# *UBUNTU* AS A MORAL THEORY AND HUMAN RIGHTS IN SOUTH AFRICA

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**Summary:** *There are three major reasons why ideas associated with ubuntu are often deemed to be an inappropriate basis for a public morality in today's South Africa. One is that they are too vague; a second is that they fail to acknowledge the value of individual freedom; and a third is that they fit traditional, small-scale culture more than a modern, industrial society. In this article, I provide a philosophical interpretation of ubuntu that is not vulnerable to these three objections. Specifically, I construct a moral theory grounded on Southern African world views, one that suggests a promising new conception of human dignity. According to this conception, typical human beings have a dignity by virtue of their capacity for community, understood as the combination of identifying with others and exhibiting solidarity with them, where human rights violations are egregious degradations of this capacity. I argue that this account of human rights violations straightforwardly entails and explains many different elements of South Africa's Bill of Rights and naturally suggests certain ways of resolving contemporary moral dilemmas in South Africa and elsewhere relating to land reform, political power and deadly force. If I am correct that this jurisprudential interpretation of ubuntu both accounts for a wide array of intuitive human rights and provides guidance to resolve present-day disputes about justice, then the three worries about vagueness, collectivism and anachronism should not stop one from thinking that something fairly called 'ubuntu' can ground a public morality.*

**Keywords:** Human Rights; Ubuntu; Moral Theory; South Africa.

> [W]e have not done enough to articulate and elaborate on what *ubuntu* means as well as promoting this important value system in a manner that should define the unique identity of South Africans.
>
> Former South African President Thabo Mbeki,
>
> Heritage Day 2005

## 1. Introduction

Despite President Mbeki's call, many jurists, philosophers, political theorists, civil society activists and human rights advocates in South Africa reject the invocation of *ubuntu*, tending to invoke three sorts of complaints.

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First, and most often, people complain that talk of *ubuntu* in Nguni languages (and cognate terms such as *botho* in Sotho-Tswana and *hunhu* in Shona) is vague. Although the word literally means humanness, it does not admit of the precision required in order to render a publicly-justifiable rationale for making a particular decision. For example, one influential South African commentator suggests that what *ubuntu* means in a legal context 'depends on what a judge had for breakfast', and that it is 'a terribly opaque notion not fit as a normative moral principle that can guide our actions, let alone be a transparent and substantive basis for legal adjudication'. [2] This concern has not exactly been allayed by a South African Constitutional Court justice who has invoked *ubuntu* in her decisions, insofar as she writes that it can be grasped only on a 'know it when I see it' basis, its essence not admitting of any precise definition.[3]

A second common criticism of *ubuntu* is its apparent collectivist orientation, with many suspecting that it requires some kind of group-think, uncompromising majoritarianism or extreme sacrifice for society, which is incompatible with the value of individual freedom that is among the most promising ideals in the liberal tradition. Here, again, self-described adherents to *ubuntu* have done little to dispel such concerns, for example, an author of an important account of how to apply *ubuntu* to public policy remarks that it entails 'the supreme value of society, the primary importance of social or communal interests, obligations and duties over and above the rights of the individual'.[4]

A third ground of scepticism about the relevance of *ubuntu* for public morality is that it is inappropriate for the new South Africa because of its traditional origin. Ideas associated with *ubuntu* grew out of small-scale, pastoral societies in the pre-colonial era whose world views were based on thickly spiritual notions such as relationships with ancestors (the 'living-dead'). If certain values had their source there, then it is reasonable to doubt that they are fit for a large-scale, industrialised, modern society with a plurality of cultures, many of which are secular.[5]

Call these three objections to an *ubuntu*-oriented public morality those regarding 'vagueness', 'collectivism' and 'anachronism'. It would be incoherent to hold all three

[2] E McKaiser 'Public morality: Is there sense in looking for a unique definition of *ubuntu*?' *Business Day* 2 November 2009.

[3] Y Mokgoro '*Ubuntu* and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law Journal* 2.

[4] GM Nkondo '*Ubuntu* as a public policy in South Africa' (2007) 2 *International Journal of African Renaissance Studies* 90.

[5] See several expressions of scepticism about the contemporary relevance of traditional African ideas recounted in J Lassiter 'African culture and personality' (2000) 3 *African Studies Quarterly* 10-11.

objections at the same time; after all, the more one claims that *ubuntu* is vague and admits of any interpretation, the less one can contend that it is inherently collectivist. Even so, the three objections are characteristic of discourse among professionals, elites, intellectuals and educated citizens in general, and hence are worth grouping together.

In this article, I aim to articulate a normative-theoretical account of *ubuntu* that is not vulnerable to these three objections. I construct an ethical principle that not only grows out of indigenous understandings of *ubuntu*, but is fairly precise, clearly accounts for the importance of individual liberty, and is readily applicable to addressing present-day South Africa as well as other societies. To flesh out these claims, I explain how the *ubuntu*-based moral theory I spell out serves as a promising foundation for human rights. Although the word *ubuntu* does not feature explicitly in the Constitution that was ultimately adopted in South Africa,[6] my claim is that a philosophical interpretation of values commonly associated with *ubuntu* can entail and plausibly explain this document's construal of human rights. In short, I aim to make good on the assertion made by the South African Constitutional Court that *ubuntu* is the 'underlying motif of the Bill of Rights'[7] and on similar claims made by some of the Court's members.[8]

Note that this is a work of jurisprudence, and specifically of normative philosophy, and hence that I do not engage in related but distinct projects that some readers might expect.[9] For one, I am not out to describe the way of life of any particular Southern African people. Of course, to make the label *ubuntu* appropriate for the moral theory I construct, it should be informed by pre-colonial Southern African beliefs and practices (since reference to them is part of the sense of the word as used by people in my and the reader's linguistic community). However, aiming to *create* an applicable ideal that has a Southern African pedigree and grounds human rights, my ultimate goal in this article is distinct from the empirical project of trying to accurately *reflect* what a given traditional black people believed about morality – something an anthropologist would do. For another, I do not here engage in legal analysis, even though I do address some texts prominent in South African legal discourse. My goal is not to provide an

[6] Constitution of the Republic of South Africa, 1996, http://www.info.gov.za/documents/constitution/1996/index.htm (accessed 31 October 2011).

[7] *Port Elizabeth Municipality v Various Occupiers* (2004) ZACC 7; 2005 1 SA 217 (CC); 2004 12 BCLR 1268 (CC) para 37.

[8] In particular, see Justice Albie Sachs's remarks in *Dikoko v Mokhatla* (2006) ZACC 10; 2006 6 SA 235 (CC); 2007 1 BCLR 1 (CC) para 113, as well as views ascribed to Justice Yvonne Mokgoro in D Cornell '*Ubuntu*, pluralism and the responsibility of legal academics to the new South Africa' (2008) 20 *Law and Critique* 47 56.

[9] I might also fail to adhere to certain stylistic conventions to which academic lawyers are accustomed, and beg for leniency from my colleagues.

interpretation of case law, but rather to provide a moral theory that a jurist could use to interpret case law, among other things.

I begin by summarising the *ubuntu*-based moral theory that I have developed elsewhere (section 2) and then I articulate its companion conception of human dignity (section 3). Next, I invoke this conception of human dignity to account for the nature and value of human rights of the sort characteristic of the second chapter of South Africa's Constitution (section 4). In the following section, I apply the moral theory to some human rights controversies presently facing South Africa (and other countries as well), specifically those regarding suitable approaches to dealing with compensation for land claims, the way that political power should be distributed, and sound policies governing the use of deadly force by the police (section 5). My aim is not to present conclusive ways to resolve these contentious disputes, but rather to illustrate how the main objections to grounding a public morality on *ubuntu*, regarding vagueness, collectivism and anachronism, have been rebutted, something I highlight in the conclusion (section 6).

