Exploring *ubuntu:* Tentative reflections

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Summary

This paper reflects the significance of ubuntu *in South African constitutional law and proceeds by discussing the complex question of African identity, as this is relevant for the study of African jurisprudence and legal ideals. To show the practical significance of* ubuntu *and what it might mean juris- prudentially, the authors examine Mokgoro J's recent opinion in the* Khosa *case and how it could be applied as a principle in that case.*

1 Introduction

In March 2004, the *Ubuntu* Project, a project developed out of the Stellenbosch Institute for Advanced Studies, held a one-day conference to discuss the role of *ubuntu* in the new South Africa, and particularly the feasibility of translating *ubuntu* into law. Our article has a modest goal: We seek mainly to articulate the central questions raised in that conference and to deepen the possible significance of those questions for a nuanced constitutional jurisprudence in South Africa.

In this essay we proceed as follows: First, we address the issue of the nature of African philosophy and how an understanding of this relates to debates about *ubuntu*. Central to this discussion is an examination of Derrida's writing on the archive as this relates to the recollection and

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re-imagination of African *gnosis*. Second, we attempt to expand from this discussion of *gnosis* and explore whether *ubuntu* can be used as a justiciable principle. Third, to show how *ubuntu* might be deployed, both as a founding legal ideal and as a working legal principle, we examine Mokgoro J's opinion in the *Khosa* case.[1]

Ubuntu is a controversial value or ideal in South Africa. Philosophers such as Shutte have forcefully argued that *ubuntu* should be adopted as a new ethic for South Africa.[2] On the other hand, critics of *ubuntu* have argued against those who would make *ubuntu* an essential ethical ideal or moral value in the new South Africa. Broadly construed, those criticisms range from the claim that *ubuntu* was once a meaningful value, but now gives nothing to young South Africans, to the claim that *ubuntu* is inherently patriarchical and conservative. Still others argue that *ubuntu* is such a bloated concept that it means everything to everyone, and as a bloated concept it should not be translated into a constitutional principle. Although *ubuntu* was included in the epilogue of the interim Constitution, there have not been many attempts to incorporate *ubuntu* into post-apartheid jurisprudence. Where courts have referred to *ubuntu*, they treated it as a 'uni-dimensional' concept and not as a philosophical doctrine.[3]

The debate over whether or not *ubuntu* can be translated into a justiciable principle turns not only on the definition one gives to *ubuntu*, but also on how and why *ubuntu* can be considered an 'African' or 'South African' value. One panel at the conference focused exclusively on the question of whether *ubuntu* is a South African value, and even more broadly an African value or ideal, and what this would mean for the future of the Constitution. The three panellists agreed that *ubuntu*, or something very close to it, appears in most African languages. It is beyond the scope of this article to try to address the complex ethno-philosophical questions of whether or not *ubuntu* actually represents a key ethical principle or ideal in African philosophy generally. However, we realise, at the very least, that the question of 'what is' and 'what can' constitute an 'African' philosophy lies at the very heart of this discussion. A related question is what role African philosophy, including African political and ethical philosophy, should play in the development of a constitutional jurisprudence for a new South Africa. To help us respond to these questions, we turn to the work of two philosophers, namely Mudimbe and Derrida.

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[1]   *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) (*Khosa*).
[2]   See eg A Shutte *Philosophy for Africa* (1995), especially ch 10 & 11.
[3]   M Pieterse '''Traditional'' African jurisprudence' in C Roederer & D Moelendorf *Jurisprudence* (2004) 442.

2 African *gnosis*: What is African philosophy?

Mudimbe has suggested the word *gnosis* to configure African ethno-philosophy.[4] And why is African philosophy necessarily ethno-philosophy? Mudimbe powerfully argues that the question of what African philosophy is must be pursued through a genealogy of its social and historical origins, including a genealogy of the anthropological methods used to articulate African *gnosis* and the epistemological context in which it has been made possible.

These intellectual explorations must inevitably deal with the troubling social and historical reality that the very question of what constitutes African philosophy cannot be separated from the brutal imposition of colonialism on the continent of Africa. Mudimbe attempts to analyse the complexity of epistemological legitimation. Who, in the last few centuries at least, has been given the right and credentials to write, describe, and produce opinions of what is African philosophy? In addressing this question about right and credentials, we must also grapple with the issue of how African *gnosis*, to use Mudimbe's word, has inevitably and inextricably been bound up with the social scientific constructs of a Western *episteme*. As Mudimbe reminds us, one aspect of colonialism is that it seeks to organise and transform the non-European world through European constructs. But this does not mean that *gnosis* is reducible to European constructs. Mudimbe's definition of *gnosis*, at least, gives us a word that yields a form of knowledge that cannot be reduced to *doxa,* or opinion, or *episteme* understood as a scientific or social scientific construct associated with the so-called modern West. *Gnosis*, as Mudimbe defines it:[5]

> . . . means seeking to know, inquiry, methods of knowing, investigation, and even acquaintance with someone. Often the word is used in a more specialised sense, that of higher and esoteric knowledge, and thus it refers to a structured, common, and conventional knowledge, but one strictly under the control of specific procedures for its use as well as transmission.

