Exploring the Possibility of an Ubuntu-Based Political Philosophy

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Abstract

It is typically said that there are two questions that political philosophy seeks to address: 'who gets what?' and 'who decides on who gets what?' South Africa, along with much of the rest of the world, has answered the second question badly and currently ranks as one of the world's most unequal societies. Counter-intuitively, South Africa maintains a social-political order that (re)produces this inequality along with great enthusiasm for ubuntu, an African ethic that at a minimum requires that we treat each other humanely. However, due to the view that ubuntu has been co-opted in support of South Africa's unjust system, ubuntu has largely been ignored by radical thinkers. The aim of this thesis is therefore to explore the possibility of an ubuntu-based political philosophy, with the core assumption that political philosophy is rooted in ethical theory. Three tasks are therefore undertaken in this thesis. Firstly, ubuntu is articulated as an ethic. Secondly, it is compared to similar Western ethical theories in order to determine if there are distinguishing characteristics that make ubuntu a more appropriate founding ethic for South African political philosophy. Finally, whether ubuntu can find real-world applicability will be assessed by looking at the way ubuntu has been used in the law.

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Introduction

It is typically said that there are two questions that political philosophy seeks to address: 'who gets what?' and 'who decides on who gets what?'(Wolff, 1996, p. 1). In South Africa, it may appear that both questions have been resolved. General elections are held every five years to determine who rules (Section 86, Constitution of the Republic of South Africa 1996) and distributive questions are resolved by the market, with state intervention to redistribute some national wealth occurring via a few main budgetary mechanisms; including a progressive tax system, spending on public education, health care, and welfare payments (Nattress & Seekings, 2001, p. 493).

However, the answer to the question of 'who gets what' remains unsatisfactory. On the international level, there is renewed interest in finding alternative ways to arrange the socio-economic order, both due to the recent financial crisis, and because of the dire environmental consequences associated with market capitalism (Fluxman, 2009, p. 377). Douzinas and Žižek argue that the collapse of the banking system in 2008 called into question not only economic understandings of capitalism, but that it 'has matured into a full-fledged political crisis which is de-legitimizing political systems' and has 'renewed interest in radical ideas and politics'(2010, pp. vii-viii). In Western political thought, this trend has largely taken the form of a renewed interest in Marxism, which is clearly reflected in the recent outpouring of Marxist literature. Literature in this vein includes Douzinas and Žižek's *The Idea of Communism* (2010) (following the 2009 conference on the same topic held at the Birkbeck Institute for the Humanities) and Terry Eagleton's *Why Marx Was Right* (2011). Most recently, *The Guardian* announced that, 'Yes, Karl Marx is going mainstream – and goodness knows where it will end' (Jeffries, 4 July 2012).

On the local level, the current South African system requires attention, due to the gross inequality that it produces. In the 2009 Human Development Report, South Africa's Gini Index rating was listed as 57.8, based on data from the 1992-2007 period.[1] Further, in the 2002-2007 period, 42.9% of South Africans lived on $2 or less a day; while 44.9% of all expenditure came from just 10% of the population (United Nations Development Programme, 2009).

However, contrary to the Western trend toward Marx, South Africa has experienced a 'retreat' from Marxism in the post-apartheid era (Helliker & Vale, 2012, p. 1). Helliker and Vale argue that the

[1] The Gini Index operates on a scale of 0-100, where 0 represents perfect equality and 100 represents perfect inequality.

decreased interest in Marx may have the positive effect of curbing radical thinkers' fixation with the state, thus creating the space for a more society-orientated political philosophy to develop (Helliker & Vale, 2012, pp. 2, 11). Such a shift would involve recognizing 'the legitimacy, viability and significance of sites outside the state that involve popular-radical struggles challenging the basis and form of state power'(Helliker & Vale, 2012, p. 11). However, they also argue that dismissing the state entirely would be unsatisfactory because '[i]f transformation is to be authentic, both state-centred and society-centred forms of change are needed' (Helliker & Vale, 2012, p. 9).

Ubuntu seems to offer an ethic that may plausibly form the basis of a political philosophy that is both state *and* society orientated, given the political role it has played in post-apartheid South Africa and its overall resonance within peoples' lived experiences. However, as McDonald notes, radical thinkers have largely ignored ubuntu (McDonald, 2010, p. 140). This thesis explores the possibility of an ubuntu-based political philosophy.

Towards this end, the study will be divided into three chapters. The first chapter will focus on articulating ubuntu as an ethic. The second chapter will focus on comparing it to similar ethical theories in order to determine if there are distinguishing characteristics that make ubuntu more appropriate than other communally-orientated moral theories for forming the basis of a South African political philosophy. The third chapter will assess whether ubuntu can realistically find practical application by looking at how ubuntu has gained legal applicability.

Chapter 1:
Ubuntu as a Moral Theory

Political philosophy is rooted in moral philosophy, where prescriptions of right action for the individual are amplified to prescriptions of right action for state and in standard political philosophy the ethical base is typically provided by Kantianism or Utilitarianism(Metz, 2009, p. 335). This chapter aims to describe and defend a theory of right action implicit in ubuntu, with the intention that this can be used as the premise for an African political philosophy – the task of subsequent chapters. In describing an ubuntu ethic, the aim is not to uncover the 'most true' account of ubuntu. As van Binsbergen argues:

> [T]he majority of the population of Southern Africa today cannot be properly said to know and to live *ubuntu* by any continuity with village life. They have to be educated to pursue (under the name of *ubuntu*) *a global and urban reformulation* of village values. And they learn this on the authority, not of traditional diviner-priests… but of recognised opinion leaders of the globalised centre: politicians, university intellectuals(Van Bisburgen, 2001, p. 64).

The sources of ubuntu morality in contemporary South Africa are not necessarily Oruka's sages.[2] The experience of colonialism and oppression has damaged the connection to pre-colonial life(Praeg, 2000, p. 97); and therefore, trying to find the most 'authentic' (that is to say, the most accurate reflection of pre-colonial values) description of ubuntu would be impossible. Instead, ubuntu needs to be thought of in terms of Eric Hobsbawm's notion of 'invented tradition', which refers to the idea that '[t]raditions which appear or claim to be old are often quite recent in origin and sometimes invented'(1992, p. 1).For example, Trevor-Roper argues that the culture of the Scottish Highlands – kilts, bagpipes, etc. – only came into existence during the eighteenth and nineteenth centuries as a form of resistance against union with England, despite being represented as a cultural practice dating back to time immemorial (1992, pp. 15-16). But as Praeg cautions, 'to reinvent tradition does not mean we simply make it up'(2008, p. 373). This warning is especially pertinent in the case of ubuntu, because unlike the invention of the Scottish Highland Games, ubuntu practice persists as a deep-rooted part of many South Africans' lived experience. For instance, in Shutte's description of German and African nuns living in the same convent, he argues that the African nuns see it as imperative to spend their free time in conversation with one another in order to strengthen their relationships, while the German nuns living in the same convent do not see conversation or

[2] See Oruka's *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy*(1990).

relationship-building as a moral imperative (Shutte, 2001, pp. 27-28)[3]. Further, the process of the South African Truth and Reconciliation Commission provides a number of examples of people who prioritised ubuntu by means of the show of forgiveness. One particularly moving example is Cynthia Ngewu's forgiveness of her son's apartheid murderer when she says:

> This thing called reconciliation … if I am understanding it correctly … if it means this perpetrator, this man who has killed Christopher Piet, if it means he becomes human again, this man, so that I, so that all of us, get our humanity back … then I agree, then I support it all (quote taken from Praeg 2008, pp. 374-375).

Given the significant role that ubuntu continues to play in social exchange, it cannot be casually defined. The description of ubuntu as an ethic that is provided in this thesis will have to take account of two things: the reality that the current discourse of ubuntu is unlikely to be properly 'authentic'; and Praeg's warning that we cannot simply invent ubuntu anew. The approach here will therefore be to go through various accounts of ubuntu as a moral theory that have gained credence in the literature and to select from these accounts that definition of ubuntu as an ethic best suited for developing ubuntu as a political theory.

Setting out an ubuntu moral theory

The word 'ubuntu' comes from the Nguni language family, i.e. Zulu, Xhosa, Swati, and Ndebele; and it means something close to 'human' or 'humaneness'(Metz, 2007, p. 322). Equivalent terms are found in other African languages, such as *botho* in the Sotho languages, *vhutu* in Venda, *bunhu* in Tsonga and *hunhu* in Shona (Louw, 2001, p. 29; Midgley & Keep, 2007, p. 31; Van Bisburgen, 2001, p. 53). According to Van Binsburgen the term 'ubuntu' is composed of the suffix *ntu* which refers to that which is human[4], and the prefix *ubu,* which is a construction that allows for the creation of abstract concepts (Van Bisburgen, 2001, p. 54). When the prefix and the suffix are joined they form a term that refers to an abstract concept related to humanness.

Defining ubuntu beyond 'humaneness' and providing an ethical structure based on ubuntu has been a difficult task for many authors. There are at least three ways in which the question of how to derive clear ethical content from ubuntu has been approached. These include: 'an ubuntu ethic by religion' – accounts of ubuntu as an ethical theory that incorporate religious (typically Christian)

[3] This is likely to be an over-simplification of the nuns' moral perspectives, but it nonetheless serves the point that there are still people who live 'by ubuntu'.

[4] Comparable terms include *muntu* (a human) and *bantu* (people) (Van Bisburgen, 2001, p. 54).

elements into their descriptions(Battle, 1997; Shutte, 1993; Shutte, 2001; Tutu, 2000); 'an ubuntu ethic by maxim' – accounts of ubuntu that take short proverbs or sayings as the basis for the definition of ubuntu that can be expanded to the level of ethical theory (Mokgoro, 1998); and 'an ubuntu ethic by underlying principle' – accounts of ubuntu that aggregate many African moral beliefs, with the intention of locating a single ethic that may serve to capture the moral content of a variety of beliefs (Metz, 2007).

Other taxonomies for thinking about ubuntu have been proffered. For instance, Metz provides six potential descriptions of ubuntu as an ethic in *Toward an African Moral Theory* (2007), however these are descriptions of the possible content of an appropriate ubuntu ethic[5], not competing descriptions of how that content might be derived – Metz is fairly convinced that the best way of locating ubuntu as a moral theory is to discover the ethic that captures the greatest number of other moral beliefs that people already hold. Hailey, in a commissioned report on ubuntu for the Tutu Foundation, makes a concerted attempt to systematise the various approaches to thinking about ubuntu. He describes ubuntu thought as falling into the following categories: theological ubuntu (such as the description of ubuntu promoted by Tutu)(2008, pp. 5-6),practically-orientated ubuntu (such as ubuntu-based management theory)(2008, p. 7), ubuntu via proverbs (such as *umuntu ngumuntu ngabantu* or 'a person is a person through other persons') or greetings (such as *sawabana* or *muse atse* which mean 'I see you')(2008, p. 8), and ubuntu as reconciliation (that is the Truth and Reconciliation Commission and President Mandela's nation building)(2008, pp. 13-14). While this is a useful taxonomy for thinking about the key trends in the ubuntu literature, not all of Hailey's categories are ethical in nature, and so it is necessary to have a more narrow set of categories for describing ubuntu as a moral theory.

The categorization of approaches to ubuntu presented in this thesis (*an ubuntu ethic by religion, an ubuntu ethic by maxim,* and *an ubuntu ethic by underlying principle*) relates most directly to a

[5] These are: 1) 'An action is right just insofar as it respects a person's dignity; an act is wrong to the extent that it degrades humanity' (p.328); 2) 'An action is right just insofar as it promotes the well-being of others, an act is wrong to the extent that it fails to enhance the welfare of one's fellows' (p.330); 3) 'An action is right just insofar as it promotes the well-being of others without violating their rights; an act is wrong to the extent that it either violates rights or fails to enhance the welfare of one's fellows without violating rights' (p. 330); 4) 'An action is right just insofar as it positively relates to others and thereby realizes oneself; an act is wrong to the extent that it does not perfect one's valuable nature as a social being'(p. 331); 5) 'An action is right just insofar as it is in solidarity with groups whose survival is threatened; an act is wrong to the extent that it fails to support a vulnerable community'(p. 333); 6) 'An action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community'(p. 334).

currently unpublished seminar presentation by Jason Van Niekerk in the Rhodes University Philosophy Department in 2010. While there is some overlap with Hailey's categories, this approach is favoured because it allows for the focus to be on ubuntu as an ethical theory, not on broader descriptions of ubuntu. Each category of ubuntu as an ethical theory will now be discussed.

An ubuntu ethic by religion[6]

One of the most prominent articulations of ubuntu as an ethic was provided by Desmond Tutu in his sermons during the end of apartheid.[7] Since then, there have been three writers who have articulated religious-based accounts of an ubuntu ethic. These include Desmond Tutu himself in *No Future without Forgiveness* (1999), Michael Battle in *Reconciliation: the Ubuntu theology of Desmond Tutu* (1997) (in which he systematises Tutu's thought into something more recognizably philosophical) and Augustine Shutte, in *Ubuntu* (2001) and *Philosophy for Africa* (1993).