## *2. Ubuntu* as a moral theory

Neville Alexander recently remarked that he is glad that the oral culture of indigenous Southern African societies has made it difficult to ascertain exactly how they understood *ubuntu*.[10] For him and some other intellectuals,[11] the relevant question is less 'How was *ubuntu* understood in the past?' and more 'How should we understand *ubuntu* now?' I agree with something like this perspective, and begin by spelling out what it means to pose the latter question, after which I begin to answer it.

### 2.1. Considerations of method

To speak legitimately of *ubuntu* at all requires discussing ideas that are at least *continuous* with the moral beliefs and practices of those who speak Nguni languages, from which the term originated, as well as of those who have lived near and with them, such as Sotho-

[10] Comments made at a Symposium on a New Humanism held at the Stellenbosch Institute for Advanced Study (STIAS) 24-25 February 2010.

[11] Eg MO Eze *Intellectual history in contemporary South Africa* (2010).

Tswana and Shona speakers.[12] Some would say that it is fair to call something *ubuntu* only if it mirrors, without distortion, how such peoples have traditionally understood it.[13] However, I reject such a view, for two reasons. First, analogies with other terms indicate that it can be appropriate to call a perspective *ubuntu* if it is grounded in ideas and habits that were salient in pre-colonial Southern Africa, even if it does not fully reproduce all of them. Consider, for example, the way contemporary South African lawyers use the phrase 'Roman Dutch law'. Second, there is no single way in which pre-colonial Southern African peoples understood *ubuntu*; there have been a variety of different Nguni (and related) languages and cultures and, with them, different values. One unavoidably must choose which interpretation of *ubuntu* one thinks is most apt, given one's aims.

I submit that it is up to those living in contemporary Southern Africa to refashion the interpretation of *ubuntu* so that its characteristic elements are construed in light of our best current understandings of what is morally right. Such refashioning is a project that can be assisted by appealing to some of the techniques of analytic philosophy, which include the construction and evaluation of a moral theory. A moral theory is roughly a principle purporting to indicate, by appeal to as few properties as possible, what all right actions have in common as distinct from wrong ones. What (if anything) do characteristically immoral acts such as lying, abusing, insulting, raping, kidnapping and breaking promises have in common by virtue of which they are wrong?

Standard answers to this question in Western philosophy include the moral theories that such actions are wrong just insofar as they tend to reduce people's quality of life (utilitarianism), and solely to the extent that they degrade people's capacity for autonomy (Kantianism). How should someone answer this question if she finds the Southern African values associated with talk of *ubuntu* attractive?

[12] Sometimes the word *ubuntu* is meant to capture not merely Southern African moral views, but sub-Saharan ones more generally. I lack the space in this article to compare the two bodies of thought, but elsewhere I have drawn on anthropological and sociological findings indicating that there are many important similarities between a wide array of traditional cultures below the Sahara desert. If so, then Mbeki's suggestion that *ubuntu* is unique to South Africans is incorrect. See T Metz 'Toward an African moral theory' (2007) 15 *Journal of Political Philosophy* 321.

[13] An assumption present in M Ramose *African philosophy through* ubuntu (1999).

### 2.2. Moral-theoretic interpretation of *ubuntu*

She would likely start by appealing to the ubiquitous maxim 'A person is a person through other persons'.[14] When Nguni speakers state '*Umuntu ngumuntu ngabantu*', and when Sotho-Tswana speakers say '*Motho ke motho ka batho babang*', they are not merely making an empirical claim that our survival or well-being are causally dependent on others, which is about all a plain reading in English would admit. They are rather in the first instance tersely capturing a normative account of what we ought to most value in life. Personhood, selfhood and humanness in characteristic Southern African language and thought are value-laden concepts. That is, one can be more or less of a person, self or human being, where the more one is, the better.[15] One's ultimate goal in life should be to become a (complete) person, a (true) self or a (genuine) human being.

So, the assertion that 'a person is a person' is a call to develop one's (moral) personhood, a prescription to acquire *ubuntu* or *botho*, to exhibit humanness. As Desmond Tutu remarks: 'When we want to give high praise to someone, we say *Yu u nobuntu*; Hey, so-and-so has *ubuntu*.'[16] The claim that one can obtain *ubuntu* 'through other persons' means, to be more explicit, by way of communal relationships with others.[17] As Shutte, one of the first professional South African philosophers to publish a book on *ubuntu*, sums up the basics of the ethic:[18]

Our deepest moral obligation is to become more fully human. And this means entering more and more deeply into community with others. So although the goal is personal fulfilment, selfishness is excluded.

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[14] The following several paragraphs draw on T Metz 'Human dignity, capital punishment, and an African moral theory' (2010) 9 *Journal of Human Rights* 83-85; T Metz & J Gaie 'The African ethic of *ubuntu/botho*' (2010) 39 *Journal of Moral Education* 274-276.

[15] As is made particularly clear in Ramose (n 12 above) 51-52. For similar ideas ascribed to sub-Saharan thought generally, see K Wiredu 'The African concept of personhood' in HE Flack & EE Pellegrino (eds) *African-American perspectives on biomedical ethics* (1992) 104; I Menkiti 'On the normative conception of a person' in K Wiredu (ed) *A companion to African philosophy* (2004) 324.

[16] D Tutu *No future without forgiveness* (1999) 31.

[17] For representative statements from those in Southern Africa, see S Biko 'Some African cultural concepts' in S Biko *I write what I like. Selected writings by Steve Biko* (1971/2004) 46; Tutu (n 15 above) 35; N Mkhize '*Ubuntu* and harmony' in R Nicolson (ed) *Persons in community* (2008) 38-41.

[18] A Shutte *Ubuntu: An ethic for the new South Africa* (2001) 30.

Just as 'an unjust law is no law at all' (Augustine), Southern Africans would say of a person who does not relate communally that 'he is not a person'. Indeed, those without much *ubuntu*, roughly, those who exhibit discordant or indifferent behaviour with regard to others, are often labelled 'animals'.[19]

One way that I have sought to contribute to *ubuntu* scholarship is by being fairly precise, not only about what communal relationships and related concepts such as harmony essentially involve, but also about how they figure into performing morally-right actions.[20] To seek out community with others is not best understood as equivalent to doing whatever a majority of people in society want or conforming to the norms of one's group. Instead, African moral ideas are both more attractively and more accurately interpreted as conceiving of communal relationships as an objectively-desirable kind of interaction that should instead guide what majorities want and which norms become dominant.

More specifically, there are two recurrent themes in typical African discussion of the nature of community as an ideal, what I call 'identity' and 'solidarity'. To identify with each other is largely for people to think of themselves as members of the same group, that is, to conceive of themselves as a 'we', for them to take pride or feel shame in the group's activities, as well as for them to engage in joint projects, coordinating their behaviour to realise shared ends. For people to fail to identify with each other could go beyond mere alienation and involve outright division between them, that is, people not only thinking of themselves as an 'I' in opposition to a 'you', but also aiming to undermine one another's ends.

To exhibit solidarity is for people to engage in mutual aid, to act in ways that are reasonably expected to benefit each other. Solidarity is also a matter of people's attitudes such as emotions and motives being positively oriented toward others, say, by sympathising with them and helping them for their sake. For people to fail to exhibit solidarity would be for them either to be uninterested in each other's flourishing or, worse, to exhibit ill-will in the form of hostility and cruelty.

Identity and solidarity are conceptually separable, meaning that one could in principle exhibit one sort of relationship without the other. For instance, workers and management in a capitalist firm probably identify with one another, but insofar as typical workers neither labour for the sake of managers nor are sympathetic toward them, solidarity between them is lacking.

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[19] C Pearce '*Tsika*, *Hunhu* and the moral education of primary school children' (1990) 17 *Zambezia* 147; MJ Bhengu *Ubuntu: The essence of democracy* (1996) 27; M Letseka 'African philosophy and educational discourse' in P Higgs *et al* (eds) *African voices in education* (2000) 186.