There is clearly much more work to be done in terms of the historical genealogy and, indeed, the anthropological investigation into what African philosophy is or can be, and perhaps most importantly what it ethically should be, in the struggle of African nations to define themselves in the purportedly post-colonial world. But for our purposes, at least, we want to accept the postulate that there is a form of knowledge, *gnosis*, that allows us to engage in an ontological, or what Mudimbe calls *anthropou-logos*, hermeneutic which could facilitate investigation into African or South African indigenous systems.

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[4] VY Mudimbe *The invention of Africa: Gnosis, philosophy, and the order of knowledge* (1988) 186.
[5] Mudimbe (n 4 above) ix.

But, how does one pick up the project that Mudimbe has started for us? The answer is two-fold. First, there is a sense that we are investigating the way the meaning of values and ideals comes out of an engagement with the past and with interpretation about the meaning of that past as it relates to the configuration of such values and ideals. Second, the South African Constitution has been conceived through different metaphors, one of which is the archive.[6] This metaphor seems to be the best way to grapple with the promise of the Constitution. And so, we begin with a more general consideration of the archive.

3   Feverish words and the role of archive

The problem of the 'archive,' and what counts as archival material, haunts all historical and anthropological research and is for obvious reasons important in our exploration of and reflections on *ubuntu*. Derrida argues that what an archive is resists conceptualisation, more appropriately being rendered or configured as an impression. The archive 'impresses' the past on us, and yet the way in which it does so inescapably involves the one who is recording or describing the impression in its transmission as authoritative. What the archive encodes is how the past makes an impression on human beings. It encodes how we are to remember in terms of both an internal memory that constitutes a 'we', and also at the same time in terms of a purportedly legitimating memory for those who are outside the 'we' that is therefore constituted. In his work on the archive, Derrida describes his own use of the word impression instead of concept as follows:[7]

> We have no concept, only an impression, a series of impressions associated with a word. To the rigor of the *concept*, I am opposing here the vagueness or the open imprecision, the relative indetermination of such a *notion*. 'Archive' is only a *notion*, an impression associated with a word and for which, together with Freud, we do not have a concept. We only have an impression, an insistent impression through the unstable feeling of a shifting figure, of a schema, or of an in-finite or indefinite process.

However, the disjointedness of the archive takes on a particular meaning in terms of Africa. As Mudimbe shows us in his excellent genealogy of African ethno-philosophy, the recording of this philosophy 'originates' with anthropological testimony about it. There is a central problem with this testimonial as to how African rituals, practices and social encounters are described, namely that the 'impression' made by the 'natives' on the anthropologists are given expression and articulation in terms of Western epistemological schemas. Thus, Africa comes 'to be

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6   See K van Marle 'Constitution as archive', unpublished paper delivered at a workshop on 'Law, time and reconciliation', Glasgow, May 2004; copy on file with the authors.
7   J Derrida *Archive fever: A Freudian impression* (1996) 29.

invented' by anthropologists and shaped by the changing trends within that discipline.[8]

Mudimbe demonstrates that even the political movements, such as negritude, which have affirmed the uniqueness of African philosophy, only do so through an archive that comes to them from Western anthropologists engaging in a study of a form of knowledge that was primarily oral — passed down in ritual, aphorisms and parables — and therefore not presented as the form of knowledge some today would recognise as the discipline of philosophy. But does this mean that 'something' called African philosophy does not exist? Does this mean, further, that there is no sense in trying to trace the 'geographic of reason'? Not at all. Indeed, we would argue that the opposite is the case, since what have been considered the governing ideas of philoso-phical reason have now been localised and consigned to the West. Mudimbe offers us a genealogy of how 'African' philosophy 'came to be', and continues to be invented and re-imagined in part through the re-working of its genealogy. His work is exactly that: a genealogy of how African philosophy 'came to be' as ethno-philosophy.

Derrida adds to Mudimbe's explorations a philosophical understand-ing of how what is true to Africa may be unique in form and therefore have its own unique genealogy, and yet can still present us with the more general dilemma of the archival, which is not simply a problem for Africanists, but for all who engage with the significance, both politically and ethically, with the geography of reason and of the meaning of memory. We can, however, make use of Derrida's obsession (or, to use his word, fever). We see how a past and with it an identity impresses itself upon us so that we inherit that impression as it constitutes us as a 'we'. We also see that the archive is inherently troubled in that it always involves 'us' in interpreting the trait of being, and indeed authorising it as that which is a mark of an identity. The archive in that sense both encircles and marks us, and it is through that encirclement that we endlessly find ourselves in a spiral of reinterpretation that opens out