In *No Future without Forgiveness,* Tutu provides what appears to be a secular description of ubuntu. He states:

> When we want to give high praise to someone we say," *Yu, u nobuntu*"; "Hey, so-and-so has *ubuntu.*" Then you are generous, you are hospitable you are friendly and caring and compassionate. You share what you have. It is to say, "My humanity is caught up, is inextricably bound up, in yours." We belong in a bundle of life. We say, "A person is a person through other persons." It is not, "I think therefore I am." It says rather: "I am human because I belong. I participate, I share." A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed, or treated as if they were less than who they are. Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* - the greatest good. Anything that subverts, that undermines this sought-after good, is to be avoided like the plague. Anger, resentment, lust for revenge, even success through aggressive competitiveness, are corrosive of this good. To forgive is not just to be altruistic. It is the best form of self-interest. What dehumanizes you inexorably dehumanizes me. It

[6]This refers specifically to what Hailey terms 'theological ubuntu' (2008, p. 5), that is - ubuntu connected to the Judeo-Christian religious tradition, such as the descriptions of ubuntu made popular by Desmond Tutu. It does not refer to the metaphysically-laden accounts of ubuntu that involve the ancestors, although these will also be discussed later in this dissertation.

[7] It is unlikely that Tutu provided the first articulation of ubuntu as an ethic, and it is interesting to note that in Gade's historical account of ubuntu's conceptual development, the description of ubuntu as an 'ethic' only became popular in the 1980s; whereas written accounts of ubuntu date back to 1846(Gade, 2011, p. 309) .

> gives people resilience, enabling them to survive and emerge still human despite all efforts to dehumanize them (Tutu, 2000, p. 31).

Although this description of ubuntu appears secular[8], the context in which Tutu places this description is explicitly within the Christian tradition. For instance, following shortly after the above passage, in his discussion on the antecedent conditions for peaceful transition in South Africa, he references St Paul's letter to the Galatians, where Paul tells the story of the historical circumstances that were necessary for the birth of Christ. Tutu compares this to the fortuitous culmination of events that allowed for South Africa's peaceful transition to democracy (Tutu, 2000, p. 36). The Christian-religious elements of Tutu's ethic are all the more prominent in Michael Battle's articulation of Tutu's thought.

Battle assembles Tutu's sermons, writings and general comments into what he describes as an 'ubuntu theology' (Battle, 1997, p. 4) – a name indicative of the Christianised approach. The conceptual point of departure for ubuntu theology is the biblical creation story of Adam and Eve in the Garden of Eden, particularly the moment in which Adam recognised his loneliness, and Eve was created to provide him with companionship (Battle, 1997, p. 4&42). The result of this account is that humans were literally 'made' to live together and to form relationships (Battle, 1997, p. 41). The implication of this, both for ethics and for determining the good life, is that human potential can only be fully realised in relationship with others and in relationship with god, in whose image humans are created.

The problem with Tutu and Battle's articulation of an ubuntu ethic is that it is exclusive to those who accept the religious account. If a viable post-colonial African political philosophy is to be developed, one that takes as its point of reference to be a political community represented by the nation or the state, it is clear that its founding ethic needs to be secular in order to avoid being exclusionary. This non-secular approach to ubuntu as an ethic is thus set aside here.

Shutte is sensitive to this criticism and recognises the need for an inclusive ubuntu ethic (Shutte, 2001, p. 14). His aim is to create a founding ethic for post-apartheid South Africa that can be applied to a wide variety of political issues, including: gender, family, education, and labour policy. From his perspective, he ensures that his founding ethic is sufficiently diverse, by merging the Western value of freedom with the African value of community (Shutte, 2001, p. 10). However, Shutte sees religion

[8] It is interesting to note that Metz's rests his secular ubuntu ethic on this reference to *harmony*; which will be discussed later in this chapter. See Metz, 2007: 323.

as basic to all human life, and therefore necessary for a full description of an ethical system (Shutte, 2001, p. 198; Shutte, 1993, p. 12). In order to justify the religious elements of his ubuntu account, he puts forward the following argument.

Firstly, Shutte takes it to be fundamental to ubuntu that one's personal growth is connected to the community more broadly. However, he argues that this capacity to promote growth has to have a source. It cannot come from the community itself, because eventually this leads to a problem of an infinite regress – with the question arising of who it is that empowers the community to empower the individual to achieve personal growth – and so there must be some higher source of power, which Shutte concludes is god (Shutte, 2001, p. 201). Whether this argument is successful will be bracketed for our purposes. Shutte does not see this as compromising the inclusivity of his project, because he leaves the question of which religion to follow open. Further, he argues that all religions (as manifestations of the universal phenomenon of religion) would be compatible with ubuntu, because they all need to comply with elements of human nature, including the human tendency to be social (Shutte, 2001, p. 200). However, instead of making Shutte's ubuntu ethic more inclusive, this description is likely to make it doubly exclusive. Not only does his account exclude non-religious members of society, in the same way as Tutu and Battle, because they are unlikely to accept the creationist elements of his account, but he is also likely to isolate religious members of society, who are unlikely to accept that their religion complies with ubuntu, especially given the emphasis that Shutte places on *serti* (the force field that connects all people and animates all being) and on the role of ancestors in his account. He therefore ultimately falls prey to the same problems as Tutu and Battle.

None of the religious accounts of ubuntu ultimately provide us with an adequate ethic for the purposes of constructing a socially functional ubuntu-based political philosophy, because each is only likely to be accepted by isolated segments of society and are therefore poor candidates for a broad political philosophy.

An ubuntu ethic by maxims

It was noted above that ubuntu is often translated to mean 'humaneness'. Another popular way of providing definitional content for ubuntu is by making use of maxims. Perhaps the best known of these maxims is *umuntu ngumuntu ngabantu* or 'a person is a person through other persons'(Shutte, 1993, p. 46). Another maxim is Mbiti's statement 'I am because we are, and since we are, therefore I

am' (Mbiti, 1969, p. 106). This way of providing definitional content has become quite popular, and was even included in Mokgoro J's definition of ubuntu in *S v Makwanyana*[9]*,* where she defines ubuntu thus: 'Generally, *ubuntu* translates as humaneness. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu …*'(paragraph 308).

In Gade's description of ubuntu's historical development, he argues that the maxims are a comparatively new addition to the ubuntu discussion, only coming to prominence in the 1993-1995 period. He hypothesises that the emergence of ubuntu via these maxims is linked to the publication of Shutte's *Philosophy for Africa* in 1993, which he believes is the first English publication to explore the moral beliefs embedded in the maxims (Gade, 2011, p. 313).[10] Further, Gade goes on to speculate that the emergence of the maxims in this period is linked to the concurrent political transition. His reasoning is that it was politically useful for this conception of ubuntu to emerge, because apartheid was characterised by division and it was necessary for the new leadership that South Africans cooperate in order for the transition to be successful. Ubuntu as an ethic promoted this kind of cooperation and linking it to traditional proverbs and maxims in an indigenous language allowed for these ideas to have greater legitimacy among the oppressed black majority 'who considered ubuntu to be something good and deeply rooted in their culture'(Gade, 2011, p. 321). He also notes that some have speculated that the introduction of the proverbs allowed for complex philosophical content of ubuntu to be expressed more succinctly than it had been previously, which was seen as an important discursive shift for ubuntu to be able to form the basis of political transition – i.e. the conversion of a complex system of thought into an 'intellectual bumper sticker of sorts' was politically expedient (Gade, 2011, p. 320). However, as Gade notes, it is almost impossible to substantiate accounts of how the maxims came to be popular descriptors of ubuntu. It is possible that post-apartheid leaders had no such motivations and that the shift to ubuntu via the maxims may have occurred more organically (Gade, 2011, p. 321).

It seems clear that these maxims are not simply drawn upon to make descriptive claims about ubuntu*,* rather they are used in order to have some kind of normative force. For instance, Mokgoro J uses her definition of ubuntu to advocate for death penalty repeal in *S v Makwanyane*. Gade

[9] 1995 (3) SA 363 (CC).

[10] However in this section, Menkiti, Temples and Gyeke will all be discussed in the context of the maxims as a source of ethical value; with all threepre-dating the publication of Shutte's book.

meanwhile notes that some writers go so far as to interpret the maxim as identical to an ethical claim, not just something from which ethical content can be derived (Gade, 2011, p. 321). But one might ask precisely where the normative force of the maxims is located. One possibility is that they are implied ontological statements, and that the normative force of the ethical claim is rooted in their ontology. This is the manner in which Placide Temples, the notorious ethno-philosopher, understood African ethical structures. He describes the relationship between ontology and ethics as follows:

> Objective morality to the Bantu is ontological, immanent and intrinsic morality. Bantu moral standards depend essentially on things ontologically understood. Knowledge of a necessary natural order of forces forms part of the wisdom of primitive peoples. From that we may conclude that an act of usage will be characterized as *ontologically good* by Bantu and that it will therefore be accounted *ethically good*; and at length, by deduction, be assessed as *juridically just* (Temples, 1969, p. 121).

One writer who has pursued these ontological implications is Menkiti. He argues that one can only acquire personhood through a process of increasing incorporation into the community. This is what he refers to as a 'processual' account of personhood, and it relies on a process of ontological progression throughout the course of a person's life (Menkiti, 1984, pp. 172-173). If this is read against these maxims, then it can be seen that one is, quite literally, only a person through other persons. As a result of this ontology, there are also limitations to personhood. Failure to participate or to participate successfully in processual becoming can leave one as a 'non-person', or 'non-human'. Of course, Menkiti's reading is contested, especially by Gyeke, who argues that Menkiti's emphasis on the priority of the community is 'overstated' and that he misinterprets the examples from Akan culture that are used to support his argument(Gyeke, 2002, pp. 299, 301-305). Gyeke's objections notwithstanding, the full implication of Mentiki's ontological approach to ethics is pursued here. Gyeke's critique will then be revisited.

Menkiti recognises that there is a relationship between the ethical and the ontological, but he structures his account such that the ethical informs the ontological. For instance, he argues that the young are not yet moral and that this contributes to the community perspective that they have not yet acquired personhood (Menkiti, 1984, p. 175). However, it seems likely that the ontological relationship works in the reverse to what is suggested by Menkiti here, namely that one's ethics is premised upon an understanding of the ontological (as suggested by Temples in the above quote). For instance, if one accepts an extremely individualistic ontology, then it is more likely that intense competitiveness would be morally permissible and inform one's morality. However, if one accepts

an ontology of interdependence, then it is likely that the ethical account flowing from that would be more focused on reciprocal obligations between self and community. According to Menkiti's account, where an individual is not even a person until the community recognises them as such, it seems more likely that one would necessarily have intense ethical duties to that community. However, he does not explore what these obligations might be and it is outside the scope of this chapter to do so.

The problem with this approach is that the ontological claim relied upon to generate the ethical account is firstly of a deep metaphysical interconnectedness, and secondly one that derives its depth from supernatural elements. For instance, on Menkiti's account he includes the ancestors as part of the community that constitutes the moral rightness of certain actions (Menkiti, 1984, p. 175). This reliance on the supernatural is problematic for an ethics that is meant to form the basis of a political theory relevant to an imagined community of diverse people and cultures, much like the problem faced by the religious accounts of ubuntu. The question that arises is thus whether we would still arrive at this situation if Gyeke's critique taken into account. It is worth asking whether this is a real problem, or just one that has manifested as a result of factual inaccuracies.

It seems unlikely that following Gyeke would be significantly more satisfactory. To assess this further, it is necessary to work through the stages of his reasoning.

Gyeke is also sympathetic to the idea that we need an ontological account (what he refers to as the 'metaphysical') in order to understand morality (Gyeke, 2002, p. 297) and he also uses the proverbs and maxims of a 'traditional' Africa to derive his ontological content. For instance, in assessing the relationship between the individual and the community, he refers to the Akan maxim '*duo baako nnye kwae*' or 'one tree does not make or constitute a forest'(Gyeke, 2002, p. 300) – i.e. he takes the maxim as having ontological import, which once understood, has ethical implications. Therefore, Gyeke follows the same theoretical structure as Menkiti. But this is not in itself problematic. Initially his approach seems much more promising, because he offers a more moderate communitarianism than Mentiki, in which he argues that aspects of the individual beyond her communal orientation need to be taken into account (Gyeke, 2002, p. 301). However, in the end, he still turns to the supernatural to 'ground' his theory. For instance, when discussing the importance of 'dignity' in African thought, he draws on the maxim '*nnipa nyinaa ye Onyame mma; obiara nnye asase ba'*, which can be translated as 'all persons are children of God; no one is a child of the earth' (Gyeke, 2002, p. 307). He takes this to mean that because each person is a child of god, and because god is

good, each person has intrinsic value and is therefore worthy of dignity (Gyeke, 2002, p. 307). Appealing to Kant, he goes on to argue that there is a secular route to reaching this conclusion, and he thereby strays from African thought (Gyeke, 2002, p. 307). This leaves Gyeke in a dilemma. Either he sustains a particular African communitarianism that is exclusivist because of its metaphysical elements, or he secularises it (with reference to Kant), which makes it more inclusive - but less African. Neither of these results are likely to be satisfactory for Gyeke.