[20] Metz (nn 11 & 13 above).

Conversely, one could exhibit solidarity without identity, say, by helping someone anonymously.

While identity and solidarity are logically distinct, characteristic African thought includes the view that, morally, they ought to be realised together. That is, communal relationship with others, of the sort that confers *ubuntu* on one, is well construed as the combination of identity and solidarity. One will find implicit reference to both facets of community in the following statements by Southern African adherents to *ubuntu*:[21] 'Harmony is achieved through close and sympathetic social relations within the group;'[22] '[*U*]*buntu* advocates… express commitment to the good of the community in which their identities were formed, and a need to experience their lives as bound up in that of their community;'[23] 'Individuals consider themselves integral parts of the whole community. A person is socialised to think of himself, or herself, as inextricably bound to others … *Ubuntu* ethics can be termed anti-egoistic as it discourages people from seeking their own good without regard for, or to the detriment of, others and the community. *Ubuntu* promotes the spirit that one should live for others.'[24]

To begin to see the philosophical appeal of grounding ethics on such a conception of community, consider that identifying with others can be cashed out in terms of sharing a way of life and that exhibiting solidarity toward others is naturally understood in terms of caring about their quality of life. And the union of sharing a way of life and caring about others' quality of life is basically what English speakers mean by a broad sense of 'friendship' (or even 'love'). Hence, one major strand of Southern African culture places friendly (or loving) relationships at the heart of morality, as others have tersely summarised *ubuntu* on occasion. For instance, speaking of African perspectives on ethics, Tutu remarks:[25]

Harmony, friendliness, community are great goods. Social harmony is for us the *summum bonum* – the greatest good. Anything that subverts or undermines this sought-after good is to be avoided like the plague.

[21] For similar expressions from Africans far north of the Limpopo, see S Gbadegesin *African philosophy* (1991) 65; K Gyekye *Beyond cultures* (2004) 16; P Iroegbu 'Beginning, purpose and end of life' in P Iroegbu & A Echekwube (eds) *Kpim of morality ethics: General, special and professional* (2005) 442.

[22] Mokgoro (n 2 above) 3.

[23] Nkondo (n 3 above) 91.

[24] M Munyaka & M Motlhabi '*Ubuntu* and its socio-moral significance' in FM Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 69 71-72.

[25] Tutu (n 15 above) 35.

Kasenene similarly says that 'in African societies, immorality is the word or deed which undermines fellowship'.[26]

Tutu and Kasenene indicate that one must, above all, avoid unfriendliness or acting in ways that would threaten communal ties. However, a fuller statement of how to orient oneself toward friendly relationships is needed, for example, in light of the question of what to do when being unfriendly in a certain respect is expected to have the long-term effect of promoting a greater friendliness.

My suggestion about how to orient oneself toward friendly or communal relationships, in order to act rightly and exhibit *ubuntu*, is that one ought to *prize* or *honour* such relationships. Such a relation to them contrasts in the first instance with promoting them as much as possible wherever one can.[27] The latter prescription, simply to maximally produce communal relationships (of identity and solidarity) and reduce anti-social ones (of division and ill-will) would permit intuitively impermissible behaviour. To adopt an example familiar to a philosophical audience, an instruction to promote as many communal relationships as one can in the long run would permit a doctor to kill an innocent, relatively healthy individual and distribute her harvested organs to three others who would otherwise die without them, supposing there would indeed be more of such relationships realised in the long term. A moral theory that focuses *exclusively* on promoting good outcomes however one can (which is 'teleological') has notorious difficulty in accounting for an individual right to life, among other human rights.

I therefore set it aside in favour of an ethical approach according to which certain ways of treating individuals are considered wrong at least to *some* degree 'in themselves', apart from the results. Honouring communal relationships would involve, roughly, being as friendly as one can oneself and doing what one can to foster friendliness in others without one using a very unfriendly means.[28] This kind of approach, which implies that certain ways of bringing about good outcomes are impermissible (and is 'deontological'), most promises to ground human rights.

To sum up, the maxim 'A person is a person through other persons', which is fairly opaque (at least to English speakers), admits of the following, more revealing interpretations:

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[26] P Kasenene *Religious ethics in Africa* (1998) 21.

[27] For an analysis of these two different ways of responding to value, see P Pettit 'Consequentialism and respect for persons' (1989) 100 *Ethics* 116; D McNaughton & P Rawling 'Honouring and promoting values' (1992) 102 *Ethics* 835.

[28] I refine this approximate principle below.

'One becomes a moral person insofar as one honours communal relationships', or 'A human being lives a genuinely human way of life to the extent that she prizes identity and solidarity with other human beings', or 'An individual realises her true self by respecting the value of friendship'. According to this moral theory, grounded in a salient Southern African valuation of community, actions are wrong not merely insofar as they harm people (utilitarianism) or degrade an individual's autonomy (Kantianism), but rather just to the extent that they are *unfriendly* or, more carefully, fail to respect friendship or the capacity for it. Actions such as deception, coercion and exploitation fail to honour communal relationships in that the actor is distancing himself from the person acted upon, instead of enjoying a sense of togetherness; the actor is subordinating the other, as opposed to coordinating behaviour with her; the actor is failing to act for the good of the other, but rather for his own or someone else's interest; or the actor lacks positive attitudes toward the other's good, and is instead unconcerned or malevolent.

From the analysis so far, it should be clear that the moral-theoretic interpretation of *ubuntu* is much more precise than other, more typical renditions of it. In the rest of this article, I aim to demonstrate how this *ubuntu*-based moral theory plausibly accounts for the human rights characteristic of the South African Constitution and can enable us to address contemporary controversies about justice in South Africa and elsewhere.

Before applying the theory, though, I remind the reader not to conflate it (a philosophical account of what all right actions have in common) with an anthropological description of the world views of any particular sub-Saharan peoples. I am providing one, theoretically attractive way to interpret ideas commonly associated with *ubuntu*; I am neither suggesting that it is the only way to do so, nor trying to spell out a principle that anyone has actually held prior to now. I do, however, believe that the suggested interpretation of *ubuntu* is a promising way to unify into the form of a theory a wide array of beliefs and practices that have been recurrent for a long span of time and a large number of peoples south of the Sahara.[29]

### *3. Ubuntu* as a moral theory and human dignity

In order to explain how *ubuntu* as a moral theory can account for much of the Bill of Rights, I make the presumption that human rights are grounded upon human dignity. In this section, I first motivate this assumption, and then articulate a new conception of human dignity

[29] Which I have argued in Metz (n 11 above).

grounded in *ubuntu* as a moral theory, which I will use in the rest of the article to explain and unify human rights.

### 3.1. Human rights and human dignity

One has a human right to something, by definition, insofar as all agents have a stringent duty to treat one[30] in a certain way that obtains because of some quality one shares with (nearly) all other human beings and that must be fulfilled, even if not doing so would result in marginal gains in intrinsic value or in somewhat fewer violations of this same duty in the long run. So construed, a human right is a moral right against others, that is, a natural duty that ought to be taken into account by morally responsible decision makers, regardless of whether they recognise that they ought to. I am therefore not interested in norms that are *inherently* either customarily acknowledged or legally enforced (even though I do use the second chapter of the South African Constitution to illustrate characteristic human rights).

There are utilitarians who claim that human rights are basically rules of thumb designed to maximise the general welfare, but I, with the majority of contemporary moral theorists, presume that such a view has been shown to be implausible,[31] in part because of examples such as the organs case above. Instead, I assume that to observe human rights is to treat an individual as having a dignity, roughly, as exhibiting a superlative non-instrumental value. Alternatively, a human rights violation is a failure to honour people's special nature, often by treating them merely as a means to some ideology such as racial or religious purity or to some prudentially selfish end.