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[8]   Foucault has captured this dilemma that inheres in the ethno-philosophy of Africa and its inevitable domination by a Western framework as follows: Ethnology has its roots, in fact, in a possibility that properly belongs to the history of the European culture, even more to its fundamental relation with the whole of history . . . *There is a certain position of the Western ratio that was constituted in its history and provides a foundation for the relation it can have with all other societies* . . . Obviously, this does not mean that the colonising situation is indispensable to ethnology: neither hypnosis, nor the patient's alienation within the fantasmatic character of the doctor, is constitutive of psychoanalysis; but just as the latter can be deployed only in the calm violence of a particular relationship and the transference it produces, *so ethnology can assume its proper dimensions only within the historical sovereignty — always restrained, but always present — of European thought and the relation that can bring it face to face with all other culture as well as with itself.* (M Foucault *The order of things* (1973) 377 as cited in Mudimbe (n 4 above) 16 (Mudimbe's emphasis)).

into a future as we continuously reaffirm 'what are' and 'what are not' the authoritative traits of an identity.

Derrida reminds us of the force of remembering any trait of being that we call identity and the consignation that orders the archive:[9]

> This archontic function is not solely toponomological. It does not only require that the archive be deposited somewhere, on a stable substrate, and at the disposition of a legitimate hermeneutic authority. The archontic power, which also gathers the functions of unification, of identification, of classification, must be paired with what we will call the power of *consignation*. By consignation, we do not only mean, in the ordinary sense of the word, the act of assigning residence or of entrusting so as to put into reserve (to consign, to deposit), in a place and on a substrate, but here the act of *con*signing through *gathering together signs*. It is not only the traditional *consignatio*, that it, the written proof, but what all *consignatio* begins by presupposing. *Consignation* aims to coordinate a single corpus, in a system or a synchrony in which all the elements articulate the unity of an ideal configuration. In an archive, there should not be any absolute dissociation, any heterogeneity or *secret* which could separate (*secernere*), or partition, in an absolute manner. The archontic principle of the archive is also a principle of consignation, that is, of gathering together.

The archive, then, in a sense shelters and keeps safe the impression of the past, and this act of self-repetition is inevitably a promise to the future, since what is preserved is meant to be preserved, not only for those living, but also for those to come. What is preserved is a confirmation of its significance (using that work deliberately to keynote both meaning and importance):[10]

> The injunction, even when it summons memory or the safeguard of the archive, turns incontestably toward the future to come. It orders to promise, but it orders repetition, and first of all self-repetition, self-confirmation in a *yes*, *yes*. If repetition is thus inscribed at the heart of the future to come, one must also import there, *in the same stroke*, the death drive, the violence of forgetting, *superrepression* (suppression and repression), the anarchive, in short, the possibility of putting to death the very thing, whatever its name, which *carries the law in its tradition*: the archon of the archive, the table, *what* carries the table and *who* carries the table, the subjectile, the substrate, and the subject of the law.

What is known as Africa is inseparable from an ethical and political contest over what African can or should be. That this knowledge is inevitably political and ethical explains the 'heat', or what Derrida calls the 'fever', over how words like *ubuntu* come to be given meaning and significance as part of a tradition that marks both the importance of what is, either or both, African or South African. It is, of course, also a debate over who has the right to name what is African or South African and from where that right comes.

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[9]   Derrida (n 7 above) 3.
[10]   Derrida (n 7 above) 79.

Sheltering, for Derrida, is always a matter of both preserving and of protecting a legacy. This protection, since it can never be complete, carries within it what Derrida calls the 'secret'. But, *gnosis*, as Mudimbe has defined it, is a kind of secret knowledge in a special sense in that it has been accessible at least in certain times and places only by certain people (priests and priestesses for example) with permission to access realms of being and forms of knowledge to which others cannot ascend. There is yet another sense in which *gnosis* is secret, in that it resists translation into the very anthropological language that gave it its being. As Mudimbe explains:[11]

> *Gnosis* is by definition a kind of secret knowledge. The changes of motives, the succession of theses about foundation, and the differences of scale in interpretations that I have tried to bring to light about African *gnosis* witness to the vigour of a knowledge which is sometimes African by virtue of its authors and promoters, but which extends to a Western epistemological territory.

Is there anything there that matters as 'Africa'? And who is the 'we' that will decide that question? Those who think that the answer has to be 'no', that there is nothing there that can be identified as African, may have been misled by the wisdom of deconstruction, and therefore may have missed the heart of deconstruction, and even of genealogy. Why? Because they inscribe themselves in a process of denial that is insepar-able from the horrifying realty of the colonialism that identified Africa with all that was dark, unthinkable, and only knowable as what should not be for itself and thus must be overcome in the name of civilisation. Our point is to show that the idea of an 'African' philosophy can not be summarily dismissed, which is why we point to some of the most sophisticated thinking on the notion of identity and its connection to the process of archivalisation. For us, the debate over the meaning of *ubuntu* and, more significantly, its identification as both African and South African, is feverish because it is integral to the struggle over what Africa or South Africa can or should 'come to be' in the future. We more than understand the risk of essentialising Africa. But we believe that the only cure for this risk is through the kind of re-evalua-tion through anthropology and genealogy that Mudimbe calls for. Otherwise we simply fall back into formulations that carry within them the worst aspect of the colonial project: the full-scale trivialising of the traditional mode of life and the spiritual framework of the *African Weltanschauungen*, and denial of the *gnosis* through which we struggle to articulate and interpret its meaning.