In yet another example of using the maxims to derive ethical content, Drucilla Cornell – who will be discussed more extensively in the third chapter – also relies on an account of ubuntu that includes ancestors, and from that ontological premise develops various normative requirements. Let us begin by looking at the maxims she uses to derive an African ontology. She states that:

> The famous phrase *umuntu ngumuntu ngabantu* literally means 'a person is a person by or through other people' … There are innumerable phrases and parables that are used in Xhosa and Zulu to teach us about uBuntu, this is only one. Still, since it is so well known, we can begin with it in our examination of uBuntu (Cornell, 2009 , p. 47).

Further:

> There is a famous isiXhosa saying 'what goes out the front door comes in the back window'. The idea here is that we live in a force field in which ethical actions reverberate and encourage affirmative ethical environments (Cornell, 2009 , p. 48).

The latter quote captures perfectly this approach of deriving ethical content from the maxims. There is a maxim, it provides ontological content – in this case that there is a 'force field in which ethical actions reverberate' – and this leads to the conclusion that we should behave in certain ethical ways – treat others well so that only good things come back to us. Additionally, Cornell's ontology relies on supernatural elements, in the context of this quote a 'force field', but more generally in her approach she relies on ancestors as forming an important part of her ontological framework (Cornell, 2009 , pp. 46-47).

The tendency toward accounts of inter-connectedness that are metaphysically grounded in ancestors and supernaturalism, such as can be found in the approaches of Menkiti, Geyeke and Cornell, is extremely problematic for the present purpose. We therefore need to reject the approach of developing an ubuntu ethic that is reached via ontologically grounded maxims. It is tempting to suggest that we should just bracket or suspend the metaphysical and supernatural elements of this

approach, thus leaving a purely secular account behind. However, the problem with suspending the non-secular aspects of these accounts is that the maxims lose their normative force when separated from their metaphysical premises. This is a similar point to that made by MacIntyre in *After Virtue* (1985), where he argues that the abandonment of the teleological premises of ethical theory during the Enlightenment resulted in a set of empty (and somewhat arbitrary) moral prescriptions. Bracketing the supernatural elements here leaves us with a similarly arbitrary moral framework, in that there is nothing left to appeal to when individuals choose not to be moral. For instance, in the pre-Enlightenment moral world to which MacIntyre refers, instances of moral disagreement or moral disregard could be resolved by appealing to god, the ultimate adjudicator. With god falling out of the ethical picture, there was no one to appeal to in order to enforce the moral code, and philosophers in the Western tradition have been grappling with the question of 'why be moral' ever since. Similarly, advocates of the metaphysically-laden accounts of ubuntu are able to appeal to the ancestors as the enforcers and advocates of the moral law. If the ancestors are removed from these ethical accounts, then the proponents of such accounts are left in the same quandary as the post-Enlightenment moral philosophers in the West, that is - without any response to those who would act counter to the prescriptions of ubuntu, except perhaps something to the effect of 'it is nice to be nice'.

An ubuntu ethic by underlying principle

Metz's methodology begins by providing a descriptive account of what moral beliefs people actually hold and then articulating a unifying moral theory that underpins those beliefs thereafter. This specific approach is articulated by Metz in the paper *Toward an African Moral Theory* (2007), where he lists specific acts that would be considered immoral in African communities and then to tries establish the common principle that serves to explain the immorality of those acts. As with the previous approach, the process here is deductive. But while the previous approach deducts ethics from ontology (or vice versa), Metz suggests deducting ethics from a variety of acts *already considered* immoral. His intention is that the common principle would then represent the fundamental ethical principle adhered to by African communities. His list of immoral acts follows, in which the first six are acts considered to be immoral in both Western and African communities, while the second six are those that are likely to be considered immoral only in African communities. In African and Western communities it would be immoral:

A. to kill innocent people for money;
B. to have sex with someone without her [or his] consent;
C. to deceive people, at least when not done in self- or other-defence;

D. to steal (that is, to take from their rightful owner) unnecessary goods;
E. to violate trust, for example, break a promise, for marginal personal gain;
F. to discriminate on a racial basis when allocating opportunities (Metz, 2007).

In pre-Colonial African societies, and potentially in some contemporary African societies, it would be considered immoral:

G. to make policy decisions in the face of dissent, as opposed to seeking consensus;
H. to make retribution a fundamental and central aim of criminal justice, as opposed to seeking reconciliation;
I. to create wealth largely on a competitive basis, as opposed to a cooperative one;
J. to distribute wealth largely on the basis of individual rights, as opposed to need;
K. to ignore others and violate communal norms, as opposed to acknowledging others, upholding tradition and partaking in rituals;
L. to fail to marry and procreate, as opposed to creating a family (Metz, 2007, pp. 324-327).

Before looking at the principle Metz proposes to unify these beliefs, two questions need to be addressed. Firstly, which 'Africans' are these beliefs meant to represent? Secondly, where does he source these 'African beliefs' (G-L)? In response to the first question, Metz does not intend for this to be a theory that is representative of *all* individuals living in or originating from Sub-Saharan Africa, and he explicitly wishes to avoid the essentialising and homogenising effects that claims to this broad kind of representation result in. Instead he intends for these to be taken as 'tendencies'- i.e. beliefs that can be found broadly amongst people of specifically Sub-Saharan Africa (Metz, 2007b, p. 333). Specific groups that Metz has in mind are: 'the Zulu in South Africa to the Shona in Zimbabwe, the Gwi in Botswana, the Behema in the Congo, the Nso' in Cameroon, the Yoruba and the Tiv in Nigeria, and the Ashanti and Akan in Ghana'(Metz, 2007b, p. 333). Where does his account of these beliefs come from? Metz explicitly answers this question in *The Motivation for "Toward an African Moral Theory"* (2007b). He states that his list was:

> Obtained as a result of reading several dozen anthropological and philosophical works about the moral beliefs of Africans, participating in conferences and colloquia with those who live on the African continent, receiving written input from academic colleagues familiar with African ethics, engaging with students in my ethics classes in South Africa, and, finally, speaking to my colleagues on the recently inaugurated Ubuntu Advisory Panel of the South African National Heritage Council (Metz, 2007b, p. 333).

A brief glance over the literature provides supporting examples for G-L. The belief that it would be improper to make policy decisions in the face of dissent instead of seeking consensus (G) is supported by Wiredu in *Democracy and consensus in African traditional politics: A plea for a non-party polity* (1998) and by Busia's *Africa in Search of Democracy*(1967, p. 28). The belief that it would

be improper for criminal justice to seek only retribution and to avoid reconciliation (H) is supported by Mokgoro in *Ubuntu and the law in South Africa* (1998). The belief that is improper to engage in competitive (as opposed to cooperative) activities in the pursuit of wealth (I) is supported by Tutu in *No Future Without Forgiveness* (2000, p. 31). The belief that it would be improper to distribute wealth purely on the basis of individual rights and ignoring needs (J) is supported by Ramose in *African Philosophy through Ubuntu* (1999, p. 194).

He proposes that the principle that unifies these acts is: 'An action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community' (Metz, 2007, p. 334). The necessary conditions that need to be in place in order for this principle to exist are i) that individuals must have a shared sense of identity and ii) they must have good will towards each other. This sense of good will might even be described as 'love', which would make sense of the oft-cited analogy between African communities and extended families, where a healthy family is one in which its members have a shared sense of identity and love for each other(Metz, 2007, p. 337). The analogy of family is also used by Shutte thus:

> Perhaps the best model for human community as understood in African thought it the family. The family has no function outside itself. It is a means of growth for its members, and the interaction, the companionship and conversation, is also an end in itself (Shutte, 1993, p. 50).

Metz therefore provides a secular, ubuntu-based normative ethical theory, grounded in peoples' relationships with each other (Metz, 2007, p. 333). He claims that it is the relational quality of his ethical account that makes it African (Metz, 2007, p. 333), while noting that Western communitarian philosophies are also premised on locating the moral good in the relationships between people, and not in any one particular person. This suggests that Metz's theory is vulnerable to criticism. Ramose criticises Metz on precisely this issue (Ramose M. , 2007, pp. 353-354). Metz responds by arguing that it is 'African' because it is premised on beliefs held by Africans, and that is 'distinctive' in that these beliefs are more prevalent in Africa than in the West (Metz, 2007a, p. 375). Further, he is happy to accept that this may not be an ethical system that is 'unique' to Africa and that it may still be a characteristically African theory without being unique (Metz, 2007a, p. 376). These are appropriate responses to Ramose's criticism, but the concern is left open that if there is nothing at all that conceptually distinguishes ubuntu from similar concepts in Western thought, then the project may not be worth pursuing, because one can get the same conceptual results from already well worked out moral theories with substantially less effort. More time therefore needs to spent assessing whether ubuntu is distinctive. The next chapter will therefore provide an account of

communitarianism, humanism and feminist communitarianism in order to compare them with Metz's theory.

Chapter 2:
Comparing Ubuntu: Communitarians, Humanists and Feminist Communitarians

The first chapter concluded that Metz's theory of an ubuntu ethic provides an appropriate moral theory on which to premise an ubuntu political philosophy. This chapter aims to assess whether there is anything distinguishable about this account of ubuntu when compared to other collectively-focused moral theories; namely communitarians, feminist communitarians, and humanists.

Communitarianism

The three great political values from the French Revolution onward were liberty, equality and community (also known as fraternity)(Kymlicka, 2002, p. 208). However, in the period after World War II, the value of community became less prominent.[11] It was in this context that Rawls wrote *A Theory of Justice* (1972), in which he specifically provides analysis on issues of liberty and equality, but fails to mention community (Kymlicka, 2002, p. 208). In *A Theory of Justice*, Rawls argues that we are able to achieve a picture of the just society by thinking of ourselves as adopting the moral perspective of the 'original position' – i.e. a moral perspective in which impartial individuals, who are free and equal, derive the principles of justice. In order to ensure the impartiality of those in the imagined original position, Rawls develops the conceptual tool of the 'veil of ignorance.' That is, we are to imagine a hypothetical situation in which those deciding the arrangement of society do so from a position in which they lack knowledge of themselves, their position in society, and even of the society itself (Rawls, 1972, p. 11). Communitarianism arose as a response to Rawls's account of disconnected personhood as articulated in the veil of ignorance and thus crucially underpinning his account of justice, although it should be noted that most of the thinkers associated with this movement did not self-identify as communitarians (Mullhall & Swift, 1992). Two of the most prominent thinkers in communitarianism are Michael Sandel in *Liberalism and the Limits of Justice* (1982) and Alisdair MacIntyre in *After Virtue* (1981). The work of these two writers, specifically the aspects of their critique of Rawls that relate to communitarianism, will be discussed in comparison to Metz's account of ubuntu.

[11] This becomes even more pronounced after the Cold War, however, this stands outside of the relevant chronology under discussion here.

One of Sandel's core concerns with Rawls is with the 'theory of the person' he elicits to devise the veil of ignorance. On this conception of the personhood, community is just one value among many that the individual may or may not choose to accept (Sandel, 1982 , p. 64). Instead Sandel argues that our understanding of ourselves as members of families and communities is constitutive of the self, and that we are incapable of conceiving of ourselves as separated from them (Sandel, 1982 , p. 179). This resonates strongly with the understanding of ubuntu captured by the proverb 'I am because we are', because of the strong sense of interconnected personhood it promotes. Further, it also resonates with Metz's requirement that individuals involved in an ubuntu moral community identify as members of that community. MacIntyre's project in *After Virtue* is much larger than just the communitarian issues. His main concern is that in post-enlightenment philosophy, moral debates have become 'interminable' (MacIntyre, 1985, p. 6) – that is, when competing arguments are reduced to irreconcilable yet legitimate premises, there is nothing that can be appealed to in order to resolve the dispute and those advocating the competing positions are forced to appeal to emotional factors (MacIntyre, 1985, p. 8). His argument intersects with the communitarian debate when he looks at moral starting points. In contrast to Rawls's individual, separated from her relationships and society by the veil of ignorance, MacIntyre's individual is understood as a moral agent by virtue of her various social roles:

> I am someone's son or daughter, someone else's cousin or uncle; I am a citizen of this or that city, a member of this or that guild or profession; I belong to this clan, that tribe, this nation. Hence, what is good for me has to be good for one who inhabits these roles. As such, I inherit from the past of my family, my city, my tribe, my nation, a variety of debts, rightful expectations and obligations. These constitute the given of my life, my moral starting point (MacIntyre, 1985, p. 220).

What is noteworthy about MacIntyre's approach, for current purposes, is that he advocates an account of morality that is inherently relational,[12]which captures the relational quality of Metz's ubuntu ethic. He does not require that relationships be those of good will and therefore does not argue for anything that approximates the love requirement of Metz's argument. It is here that the theories become distinguishable.

Both MacIntyre and Sandel capture the sense of interconnectedness proposed by all three of the approaches to ubuntu discussed above. Further, Sandel captures Metz's requirement for a shared sense of identity and MacIntyre captures the idea that morality is inherently premised on relational

[12] In feminist communitarian accounts, such as that provided by Friedman, the set of relevant relationships are expanded to include friendship and other relationships that are typified by care. This will be dealt with more fully later in this chapter.

properties. What the communitarians do not capture is i) the idea that members of the community ought to 'love' one another and ii) that the morally right action occurs when one promotes harmony. In these ways, Metz's theory of ubuntu remains distinguishable. However, it is necessary to turn to humanism, which may fulfill both of these requirements.

