal ownership of land and the individualised property ownership enshrined in section 25 of the South African Constitution (South Africa 1996). Section 25 promotes and upholds the

individual's property ownership of land instead of communal ownership of land. Land in African society is collectively owned by the community under the custodianship of the Chiefs, who hold it for and on behalf of the community and for their benefit. This form of land ownership ensured equitable and fair access to land, and this in turn had a positive spin on poverty reduction. This has not been adopted and codified in legislation (Communal Land Act 11 of 2004),⁴ case law⁵ and section 25 of the Constitution. Further, section 25 of the Constitution does not recognise the meaning and different uses of property/land by Africans. Instead, a single conception of meaning and use of property is promoted: that of individualised land ownership, for the most part. Perhaps this is why Moosa holds the view that the Constitution was de-Africanised (Moosa 2000, 131).

Interestingly, it has recently been argued that ubuntu shares a relation to *ukama*, a Shona word for relatedness (Le Grange 2015, 306). Le Grange fortifies his arguments with reference to Murove, who argues that ubuntu is the solid form of *ukama*, in that "human interrelationship within society is a microcosm of the relationality within the universe" (Murove 2009, 316). Seen in this light, "*ukama* provides the ethical anchorage for human social, spiritual and ecological togetherness" (Murove 2009, 317). According to Murove, *ukama* stretches to all people, past, present and future generations, because "human actions are sensitised to all dimensions of existence – past, present and future" (316–317), and the connecting glue in all three generations is the existence of the moral values that are inherited and passed down to future generations. This means that *ukama* cannot be separated from its relatedness to nature, achieved through ancestral rites since African ancestral rites tend to involve the transfer of the human soul to animals, and to plants; an amazing feeling that there is interconnectedness between various forms of life (Junod 1939, 112). Murove's views have merit, and we align ourselves with his views in that ubuntu is the form of *ukama*. The basis for this is that it is through relatedness that the actions of an individual may have a negative and/or positive impact on others. For example, a person who destroys a small stream that is used by the community as a source of water affects the entire community through his/her actions. Therefore, his/her conduct of destroying the stream is contrary to the spirit of ubuntu as it is against the well-being of the society. Herein lay the interconnectedness between the concept of ubuntu and the environment.

Ukama and ubuntu share similarities in their embrace of relations in both the physical world and the metaphysical world. This is because ubuntu stretches beyond the living in the context of the relationship between those that have passed on (ancestors) and the living, who regularly seek guidance from ancestors, and also perform rituals of remembrance from time to time. By the same token, *ukama* also covers the human social interactions in the physical and metaphysical world. This is because human interaction in the context of *ukama* covers all dimensions of existence, past, present and future, and acts as the connecting glue between generations through the existence of moral values that are inherited and passed down to future generations. For instance, in the context of ubuntu, one is expected to pay homage to one's ancestors through certain rituals involving the slaughter of an animal (usually a cow or a goat), the brewing of traditional beer, and speaking to those that have passed on, while the incense (*impepho*) is burning in the background (this traditional ritual is called *umsebenzi* in isiZulu).

The substantive content of ubuntu as captured by components such as *masakhane*, *izandla ziyagezana*, *batho pele*, *letsema*, stokvels, *masingcwabisane*, the relationship between children and adults, the sacredness of human life, the meaning and uses of land by and between Africans, the importance of dialogue and consensus-seeking, and the continued connection between the living and the dead (ancestors) in African culture are further evidence of the continued relevance and flexibility of ubuntu. Therefore, ubuntu has not reached its end but is evolving in line with both rural and urban settings. It must nonetheless be highlighted that the evolving concept of ubuntu, such as the so-called "after tears" is seen by those who subscribe to it as supporting the mourning family members, even though such support takes a new form in that there is, inter alia, loud music. This can also be seen as another innovative, substantive component of ubuntu as friends, neighbours

4 It is worth noting that this Act was declared unconstitutional and invalid by the Constitutional Court in *Tongoane and Others v National Minister of Agriculture and Land affairs and Others* 2010 (6) SA 214 (CC).

5 *Tongoane and Others v National Minister of Agriculture and Land affairs and Others*.

and members of the community show their ubuntu by remembering the deceased through the “after tears” event.