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[11]   Mudimbe (n 4 above) 186.

4 The Constitution as archive

Commentators have employed various metaphors to describe the South African Constitution. The image of the Constitution as bridge, as used in the Postamble of the interim Constitution and also further developed, for example, by the late Mureinik[12] and the late Justice Mohamed,[13] has frequently been recalled to stand in service of constitutional claims to reconciliation, healing and unity. Du Plessis chooses three other images in his reflection on the Constitution in the context of reconciliation, memory and justice, namely the Constitution as promise, as monument and memorial. For Du Plessis, a constitution serves the dual function of narration as well as authorship of a nation's history. He relates what he calls 'the potency with which [a constitution] can mould a politics of memory' to 'the authority with which it can shape the politics of the day'.[14] However, he concedes that the Constitution is but one of many participants in telling a nation's history and accordingly also one of many determinants of a nation's future. He explains that the possibility of the Constitution's promise is dependent on how the Constitution deals with memory, thereby drawing a connection between past and future, and, one could say, reasserting the point that future events should also influence constitutional memory.

Du Plessis, like others,[15] focuses on the tensions within the Constitution as a form of redemption. Following the work of Snyman, he describes the Constitution as simultaneously monumental and memorial.[16] Although monuments and memorials share a concern with memory, they differ significantly in the way they remember. Monuments celebrate and memorials commemorate. For example, after a war has been won, a monument will be created, celebrating the heroes and achievements of war. Memorials are created to commemorate the dead. In discussing the Constitution as monument, Du Plessis refers to the Constitution as 'hardly a modest text'.[17] Both interim and final Constitutions make reference and lay claim to the achievement of a

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[12]   E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31. For a critique on the bridge metaphor, see eg AJ Van der Walt 'Dancing with codes — Protecting developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258.

[13]   *AZAPO & Others v President of the Republic of South Africa & Others* 1996 8 BCLR 1015 (CC) (*AZAPO*).

[14]   LM du Plessis 'The South African Constitution as memory and promise' in C Villa-Vicencio (ed) *Transcending a century of injustice* (2000) 63.

[15]   See eg H Botha 'Democracy and rights: Constitutional interpretation in a post-realist world' (2000) 63 *Journal of Contemporary Roman-Dutch Law* 561; K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

[16]   J Snyman 'Interpretation and the politics of memory' (1998) *Acta Juridica* 312.

[17]   Du Plessis (n 14 above) 64.

'peaceful transition', to a 'non-racial democracy', to the recognition of the 'injustices of our past', and the honouring of 'those who suffered for justice and freedom in our land'; to the need for healing the 'divisions of the past' and for building a 'united and democratic South Africa'.[18] Du Plessis also refers to the entrenchment of the values of democracy, human dignity, equality and freedom as 'monumental flair'.[19] To conclude his discussion of the Constitution as monument, he refers to some of the Constitutional Court's decisions, most notably *S v Makwanyane*,[20] in which capital punishment was declared unconstitutional. He describes the various decisions as 'imbued with value statements' that not only focused on constitutionalism nationally, but also internationally. Du Plessis continues to argue that, although no one should be cynical about the 'monumental achievements' of the South African Constitution, one should also embrace the 'restrained constitution'. For Du Plessis, the restrained constitution is the constitution as memorial, namely the idea that a written constitutional text cannot alone provide justice, but rather reminds us to strive for justice.[21]

Du Plessis's metaphorical description of the Constitution can be useful in the tentative refiguring of the Constitution through yet another image, Constitution as archive.[22] With reference to the meaning of archive as the place where things commence, the place from which order is given and the place that contains memory, an easy link between archive and Constitution can be made. As the archive traces only particular aspects of the past, the Constitution similarly traces only particular aspects of the South African past and nation. Also, the principles and ideals embodied in the Constitution are already interpretations of the past and the nation's idealised aspirations for the 'new' South Africa. Like the archive cannot fully contain memory, the Constitution cannot encapsulate all that must be remembered of the 'old' South Africa. The Constitution as monument risks the 'death drive' of the Constitution, the drive to destroy all traces without any remainder of what is other to the past of the country it engraves. The Constitution, figured as archive, works against the death drive of the Constitution as monument.