Using this framework, one would distinguish the violation of a right from a justifiable limitation thereof, roughly in terms of the reason for which the right has not been observed. It would degrade human dignity, and hence violate a right, to lock up an innocent person in a room in order to obtain a ransom, but it might not degrade human dignity, and hence might justifiably limit a right, to lock an innocent person in a room in order to protect others from a virulent disease he is carrying. Kidnapping and quarantining can involve the same actions, but since the purposes for which the actions are done differ, there is a difference with regard to whether dignity is disrespected and a right is violated, on the one hand, or whether dignity is respected and a right is justifiably limited, on the other.

[30] I do not address group rights in this article, deeming 'human rights' to pick out the entitlements of individuals.
[31] See, eg, R Nozick *Anarchy, state, and utopia* (1974) 28-34.

This theoretical framework, in which human dignity is the foundational value of human rights, has become the dominant view among moral philosophers, jurisprudential scholars, United Nations theorists, and the German and South African Constitutional Courts.[32] However, they have tended to apply this general perspective in a particular way, namely, by cashing out the content of dignity in terms of *autonomy*. The dominant theme has been that human rights are ultimately ways of treating our intrinsically valuable capacity for self-governance with respect.[33] Enslaving others in order to benefit oneself, discriminating for the purpose of purifying the race, torturing in order to deter political challenges and the like seem to be well conceived, on the face of it, as degradations of individuals' ability to govern themselves, to make free and informed decisions regarding the fundamental aspects of their lives.

I lack the space here to argue against, or even to explore, this powerful and influential model, initially articulated with most care by the German enlightenment philosopher, Immanuel Kant.[34] Instead, I mention the Kantian theory in order to motivate the idea that what probably theoretically unifies the myriad human rights that intuitively exist is an intrinsic worth of the human person that admits of no equivalent among other beings on the planet. My present task is to articulate a Southern African view that can plausibly rival the Kantian conception by virtue of which we have a dignity and hence are bearers of human rights.

### 3.2. Human dignity in existent Southern African thought

Writings by those sympathetic to Southern African world views include two salient conceptions of human dignity, but, as they stand, neither is particularly useful for the aim of accounting for human rights. One view of dignity analyses it in terms of something variable among human beings that is a function of their degree of *ubuntu*. The idea is that the more one lives a genuinely human – and hence communal – way of life, the more one has a dignified existence. Traditionally speaking, it would be elders, and especially ancestors, who have the

[32] For a discussion of the role of dignity in South African jurisprudence, see S Woolman 'Dignity' in S Woolman (ed) *Constitutional law of South Africa* (2002) 36; A Chaskalson 'Dignity and justice for all' (2009) 24 *Maryland Journal of International Law* 24; L Ackermann *Human dignity: Lodestar for equality in South Africa* (unpublished manuscript).

[33] For a discussion in the South African context, see D Jordaan 'Autonomy as an element of human dignity in South African case law' (2008) 8 *The Journal of Philosophy, Science and Law* http://www6.miami.edu/ethics/jpsl/archives/all/Autonomy-humandignity.html (accessed 31 October 2011); Woolman (n 31 above).

[34] I Kant *Groundwork of the metaphysics of morals* (1785), I Kant *Metaphysics of morals* (1797).

greatest dignity, so conceived. This view might be what Botman has in mind when he says that '[t]he dignity of human beings emanates from the network of relationships, from being in community; in an African view, it cannot be reduced to a unique, competitive and free personal ego'.[35]

Such a variant conception of dignity obviously cannot ground human rights, which are uncontroversially deemed to be equal among persons. If a merely decent person, let alone a scoundrel, has a right to life to no less a degree than a Nelson Mandela or Mother Teresa (at least in their stereotypical construals), then we need a conception of dignity that does not vary according to degrees of moral merit. Another way to see the problem is this: A non-violent person who has been put into solitary confinement and hence lacks communal relationships with others nonetheless retains dignity, indeed a dignity that is degraded by virtue of the solitary confinement. If dignity were a function of actually being in community, however, then this individual would counterintuitively lack a dignity.

Now, one does find an invariant conception of dignity among Southern African thinkers, according to which what makes us deserving of equal respect is the fact of human life as such.[36] The traditional thought is that every human being has a spiritual self or invisible 'life force' that has been bestowed by God, that can outlive the death of her body, and that makes her more special than anything else in the mineral, vegetable or animal kingdoms. Such a view would obviously underwrite an equal right to life, and also probably rights to integrity of the human organism that carries the 'soul'.

However, for several reasons I do not find this conception of human dignity attractive. First, grounding dignity in human life *qua* spiritual does a poor job of accounting for human rights that do not concern 'life and death matters', for example, to democratic participation in government or to freedom of movement.[37] Second, a more secular understanding of human dignity is more apt for modern, and often multicultural, societies than is a highly contested, particular form of supernaturalism. Third, I seek an interpretation of human dignity that coheres particularly well with the moral theory articulated above, which makes no fundamental reference to God, a soul or similarly supra-physical beings or forces.

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[35] HR Botman 'The OIKOS in a global economic era' in JR Cochrane & B Klein (eds) *Sameness and difference: Problems and potentials in South African civil society* (2000) http://www.crvp.org/book/Series02/II-6/chapter_x.htm (accessed 31 October 2011).

[36] See, eg, Justice Mokgoro's remarks in the South African Constitutional Court case *State v Makwanyane & Mchunu* (1995) ZACC 3; 1995 6 BCLR 665; 1995 3 SA 391 paras 309-311; Ramose (n 12 above) 138-145; MJ Bhengu *Ubuntu: Global philosophy for humankind* (2006) 29-87.

[37] I argue the point in T Metz 'African conceptions of human dignity: Vitality and community as the ground of human rights' (2011) 13 *Human Rights Review* 1.

### 3.3. A more promising conception of dignity

In any event, I draw upon alternative resources in Southern African moral thought to construct a conception of human dignity that entails and plausibly explains human rights. Here is my suggestion: One is to develop one's humanness by communing with those who have a dignity in virtue of their capacity for communing. That is, individuals have a dignity insofar as they have a communal nature, that is, the inherent capacity to exhibit identity and solidarity with others. According to this perspective, what makes a human being worth more than other beings on the planet is roughly that she has the essential *ability* to love others in ways these beings cannot. If you had to choose between running over a cat or a fellow person, you should run over the cat, intuitively because the person is worth more. While the Kantian theory is the view that persons have a superlative worth because they have the capacity for autonomy, the present, *ubuntu*-inspired account is that they do because they have the capacity to relate to others in a communal way.

Note that some people will have *used* their capacity for communal relationship to a greater degree than others. However, it is not the exercise of the capacity that matters for dignity, but rather the capacity itself. Even those who have misused their capacity for community, by acting immorally, retain the capacity to act otherwise and hence have not thereby lost their dignity.

Now, some people do have a *greater ability* to enter into community with others, but the present conception of dignity is that supposing one has the ability above a certain threshold, one has a dignity that is the equal of anyone else who also meets it.[38] Whenever one encounters an individual with the requisite degree of the capacity for sharing a way of life and caring for others' quality of life, one must treat that capacity of hers with equal respect.

Although the differential use of the capacity for communal relationships, and even a differential degree of the capacity itself, are compatible with equal dignity and equal respect, there is a very small percentage of human beings who utterly lack this capacity, and hence lack a dignity by the present account. Here, one should keep in mind that literally every non-arbitrary and non-speciesist theory of what constitutes human dignity faces the problem that some human beings lack the relevant property. Unless we have a dignity merely by virtue of our DNA, it will follow from any theory that anencephalic infants, for example, lack human dignity, meaning that the present view is no worse off than, say, the Kantian one. Furthermore, from the

[38] See J Rawls *A theory of justice* (1971) 505-506.

bare fact that there are probably some human beings that lack a dignity, it does not follow that one may treat them however one pleases; for they in all likelihood have a moral status for reasons other than dignity, that is, their capacity to feel pain (or, as I argue elsewhere, their ability to be an object of others' love, even in the absence of their ability to exhibit love themselves).[39]

## 4. An *ubuntu*-based conception of dignity as the basis of human rights

In this section I put the *ubuntu*-inspired account of dignity from the previous section to work, aiming to demonstrate the way that it naturally grounds salient human rights. I start by articulating a principle about how to respond to beings with such a dignity that purports to capture most human rights violations, and then I apply the principle to much of the Bill of Rights from the second chapter of South Africa's Constitution.