Metz identifies twelve values that he argues should ground a viable moral theory of ubuntu that are acceptable to both followers of ubuntu and Western people in modern democracies. According to Metz, for both groups of people it is immoral to kill innocent people for money, to have sex with someone without her/his consent, to deceive people – at least when not done in self- or other-defence, to steal (that is, to take from their rightful owner) unnecessary goods, to violate trust – for example, break a promise – for marginal personal gain, to discriminate on a racial basis when allocating opportunities, to make policy decisions in the face of dissent – as opposed to seeking consensus, to make retribution a fundamental and central aim of criminal justice – as opposed to seeking reconciliation, to create wealth largely on a competitive basis – as opposed to a cooperative one, to distribute wealth largely on the basis of individual rights – as opposed to need, to ignore others and violate communal norms – as opposed to acknowledging others, upholding tradition and partaking in rituals, and to fail to marry and procreate – as opposed to creating a family (Metz 2007, 324–328).

Metz’s twelve values on ubuntu mentioned above are a promising attempt at developing an acceptable ubuntu-based moral ethic. However, in our view, his twelve values are based on the assumption that both the followers of ubuntu and Western people in modern democracies subscribe to a supposed common morality. The idea of a common and shared morality in any society has long been discredited (Phooko 2011, 67), Metz also admits as much, saying that people in societies do not share a common morality (Metz 2007, 327). What is more troubling with his twelve values is that some of them are based on the wrong premise and assumptions. For instance, in African societies decisions are taken after long discussions, with the aim of seeking consensus and inclusiveness. However, this does not mean that there must always be a compromise or consensus because dissent is encouraged, and those who are still aggrieved by an issue following the long discussions are allowed to form their own communities within the larger community.

In addition, Metz is correct that land in African societies is held in common and for the benefit of the community, and that wealth creation has the spirit of community as its base and not individualism and crass competition. However, he fails to acknowledge that, despite this, there were empires in African societies. He also wrongly assumes that it is immoral not to have a family and procreate for ubuntu followers and Western people in modern democracies. On the contrary, Western people in modern democracies have rights, and may choose to either have a family or procreate or not. Ubuntu followers do not have a moral obligation to have a family and procreate because an individual in African societies still enjoys certain entitlements within the broader norms of the community as mentioned earlier. Another weakness in Metz’s ubuntu-based moral theory is that it lacks specificity; for instance, he mentions traditions and rituals (Metz 2007, 327), but he does not mention the traditions and rituals that he refers to. The readers are left to guess what traditions and rituals he is referring to. In contrast, in this paper, we attempt to distil with specificity some of the substantive components that make up ubuntu as demonstrated earlier.

These components of ubuntu which are seldom acknowledged in academic writings and court decisions have crystalised with time into certain maxims such as *umuntu ngumuntu ngabantu* or *motho ke motho ka batho ba bangwe*. These maxims then have become a sort of shorthand for these and other components of ubuntu.

Ubuntu and the South African Constitution

Ubuntu finds no mention in the 1996 Constitution of South Africa, despite the fact that it was part of the Interim Constitution’s epilogue (*S v Mhlungu* 1995, §111). Does this then mean that ubuntu does not form part of our legal system? Can it be said that ubuntu has found its way into the final Constitution nevertheless, through section 39 of the Constitution? Section 39 requires the courts, tribunals and forums to interpret the Bill of Rights in line with an open and democratic society, based the values of human dignity, equality, and freedom. The courts, tribunals and forums are also required, when interpreting legislation and when developing the common law or customary law, to promote the spirit and objectives of the Bill of Rights. Significantly, section

39(3) provides that “the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights”.

Section 211(3) of the Constitution also provides that “the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”. It can therefore be said that since the courts, especially the Constitutional Court, have recognised ubuntu as a constitutional value, the courts are taking heed of sections 39(3) and 211(3) of the Constitution, thereby giving life to the challenge in both sections 39(3) and 211(3), that firstly, the constitutional values expressly mentioned in the Constitution are not a closed list, second, that the courts are willing to apply components of African customary law, such as ubuntu, so long as these are consonant with the Constitution.

The Constitutional Court in *S v Makwanyane*, a decision dealing with the constitutionality of the death penalty, made it clear that ubuntu is part and parcel of the South African legal system. The Court held that

the legacy of the past and gross human rights violations must be addressed through the Constitution and human rights culture, including on the retribution ought not to be given undue weight in the balancing process. The Constitution is premised on the assumption that ours will be a constitutional State founded on the recognition of human rights. The concluding provision on National Unity and Reconciliation contains the following statement: The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. *These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation* (*S v Makwanyane and Another* 1995, §130–131, emphasis added).