To return to Derrida's work on the archive, Derrida himself reminds us that the word 'archive' has at its root a nomological principle:[23]

> But rather the word 'archive' — and with the archive of so familiar a word. *Arkhē*, we recall, names at once the *commencement* and the *commandment*. This name apparently co-ordinates two principles in one: the principle

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18 As above.
19 As above.
20 *S v Makwanyane* 1995 3 SA 391 (CC) (*Makwanyane*).
21 Du Plessis (n 14 above) 65.
22 Van Marle (n 6 above).
23 Derrida (n 7 above) 1 (emphasis from original).

according to nature or history, *there* where things *commence* — physical, historical, or ontological principles — but also the principle according to the law, *there* where men and gods *command*, *there* where authority, social order are exercised, *in this place* from which order is given — nomological principle.

As we have seen earlier, Derrida's careful work on the meaning of the archive always shows us that the reality to which the archive testifies is always beyond itself in that it points to a future implicit in the ambiguity of the word itself; implicit in the sense that the command of a *nomos*, an ethical command, is always beyond the simple 'there' that is always purportedly being discovered. Thus, a constitution understood as an archive that always carries within it this ambiguity turns us to a future of struggle in which we confront the inescapability of our responsibility for the meaning we give to the archive as a nomological principle.[24]

One aspect of understanding the Constitution as an archive is that the struggle over the values and ideals of the South African Constitution should be made explicit as crucial to the continuous transfiguration of the social and political reality of the new South Africa. For what is being constituted in the new South Africa, if not a new *nomos* which continuously shapes and reconfigures both the meaning of what is 'new' and 'South African'? This 'new' carries within it a commandment to the moral memory of apartheid which it partially, at least, defines itself against. An interesting feature of the South African Constitution is that it points to this 'new' *nomos* that must be brought into being. Thus, it does not turn, as many other constitutions do, on a past that legitimates its basis. It is explicitly future-oriented and thus purposive in a sense that it seeks to bring the 'new' *nomos* into being. Mokgoro's demand for the ontological transparency of the ideals and values through which this new *nomos* will come into being shows her profound commitment and fidelity to the purposive self-understanding of the South African Constitution. In her concurring opinion in the Constitutional Court's decision to reject the death penalty, Mokgoro J explicitly called for making the values that inform constitutional decision explicit in the decisions themselves. To quote Mokgoro:[25]

> In order to guard against what Didcott J, in his concurring judgment, terms the trap of undue subjectivity, the interpretation clause prescribes that courts seek guidance in international norms and foreign judicial precedent, reflective of the values which underlie an open and democratic society based on freedom and equality. By articulating rather than suppressing values which underlie our decisions, we are not being subjective. On the contrary, we set out in a transparent and objective way the foundations of our interpretive choice and make them available for criticism. Section 35 seems to acknowledge the paucity of home-grown judicial precedent upholding human rights, which is not surprising considering the repressive nature of the past legal

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24 See Cornell *The philosophy of the limit* (1992) 62-90.
25 *Makwanyane* (n 20 above) para 304.

order. It requires courts to proceed to public international law and foreign case law for guidance in constitutional interpretation, thereby promoting the ideal and the internationally accepted values in the cultivation of a human rights jurisprudence for South Africa. However, I am of the view that our own (ideal) indigenous value systems are a premise from which we need to proceed and are not wholly unrelated to our goal of a society based on freedom and equality.

As Derrida reminds us, the archive is a troubled word, precisely because of the ambiguity inherent in the two meanings of beginning. But this trouble can be good for a constitution understood as an archive of what must be other to the past of apartheid, and that in this other is always a future-oriented affirmation of the very ideals that mark the past as a wrong to be overcome. Mokgoro's call that constitutional decisions make the values and ideals of the Constitution explicit can, at least, turn us back to an understanding of constitutionalism as in service of democratic struggle in which what is constituted is, at least in part, the space for the contest over ideas and values that seek to keep the just promise of the South African Constitution alive. Ideals and values should not be conflated, and the significance of the difference between these terms was debated in the seminar. Values are defined as what are actually liked, prized, esteemed, or approved of by actual groups or individuals. In utilitarianism, for example, values are the basic measure of the worthiness of any moral proposition. Ideals, alternatively, mark a place of irreducibility to what is actually valued or prized. It is this irreducibility that can always demand transformation of current tastes and desires in the name of the horizon which the ideal holds out. Obviously the Constitution understood as archive, which demands that the ethical moment always be recognised, in its commandments would include struggle over both values and ideals. Mokgoro's call for ontological transparency, then, is crucial if the Constitution seeks to redeem the past of apartheid, and yet to do so in such a way as to remember that justice itself is always an ideal to be struggled for, never one that can be realised once and for all even in the best of constitutions.