Humanism

Humanism is not a single, narrowly defined belief system and Fowler (1999) argues that it is necessarily vague because human experience – which is the fundamental basis of humanism – is diverse, thus making it resistant to specific descriptions (p. 8). This makes it difficult to distill a specific description of humanism for the purposes of comparison with ubuntu. However, in Lamont's *The Philosophy of Humanism* (1965), the following necessary conditions are provided for determining whether or not something counts as a 'humanist philosophy':

1.) Naturalistic metaphysics and no reference to supernaturalism;
2.) Free will;
3.) Ethics grounded in relationships;
4.) Achievement of the good life through harmonising self interest and community interest;
5.) Necessity of aesthetics for human flourishing;
6.) Belief in reason and scientific method; and
7.) Constant return to all basic assumptions, including that of humanism itself (Lamont, 1965, pp. 13-15).

Humanism is intended to be a complete philosophical framework, hence the list incorporates a wide range of issues, not all of which are relevant for comparison with ubuntu. The items on Lamont's list that are relevant are criterion 3) *ethics grounded in relationships* and criterion 4) *the achievement of the good life by harmonising self-interest and community interest.* Additionally, it is worth noting that Metz's account also complies with criterion 1) because it is entirely secular. The religious-based accounts of ubuntu and arguably the proverb-based accounts would not comply with this criterion, thus making these formulations of ubuntu potentially easier to distinguish from humanism, because they make reference to supernaturalism and are therefore strictly prohibited by humanism. Criteria 3) and 4) need further examination in order to determine if Metz's secular account of ubuntu is distinguishable from humanism, as it is described above.

Criterion 3 describes humanist ethics as grounded in relationships (Lamont, 1965, pp. 13-15). This is the same as Metz's account, which is also focused on providing a realtional moral theory (Metz, 2007, p. 333). Further, Lamont describes these as being relationships of 'brotherhood', 'friendship'

and ‘compassionate concern’ (Lamont, 1965, p. 16). These relationships therefore approximate Metz’s requirement of ‘good will’. Further still, Lamont’s familial and friendship-orientated language makes it clear that the relationships required for humanism are not just associations of good will, but also ones of love. They are relationships then that would resonate with the analogy of the extended family. Once again, this captures a crucial aspect of Metz’s account of ubuntu. All of the relational aspects of Met’s account are therefore captured by humanism – it is a relational theory, based on good will, that is very much like familial love. At this stage it seems unlikely that humanism and Metz’s secular ubuntu could be distinguishable.

Criterion 4 makes reference to ‘harmony’ (Lamont, 1965, p. 13). Yet again, this captures an important aspect of Metz’s theory, the end result of which is that we ought to aim to produce ‘harmony’. Even the language used in these accounts is the same. However, when the wording of the fourth criterion is examined closely, the fundamental distinction between Metz’s account and humanism is uncovered.

Criterion 4 states that the good life is achieved ‘through harmonising *self interest* and community interest’ [emphasis added](Lamont, 1965, p. 13). The operative term used is ‘self interest’, because where many accounts of ubuntu and humanism diverge is on the status of the individual in relation to the community. One aspect that all accounts of ubuntu share is their focus on the importance of the community. The result is that most accounts allow for individuals’ interests to be overridden to some degree by the communal good, differing in the extent to which individual interests can be compromised. For instance, returning to Menkiti’s account of processural personhood, the ontological priority of community would allow for communal interest to override individual interests to a substantial degree (Menkiti, 1984, pp. 172-173). In another interpretation of the relationship between individual and community in ubuntu, Gyeke argues that although the community is essential for human flourishing and therefore indispensible (2002, p. 301), ‘it cannot be persuasively argued that personhood is *fully* defined by the communal structure or social relationships’(Gyeke, 2002, p. 305). On Gyeke’s account there would be little scope for the community to trump individual interests, though the community remains important.

By contrast to the accounts of ubuntu, which prioritise community, humanism is premised on a strong commitment to ‘*individual* potential, status, dignity and uniqueness’ [emphasis added](Fowler, 1999, p. 2). This is due to the humanism’s development during the Enlightenment period and the result of this commitment is that humanism is actually distinctly individualistic

(Fowler, 1999, p. 2). While humanists recognise that individuals cannot survive in atomised vacuums of self-interest, and that the community is necessary for individual flourishing, the individual always takes priority over the community in humanism and communal interests can never trump the interests of the individual (Fowler, 1999, p. 139 & 141). On the humanist account of ethics, the community is therefore valuable only to the extent that it enables the individual to realise her potential as a rational and autonomous agent – i.e. the community is only valuable in an instrumental way. This view is incompatible with Metz's account of ubuntu and at this point one may become sceptical as to whether ubuntu could be classed as a type of humanism at all, especially given how many accounts of ubuntu are non-secular (Menkiti, 1984; Cornell, 2004 and 2009; Ramose, 1999; Mokgoro, 1998; Battle, 1997; Shutte, 1993 and 2001; Tutu, 2000), and given the central position attributed to the individual on the humanist account.

Metz addresses similar positions as those articulated by the humanists – i.e. positions in which community is intrinsically valuable – in *Toward an African Moral Theory* (2007) and in *Ubuntu as a Moral Theory: Reply to Four Critics* (2007a), where he responds to Van Niekerk's *In Defence of an Autocentric Account of Ubuntu* (2007).

The core of what Van Niekerk describes as the 'autocentric' account of ubuntu is that in order for the individual to flourish and to live a truly human life, she must have certain types of relationships with others (i.e. relationships that are caring and harmonious). Subtly different to the humanist's account, Van Niekerk proposes that the autocentric account it not strictly instrumental – one cannot pursue good relationships with others solely for one's own sake. One pursues good relationships for their own sake and one flourishes as a result. Pursuing good relationships with one's own interests in mind would defeat the object and not help one to attain the good life (Van Niekerk, 2007, p. 368). Metz argues that there are at least three reasons for rejecting a self-regarding account of ubuntu. Firstly, it can lead to counter-intuitive results. For example, according to Metz, it may allow one to sacrifice an innocent to harvest their organs in a medical crisis because there is nothing intrinsically valuable about others that needs to be protected, our relationships with others are only pursued to the extent that they further our individuated self-development and flourishing. Further, Metz argues that this may be the morally obligatory course of action if it somehow allows one to maximize relationships with others (Metz, 2007a, p. 384). Secondly, he argues that self-regarding accounts of ubuntu do not allow one to sacrifice oneself for the good of others, because others are only of value to the extent that they advance the development of the individual (Metz, 2007a, p. 384). It might be possible to argue, following Van Niekerk's example, that the permissibility of sacrificing others and

the impermissibility of sacrificing oneself, stems from the mischaracterisation of the autocentric approach to ubuntu as a strictly *instrumental* ethical theory.[13]One still needs to pursue good relationships with others for their own sake, and harvesting others' organs or refusing to sacrifice oneself for the sake of others, even under certain extreme circumstances, may compromise the quality of those relationships. These counterintuitive examples would therefore not arise. However, Metz's third reason for rejecting autocentric accounts severely compromises the efficacy of this approach. Metz's concern is that it is an incoherent moral theory. It requires one to pursue relationships and to believe that they are good for their own sake, yet in reality the goodness of those relations is based in their ability to enhance individual flourishing. One therefore needs to hold a false belief about morality – that relationships with others are intrinsically valuable – in order to pursue the truly moral course of action – to enhance personal flourishing. This incoherence leads Metz to reject autocentric or self-regarding accounts of ubuntu (Metz, 2007a). It is important to note that the rejection of the autocentric account of ubuntu is specific to Metz's theory and to keep in view that other competing accounts of ubuntu would be compatible with both humanism and the autocentric account. For instance, Gyeke's description of ubuntu, with its emphasis on individual rights and personal development, would be consistent with humanism. However, Metz's description is given priority here, due to its initial selection as the ethical theory most compatible with the requirements of political theory.

To conclude this section, it is important to note that there is some similarity between humanism and ubuntu, particularly in terms of their shared emphasis on loving relationships and the promotion of harmony. However, the core distinction between these accounts arises from the fact that the individual occupies the prime position in humanism, and while this may be compatible with some accounts of ubuntu (Van Niekerk, 2007; Wiredu, 1998; Gyeke, 2002), it is ultimately incompatible with Metz's ubuntu, which is maintained as providing a promising basis for a South African political philosophy. The next section will look at feminist communitarianism, particularly because the feminist ethic of care and ubuntu seem to be so similar.

Feminist Communitarianism

There is no monolithic feminist theory and no single feminist political philosophy. Similarly, there is no uniform feminist communitarianism (Jaggar, 1983, p. 5 ; Kymlicka, 2002, p. 377). While some

[13] Although this follows from Van Nierkerk's account, this is not the response that he gives. See *In Defence of an Autocentric Account of Ubuntu* (2007) for Van Niekerk's own response to Metz.

feminist philosophers argue that the individualistic sense of personhood promoted by liberalism, particularly by Rawls, is inaccurate(Friedman, 1989 , p. 275; Jaggar, 1983, pp. 28-29), some oppose the extreme communal understanding of personhood advocated by communitarians such as Sandel, who claim that the individual is 'constituted' by the community (Sandel, 1982 , p. 150). The latter is a very similar criticism to that offered by Gyeke against Menkiti, as discussed earlier in this chapter. Still others are concerned by communitarianisms uncritical acceptance of community values, arguing that values are not unequivocally good just because they happen to achieve community endorsement. Feminists who offer this critique often also recommend that communitarians participate in discussions on the power structures that produce certain hegemonic values in society (Koggel, 2000, p. 102).

Keeping the diversity of feminist moral philosophy in mind, the one area that can be accurately described as a 'feminist communitarian' position is that of the 'ethic of care' (Koggel, 2000, p. 102). Even this is an area of controversy in feminist circles, with liberal feminists arguing that the legal protections offered by a political system premised on juridical equality can be used to protect the rights of women in their public and private lives and that the 'ethic of care' is merely used to romanticise women's traditional role as the care-giver in the home (Held, 1999, p. 292). The feminist ethic of care relates directly to ubuntu as discussed so far and due to its striking similarity with ubuntu, it will be analysed in this section.

The ethic of care first enters the feminist literature in Carol Gilligan's *In a Different Voice* (1982). Gilligan's concern was that psychoanalytic theory tends to rely on data collected exclusively from male subjects and assumes the normalcy of male experience, thus casting female experience as deviant and beyond explanation (Gilligan, 1982, p. 14). She therefore undertook three studies, based on interviews with men and women of various ages and from various socio-economic backgrounds, in which she explored issues of self-perception and perceptions of morality.[14] As a result of these studies, she concludes that the masculine experience of the world is typified by an ontology of separation, resulting in a moral system based on rights and rules, abstracted from context. On the other hand, she postulates that the typical feminine experience is one of connectedness and feminine moral standards are premised on an ethic of care. It should be noted that Gilligan does not take this to be an essentialist claim, rather as the empirical results of her studies – women and men that participated in her study happened to show these tendencies, but this does not mean that the results are true for *all* men and women. Further, she recognises that the results of her study are

[14] For further details of the studies, see Gilligan, 1982: 2-4.

linked to broader social structures and are unlikely to be the connected to any essential features of the study-participants themselves(Gilligan, 1982, p. 2). Her description of the ethic of care is summarised in the following statement:

> This ethic [the ethic of care], which reflects a cumulative knowledge of human relationships, evolves around a central insight, that self and other are interdependent... [T]he fact of interconnection informs the central, recurring recognition that just as the incidence of violence is in the end destructive to all, so the activity of care enhances both others and self(Gilligan, 1982, p. 74).

Gilligan's work has come under substantial criticism, mostly by feminists who are concerned about essentialising the moral experiences of men and women. However, regardless of the controversy surrounding Gilligan's work, *In a Different Voice* has opened up multiple areas of study and provided the impetus for substantial work in feminist moral philosophy (Hekman, 1995 , p. 3).
As with much thinking about ubuntu, Gilligan's account and the feminist moral theories it has inspired, involves elements devoted to describing human nature (although frequently not quite ontological) and there are the normative implications that result from those descriptions. This is what Hekman terms 'the connection between morality and subjectivity' (Hekman, 1995 , p. 71). For instance, in *Liberalism and Ethics of Care* (1999), Virginia Held critiques the account of personhood offered by liberalism as follows:

> A glaring deficiency in the liberal image of the individual citizen is that it abstracts from the interconnected social reality, taking ideal circumstances of an adult, independent head of a household as paradigmatic and ignoring all the rest. It overlooks the social relations of an economy that makes its members (including heads of households) highly dependent (Held, 1999, p. 294).

She goes on to describe those periods in all of our lives when we are invariably dependent on others – infancy, early childhood, old age, and times of illness and injury(Held, 1999, p. 294). She thus develops an account of our experience of personhood that includes a period of seeming independence, but in which we are actually interdependent for most of our lives. This is an account of personhood that is likely to cohere with many secular accounts of ubuntu, including Metz's central insight that we are functionally interdependent for most of our lives. A stronger account of feminist personhood is that offered by Noddings, where she argues that relationships are 'ontologically basic', meaning that 'we recognize human encounter and affective response as a basic fact of human existence' (Noddings, 1984, p. 4). From descriptive accounts of personhood flow moral implications. Invariably, in this area of feminist literature, the result of our interconnectedness is that we ought to care for one another and foster loving relationships (Noddings, 1984, p. 5). This is all very close to our understanding of ubuntu and should lead us to believe the ubuntu and the feminist ethic of care are indeed closely related.