The reference to ubuntu in *S v Makwanyane* was correctly made because the word “ubuntu” was contained in the epilogue to the Interim Constitution (1993). However, the concept of ubuntu has been omitted in the text of the 1996 Constitution of South Africa. One of the reasons that led to its omission was that there was no consensus on whether it should be included or not. Furthermore, some philosophers argue that ubuntu “is such a bloated concept that it means everything to everyone, and as a bloated concept it should not be translated into a constitutional principle” (Cornell and Van Marle 2005, 196). Contrary to Peterse’s view as quoted by Cornell and Van Marle, the Constitutional Court has demonstrated in a battery of cases that ubuntu is a constitutional value that may be developed alongside the other constitutional values.

The omission of the concept of ubuntu in the 1996 Constitution has not been well received by some academics. For instance, Moosa has described the omission of ubuntu as meaning that the “Constitution was de-Africanised in the re-drafting process” (Moosa 2000, 131). Furthermore, according to Moosa, “[w]ith that, the religio-cultural values of African people are also devalued” (Moosa 2000, 131). As a result of this omission, Moosa is of the view that “the desire to formulate a core legal system which encapsulates the multiple value systems in South Africa was not necessarily accomplished in the final Constitution” (Moosa 2000, 131). On the contrary, Moosa’s view is at odds with the Constitutional Court’s jurisprudence, which confirms that the concept of ubuntu is one of the constitutional values. However, a challenge may still lie ahead for the Constitutional Court, namely to develop a coherent jurisprudence that encapsulates multiple values of the people of South Africa, and is still in tune with the changing social and economic challenges facing South Africa.

The other case in which ubuntu was recognised as a constitutional principle or value is the case of *Port Elizabeth Municipality v Various Occupiers*, which concerned residents who built an informal settlement on privately owned land and were facing eviction (*Port Elizabeth Municipality v Various Occupiers* 2005, §1–7). The Court reasoned that

...[t]he Constitution and PIE confirm that we 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 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 (*Port Elizabeth Municipality v Various Occupiers* 2005, §37, emphasis added).

This was also confirmed in the case of *Bhe and Others v Khayelitsha Magistrate and Others*, albeit in a different context from that involved in *S v Makwanyane and Another* and *Port Elizabeth Municipality v Various Occupiers*. The *Bhe and Others v Khayelitsha Magistrate and Others* case concerned the constitutionality of the rule of primogeniture and its attendant exclusion of extramarital children in the customary law of succession (*Bhe and Others v Khayelitsha Magistrate and Others* 2005, §1–7). The Court reasoned that the positive side of customary law is important and deserves protection in the Constitution. One of those positive aspects of customary law was held to be ubuntu, which offers better alternatives to problem solving and provides a better setting for the family structure and fostering of co-operation (*Bhe and Others v Khayelitsha Magistrate and Others* 2005, §45–46).

The more telling case perhaps was that of *Dikoko v Mokhatla*, which concerned the reach of immunity from civil law liability or damages accorded to Municipal Councillors in respect of utterances they make in the performance of their official duties as Municipal Councillors (*Dikoko v Mokhatla* 2007, §1). The Court held that the philosophy of ubuntu or *botho* had been invoked in a variety of legal disputes, such as criminal law in child justice and capital punishment cases, evictions, and that there is no reason why it should be limited to these areas of the law (*Dikoko v Mokhatla* 2007, §115–116). Besides section 39(3) of the Constitution, the Constitutional Court has put the questions of whether the value or philosophy of ubuntu is part of our constitutional order and law beyond question in the abovementioned cases.⁶ We therefore submit that, despite the failure to expressly include ubuntu in the Constitution, ubuntu has nevertheless found its way into the Constitution through section 39, and this is further fortified by the jurisprudence of the Constitutional Court which locates ubuntu among the recognised constitutional values.

Is ubuntu being misunderstood?

An analysis of the definitions and descriptions of ubuntu, save for the ones provided by Tshoose, and Mokgoro to an extent, reveals, we submit, that ubuntu is deeply misunderstood by academic writers and courts alike (see English 1996, 645–648; Keevy 2009, 34–50; Cornell and Van Marle 2005, 205–207). An example of a courts' misunderstanding of ubuntu was its erroneous use to suppress freedom of expression, part of South African history and heritage embodied in an infamous struggle song *dubula ibhunu* (*Afri-Forum and another v Malema and Others* 2011, §108, 111). This is because ubuntu encompasses more than what has been provided for in their definitions and descriptions. Ubuntu is more than a South African and African concept; it comprises many components, as explored above, and is common as a way of life to many African people (Nafukho 2006, 409–410). For instance, the spirit of *Ujamaa* in Tanzania is similar to ubuntu, and similar concepts are found in East Africa and Nigeria (Falamusu 2010, 1–2; Nafukho 2006, 409–410).