5   *Ubuntu* behind the law

One crucial aspect of 'African' philosophy which is articulated by anthropologists, theologians and philosophers, who disagree on every other aspect of 'African' philosophy, is its focus on metadynamics and the relationship, or active play of forces, as the nature of being. *Ubuntu* in a profound sense, and whatever else it may be, implies an interactive ethic, or an ontic orientation in which who and how we can be as human beings is always being shaped in our interaction with each other. This ethic is not then a simple form of communalism or communitarianism, if one means by those terms the privileging of the commu-

nity over the individual. For what is at stake here is the process of becoming a person or, more strongly put, how one is given the chance to become a person at all. The community is not something 'outside', some static entity that stands against individuals. The community *is* only as it is continuously brought into being by those who 'make it up', a phrase we use deliberately. The community, then, is always being formed through an ethic of being with others, and this ethic is in turn evaluated by how it empowers people. In a dynamic process the individual and community are always in the process of coming into being. Individuals become individuated through their engagement with others and their ability to live in line with their capability is at the heart of how ethical interactions are judged.

However, since we are gathered together in the first place by our engagements with others, a strong notion of responsibility inheres in *ubuntu*. Since our togetherness is actually part of our creative force that comes into being as we form ourselves with each other, our freedom is almost indistinguishable from our responsibility to the way in which we create a life in common with each other. If we ever try to bring *ubuntu* into speech, we might attempt to define it as this integral connection between freedom as empowerment, which is always enhanced and indeed only made possible through engagement with other people. Each one of us is responsible for making up our togetherness, which in turn yields a process in which each person can come into their own.

This interactive, ontic orientation reveals how freedom can be understood as indivisible. As Mandela himself wrote: 'Freedom is indivisible. The chains on any one of my people are the chains on all of them. The chains on all of my people are the chains on me.'[26] Without justice and without all of us transforming ourselves so as to be together in freedom, our individuality will be thwarted since we will all be bound, if differently so, in a field of unfreedom. Again to quote Mandela:[27]

> A man who takes away another man's freedom is a prisoner of hatred. He is locked behind the bars of prejudice and narrow-mindedness. I am not truly free if I am taking away someone else's freedom, just as surely as I am not free when my freedom is taken from me. The oppressed and the oppressor alike are robbed of their humanity.

Mandela refers to the word 'humanity' as an ideal in that *ubuntu*, as it is associated with justice and freedom, is something to live up to. On the other hand, the dynamic, interactive ethic that *ubuntu* expresses has as much to do with reshaping our humanness through the modality of being together as it does with defining what are, for example, the essential attributes of our humanity that make us moral beings. This understanding that our humanness is shaped in our interactions with

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26   NR Mandela *Long walk to freedom* (1995) 624.
27   As above.

one another and within a force field created and sustained by those interactions, explains one of the most interesting aspects of *ubuntu*, which is the notion that one's humanness can be diminished by the violent actions of others, including the violent actions of the state.

We can at least make sense of why *ubuntu* was so crucial in the decision rejecting the constitutionality of the death penalty in South Africa. In a society in which the death penalty is allowed, state murder is institutionalised and this form of vengeance becomes part of the field in which we have to operate. Vengeance feeds on itself, whether it is perpetuated by the state or the individual. Freedom as understood by *ubuntu* thinking, then, is not freedom from; it is freedom to be together in a way that enhances everyone's capability to transform themselves in their society.[28] Since *ubuntu* is an ontic orientation within an interactive ethic, it is indeed a sliding signifier whose meaning in terms of a definition of good and bad is always being re-evaluated in the context of actual interactions, as these enhance the individual's and community's powers. In this sense, the ultimate irony may be that it is precisely the bloatedness of *ubuntu*, to use the word of one of its critics, is actually its strength.[29] We do not pretend to be giving the ultimate definition of *ubuntu*, because indeed that would go against the spirit of *ubuntu*, but instead we simply choose to emphasise certain key aspects as these were articulated in the seminars and the interviews conducted by one of the authors. Let us return now to the role *ubuntu* might play in the constitutional jurisprudence of the new South Africa. To do so we raise two further questions.

6   *Ubuntu* and the South African Constitution

The first question, which was addressed over and over again in the seminar, is: Who is the 'we' of the nation state of South Africa? The afternoon panel raised this question with particular attention to the inadequate representation of black South African ideals, such as *ubuntu* in the final version of the Constitution. To remind the reader, *ubuntu* appeared in the 1993 Postamble of the Constitution, but was not carried over into the 1996 Constitution. The panellists are not alone in this concern. Moosa argues that:[30]

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[28]   In a forthcoming article, Cornell will be engaging in a discussion of the integral connection between *ubuntu* and the capabilities approach developed by Amartya Sen. For preliminary thinking by Cornell on the capabilities approach, see D Cornell *Defending ideals: War, democracy, and political struggle* (2004) ch 4.

[29]   IJ Kroeze 'Doing things with values II: The case of *ubuntu*' (2002) 13 *Stellenbosch Law Review* 260.

[30]   E Moosa 'Tensions in legal and religious values in the 1996 South African Constitution' in M Mamdani (ed) *Beyond rights talk and culture talk: Comparative essays on the politics of rights and culture* (2000) 131.

> The omission of *ubuntu* must therefore mean that the Constitution was de-Africanised in the re-drafting process. With that the religio-cultural values of African people are also devalued. Thus the desire to formulate a core legal system which encapsulates the multiple value systems in South Africa was not necessarily accomplished in the final Constitution.