However, Marilyn Friedman's insightful article *Feminism and Modern Friendship: Dislocating the community* (1989), which deals specifically with the relationship between communitarianism and feminist communitarian thought, provides one with the sense that a marriage between ubuntu and feminist communitarianism is unlikely to be a 'happy union'. In order to arrive at the point where we can see how this may relate to ubuntu, we need to work through her critique of communitarianism first.

She begins by noting that at first glance, communitarian and feminist communitarian thought ought to have a great deal in common – especially given communitarians' focus on the individual's identity as embedded in the community as well as on the moral requirements of care and nurturance (Friedman, 1989 , p. 276). In the same vein, ubuntu and feminist communitarian thought would appear similar for corresponding reasons. However, she goes on to argue that feminist communitarianism and communitarianism are not quite such comfortable allies:

> However, communitarian philosophy as a whole is a perilous ally for feminist theory. Communitarians invoke a model of community which is focused particularly on families, neighborhoods, and nations. These sorts of communities have harbored social roles and structures which have been highly oppressive for women, as recent feminist critiques have shown. But communitarians seem oblivious to those criticisms and manifest a troubling complacency about the moral authority claimed or presupposed by these communities in regard to their members. By building on uncritical references to those sorts of communities, communitarian philosophy can lead in directions which feminists should not wish to follow (Friedman, 1989 , p. 277).

Fanois Mangena picks up on the question of the compatibility of ubuntu and feminist ethics in her fascinating paper *The Search for an African Feminist Ethic: A Zimbabwean Perspective* (2009), arguing that ubuntu[15] places a disproportionate burden on women in African society, because it requires them to care not just for their nuclear families, but for members of their extended families and many additional members of their communities(Mangena, 2009, p. 24). The following excerpt, taken from an interview as part of Mangena's field work sums up this point well:

> [T]his thing called *hunhu* (the Shona equivalence for *ubuntu*) has brought more burdens than benefits especially to us housewives because when an irresponsible husband brings AIDS in the home you are required to care for him, even against your will. The elders will tell you that you will have to do that in the spirit of *hunhu.* (Quoted in Mangena, 2009, p. 19)

[15] Although Mangena seems to be using a much broader sense of ubuntu than used in this study, her observation is still fitting for its purposes.

Cornell also points out the potential tension between ubuntu and broader feminist ethical concerns when reviewing Mokgoro J's use of ubuntu in the Constitutional Court – who in her capacity as both a feminist and as an advocate of ubuntu in the Court may encounter a tension between trying to realise both values concurrently. However, according to Cornell, this tension can be resolved by recognising that these values take on new meanings as they are lived and that this fluidity in meaning allows for the reimagination of the role of women within the context of traditional values (Cornell, 2004, p. 671). The idea here is that the Court can take on projects, such as tranforming sexist inherentence regulations in customary law, while promoting values like ubuntu. That is to say, it can transform aspects of certain traditional values while promoting others. It would not be possible to include here an investigation into to go the problems of determining which values are worth promoting and which are not. Instead, it seems that this interpretation of how ubuntu can be used without being problematic to women misses the central point made above – that ubuntu seems to make actions that can be harmful to woman (such as caring for an unfaithful partner who has HIV/AIDS or caring for members of the extended community) morally obligatory. One might want to respond that ubuntu makes these kind of actions morally obligatory for *everyone*, but considering that most of these care-related functions are still performed by women, they are impacted most directly by the application of ubuntu.

Although the considerations above may be extremely disconcerting, there is still a prominant similarity between ubuntu and the feminist ethic of care. Sandra Harding identifies this similarity in *The Curious Coincidence of Feminine and African Moralities* (1987). The point that Harding makes is that we should be struck by the possibility that two such similar ethical theories could have developed independently in such different contexts – i.e. in Western feminist groupings and in African philosophical circles(Harding, 1987, p. 304). As Harding rightly points out, this is extremely odd. She argues that one potential explanation for this 'curious coincidence' is the joint experience of isolation from andocentric Western moral theory, which impacted upon both women and Africans (Harding, 1987, p. 305). She thus promotes a contextually and historically-rooted account of moral theory, the importance of which will be addressed later in this chapter.

In concluding the discussion on the feminist moral theory, ubuntu and the feminist ethic of care are virtually indistinguishable. They both require that loving (and caring) relationships with others be promoted and that moral theory be premised on these relationships. It is therefore necessary to determine whether it makes sense to pursue ubuntu as a distinct ethic, considering that so many of its fundamental elements are caputred elsewhere.

Distinguishing ubuntu

Through an examination of the Western theories of humanism; communitariansim and feminist communitarianism, all of the elements of Metz's African moral theory can be captured without any reference to 'African values'. Does this mean that ubuntu should be discarded for the purposes of the current project? Two related reasons will be provided for why it still makes sense to focus on ubuntu, despite it not being conceptually distinct. Firstly, ubuntu resonates with the lived experience of South Africans and secondly, to borrow language from Janz (2004, 2009), ubuntu makes sense when we think about African philosophy 'platially' – not simply 'spatially'.[16]

Firstly, ubuntu remains the most appropriate ethical tool to humanise South African politics, because it is more closely linked to the lived experience of many South Africans.

The reason it may seem initially concerning that ubuntu is not conceptually distinguishable from humanism and feminist communitarianism, is because philosophy is typically concerned with concepts, abstracted from place and from particular cultural practices. To become too concerned with context would mark an exit from the domain of philosophy and entry into another area of study – such as anthropology, sociology, psychology or political science (Janz, 2009, p. 6), not to mention to open the door to all sorts of nasty relativisms. This account of philosophy makes it seem as though the concepts it addresses are somehow free floating ideas, perhaps tied to a context in the world, but not deeply rooted in that context. However, when using philosophy in practical political and policy-orientated spheres, this disconnected understanding of philosophy becomes inappropriate. Edgar Pieterse, for example, argues that when developing policies for cities it is crucially important that we take into account the lived experiences of those who inhabit in the cities - i.e. 'the phenomenology of the city'(Pieterse, 2008). The same advice seems relevant for political life in general. Further, as Harding notes, there is something intuitively peculiar about the thought that one's ontological, epistemic and moral experiences could be completely disassociated from our lived experiences, or from our contexts (Harding, 1987, p. 304). Shutte also addresses this issue in *Philosophy for Africa* (1993), noting that 'actual philosophy is always produced in a particular culture and language and develops particular sets of concepts to deal with particular intellectual problems that are felt to be important' (p. 17). As Harding notes, this may be why feminist communitarian

[16] To be expanded upon shortly.

thought and ubuntu share similarities, because they both developed under related systems of oppression. Thinking of philosophy as deeply rooted in lived experience then provides a reason for continuing to talk about ubuntu, because it more closely resonates with the lived experience of South Africans and therefore provides a more appropriate basis for humanising South African politics than do other ethical alternatives.

Bruce Janz (2004, 2009) provides a more sophisticated framework for thinking about these issues, by describing them in terms of 'spatial' and 'platial' thinking. To illustrate the distinction he uses the example of map-making. Many examples of early maps are platial – meaning concerned with human experience, particularly the experience of place – they therefore have very little water (because back then very little of human experience happened out at sea) and the location of places represents their importance rather than their geographical location. In the *mappamundi*, dating back to 1290, Jerusalem was depicted as the centre of the earth because of its cetral significance to people at the time (Janz, 2004, p. 106). Over time however, maps became more spatially orientated, characterised by grids and lines of longitude and latitude. Maps stopped being expressions of lived experience and became abstract representations of geography (Janz, 2004, p. 106). Much philosophy inhabits the world of spatial thinking, concerned as it is with universals abstracted from the particulars of human experience. African philosophy has also adopted a primarily spatial mode, trying to reclaim intellectual space in the same way that Africans have been able to reclaim geographical space from their colonisers. In Janz's own words: 'The mind, as well as the land, must be decolonized. Space must be reclaimed'(2004, p. 107). When spatial reasoning rules, the important philosophical question is: 'is there an African philosophy?' or in the current debate 'is there a distinguishable African ethic?' Janz suggests that when we shift from a spatial to a platial understanding, the appropriate question becomes: 'What is it to do philosophy in this (African) place?'(Janz, 2004, p. 110). Or for our purposes 'What is it do ethics in this (African) place?' When the question is asked in that form ubuntu is unavoidably invoked in the answer, because it forms part of the lived ethical experience of this (South African) place. Further, humanism and feminist communitarianism fall away, because they are not representative of an Africana phenomenology in the same way that ubuntu is.

Now that an ethical theory that is at least somewhat distinguishable has been articulated, it is important to provide a sense of how this relates to ubuntu as a political philosophy.

Ubuntu as a Political Philosophy

As already noted, political philosophy is typically grounded in ethical theory, with Utilitarianism and Kantianism providing the traditional normative basis of most Western accounts of political theory (Metz, 2009, p. 335). Shifting ubuntu from the level of an ethic to a political theory therefore requires that the guiding principle of the individual ethic becomes the guiding principle at the political level. At the end of the first chapter, it was concluded that 'An action is right just insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community'(Metz, 2007, p. 334). When this is transposed to the political level, it requires that government officials also pursue actions that promote harmony and reduce discord.

The next chapter is devoted to assessing whether there is the possibility of an ubuntu-based political theory being practically realisable.

Chapter 3:
Ubuntu and the Law

Introduction

The previous chapters have been devoted to defining ubuntu as an ethic and as a political value. This chapter has a more pragmatic focus. It seeks to assess ubuntu's real-world applicability, specifically by looking at an area where it has already found some practical application in South Africa – in the law. Other attempts have been made to give ubuntu practical effect in South Africa, such as the corporate sector's enthusiasm over 'ubuntu capitalism' and its incorporation into the government's Moral Regeneration Movement in late 1990s(McDonald, 2010, pp. 142-143). However, these efforts have typically lacked any attempt at theory and have often boiled down to being 'simply wishful and naïve'(McDonald, 2010, p. 140). By contrast, while legal scholars have struggled with the theoretical complexity of ubuntu, a substantial body of academic literature on its incorporation into the law has been developed, providing a theoretical 'node' on which to attach the philosophical understanding of ubuntu that has been developed through the course of this thesis.

This chapter will be divided into three parts. The first section will provide a genealogy of ubuntu in the law, tracing its incorporation into South African legal culture from its initial inclusion in the interim Constitution[17] and through some key cases that have made use of ubuntu. The second section will provide a more thorough examination of whether ubuntu has been *successfully* applied in the law, by comparing two competing assessments of ubuntu's legal inclusion – that of Van der Walt, who questions the usefulness of ubuntu in the law, and that of Cornell, who celebrates its use. By the end of the second section it should be clear that ubuntu has had limited legal application, but that all is not lost. The intention of the third section is to demonstrate that the way in which ubuntu has been used in the law provides useful lessons for understanding its potential applicability in other spheres – firstly, by providing an understanding of ubuntu in terms of ideal and non-ideal theory, and secondly, by combating the naivety often associated with ubuntu-orientated projects.

Genealogy of Ubuntu in the Law

This section will provide a brief genealogy of ubuntu's incorporation in the law. This will begin by discussing ubuntu's initial inclusion in the interim Constitution and tracing its development in South African jurisprudence via some prominent ubuntu-orientated judgments. This includes its initial

[17] The Constitution of the Republic of South Africa, Act 200 of 1993.

inclusion in the case law (*S v Makwanyane*); its clarification as a legitimate jurisprudential value (*AZAPO v President of the Republic of South Africa*[18]); its extension into the socio-economic sphere (*Port Elizabeth Municipality v Various Occupier*[19]); and its eventual solidification in the case law (*Afri-Forum v Malema*[20]).

Ubuntu first appeared in the post-amble of the South African interim Constitution, which mandated the creation of the Promotion of National Unity and Reconciliation Act 34 of 1995 (known as the Reconciliation Act), thereby bringing the Truth and Reconciliation Commission (TRC) into existence. The section states:

> The adoption of the 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.

At this point in South Africa's jurisprudential history ubuntu's legal status was unclear. Ubuntu was only included in the post-amble of the interim Constitution and it referred specifically to the establishment of the TRC. It was therefore ambiguous as to whether ubuntu would be legally applicable beyond issues of reconciliation, or if the writers of the Interim Constitution had intended it to form part of South Africa's jurisprudence more broadly. It seems reasonable to assume that if the intention had been for ubuntu to become a jurisprudential value, it would have been explicitly included in the main body of the text. This is similar to the point raised by the Attorney General in the case of *S v Makwanyane*, where he argued that if the writers of the Constitution had intended for the death penalty to be illegal, then the interim Constitution would have stated that explicitly (paragraph 11). However, as the intricacies of the *Makwanyane* case confirm, constitutional interpretation is substantially more complex than literally applying the exact words of the text to the facts of the case (paragraph 13, 16, 18 and 19). Keeping this in mind, further cause for confusion was provided by ubuntu's exclusion from the final Constitution[21] (Keep & Midgley, 2007, p. 33; Motha, 2009, p. 305). If the relegation of ubuntu to the post-amble had not sent a clear message

[18] 1996 (8) BCLR 1015 (CC).