### 4.1. From human dignity to human rights

My proposal is that we understand human rights violations to be serious degradations of people's capacity for friendliness, understood as the ability to share a way of life and care for others' quality of life, where such degradation is often a matter of exhibiting *extraordinarily unfriendly behaviour* toward them. Human rights violations are ways of gravely disrespecting people's capacity for communal relationship, conceived as identity and solidarity, which disrespect principally takes the form of a significant degree of anti-social behaviour, for example, of division and ill-will. As I demonstrate below, many of the most important human rights, for instance not to be enslaved or tortured, are well understood as protections against enmity, against an agent treating others as separate and inferior, undermining their ends, seeking to make them worse off, and exhibiting negative attitudes toward them such as power seeking and *Schadenfreude*.

This explanation of the nature of a human rights violation is a promising start, but is incomplete; as it stands, it requires pacifism and forbids any form of unfriendly behaviour such as coercion. Yet, almost no believers in human rights are pacifists, instead maintaining that, in some situations, violence is justified, at least for the sake of preventing violence. Indeed, one

[39] For an *ubuntu*-based discussion of the moral standing of beings who in principle cannot exhibit identity and solidarity, see T Metz 'An African theory of moral status: A relational alternative to individualism and holism' (2011) 14 *Ethical Theory and Moral Practice* http://www.springerlink.com/content/j5g38kl117110628/fulltext.pdf (accessed 31 October 2011).

of the most uncontroversial human rights that people have is a claim against their state to use force if necessary to protect them from attack on the part of domestic criminals or foreign invaders.

I therefore must find a way to account for the impermissibility of unfriendliness when there are intuitive human rights violations, and the permissibility of unfriendliness when there are not. In light of the reflections above about the difference between a kidnap and a quarantine, it is natural to suggest that the difference will importantly depend on the purpose served by the unfriendliness. Consider, then, this principle: It is degrading of a person's capacity for friendliness, and hence a violation of her human rights, to treat her in a substantially unfriendly way if one is not seeking to counteract a proportionate unfriendliness on her part, but it need not be degrading of a person's capacity for friendliness to treat her in a substantially unfriendly way, when one's doing so is necessary to prevent or correct for a comparable unfriendliness on her part. A kidnap is a human rights violation because the person kidnapped is innocent, namely, roughly, has not acted in an unfriendly way, but a quarantine need not be a human rights violation, if the person quarantined refuses of her own accord to isolate herself so as to avoid infecting others with an incurable, fatal, easily communicable disease.

In short, being unfriendly toward another is not necessarily to degrade her capacity for friendship, as respecting her capacity requires basing one's interaction with her on the way she has exercised it.[40] To respect those who have not been unfriendly requires treating them in a friendly way, while respecting those who have been unfriendly permits treating them in an unfriendly way, under conditions in which doing so is necessary to protect the victims of their comparable unfriendliness. If someone misuses her capacity for communal relationship, there is no disrespect of this capacity and human rights violation if divisiveness and ill-will is directed toward her as essential to counteract her own divisiveness and ill-will. Hence, violence is justified when, and only when, necessary to protect innocent victims of unjustified violence.

Note that this rationale is not retributive in the sense of justifying the imposition of suffering merely because it is deserved or of treating aggressors as beyond the pale of human community. The principle implies that it would be unjust to treat someone who has been unfriendly in an unfriendly way, if doing were *not* necessary to protect her potential victims or to compensate her actual ones. The principle therefore permits punishment, deadly force and other forms of coercion as they intuitively can be justified, while also underwriting the prescription not to use it when harm can be prevented or alleviated without it. Hence, this

[40] In order to justify coercion, a parallel principle is widely used by Kantians, who prize the capacity for freedom.

principle can make theoretical sense of the tight associations often drawn between *ubuntu* and restorative justice,[41] on the one hand, *and* between *ubuntu* and self-defence,[42] on the other: Intentional harm may be inflicted on offenders only when necessary to protect their victims, which, in many cases, it is not.

Summing up, according to the moral-theoretic interpretation of *ubuntu*, one is required to develop one's humanness by honouring friendly relationships (of identity and solidarity) with others who have dignity by virtue of their inherent capacity to engage in such relationships, and human rights violations are serious degradations of this capacity, often taking the form of very unfriendly behaviour that is not a proportionate, counteractive response to another's unfriendliness. This *ubuntu*-inspired theory is sufficient to account for a wide array of human rights, as I now sketch in the context of South Africa's Bill of Rights. I obviously lack the space to apply it to every single right included there, and so refer to a few major clusters of them only. In addition, in striving to give the reader a bird's eye view of how one might try to unify human rights by appeal to the dignity of our communal nature (rather than our autonomy), I inevitably pass over many important subtleties; issues of justifiable limitation, progressive realisation, horizontal application and the like will have to wait for another, much lengthier treatment.

### 4.2. Human rights to liberties

The South African Constitution counts as 'liberal' at least insofar as it explicitly recognises individual rights to freedoms of religion, belief, press, artistic creativity, movement and residence.[43] The state and all other agents in society are forbidden from restricting what innocent people may do with their minds and bodies for the sake of any ideology or benefit; only some other, stronger right can outweigh these 'negative' rights to be free from interference.

Respect for the dignity of persons as individuals with the capacity for friendly relationships *qua* identity and solidarity accounts naturally for rights to liberty. What genocide, torture, slavery, systematic rape, human trafficking and apartheid have in common, by the present theory, is that they are instances of substantial division and ill-will directed to those

[41] Eg Tutu (n 15 above); D Louw 'The African concept of *ubuntu* and restorative justice' in D Sullivan & L Tifft (eds) *Handbook of restorative justice* (2006) 161; A Krog '"This thing called reconciliation …"; Forgiveness as part of an interconnectednesstowards-wholeness' (2008) 27 *South African Journal of Philosophy* 353.

[42] Ramose (n 12 above) 120: 'The authority of law rests in the first place upon its recognition of self-defence as an inalienable individual or collective right … This is the basis of *ubuntu* constitutional law.' See also Kasenene (n 25 above) 41.

[43] Secs 11-18 & 21-22 South African Constitution.

who have not acted this way themselves, thereby denigrating their special capacity to exhibit the opposite traits of identity and solidarity. Concretely, one who engages in such practices treats people, who have not themselves been unfriendly, in an extremely unfriendly way: The actor treats others as separate and inferior, instead of enjoying a sense of togetherness; the actor undermines others' ends, as opposed to engaging in joint projects with them; the actor harms others (which includes stunting their potential to flourish as loving beings) for his own sake or for an ideology, as opposed to engaging in mutual aid; and the actor evinces negative attitudes toward others' good, rather than acting consequent to a sympathetic reaction to it.

Of most relevance in the context of these rights not to be enslaved, tortured and otherwise interfered with is the capacity to identify with others or to share a way of life, where *genuinely sharing* a way of life requires interaction that is coordinated, rather than subordinated. Part of what is valuable about friendship or communal relationships is that people come together, and stay together, of their own accord. When one's body is completely controlled by others, when one is forbidden from thinking or expressing certain ideas, or when one is required by law to live in some parts of a state's territory rather than others, then one's ability to decide for oneself with whom to commune and how is impaired. In order to treat a person as though her capacity to share a life with others is (in part) the most important value in the world, it ought not be severely restricted (unless doing so is necessary to rebut similar restrictions that she is imposing on others).