The maxim, *umuntu ngumuntu ngabanye abantu*, for example, has an equivalent in eastern African indigenous communities: *omundu nomundu wa bandu* (which means “an individual is an individual because of other individuals in society”) (Nafukho 2006, 409). Herein lay the interconnectedness of African culture, ways of life and origin (Williams 1974, 101–124; Nafukho 2006, 409–410). Chancellor Williams irrefutably traced the origins and culture of African people when Africa was one, and before its civilisation and great empires were violently interrupted and destroyed by colonisers (Williams 1974, 121–124). The relationship between ubuntu in South Africa and in some

6 For recent cases that refer to and apply ubuntu, see: *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011; *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape and Others* 2015, §47).

African countries shows that ubuntu is, at the very least, understood in the same content and relates to a way of life to many African people.

Ubuntu has been heavily criticised by some academic writers (English 1996, 644–648; Keevy 2009, 34–50). English argues that ubuntu is merely a marketing device, made to impose a set of African values on a set of civil liberties and freedoms, forged out of Western tools (English 1996, 646–648). English reasons that constitutional litigation and adjudication are about conflict, and therefore ubuntu cannot be a basis of constitutional jurisprudence since it places more emphasis on conciliation and co-operation as its core value than on conflict (*ibid.*). This criticism is without merit because English confuses ubuntu with the dispute resolution mechanisms in African customary law. The dispute resolution mechanisms in African customary law are rooted in consensus-seeking, conciliation/mediation and co-operation, but where this cannot be achieved, other mechanisms of resolving disputes are employed, such as fines administered by traditional courts. In addition, democracy under African systems encourages consensus-seeking and dissent, and if no consensus is achieved, people or groups of people are allowed to break away and form their own community within the larger community. This then, is partly how Africa came to have many communities or tribes (Williams 1974, 172–176, 186). In any event, the Constitutional Court has long settled the debate in that ubuntu is part of South Africa's constitutionalism and human rights in numerous cases.

Keevy also argues that ubuntu is not "...consonant with the values of the Constitution in general and the Bill of Rights in particular..." (Keevy 2009, 52–53). To that end, Keevy argues that ubuntu entrenches patriarchy (Keevy 2009, 36–44), and discriminates against gays and lesbians (Keevy 2009, 44–47). Moreover, Keevy argues that ubuntu entrenches practices of traditional values that do not guarantee strangers and outsiders the right to equality, as African law and religion applies to the African community or clan and not to strangers or outsiders (Keevy 2009, 48–50). As indicated above, the Constitutional Court has, in a long list of cases, held that ubuntu suffuses the whole South African constitutional order, and that it is part of the South African law. Therefore, Keevy's criticism that ubuntu is not in line with the Constitution and the Bill of Rights is without merit as it flies in the face of decisions of the Constitutional Court.

Similarly, Keevy's claims that ubuntu entrenches patriarchy, discriminates against gays and lesbians, and entrenches a set of traditional values that excludes strangers and outsiders are without merit. Ubuntu did not and has never been applied based on the condition that people know their places whether as women, children or gays and lesbians or as strangers or outsiders (Williams 1974, 176–178; Kenyatta 1978, 6–7, 36–47; Nafukho 2006, 411). For the elevated status of women in African societies, Jomo Kenyatta recorded that women were revered as sacred, and are pillars of socio-economic survival in African societies and cultures (Williams 1974, 127, 135, 139; Kenyatta 1978, 6–7, 36–47). Children were and still are important in African societies and culture, not only because the family name is carried through them, but because the culture and customs of the family lives through them as passed down by family elders, but most importantly, like women, the very continuation of society depends on them.

Keevy presents no evidence, but unsubstantiated and sweeping claims that gays and lesbians were treated badly in African societies because of ubuntu. Instead, the readers are treated to anecdotal accounts of the treatment of gays and lesbians in modern African societies. Nowhere is this supported by evidence to the effect that ubuntu or its equivalent is to blame. On the contrary to Keevy's bald claims, in the context of ubuntu, all human beings have always been accorded the same level of protection in African societies (Williams 1974, 178). Williams provides a comprehensive and original system of African democracy and Bill of Rights from which many of the modern constitutions are based (Williams 1974, 172–176, 181). Therefore, to claim as Keevy does, that the views and treatment of gays and lesbians by certain African leaders represents African culture or ubuntu, and that they amount to the views of Africans (all Africans), without providing substantiation or evidence to support the claims, is unfortunate and shows a dangerous misunderstanding of ubuntu and African culture, and of the original African democracy that is prevalent today. Tshoose captures this, for instance, in the context of the informal social security system, which directly benefited everyone who chose to participate, and indirectly benefited those

who did not participate, through family members who did and then supported families with the goods or money obtained.