[19] 2004 (12) BCLR 1268 (CC).

[20] 2011 (6) SA 240.

[21] The Constitution of the Republic of South Africa, 1996.

about ubuntu's legal status, then surely the absence of ubuntu from the final Constitution should have been an obvious sign that ubuntu was never intended to be central to the law and its application in South Africa.

In 1995, the question of whether ubuntu had legal implications beyond the TRC was at least partially resolved in the case of *S v Makwanyane*, where the Court had to decide whether the death penalty would remain a permissible sentence in the new constitutional order. The conclusion was that the death penalty was no longer appropriate, and amongst the reasons provided was that it violates the spirit of ubuntu. Ubuntu was explicitly included in the main judgment of Chaskalson P and in the concurring judgments of Madala J, Mokgoro J, Mahomed J, Langa J and Sachs J. However, ubuntu was only one reason among many provided by the Court, and it seems clear that the same decision would have been reached without any mention of ubuntu. Van der Walt questions whether ubuntu formed part of the main rationale for the decision at all, or whether ubuntu was simply obiter (an interesting aside with no actual bearing on the outcome of the case). He argues that the main rationale for the decision was that the death penalty is a disproportionate punishment, especially when one considers that there are alternative sentences available to the Court (Van der Walt, 2005, pp. 105-106). This interpretation is compelling, especially when one returns to Chaskalson P's judgment, where he explicitly states that:

> Disparity between the crime and the penalty is not the only ingredient of proportionality; factors such as the enormity and irredeemable character of the death sentence in circumstances where neither error nor arbitrariness can be excluded, the expense and difficulty of addressing the disparities which exist in practice between accused persons facing similar charges, and which are due to factors such as race, poverty, and ignorance, and the other subjective factors which have been mentioned, are also factors that can and should be taken into account in dealing with this issue. It may possibly be that none alone would be sufficient under our Constitution to justify a finding that the death sentence is cruel, inhuman or degrading. But these factors are not to be evaluated in isolation. They must be taken together, and in order to decide whether the threshold set by section 11(2) has been crossed they must be evaluated with other relevant factors, including the two fundamental rights on which the accused rely, the right to dignity and the right to life... The carrying out of the death sentence destroys life, which is protected without reservation under section 9 of our Constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account... I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment (paragraph 94-95).

By contrast, when Chaskalson discusses ubuntu, he uses it only as a counterweight to retribution in the law, meaning that it is incorporated only as a subsidiary element of the proportionality test. This is clear in the following exert from the judgment:

> 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 commitment: '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 victimization'. Although this commitment has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of ubuntu ours should be a society that 'wishes to prevent crime... [not] to kill criminals simply to get even with them' (paragraph 130 -131).

This quote illustrates ubuntu's role as one of many factors to be taken into account when determining proportionality. This is worrying if one is of the view that ubuntu should play a pivotal role in the Constitutional Court's jurisprudence, because then it would be expected that ubuntu should be dealt with more substantially in the judgments. However, the comparative absence of ubuntu may not be surprising, given that ubuntu is, at best, a *value* to be used in the process of legal interpretation, and not a legal rule to be transmitted via precedent.[22] Keeping that in mind, it remains worrying that ubuntu is dealt with in such a limited way, given the extent of the role that legal philosophers and the philosophical community more broadly attribute to it.

Importantly for the purposes of this genealogy, the quote from Chaskalson explicitly indicates that although the post-amble 'has its primary application in the field of political reconciliation' it is not strictly bound to the TRC and may be relevant to further legal problems. Although Chaskalson mentions briefly in the above extract that the post-amble may have applicability beyond the TRC, for those concerned about ubuntu's relegation to the post-amble (a section with supposedly less legal status than the main body of the interim Constitution) this provides little comfort. The question of the post-amble's status is explicitly clarified in the 1996 case of *AZAPO v President of the Republic of South Africa.*

[22] This maps onto Kennedy's distinction between 'rules' and 'standards', where rules are legal prescriptions and standards are the values used to narrow very broad generalised rules to specific fact and to prioritise particular rules instances where they may clash (Kennedy, 1976, pp. 1690- 1693).

In the *AZAPO* case, families of apartheid victims called into question the validity of Section 20(7) of the Reconciliation Act, which allowed for amnesty to be granted to those who committed political crimes during apartheid. The applicants argued that the amnesty provision violated their constitutional right to a trial, as protected by Section 22 of the interim Constitution, stating that: '[e]very person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent or impartial forum.' The Court decided against the applicants for two reasons: 1) the amnesty provision was necessary to gain information on crimes that were committed during apartheid and which normal criminal investigations would be unable to uncover (paragraph 36); and 2) the post-amble, which empowers the Reconciliation Act, is a legitimate part of the interim Constitution and it is therefore capable of limiting the right to a trial as envisaged in Section 22 (paragraph 12). This unequivocally resolves the question of the post-amble's status in relation to the rest of the interim Constitution, with Mohamed J explicitly stating that '[t]he epilogue...has no lesser status than any other part of the Constitution' (paragraph 14). It thereby provides some guidance about ubuntu's legal status, because it clarifies that ubuntu formed part of a legitimate section of the interim Constitution and was therefore available to the Court as a constitutional value. However, once again, this is an unsatisfying conclusion in that ubuntu failed to play a substantial role in the decision-making process of this case. It failed to form part of the two main reasons provided for the decision – constitutional consistency and evidentiary necessity –and the term 'ubuntu' was only mentioned three times in the entire judgment (each time as part of an overall reference to the post-amble's establishment of the TRC, never as a value in its own right). This provides cause for concern, because in both of the two cases discussed so far, ubuntu is used in a very limited manner.

The case of *Port Elizabeth Municipality v Various Occupiers* provides some hope that ubuntu may perform substantive work in the law, because it seems to successfully extend ubuntu into the socio-economic sphere and show that ubuntu can form a meaningful part of the Court's reasoning process. The case involved two issues: whether the municipality can evict unlawful occupiers and whether there is an obligation on the party seeking an eviction order to find suitable alternative accommodation for the occupiers. This case may ease concerns that ubuntu fails to form a real part of the Court's reasoning process, because Sachs's judgment seems to be fundamentally premised on ubuntu (Keep & Midgley, 2007, p. 17). Sachs states explicitly:

> It [the Prevention of Illegal Eviction Act - PIE] is called upon to balance competing interests in a principled way and promote the constitutional vision of

a caring society based on good neighbourliness and shared concern. The 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 (paragraph 37).

In a later interview with the Ubuntu Project about the case, Sachs stated that he would have been unable to reach his decision without recourse to ubuntu (Cornell, 2009). However, ubuntu's role in the case remains questionable, given that the above quote is the only time when ubuntu is mentioned in the judgment. Once again, given that ubuntu is just an interpretive value and that the case fundamentally turned on PIE and the rights to property and housing, this may be understable to a certain extent. However, there is still something deeply disconcerting about the almost complete absence of ubuntu from the text of the judgment.

A more recent case provides some optimism about ubuntu's applicability to the legal decision making process. In the 2011 case of *Afri-Forum v Malema*, the Equality Court had to decide whether the ANC Youth League leader at the time, Julius Malema, was guilty of hate speech by publically singing the words 'Shoot the boer [farmer]',where the term 'boer' is taken to refer to Afrikaans farmers in particular and white South Africans more generally (paragraph 49). In contrast to the previous cases discussed, ubuntu does seem to do substantial work in reaching the decision. There is an entire section of the judgment devoted to clarifying ubuntu, where Lamont J states that '[a]n ubuntu-based jurisprudence has been developed particularly by the Constitutional Court. Ubuntu is recognised as being an important source of law…' (paragraph 18) and in the decision itself (that publically singing the song does constitute hate speech) the Judge specifically states that complying with the order is a matter of 'both law and ubuntu' (paragraph 111). Further, Lamont J's trial process echoes ubuntu. Evidence of this is provided by the following exerts from the judgment:

During the hearing I allowed much evidence to be led which would not normally be permitted in a Court of law as it appeared to me that it was proper to allow the parties to the dispute to fully and completely ventilate the issues between them even… (paragraph 58)

It appeared to me that in the course of the trial the parties should, as it were, be allowed to scratch the wound open, re-experience the pain and search for a solution. (paragraph 58)

The public was entitled to see the events transpiring in Court so as not only be able to form its own judgment but also to re-live events as part of a process of healing. I directed that any party including a witness could at any time request the process to be stopped; that it was then to stop immediately pending further orders…(paragraph 47)

This all seems to indicate that ubuntu played a fundamental role in the decision of the *Malema* case, not only in Lamont J's reasoning, but also in the procedure adopted during the hearing. Thus it would appear that this provides at least one case in which ubuntu has formed a substantial role and where it was explicitly recognised as doing so.

How successfully has ubuntu been incorporated into the law?

The previous section concluded that there has been a relative absence of ubuntu in those cases that purport to have incorporated it as a value in their decision making. The one exception is the *Malema* case, where ubuntu played a meaningful and explicit role in the judgment. This raises the broader question of how successfully ubuntu has been included in the law. This section will therefore assess more carefully ubuntu's usefulness in the law, specifically by looking at Van der Walt and Cornell's assessments of ubuntu's impact on South Africa's jurisprudence.

Van der Walt

Van der Walt identifies at least three problems with ubuntu's inclusion in the law: a lack of conceptual clarity; a lack of African particularity; and a lack of appropriate cultural context when making use of ubuntu in the law. Each of these will be discussed in turn.

> Van der Walt is concerned that ubuntu is employed in the law without any specificity about the term's meaning (Van der Walt, 2005, p. 111). In discussing Justice Langa's judgment in *S v Makwanyane*, which he initially takes to be one of the more promising legal accounts of ubuntu, Van der Walt concludes that: Justice Langa's opinion, however, still leaves one with a nagging feeling that he offers us no more insight than do his colleagues regarding the specific and singular meaning of *ubuntu* (Van der Walt, 2005, pp. 110-111).

Van der Walt argues that instead of a clear definition, the Court has provided a series of non-specific feel-good phrases that 'would have had John Lennon (*Imagine All the People*) scrambling for new verses' (Van der Walt, 2005, p. 110). Van der Walt's assumption is that concepts need clear definitions before they can be allowed to do legal work, which is an intuitively appealing position to hold. However, it is contrary to the history of legal practice, where concepts are frequently used before the Court has settled on definitive meanings for them. The most famous example of this is provided by Justice Potter Stewart in the American case of *Jacobellis v Ohio*, who while trying to settle on a clear definition for pornography concluded that 'I will know it when I see it'. The point is

that legal praxis can (and often does) precede full theoretical understanding of the concepts employed – a comprehensive definition of pornography is not required in order to place a restriction on it in the law. Similarly, dignity is frequently employed by the Courts, despite remaining conceptually unclear to those who invoke it (McCrudden, 2008). This issue will be revisited in more detail later in this chapter when addressing the distinction between ideal and non-ideal theory. No more will added at this stage, except to point out that Van der Walt's assumption that a lack of conceptual specificity is a problem for the Court is not as obvious as one might initially expect.

The second problem Van der Walt identifies with ubuntu's inclusion in the law is that it fails to add anything specifically African to jurisprudence. Van der Walt states the problem in this way:

> [A] rigorous jurisprudence must be dissatisfied with the feel-good flavour of a jurisprudence that has done little more than add a local, indigenous and communitarian touch to the Christian, Kantian or Millsian respect for the individual that informs Western jurisprudence(Van der Walt, 2005, p. 111).

Van der Walt's objection seems to be that if there is nothing distinctively African that ubuntu can add to South African jurisprudence, why bother? This is the same problem that was encountered earlier in thesis, when distinguishing ubuntu as an ethic from competing communally-orientated ethical theories from the West. The same response that was offered there applies here: what is important is not that ubuntu is conceptually distinct, but rather the lived experience of members of society needs to be taken into account when deciding what concepts will be used in the policies applicable to that society. Taking lived experience into account is particularly important for the law, which requires that the majority of society buys into its central values if they are going to comply with it. Therefore, all that needs to be shown in order for ubuntu to be applicable as a legal value is that it resonates with society, not that it is conceptually unique.

Van der Walt's third objection is that ubuntu is thoughtlessly removed from its context in South African indigenous law when it is applied by the Court – i.e. it is used as though it is a concept with no pre-existing legal context. He is particularly dissatisfied that the Constitutional Court in *S v Makwanyane* fails to consider whether traditional communities in South Africa believe that the death penalty is an appropriate punishment for certain crimes (Van der Walt, 2005, pp. 111-112).[23] Van der Walt's thinking here can be interpreted in at least two ways. Firstly, if ubuntu is part of

[23] He notes that Sachs J does make some effort to determine what traditional communities believe about the death penalty. But he argues that Sachs provides an incomplete account, as he only recognises that the death penalty would be inappropriate in cases of murder but fails to recognise that the death penalty would be appropriate in cases of stock theft (Van der Walt, 2005, pp. 112-113).

traditional thought, then we can determine whether or not ubuntu and the death penalty are compatible by looking at the beliefs of the community from which ubuntu was taken – if they believe in both ubuntu and the death penalty, then they must be conceptually compatible. However, this cannot possibly be a correct reading because it assumes that people only ever hold conceptually compatible beliefs, which is clearly not the case. A second, and more plausible, reading is that ubuntu needs to be preserved as a culturally authentic value and that this is damaged by removing it from its context. However, it is not obvious why this would be the case.