### 4.3. Human rights to criminal justice

Although innocent people have human rights to liberty, they also have human rights to protection from the state, which can require restrictions on the liberty of those reasonably suspected of being guilty. The South African Constitution recognises an obligation on the part of the state to set up a police force that is tasked with preventing crime and enforcing the law.[44] The judgment that offenders do not have human rights never to be punished, or that violent aggressors do not have human rights never to be the targets of (perhaps, deadly) force, is well explained by the principle that it does not degrade another's capacity for friendliness if one is unfriendly toward him as necessary to counteract his own proportionate unfriendliness. In addition, the judgment that innocents have human rights against the state to use force against the guilty as necessary to protect them is well explained by the principle that it would degrade

[44] Sec 205(3) South African Constitution.

the innocents' capacity for friendliness, would fail to treat it as the most important value in the world, if the state did not take steps, within its power, to effectively protect it from degrading treatment by others.

Moving away from an explanation of the human rights of the innocent to protection from the state, consider now the rights of those suspected of guilt. Everyone in South Africa who has been charged with a crime is deemed to have rights to be informed of the charge, to be able to prepare a defence, to be tried by an impartial body, to have the trial conducted in a language he understands, to be released from pre-trial detention when feasible, and to remain in touch with family and counsel.[45]

These and similar rights are, in large part, a function of the need to avoid punishing or otherwise harming the innocent (even if doing so likely results in the acquittal of a greater number of guilty). Supposing the state wanted to minimise the extent to which those innocent of any offence were inadvertently convicted or made worse off, it would adopt these kinds of rights. And respect for people's capacity for community well explains an urgent concern to avoid coercing the innocent. As mentioned above, respect for this capacity means treating a person in accordance with the way she has exercised it. Roughly, those who have been friendly do not warrant unfriendly treatment such as detention and punishment, whereas those who have been unfriendly do warrant unfriendly treatment, when necessary to protect or compensate those threatened by their own unfriendliness. The state must take care, therefore, to discriminate between the two groups.

### 4.4. Human rights to political power

Rights to liberty and to criminal justice are ones that a democratic legislature must not contravene, while the present batch of rights concerns the abilities of citizens to participate in democratic legislation. The Bill of Rights accords citizens the rights to form political parties, to support a political party of their choice, to vote in regular elections, and to run for public office.[45]

One can fairly sum up these rights by saying that citizens are entitled to an equal opportunity to influence political outcomes. Now, if what is special about us is, in part, our ability to identify with others or to share a way of life, then that is going to require sharing political power.

[45]Secs 12 & 34-35 South African Constitution. 45 Sec 19 South African Constitution.

And supposing we are equally special by virtue of having the requisite capacity to share a way of life, that means according people the equal ability to influence collective decision making.

One could also underwrite democratic rights by appealing, somewhat less powerfully, I think, to considerations of respect for solidarity. The state must honour communal relationships in part by acting to benefit the people it has allowed within its territory, and it can best do so if they are accorded the final authority to determine political choice.

Dictators are rarely disposed to be benevolent, and even when their intentions are good, they lack the knowledge and skills to do what is in fact likely to enable their subjects to live better lives. In contrast, as John Stuart Mill argued long ago, when residents are given the responsibility for governing themselves, then not only is the government more likely to be responsive to their interests, but they also tend to become more active and self-reliant.[46] Given the plausible assumption that the more passive and dependent one is, the less well-off one is likely to be, a principle of respect for people's capacity for (among other things) mutual aid gives reason to recognise human rights to participate in governance.

### 4.5. Human rights to socio-economic goods

South Africa's Constitution is famously considered progressive for explicitly entitling (at least) legal residents to a wide array of means. Specifically, people have rights against the state (and, in principle, other agents in society) to resources such as housing, healthcare, food, water, social security and education.[47]

There are two paths running from the principle of respect for our communal nature to the judgment that we have 'positive' human rights to socio-economic assistance. First, for the state to honour communal relationships, it must seek to establish them between it and its legal residents. And that will of course mean, with regard to solidarity, that the state must do what it can to improve their quality of life, and to do so for their sake consequent to a sympathetic understanding of their situation. Furthermore, with respect to identity, residents are unlikely to enjoy a sense of togetherness with politicians and state bureaucrats if the latter are not going out of their way to fight poverty.

Second, another part of the state respecting its residents' dignity as people capable of community will mean doing what it can to foster community among residents themselves.

[46] JS Mill *Considerations on representative government* (1861). 47 Secs 26-27 & 29 South African Constitution.

Consider the identity facet, first. It is hard to enjoy a sense of togetherness with others in society when one is seriously impoverished. One feels a sense of shame, inferiority or at least distance when one's basic needs are not met while substantial segments of one's society enjoy great wealth. In addition, one's ability to engage in joint projects with others is not honoured if one is lacking means. Respect for this ability to co-operate with others means developing and supporting it by providing money and other goods needed to facilitate common projects.

Finally, think about the way solidarity between residents is affected by the fulfilment or disregard for their socio-economic rights. Treating others as though they are capable of relationships of mutual aid means, in part, providing them with the resources that would enable them to commune with others. I attended a South African National Heritage Council *imbizo* that was devoted to *ubuntu*, where an elderly black woman said that, for her, the problem with her being poor is that she is not able to help others, that is, to give wealth away.

Of course, there are more rights than these adumbrated in the Constitution, but discussing of all them is unnecessary in order to provide a sense of what is involved in the claim that people have a human dignity by virtue of their capacity for friendly or communal relationships *qua* identity and solidarity and of how various human rights plausibly follow from a requirement to respect dignity so conceived. The analyses did not appeal to the Kantian notion of autonomy; the invocation of our communal nature did the work, and appears to be worth taking seriously as a rival to the more dominant, more individualist approach to dignity and rights.

## 6. Addressing contemporary human rights controversies

In the previous section I argued that the *ubuntu*-based conception of dignity naturally underwrites a large number of human rights that we intuitively have and that appear in the South African Constitution. In this section, I apply this conception of dignity to a few issues that are more controversial or at least are much less taken for granted in contemporary South Africa and elsewhere on the continent. Contested topics include how to effect compensatory justice with regard to land, how to make political decisions, and how to use deadly force when apprehending suspects. Note that my aim is not to present resolutions of these problems, but rather to indicate respects in which the present moral-theoretic interpretation of *ubuntu* can shed light on them.

### 6.1. For a more reconciliatory land reform

As is well known, at the end of apartheid in 1994, nearly 90 per cent of land in South Africa had been forcibly expropriated into the hands of white people who constituted about 10 per cent of the population, and the new Constitution makes provision to compensate those who have been dispossessed by way of land reform (or comparable redress).[47] It is also well known that little land has been transferred back to the black majority, with the government acknowledging that it will fail to reach its 2014 goal of returning 30 per cent of white-held land. Less well known is that, according to a recent statement by the African National Congress, 90 per cent of the land that has been returned to black hands has not been productive, with the government threatening to repossess such land if its current owners do not use it to farm.[48]

In regard to these conditions, I have not infrequently encountered two antipodal responses to the land question, which responses share a common assumption that the *ubuntu*-based moral theory entails is false. I first spell out the antinomy, then bring out the dubious assumption both positions rely upon, and finally sketch a different approach.

Not surprisingly, the two competing approaches to land reform tend to correlate with race, making the issue black and white. On the white side, I sometimes hear it argued that whites owe no restitution to South African blacks since the latter's standard of living would have been worse had whites not taken control of the country. Whites sometimes point out that in the African country where they reigned the longest, the quality of life is the best. Even the worst-off in South Africa are better off, so the argument goes, than the worst-off elsewhere south of the Sahara.