The second question, which is undoubtedly related to the first, is: Can *ubuntu* be operationalised as a legal principle or justiciable right in the South African legal system? Before returning to these questions, we simply want to suggest that debates over *ubuntu* on both sides assume the possibility of an ontological hermeneutic that can interpret the *gnosis* of indigenous systems of law in South Africa, and articulate them so as to begin the debate as to their relative importance within the South African legal system.

Our suggestion here is that the ethnographic or anthropological aspect of work, such as the *Ubuntu* Project, not only includes the interviews conducted by and with young black South Africans as to the meaning and significance of *ubuntu*.[31] Of course, it does include these materials. But there is a broader claim that we also seek to emphasise. Mudimbe, rightfully to our minds, points to a form of anthropological knowledge as inherent in the understanding of what African philosophy and legal theory can be. The attempt to articulate and interpret the meaning of *ubuntu* and the struggle over its political and ethical importance in the new South Africa demand an interdisciplinary inquiry into the conditions that have shaped the meaning of the debate. Anthropology and philosophy in this sense become intertwined at the very foundation at how this debate can take place in the first place.

Obviously, the question of whether African traditions have been adequately addressed in the South African Constitution turns on the possibility of interpreting the meaning of *ubuntu*. As we will see, it also informs whether or not *ubuntu* can be operationalised in constitutional law. There is a deep sense in which we cannot even get to the possibility of addressing the two questions on the role of *ubuntu* and constitutional jurisprudence, unless we have some understanding of how we can articulate and interpret the ethics of an *African* or *South African Weltanschauungen*. Our claim here is that the interdisciplinary approach of the *Ubuntu* Project is necessary for the rethinking of what kind of philosophy African philosophy might be, and that this kind of rethinking of philosophy may be important, not only for African philosophy, but for what philosophy, including political and legal philosophy, should become in the twenty-first century.

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31 Eg, as well as the ethnographic and jurisprudential aspects of the project, there is an activist dimension. A group of young women who were initially conducting interviews in local townships on the meaning of *ubuntu* organised themselves into a committee to found an *ubuntu* women's centre in Khayamandi.

In our discussions in the seminar, the question of the relationship between *ubuntu* and law turned to some degree on the understanding of what a legal principle is. Indeed, Cornell's debate with Sachs J on the question of whether or not *ubuntu* could be operationalised turned on the question of how one defines a legal principle, as well as what principles should be included in constitutional jurisprudence. Sachs has been criticised in his work on human rights for not providing, in his attempt to reconcile competing rights situations, underlying principles of political or ethical morality to support the hierarchy that would allow us to resolve such conflicts as more than a matter of strategy.[32]

Dworkin has famously argued, for example, that we can only reconcile competing rights, and indeed competing principles and ideals, such as liberty and equality that inform most modern legal systems, if we have underlying ethical principles that allow us to configure the way in which those principles, rights and ideals can be understood in relationship to one another. In the case of Dworkin, for example, the constitutional ideals of liberty and equality can only be reconciled if they turn on a deeper level of commitment to both of the two principles making up what he has termed ethical individualism. Those two principles, quoting Dworkin, are as follows:[33]

> The first principle is the principle of equal importance: It is important, from an objective point of view, that human lives be successful rather than wasted, and that this is equally important, from that objective point of view, for each human life. The second is the principle of special responsibility: Though we must all recognise the equal objective importance of the success of a human life, one person has a special and final responsibility for that success — the person whose life it is.

Our point here is not to endorse ethical individualism. Indeed, we do not think that ethical individualism provides us with principles adequate to the task of building the new South Africa. But it is important to show that the actual rights in a constitution inevitably implicate deeper principles and that in a case of competing rights we will need to make explicit an appeal to those deeper principles in trying to identify a hierarchy between them. Sachs, like many other judges of the Constitutional Court, defends dignity as the ultimate principle of the Constitution. Although we agree with Sachs's critics that Sachs is not always clear on the relationship between rights and the Constitution and its underlying principles, it was evident in the seminar that Sachs is defending dignitarianism as the fundamental principle of the South African Constitution. Dignity has been defended by the Constitutional Court as not only an underlying principle, but also as a right, and thus dignity

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[32]   DM Davis 'Deconstructing and reconstructing the argument for a bill of rights within the context of South African nationalism' in P Andrews & S Ellmann (eds) *The post-apartheid constitutions: Perspectives on South Africa's basic law* (2001) 194.

[33]   R Dworkin *Sovereign virtue: The theory and practice of equality* (2000) 5.

also functions on many different levels in the constitutional jurispru-
dence of South Africa. The Court in *Dawood* said:[34]

> Human dignity . . . informs constitutional adjudication and interpretation at a
> range of levels. It is a value that informs the interpretation of many, possibly,
> all, other rights . . . Section 10, however, makes it plain that dignity is not
> only a *value* fundamental to our Constitution; it is a justiciable and enforce-
> able *right* that must be respected and protected. In many cases, however,
> where the value of human dignity is offended, the primary constitutional
> breach occasioned may be of a more specific right such as the right to bodily
> integrity, the right to equality or the right not to be subjected to slavery,
> servitude or forced labour.