Having examined Van der Walt's core concerns, it seems unlikely that his extremely pessimistic view of incorporating ubuntu into South Africa's legal jurisprudence is correct.

Cornell

Cornell recognises the difficulties that have been faced by the Court in incorporating ubuntu into the law (Cornell, 2009, p. 47). However, she argues that including ubuntu in the law is necessary for the realisation of the Constitution's goals (Cornell, 2004, p. 674). She provides two justifications for holding this view: firstly, that ubuntu offers an understanding of personhood that is distinct from that provided by Western jurisprudence; secondly, that an ubuntu-infused jurisprudence is better able to cope with the reality of contradiction present in the law.

The first way that Cornell sees ubuntu as being important for the law is that it brings an understanding of personhood that is absent from Western jurisprudence (Cornell, 2004, p. 668; Cornell, 2009, p. 57). Cornell provides a description of ubuntu as interdependence, with all the metaphysical trappings. In particular she emphasises the importance of *serti* – 'the life force by which a community of persons are connected to each other' (Cornell, 2004, p. 674). It should be noted that it is problematic for Cornell to adopt such a metaphysically-laden account of ubuntu, especially given the general applicability that we expect from the law. However, bracketing the supernatural elements of this account for the present moment, why might interdependence be useful for the law?

Cornell argues that it changes the foundational values on which the legal system is premised – the 'law of laws' in her terminology (Cornell, 2004, p. 670). The basis of Western jurisprudence is the social contract, with the individual at its core (Cornell, 2004, p. 668). In the case of the Hobbesian social contract, individuals only come together to cooperate because they fear each other and find

security in transferring their right to violence to the state, who in turn commits to protecting them. By this account, it is not only the premise that individuals are atomised that is at issue, but also that their relationships are inherently antagonistic. Cornell, following Mokgoro J, argues that 'ubuntu provides us with a very different notion of the founding principle of law' (Cornell, 2004, p. 669). Her vision of a jurisprudence premised on ubuntu, which she borrows from Mokgoro J, is expressed as follows:

> The original conception of the law perceived not as a tool for personal defense, but as an opportunity given to all to survive under the protection of the order of the communal entity; communalism which emphasises group solidarity and interests generally, and all the rules which sustain it, as opposed to individual interests, with its likely utility in building a sense of national unity among South Africans; the conciliatory character of the adjudication process which aims to restore peace and harmony between members rather than the adversarial approach which aims to restore peace and harmony between members ... (Mokgoro J cited in Cornell, 2004, p. 669)

The second way in which ubuntu is meant to enrich South African jurisprudence is by allowing us to better cope with contradiction in the law - to use Cornell's turn of phrase: the 'both-and'. She describes this situation as arising when two opposing registers come into conflict that cannot (or perhaps should not) be brought into a coherent whole. For instance, one may simultaneously hold beliefs in both ancestor worship and the Constitution (Cornell, 2004, p. 673). Her second example is the case of *Soobramoney v Minister of Health, Kwa-Zulu Natal,*[24] in which Soobramoney's application for state-funded dialysis was rejected, because he had too many additional complicating health problems to qualify for the transplant list and dialysis is prioritised for patients awaiting transplants. Cornell concludes that the decision in *Soobramoney* is both 'just' and 'tragic', and that it is only by including ubuntu in our jurisprudence that we can cope with this result. This is because ubuntu allows both for the sacrifice of the individual for the greater good and for our society to be diminished by the loss of one of its members (Cornell, 2004, p. 674). Further, Cornell believes that the 'both-and' scope of ubuntu jurisprudence allows us to better deal with the unsatisfactory status of socio-economic rights in South Africa, which are simultaneously constitutionally guaranteed and unrealizable due to economic constraints – another example of that which is both tragic and just (Cornell, 2004, p. 674).

Both of Cornell's arguments are normative, in that they describe how South African jurisprudence might be enhanced by including ubuntu in the Court's reasoning. However, it remains unclear

[24] 1998 1 SA 765 (CC).

whether ubuntu has already been successfully used in the law and whether it is possible to realise the goals that Cornell advocates.

At this stage, it is clear that ubuntu's inclusion in the law has had limited success. In three out of the four cases discussed, ubuntu failed to form a meaningful part of the Court's reasoning process. Further, there are the challenges described by Van der Walt – a lack of specificity, uniqueness, or contextualisation – which although questioned in this chapter, are worth keeping in mind when assessing ubuntu's inclusion in the law. Cornell has been more optimistic in her account of ubuntu in the law, describing it as capable of changing the fundamental premises of the legal system and allowing South Africans to better cope with instances of contradiction in the law – that which is both just *and* tragic; that which is morally imperative *and* practically unachievable. However, these are forward-looking suggestions about what ubuntu might achieve in the law, which does not help us to understand the limited success of ubuntu's inclusion in the law to date.

Lessons from ubuntu in the law

The previous section concluded that ubuntu has had limited success in its incorporation in the law. However, this does not mean that discussing ubuntu in this context is not worthwhile for improving our understanding of ubuntu's applicability. In this section it will be argued that the way the Courts have grappled with ubuntu provides two important lessons for our understanding.

Praxis preceding theory

One of the core challenges facing those who make use of ubuntu is that it is so tricky to define. As Van der Walt correctly identifies, this problem has also been experienced by the Courts (Van der Walt, 2005, pp. 110-111). Despite this difficulty, the Courts have made some use of ubuntu, albeit in a limited manner. This provides at least some reason to believe that ubuntu can have practical application prior to the achievement of a full theoretical understanding of it has been achieved.

The question of whether a correct theoretical understanding of ubuntu should precede its application links to the broader philosophical debate on the connection between ideal and non-ideal theories of justice, a distinction first identified by Rawls in *A Theory of Justice* (1972)(Simmons, 2010, p. 5). Rawls defines an ideal theory of justice as one that assumes that members of society will strictly comply with the requirements of justice, thus allowing the philosopher to work out the

institutional framework of a well-ordered society under ideal conditions. Non-ideal theory comes into play in order to practically realise the vision of ideal theory, particularly in determining what transitional steps need to be taken in order for society to be brought closer to the ideal (Rawls, 1972, pp. 245-246). In Rawls's description, ideal theory takes strict priority over non-ideal theory and must be fully worked out before any attention can be paid to the pragmatic concern of its applicability to society. Rawls's distinction is not applicable as is to the current discussion, because the concern here is not with developing a 'theory of justice' as such. However, the distinction between an abstract idealised political philosophy and its practical realisation in politics is useful to keep in mind as we grapple with the difficulties of trying to define ubuntu and find its application in the real world.

If Rawls is correct about the strict priority of ideal theory over non-ideal theory, then it would be extremely difficult to understand ubuntu's inclusion in the Constitutional Court's jurisprudence, given the problems associated with providing definitional content for ubuntu. However, ubuntu does seem to find some application in the Court, thus making it seem that the practical work of the concept may be able to precede our complete theoretical understanding of it.

Sen offers a helpful response to Rawls in *The Idea of Justice* (2009), in which he argues against Rawls's strict priority of the ideal over the non-ideal, and suggests that an ideal theory of justice may not be necessary at all for dealing with real issues of social justice. Sen sees real world decisions about justice as comparative – do we choose social arrangement *A* or social arrangement *B*? In making comparative assessments it is not necessary to imagine an additional perfect alternative. For example, in determining whether a painting by Picasso or Van Gogh is superior, it is not necessary to have an idea of the perfect painting in order to make a decision (Sen, 2009, pp. 101-102). Similarly, when policy makers choose between competing policies, they are unlikely to turn to Rawls or any ideal theory of justice in selecting their programme of action. The conclusion seems to be that we can dispense with ideal theories of justice entirely, and get on with the practical work of pursuing social justice in the real world. However, social policy development differs from aesthetic judgements, in that considerations of justice do seem to play a role in selecting between alternative social arrangements, even though they may not amount to the kind of fully worked out theory of justice that Rawls would require.

This suggests that there might be a middle path to tread between Rawls's strict priority of ideal theory and Sen's suggestion that we might dispense with theory entirely. This is helpful for

understanding the example of the Court's use of ubuntu, in that some use of the concept has occurred prior to obtaining a full theoretical grip on it. This is not the only instance of Courts using a concept before it is fully understood. Courts across the world frequently make use of the concept of dignity without necessarily having settled on a complete theoretical understanding of the term (McCrudden, 2008). Naturally, the use of 'dignity' in the law is at a distinct advantage over the use of 'ubuntu', given that attempts to theoretically understand dignity in the context of the law date back to the Roman Law tradition (McCrudden, 2008, p. 657). Of course, having such a broad history of thought associated with 'dignity' means that it has come to have a far more substantial role to play in the law than ubuntu. The hope, however, is that as our theoretical understanding of ubuntu improves, so Courts may feel more free to make use of it in their reasoning.

Combating the naivety of 'ubuntu-ists'

In the popular imagination, ubuntu is unequivocally positive. Desmond Tutu provides a well-accepted account of a person 'with ubuntu' as one who is generous, hospitable, friendly, caring, compassionate, sharing, unjealous, etc. (Tutu, 2000, p. 31). These are all positive attributes. When this personal picture of ubuntu is expanded to the political level it becomes utopian. For instance, in the Department of International Relations and Cooperation White Paper, *Building a Better World: The Diplomacy of Ubuntu*(2011), South African foreign policy informed by ubuntu is described as:

> This philosophy translates into an approach to international relations that respects all nations, peoples, and cultures. It recognises that it is in our national interest to promote and support the positive development of others. Similarly, national security would therefore depend on the centrality of human security as a universal goal, based on the principle of Batho Pele (putting people first). In the modern world of globalisation, a constant element is and has to be our common humanity. We therefore champion collaboration, cooperation and building partnerships over conflict. This recognition of our interconnectedness and interdependency, and the infusion of Ubuntu into the South African identity, shapes our foreign policy (Department of International Relations & Cooperation , 2011, p. 4).

This statement clearly indicates the overwhelmingly positive attitude that is expressed toward ubuntu and its practical application. However, it ignores that incorporating ubuntu into the political realm may involve negative consequences. Ignoring these potential consequences is a dangerous oversight, and may indicate a shift away from the utopian ubuntu ideal toward dystopia. What are these potential negatives and how does the legal application of ubuntu forewarn us of them?

The negative potential of ubuntu is that it may be possible for the individual to be sacrificed for the collective good (Mokgoro, 1997). The first indication of this possibility in the law is provided in the case of *S v Magadani.*[25] In this case, the Court took ubuntu into account at the time of sentencing, and found the crime to be such an infringement of ubuntu that he was given a life sentence (Keep & Midgley, 2007). This case at least indicates that the interests of the individual (to have a shorter sentence) may in some cases be sacrificed for the good of the group (to have particularly dangerous criminals in jail for longer).

A second case where we can see the potential of ubuntu to sacrifice the interests of the individual is in *Soobramoney v Minister of Health,* as discussed above. Interestingly, ubuntu was not explicitly mentioned in this case and instead, the reasoning is explicitly utilitarian – placing the emphasis on Department of Health budget restrictions and the moral obligation to maximise the good provided by the health system. However, this case is included in Cornell's discussion of Sach's ubuntu jurisprudence (Cornell, 2004, p. 672) and Sach's concurring judgment in the case makes use of language very close to that used in discussions related to ubuntu. For instance, Sachs explicitly states that:

> Health care rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence. A healthy life depends upon social interdependence... (paragraph 54).

Sachs clearly evokes the language that is typically associated with ubuntu, thereby indirectly introducing it without explicitly naming it. Therefore, the *Soobramoney* case, despite not being directly premised on ubuntu, provides a sense of the danger potentially associated with practically employing ubuntu.

Ubuntu is not the first ethical theory to face the criticism that individuals may be sacrificed for the collective good. Utilitarianism in particular has been criticized for failing to take account of the separateness of persons – i.e. the objection that one cannot make utilitarian calculations across persons as though they were assessments within a single life (Nozick, 1974). This objection may be less problematic to those who already accept ubuntu, because they may be less committed to the separation of personal identity. However, Wolff attributes utilitarianism's waning popularity to this objection and advocates of ubuntu should therefore at least be aware of this concern (Wolff, 2006).

[25] 2001 JDR 0321 (V).

The legal application of ubuntu illustrates that those invoking ubuntu need to at least be sensitive to the possibility of sacrificing the individual for the benefit of the group. This may not discredit endeavours to make use of ubuntu practically, but those involved in these practices should be aware of the possibility of sacrifice implicit in their activities.[26]

Conclusion

This chapter has argued that the application of ubuntu in the law provides a better understanding of how ubuntu might be practically applied. This has been done by firstly tracing ubuntu's incorporation into the law and by assessing how successful the transition into the law has been – specifically by looking at Van der Walt and Cornell. It was concluded that ubuntu has played a relatively limited role in the law and that it is often mentioned in cases without actually being involved in the reasoning process of the Courts. However, the final section of the chapter considered some lessons we can take from the use of ubuntu in the law for broader application– specifically by understanding it in terms of the ideal and non-ideal theory and it helping us to overcome some of the overly-optimistic naivety associated with ubuntu.