On the black side, I sometimes hear Southern Africans argue that their standard of living would have been higher had whites not settled, exported all the minerals and kept the profits for themselves, and that, in any event, the right thing for black people to do, or for the state to do on their behalf, is immediately to take the land and give it back to those who originally owned it or who would have inherited it from those who did. In response to the rhetorical question of 'Do you really want another Zimbabwe?', I have sometimes heard the reply that the compensatory justice effected there has been worth the devastating costs to life

[47] Sec 25 South African Constitution.
[48] G Nkwinti 'Minister of Rural Development and Land Reform Cluster Briefing' 2 March 2010 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/ page71656?oid=164364&sn=Detail (accessed 31 October 2011).

expectancy and overall quality of life. The most important moral consideration, from this perspective, is restoring an original state.

I ignore the empirical claims made by the two sides, and instead demonstrate that they both share a questionable moral premise. The premise is this: The appropriate way to distribute land today is a function of what would have happened in the absence of contact between whites and blacks. Tersely, whites say that blacks have more wealth than they would have had had whites not come, and hence are not entitled to land redistribution, while blacks say that they are entitled to land redistribution because they would have had more wealth had whites not come or at least because justice requires putting things back the way they would have been had whites not come.

In light of a requirement to respect human dignity *qua* capacity for communal relationships, there are two deep problems with the shared premise that the right way to distribute land today is fixed by counterfactual claims about what would have happened without white and black interaction. One problem is that it is solely a 'backward-looking' principle, directing us to base a present distribution solely on facts about the past, and does not take into account the likely consequences of a policy, where such 'forward-looking' or future considerations are morally important. A second problem is that it is the wrong backwardlooking principle to invoke.

On the latter, one cannot reasonably deny that facts about the past are *pro tanto* relevant to determining justice in the present. It is hard to doubt that if you steal my bicycle and give it to a third party, that party does not rightfully own the bicycle and has strong moral reason to give it back to me, or to my descendants to whom I would have bequeathed it.[49]

However, the appropriate benchmark for ascertaining compensation is not a function of what would have happened had whites sailed on past the Cape, but rather what would have happened had whites fulfilled their moral obligations to blacks upon arriving there. To treat people as capable of the special good of communal relationship, as we have seen, includes exhibiting solidarity toward them. The relevant question, then, is this: What would the distribution of wealth have been like had whites, say, *shared* their science and technology, the profits resulting from mineral excavation and the allocation of political power? So, even if it were true that blacks would have been worse off had whites not arrived, that is not relevant to establishing what blacks are currently owed on backward-looking grounds.

[49] See BR Boxill 'The morality of reparations' (1972) 2 *Social Theory and Practice* 113.

However, it is a further mistake to suppose that only backward-looking considerations are relevant to determining a just distribution of land at the present time. Above I maintained that respect for people's capacity for friendliness can permit unfriendliness in response to unfriendliness, but most clearly when and only when responding in that way will prevent or make up for harm done to victims of the initial unfriendliness. In the present context, that means that an unfriendly action by the state toward whites, such as expropriation of land they currently hold, is justified only if it is likely to help those harmed by the land being held by whites, that is, dispossessed blacks. And it is unlikely that blacks can expect benefit from a Zimbabwe-style land grab.

The present suggestion does not rely on the racist notion that 'blacks cannot farm' or are more generally incapable of being productive without guidance from whites. Instead, the claim is what I take to be the reasonable one that, in order to run farms and keep the economy stable, blacks given agricultural land need substantial financing and training. Now, the present government has not been able to provide these well to the small number of blacks who have been given land so far, explaining the 90 per cent failure rate, and so the point is that the government would be even less able to support new farmers in a Zimbabwean condition. Hence, the state is not morally required to confiscate white-held land *en masse*, and is probably forbidden from doing so.

I am not an economist, and so cannot be detailed about the right way forward. However, based on the above moral argumentation, I can suggest some broad contours. Whites do owe blacks land, and so they, and the state that wrongfully gave the land to whites in the past, must transfer it in a way that is likely to benefit blacks. Here are two ways this could be done. The state could take a radical approach but implement it gradually, while white farmers could take a moderate approach but do so immediately. With regard to the state, it could grant only limited tenure over land, so that an individual can own it for a maximum period of, say, 75 years.

Over time, then, the state would regain control over the distribution of land, granting private licences to use land in ways that balance considerations of redress and productivity. In the meantime, it would give tax breaks or lowinterest loans to new black farmers, and would redistribute taxes on white farms to impoverished blacks in rural areas. With regard to white farmers, they could begin by formally apologising for retaining substantial control over land that was wrongfully taken from blacks. And they could collectively decide to impart skills to blacks and to transfer a certain percentage of fertile land to those with the demonstrable ability

to make use of it. Current agricultural associations would be sufficient to coordinate such a redress programme; state supervision would not be necessary. Surely, this is a way AfriForum and similar groups should be keeping busy.

### 6.2. For a more consensus-oriented politics

South Africa's Constitution, along with all other democratic states south of the Sahara, took over the competitive, multi-party style of democracy that is the norm in Western societies. A party has the legal right to govern roughly in proportion to the number of votes that it has obtained via fair procedures, and it has the legal right to make decisions that are expected to benefit its particular constituency. The system of vying for votes and granting the power to make political decisions to those with the most is so ubiquitous that people are often inclined to *identify* democracy with it. However, a form of democratic decision making different from the adversarial, majoritarian form is possible, and is probably what respect for people's dignity as beings capable of community requires.

The interpretation of *ubuntu* articulated in this article seems to support a consensus-oriented political system of the sort that has been common in traditional African cultures and that some Southern and other African philosophers have proposed for a modern society.[50] Consider systems in which legislators are initially elected by majority vote, but are not tied to any political party, and, once elected, seek unanimous agreement amongst themselves about which policies to adopt. Instead of trying to promote any constituencies' interests, politicians would seek consensus about what would most benefit the public as a whole. There are two major reasons for thinking that respect for the dignity of people's communal nature supports this kind of democracy.

First, return to the rationale above for thinking that democracy of some form or other is required. If what is special about us is, in part, our capacity to share a way of life with others, then that is going to require sharing political power, that is, to forbid authoritarian government. Majoritarian democracy is a sharing of power but only in a weak sense, giving to minorities the amount of power they are owed in accordance with the number of votes they have acquired, and giving them the fair opportunity to become majorities in elections scheduled every four or five years or so. A more intense sharing of power would accord every citizen not merely the

[50] See especially Ramose (n 12 above) 135-152; LJ Teffo 'Democracy, kingship, and consensus: A South African perspective' in K Wiredu (ed) *A companion to African philosophy* (2004) 443. A particularly careful and influential exposition is in K Wiredu *Cultural universals and particulars: An African perspective* (1996) 172-190.

equal ability to become the ones who determine law and policy, but also 'the right of representation with respect to every particular decision',[51] the right not to be utterly marginalised when major laws and policies are actually formulated and adopted. And it is reasonable to think that when laws obtain the consent of all elected representatives, it is more likely that they would benefit the public as a whole, and not merely a subset, which solidarity would prescribe.

While the first argument for a consensus-based democracy is that respect for our communal nature requires legislators to *exhibit* substantial identity and solidarity with themselves and with citizens whenever they make major decisions, the second argument is that it also requires them to act in ways that are likely to *foster* substantial identity and solidarity, or at least prevent great division and ill-will, in the long run. Consensus-oriented decision making would best avoid creating legislative minorities and their constituencies who repeatedly lose out to the majority, becoming marginalised, alienated and losing out. Generally speaking, in order for a state to produce a sense of togetherness and to facilitate cooperative, mutually beneficial endeavours both between it and citizens and between citizens themselves, its officials must not act for the sake of any subset of the population related to them in some way, a principle entailing that it is unjust for a politician to act for the sake of a constituency.[52]

This reasoning points, then, to a respect in which South Africa's Constitution should be changed to recognise a 'human right to decisional representation'.[53] Although it enshrines people's human right to democratic participation in government, those favouring an *ubuntu*oriented perspective on politics might see it as an expression of the 'conqueror's' will for imposing a competitive, majoritarian form.[54] It is worth debating whether people's human right to political power is best understood as requiring a constitutional amendment forbidding any party polity, and whether the Constitution would be on the whole a more coherent document if it were so changed.