More telling, is the fact that “the overwhelming majority of Africans do not live their everyday normal lives as Senegalese, Nigerians, Zaireans, Kenyans...instead, they live their lives as Wolof, Yoruba, Igbo, Ijo, Nupe, Bakong, Baluba, Baganda, Kikuyu, Asante, and so on” (Ekwe-Ekwe 1993, 95). Keevy’s claims in this context, then, seem not only far-fetched, but outlandish because of the false idea of a singular African culture or morality. This is not to deny that African cultures share certain similarities, like ubuntu, but to say that there are complex cultural nuances that exist within these similarities.

Ubuntu has also recently come under heavy criticism from Matolino and Kwindigwi (2013), who essentially argue that ubuntu has reached its end. They first argue that there may have been other inferior or superior interpretations or ways of looking at life in African settings that may have disappeared or may have not enjoyed the same status as ubuntu, and this does not mean that these interpretations are less valuable or less Africa (Matolino and Kwindigwi 2013, 201). Matolino and Kwindigwi are long on generalisations in that they do not mention what other African values could have existed and disappeared, or how these may have been superior or inferior. As a result, this makes it difficult for us to respond as we are not privy to what other alternative values they refer to.

Matolino and Kwindigwi also argue that ubuntu is an attempt at reviving outdated and discredited notions of return, reminiscent of the earlier notions of nationalism that post-independence African leaders sought to promote, but failed (Matolino and Kwindigwi 2013, 198–199, 201). By this they mean that ubuntu is an attempt to return to outdated notions and ways of living which do not fit into the modern world and are not commonly shared by different communities. For them, in order for ubuntu to exist, it should be commonly shared by the entire community as opposed to different communities that are undeveloped and tight-knit. On the contrary, ubuntu exists even though there are different communities who subscribe to different norms. This is because not everyone subscribes to the same norms. The example used by Matolino and Kwindigwi of a violent taxi driver in Bloemfontein is but one example of people subscribing to different norms and moral ethics. However, what we disagree with is their assertion that this incident cannot be interpreted with reference to ubuntu. By this we mean that the way the taxi driver behaved towards another fellow human being is an indication of his lack of ubuntu.

Matolino and Kwindigwi further argue that ubuntu has been commercialised (Matolino and Kwindigwi 2013, 200–201), but they do not tell what is wrong with its commercialisation. In our view, its commercialisation is evidence that ubuntu is animating modern life and the economy. This addresses Matolino and Kwindigwi’s critique of ubuntu. It is therefore strange to us when Matolino and Kwindigwi argue in the same paper that ubuntu has reached its end.

Matolino and Kwindigwi also variously refer to ubuntu as a “notion”, a “project”, and an “ideology” (Matolino and Kwindigwi 2013, 197–198). This is very confusing. It appears the authors are unable to decide what ubuntu is in their view. In addition, their critique flies in the face of various cases from the Constitutional Court that have affirmed ubuntu as one of the constitutional values, that also forms the basis for interpreting the Bill of Rights. It is therefore puzzling to us how ubuntu has reached its end in Matolino and Kwindigwi’s view, while the highest court in the land has decided to the contrary in a battery of cases.

Conclusion

We have attempted to provide an alternative way of understanding ubuntu, and have also provided some essential components that make up the substantive content of ubuntu without providing a closed list, and with the aim of stimulating further debate on the concept of ubuntu. To this end, we have demonstrated that ubuntu does not begin and end with the maxim *umuntu ngumuntu ngabanye abantu*. We have also shown that ubuntu is misunderstood by some academic writers and the courts alike because of their failure to account for its substantive content. Furthermore, we have noted that the courts, especially the Constitutional Court, have settled the debate on whether ubuntu forms part and parcel of our constitutional democracy in various cases that have been discussed in this article. However, this should not be the end of the matter because a lot more work still needs to be done

by the legislature, ordinary citizens and the courts in the clarification of the constitutional value of ubuntu.

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