[26] Van der Walt argues that all instances of the law involve sacrifice, but he is also of the position that recognising these sacrifices is better for the overall functioning of society.

Conclusion

This dissertation was motivated by a concern that there is something deeply unethical about the current political system in South Africa, due its (re)production of such high levels of inequality. The sense was that a political theory based on ubuntu, which requires that we foster loving relationships and that at the very least we treat each other humanely, could go some way to undoing the conceptual underpinnings of a political-community that seems to have such little regard for the well-being of its members. To borrow Albie Sach's language in the *PE Municipalities* case, the hope was that ubuntu could 'humanise' our politics. In order to achieve this aim, this thesis set out to explore the possibility of an ubuntu-based political philosophy, following the core assumption that political theory is grounded in ethics.

The first task was therefore to articulate ubuntu as an ethic. In order to do this, three competing strategies for developing ubuntu as an ethical theory were assessed: an ubuntu ethic by religion, an ubuntu ethic by maxim, and an ubuntu ethic by underlying principle. Metz's ubuntu ethic by underlying principle was favoured, because it allowed for the possibility of a secular account of ubuntu, which is necessary for developing a political theory relevant to an imagined community of diverse people and cultures.

However, Metz's articulation of the core ubuntu ethic as: 'An action is right insofar as it produces harmony and reduces discord; an act is wrong to the extent that it fails to develop community' (2007, p. 334), shows some initial similarities to the moral requirements of communitarianism, feminist communitarianism and humanism. It therefore became necessary to examine whether there is anything distinctive about ubuntu that makes it a more suitable candidate for application in a South African context. In this examination it was found that ubuntu is remarkably similar to the feminist ethic of care and that all of the most fundamental conceptual aspects of ubuntu can be captured without any reference to African ethics. However, it was concluded that ubuntu remains the most appropriate candidate for a locally-orientated political philosophy because it resonates with South Africans' lived experience in ways that Western communally orientated ethical theories do not. The normative requirement of this ubuntu ethic, when expanded to the political level, would therefore be that government actions and policies ought to function to 'produce harmony', 'reduce discord' and 'develop community'.

The final task of this project was therefore to determine whether ubuntu could ever have practical effect in the political realm. This was done by looking at South African jurisprudence, due to the practical role that ubuntu has already played in the law. In establishing a genealogy of ubuntu's incorporation into the law, it was found that ubuntu has been incorporated into the law with limited success and that in many of the cases in which it is named it fails to do substantial work in the jurisprudential reasoning. However, the Court's use of ubuntu teaches us important lessons for invoking ubuntu in the political realm – that we can make use of ubuntu practically before achieving a complete theoretical understanding on the concept and that we need to be wary of the possibility of the sacrifice of individuals in the application of ubuntu.

In order to fully realise the ambition of an ubuntu-based political philosophy, subsequent work would need to focus on practical political examples, keeping in mind the lessons from the law, to develop a sense of what an ubuntu politics would realistically require. To use Rawls's language, the task now is to develop non-ideal theory to bring society closer to the ideal offered by an ubuntu-based political philosophy.

Bibliography

Battle, M. (1997). *Reconciliation: The Ubuntu Theology of Desmond Tutu.* Ohio: Pilgrim Press.

Busia, A. (1967). *Africa in Search of Democracy .* London : Collins.

Cornell, D. (2004). A call for a nuanced constitutional jurisprudence: Ubuntu, dignity and reconciliation. *SAPR/PL* , 666- 675 .

Cornell, D. (2009). uBuntu, Pluralism and the Responsibility of Legal Academics in the New South Africa. *Law Critique* , 43-58 .

Department of International Relations & Cooperation . (2011, May 13). Building a Better World: The Diplomacy of Ubuntu. *White Paper on South Africa's Foreign Policy* .

Douzinas, C., & Žižek, S. (2010). Introduction: The idea of communism. In C. Douzinas, & S. Žižek, *The idea of communism* (pp. vii-x). London: Verso.

Du Bois, F. (2007). Sources of Law: Common law and precedent. In F. Du Bois, *Wille's Principles of South African Law* (pp. 64-99). Cape Town : Juta and Co .

Eagleton, T. (2011). *Why Marx Was Right .* New Haven & London: Yale University Press.

Fluxman, T. (2009). Marx, Rationalism and the Critique of the Market. *South African Journal of Philosophy* , 377-413.

Fowler, J. (1999). *Humanism: Beliefs and Practices .* Brighton: Sussex Academic Press.

Friedman, M. (1989). Feminism and Modern Friendship: Dislocating the Community . *Ethics* , 275-290 .

Gade, C. (2011). The Historical Development of the Written Discourses on Ubuntu. *South African Journal of Philosophy* , 303- 329.

Gilligan, C. (1982). *In A Different Voice: Psychological Theory and Women's Development .* Cambridge, Mass: Harvard University Press.

Gyeke, K. (2002). Person and community in African thought. In P. Coetzee, & A. Roux, *Philosophy from Africa* (Second ed., pp. 297- 312). Oxford: Oxford University Press.

Hailey, J. (2008). *Ubuntu: A literature review.* London: Tutu Foundation.

Harding, S. (1987). The Curious Coincidence of Feminine and African Moralities: Challenges for Feminist Theory . In E. Kittay, & D. Meyers, *Women and Moral Theory* (pp. 296- 315). Totowa, NJ: Rowman & Littlefield Publishers.

Hekman, S. (1995). *Moral Voices Moral Selves: Carol Gilligan and Feminist Moral Theory .* Cambridge: Polity Press.

Held, V. (1999). Liberalism and the Ethics of Care. In C. Card, *On Feminist Ethics and Politics* (pp. 288-309). Kansas: University Press of Kansas .

Helliker, K., & Vale, P. (2012). Radical Thinking in South Africa's Age of Retreat. *Journal of Asian and African Studies* , Online Edition .

Hobsbawm, E. (1992). Introduction: Inventing Traditions. In E. Hobesbawn, & T. Ranger, *The Invention of Tradition* (pp. 1-14). Cambridge: Cambridge University Press.

Jaggar, A. (1983). *Feminist Politics and Human Nature .* Totowa, NJ : Rowman and Littlefield. .

Janz, B. (2004). Philosophy as if Place Mattered: The Situation of African Philosophy. In H. Carel, & D. Gamez, *What Philosophy Is: Contemporary Philosophy in Action* (pp. 103-115). London: Continuum Publishers.

Janz, B. (2009). *Philosophy in an African Place.* Lanham, Md: Lexington Books.

Jeffries, S. (2012, July 4). Why Marxism is on the rise again. *The Guardian* , p. online edition.

Keep, H., & Midgley, R. (2007). The Emerging Role of Ubuntu-Botho in Developing a Consensual South African Legal Culture. In F. Bruinsma, & D. Nelken, *Explorations in Legal Culture* (pp. 29-56). Amsterdam: Reed Business BV.

Kennedy, D. (1976). Form and Substance in Private Law Adjudication. *Harvard Law Review* , 1685-1778.

Koggel, C. (2000). Communitarianism, Women. In L. Code, *Routledge Encyclopedia of Feminist Theories* (p. 102). London : Routledge .

Kymlicka, W. (2002). *Contemporary Political Philosophy: An Introduction .* Oxford; New York : Oxford University Press.

Lamont, C. (1965). *The Philosophy of Humanism.* New York: Ungar.

Louw, D. (2001). Ubuntu and the Challanges of Multi-Culturalism in post-apartheid South Africa. *Quest* , 15-36.

MacIntyre, A. (1985). *After Virtue: a study in moral theory* (Second ed.). London: Duckworth.

Mangena, F. (2009). The Search for an African Feminist Ethic: A Zimbabwean Perspective. *Journal of International Women's Studies* , 18-30.

Mbiti, J. (1969). *African Religions and Philosophy* (Second ed.). Oxford: Heinemann.

McCrudden, C. (2008). Human Dignity and Judicial Interpretation of Human Rights. *The European Journal of International Law* , 655-724.

McDonald, D. (2010). Ubuntu bashing: the marketisation of 'African values' in South Africa. *Review of African Political Economy* , 139- 152.

Menkiti, I. (1984). Person and Community in African Traditional Thought. In R. Wright, *African Philosophy, An Introduction* (pp. 171-182). Lanham, Md: University Press of America.

Metz, T. (2007). Towards an African Moral Theory. *The Journal of Political Philosophy* , 321-341.

Metz, T. (2007a). Ubuntu as a Moral Theory: Reply to Four Critics. *South African Journal of Philosophy* , 369-387.

Metz, T. (2007b). The Motivation for "Toward an African Moral Theory". *South African Journal of Philosophy* , 331-335.

Metz, T. (2009). African Moral Theory and Public Governance: Nepotism, Preferential Hiring and Other Partiality . In M. F. Murove, *African Ethics: An Anthology for Comparative and Applied Ethics* (pp. 335- 356). Scottsville : UKZN Press.

Mokgoro, Y. (1998). Ubuntu and the law in South Africa. *Potchefstroom Electronic Law Journal* , 1-11.

Motha, S. (2009). Archiving Colonial Sovereignty: From ubuntu to the jurisprudence of sacrafice. *SAPR/PL* , 297-327.

Mullhall, S., & Swift, A. (1992). *Liberals and Communitarians.* Oxford: Blackwell.

Nattress, N., & Seekings, J. (2001). Democracy and distribution in highly unequal economies: the case of South Africa. *Journal of Modern African Studies* , 471- 498.

Noddings, N. (1984). *Caring: A feminine approach to ethics and moral education .* Berkely and Los Angeles, California: University of California Press.

Nozick, R. (1974). *Anarchy, State, and Utopia.* New York: Basic Books.

Oruka, H. (1990). *Sage Philosophy: Indigenous Thinkers and Modern Debate on African Philosophy.* Leiden: E. J. Brill.

Pieterse, E. (2008). *City Futures: confronting the crisis of urban development.* London, Cape Town: Zed Books, UCT Press.

Praeg, L. (2000). *African Philosophy and the Quest for Autonomy: A Philosophical Investigation.* Amsterdam: Rodopi.

Praeg, L. (2008). 'An Answer to the Question: What is [ubuntu]?'. *South African Journal of Philosophy*, 367- 385.

Ramose, M. (1999). *African Philosophy through Ubuntu.* Harare: Mond Books.

Ramose, M. (2007). But Hans Kelsen was not Born in Africa: a reply to Thaddeus Metz. *South African Journal of Philosophy* , 347-355.

Rawls, J. (1972). *A Theory of Justice.* Oxford: Oxford University Press.

Sandel, M. (1982). *Liberalism and the Limits of Justice.* Cambridge : Cambridge University Press.

Sen, A. (2009). *The Idea of Justice .* Cambridge, Massachusetts: Harvard University Press.

Shutte, A. (1993). *Philosophy for Africa .* Rondebosch : UCT Press.

Shutte, A. (2001). *Ubuntu: An Ethic for a New South Africa.* Pietermartitzburg: Cluster Publications.

Simmons, A. (2010). Ideal and Nonideal Theory . *Philosophy and Public Affairs* , 5-36 .

Temples, P. (1969). *Bantu Philosophy.* Paris: Presence Africaine.

Trevor-Roper, H. (1992). The Invention of Tradition: The Highland Tradition of Scotland. In E. Hobsbawm, & T. Ranger, *The Invention of Tradition* (pp. 15-42). Cambridge: Cambridge University Press.

Tutu, D. (2000). *No Future Without Forgiveness.* New York: DoubleDay.

United Nations Development Programme. (2009). *Human Development Report 2009.* New York: Palgrave MacMillan.

Van Bisburgen, W. (2001). Ubuntu and the Globalisation of Southern African Thought and Society. *Quest* , 53-89.

Van der Walt, J. (2005). *Law and Sacrifice: Towards a Post-Apartheid Theory of Law.* London: Birkbeck Law Press.

Van Niekerk, J. (2007). In Defence of an Autocentic Account of Ubuntu. *South African Journal of Philosophy* , 364-368.

Wiredu, K. (1998). Democracy and consensus in African traditional politics: A plea for a non-party polity. In P. Coetzee, & A. Roux, *Philosophy from Africa* (pp. 374-382). Johannesburg: ITP.

Wolff, J. (1996). *An Introduction to Political Philosophy.* New York: Oxford University Press.

Wolff, J. (2006). Making the World Safe for Utilitarianism. *Royal Institute of Philosophy* , 1-22.

Table of Cases

Afri-Forum v Malema 2011 (6) SA 240

AZAPO v President of the Republic of South Africa 1996 (8) BCLR 1015 (CC)

Port Elizabeth Municipality v Various Occupiers 2004 (12) BCLR 1268 (CC)

Soobramoney v Minister of Health, Kwa-Zulu Natal 1998 1 SA 765 (CC)

S v Magadani 2001 JDR 0321 (V).

S v Makwanyane 1995 (3) SA 363 (CC)