Even if no formal alteration of the Constitution is on the cards, the present reasoning entails that the dominant political majority of our time in South Africa, the African National

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[51] Wiredu (n 51 above) 173.

[52] Which principle also neatly entails the injustice of nepotism and cronyism, as I argue in T Metz 'African moral theory and public governance' in FM Murove (ed) *African ethics: An anthology of comparative and applied ethics* (2009) 345-348.

[53] Wiredu (n 51 above) 180.

[54] This phrasing is found in both M Ramose 'An African perspective on justice and race' (2001) 3 *Polylog* http://them.polylog.org/3/frm-en.htm (accessed 31 October 2011); and LJ Teffo 'Monarchy and democracy' (2002) 1 *Journal on African Philosophy* http://www.africaknowledgeproject.org/index.php/jap/issue/view/1 (accessed 31 October 2011).

Congress, should be less opportunistic with regard to the power it has legally secured. It should be doing much more to promote a *de facto*, if not *de jure*, government of national unity. Some concrete steps it could take would be to appoint many more persons from other parties to positions in cabinet, and to make appointments based much more on qualifications and much less on patronage. Working together, South Africans could do more.

### 6.3. For a less retributive employment of deadly force

The last major issue of controversy that I address in order to illustrate *ubuntu* as a moral theory has to do with the way the state ought to respond to serious criminal infractions. Lately there has been debate about when the police may 'shoot to kill', with the Constitutional Court having rendered a unanimous judgment on the topic in *S v Walters*[55] that is guiding a bill that will likely soon become law.[56] The present conception of human dignity entails that the bill and the judgment on which it is based are flawed.

To keep things simple, let us focus on the Court's conclusion in *S v Walters*, which is that deadly force is ordinarily not permitted unless the suspect poses a threat of violence to the arrester or others or is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later.[57]

According to this logic, a police offer may shoot or otherwise use deadly force against a suspect under one of two independently sufficient conditions: Either (a) the suspect poses a threat of serious harm to others that cannot be prevented without deadly force; or (b) the suspect has already done or threatened serious harm to others and cannot be detained without deadly force. The relation between (a) and (b) is one of disjunction, not conjunction. That is, the court has ruled that posing a threat of serious harm to others is *not* necessary in order for deadly force to be justified; the mere facts of having already done serious harm (or having threatened to do so) and being unable to be apprehended without deadly force are enough to be liable to be shot.

Following the theoretical interpretation of *ubuntu* given above, the (a) clause is apt. Recall that respect for a person's capacity for friendliness depends on the way he has exercised it, so that, more specifically, one does no disrespect to another by being unfriendly toward him,

[55] *S v Walters* ( CCT 28/01) (2002) ZACC 6; 2002 4 SA 613; 2002 7 BCLR 663.

[56] See a draft of the bill amending the Criminal Procedure Act, 1977, regarding the use of deadly force, http://www.justice.gov.za/legislation/bills/2010_cpamendbill.pdf (accessed 31 October 2011).

[57] *Walters* (n 56 above) para 54.

if doing so is necessary to help those threatened by, or who have become victims of, his unfriendliness. Hence, if someone is threatening to kill or to impose comparable harm on others, and the only way to prevent that is to inflict deadly force on him, his capacity for friendliness would not be degraded thereby and he would not have a suffered a human rights violation.

However, the *ubuntu*-based conception of human dignity entails that the (b) clause should be deleted and that it would constitute a human rights violation not to do so. Unfriendliness is permissible, on this conception, only as a counteractive response to proportionate unfriendliness. That is, unfriendliness must serve the function of helping those who have been, are being or will be victims of comparable unfriendliness. This is another place where *ubuntu* is 'forward-looking', directing a moral agent to consider the likely consequences of her behaviour, and not to determine whether her behaviour is appropriate solely in light of facts about the past.

Of course, detaining someone who has committed a serious crime so that he may be tried in a court of law is a future 'benefit' to be sought. But *that* expected good is *not* one that is proportionate to the use of deadly force. The court requires an officer to ensure that deadly force is proportionate, but a sufficient discharge of that obligation, for the court, is reasonably deeming deadly force to be proportionate *to the crime already committed* in the past, not to harm that deadly force could avert in the future.

In a broad sense, the court's judgment is grounded in retributive ideals, not ones that most of those who accept an *ubuntu* ethic would uphold, or at least not adherents to the theoretical articulation of it presented here. Retributivism is the 'pay-back' theory of punishment and of negative responses more generally. According to this perspective, a punishment or other critical response should be based solely on the nature of the crime or other wrongdoing committed.

The worse the misdeed, the harsher the penalty or harm should be, in order to give the person what he deserves. A retributive approach considers it 'good in itself' that the amount of suffering be increased in the world, so long as it is directed toward the guilty; imposing suffering need not be expected to produce any future benefit such as preventing a similar or greater suffering.

While the court would likely disavow such baldly retributive sentiments, its judgment in *S v Walters* coheres more with a retributive approach than with an *ubuntuist* one, since it does not require the use of deadly force to serve the function of preventing a comparable harm. Instead, according to the court, a sufficient condition for the justified use of deadly force is the

fact of having already done comparable harm (along with being unable to be apprehended for it without deadly force). Furthermore, for the court, the point of using deadly force justifiably can be to ensure that a person suspected of serious wrongdoing is tried in a court of law, that is, is sentenced to a penalty roughly comparable in severity to his wrongdoing.

One might reply on behalf of the court that someone who has already committed a serious crime is likely to do so again. But there are two damning responses to be made here. First, it is simply not true. It is a commonplace in criminology, for example, that the recidivism rate for murder is low, not only in relation to other serious offences, but also in absolute terms. Most of those who have killed others did so under extreme circumstances that are unlikely to be repeated. Second, and more deeply, even if it were true, the (a) clause, or something very close to it, would be sufficient to cover the issue, as it permits deadly force when necessary to prevent serious harm.

## 7. Conclusion

In this article I have sought to defend the idea that *ubuntu*, suitably interpreted, can serve as a ground of public morality. This defence has taken the form of showing that even if various construals of *ubuntu* up to now have been vague, collectivist or anachronistic, it can be interpreted in a more promising way. My approach has been to draw upon salient beliefs and practices commonly associated with talk of *ubuntu* (and cognate terms in Southern Africa) in order to construct a moral theory, a basic principle indicating how all wrong actions differ from right ones.

The favoured moral theory is that actions are right, or confer *ubuntu* (humanness) on a person, insofar as they prize communal relationships, ones in which people identify with each other, or share a way of life, and exhibit solidarity toward one another, or care about each other's quality of life. Such a principle has a Southern African pedigree, provides a new and attractive account of morality, which is grounded on the value of friendship, and suggests a novel, companion conception of human dignity with which to account for human rights. According to this conception, typical human beings have a dignity by virtue of their capacity for community or friendliness, where human rights violations are egregious failures to respect this capacity.

More specifically, I argued that human rights violations are well understood as failures to treat people as specially capable of friendly relationships, often taking the form of extraordinarily unfriendly behaviour that is not required to protect the victims of another's

proportionately unfriendly behaviour. I contended that this conception of human rights violations straightforwardly accounts for many different human rights in South Africa's Constitution and naturally entails certain *prima facie* attractive ways of dealing with contemporary moral dilemmas relating to land reform, political power and deadly force.

If I am correct that the interpretation of *ubuntu* provided here both accounts for a wide array of intuitive human rights and can provide concrete guidance for resolving present-day disputes about justice, then the three criticisms regarding vagueness, collectivism and anachronism have been rebutted successfully. Something fairly called *ubuntu* can indeed be reasonably thought to serve as the foundation of a public morality for South Africa and other contemporary societies.