Sachs is certainly willing to have the spirit of *ubuntu* pervade constitu-
tional law and indeed, to the degree it is cited in actual legal cases,
recognises that it is a constitutionally cited principle. At least in the
seminar he seemed to argue that it would damage *ubuntu* to turn it
into a judicial principle or right, although, as we will see shortly, Sachs
seems to be rethinking his position on *ubuntu* and constitutional law.
Drucilla Cornell responded in a two-fold way. First, she agreed with
Sachs that dignity is a crucial principle in the South African Constitution.
Broadly construed, dignity is a metaphysical fact of humanity that can-
not be lost and yet can be violated. To recognise dignity as a metaphy-
sical fact does not mean that there cannot be wrongs against dignity,
because the ultimate wrong to dignity is to refuse to other human
beings the status of human. Clearly, in the context of apartheid,
South African blacks were denied the status of human. Dignity is a
crucial principle and, more specifically, an ever important reminder
that skin colour or any other supposedly biological attribute can
never be a reason to deny anyone their inclusion in the idea of human-
ity.[35] But social realities should also not be allowed to undermine the
'truth' of that metaphysical fact. In other words, we never want to make
the argument that, because of the social conditions in which someone
lives, they could lose their dignity as if it is simply the positive attribute
of being a human being that is there or not. Thus, we cannot use
dignity in and of itself to call for the promotion of sweeping egalitarian
transformation as if there were positive conditions that must be there as
part and parcel of requirements of dignity.

This understanding of dignity can help us explain why Immanuel
Kant himself never argued for the second and third generational rights

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34 *Dawood & Another v Minister of Home Affairs & Others* 2000 3 SA 936 (CC). See also *Ex
    Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of
    the Republic of South Africa* 1996 4 SA 744 (CC) (*Certification*) paras 76-8; *Soobramoney
    v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) (*Soobramoney*); *Government of
    the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*); *Minister of
    Health & Others v Treatment Action Campaign & Others (2)* 2002 5 SA 721 (CC) (*TAC*).

35 For a general discussion of dignity, see the introduction and ch 4 of D Cornell *Between
    women and generations: Legacies of dignity* (2005).

that are included in the South African Constitution. In Kant, the meta-
physical fact of dignity turns on the ideal aspect of our humanity which
inheres in humanity, placing itself under the moral law and thus achiev-
ing freedom of self-legislation by so doing. Only through such self-
legislation do we rise above the determinants of our natural life, and
thus a community of self-legislators would, at least on the level of the
hypothetical imagination, be able to constitute a moral community as
an ideal in which freedom would be a self-limiting principle. By self-
limiting principle, we mean my freedom would be limited by your free-
dom and that we would agree to this limitation because of the moral
nature of freedom itself. The social contract ideal in Kant yields an
integral relationship between duty and right.[36] My rights are also my
duties to you, but my duties to you, since they are limited by the very
rights they entail, will never go beyond this one-to-one correspondence
between rights and duties. Kant gives us a moral notion of the law of a
modern legal system as formed in and through this experiment in the
hypothetical imagination of a moral social contract based on maximis-
ing the negative freedom of all. *Ubuntu*, as it has been defined by
Mokgoro, gives us a very different notion of the founding principle of
law and with it a very different notion of rights and responsibility.

7   *Ubuntu* as a founding principle of law

To quote Mokgoro J:[37]

> *Ubuntu*(-ism), which is central to age-old African custom and tradition, how-
> ever, abounds with values and ideas which have the potential of shaping not
> only current indigenous law institutions, but South African jurisprudence as a
> whole. Examples that come to mind are: The original conception of law
> perceived not as a tool for personal defence, 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 rules which sustain it, as opposed to individual interests, with its likely
> utility in building a sense of national unity among South Africans; the con-
> ciliatory character of the adjudication process which aims to restore peace
> and harmony between members rather than the adversarial approach which
> emphasises retribution and seems repressive. The lawsuit is viewed as a
> quarrel between community members and not as a conflict; the importance
> of group solidarity requires restoration of peace between them; the impor-
> tance of public ritual and ceremony in the communication of information
> within the group; the idea that law, experienced by an individual within the

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[36]   For an excellent discussion of Immanuel Kant's defence and elaboration of the ideal of
       the social contract, see eg 'Immanuel Kant "On the common saying: That may be
       correct in theory, but it is of no use in practice"' in M Gregor (ed) *Practical philosophy*
       (1999) 273.
[37]   Y Mokgoro '*Ubuntu* and the law in South Africa' (1998) 1 *Potchefstroom Electronic Law
       Journal*.

> group, is bound to individual duty as opposed to individual rights or entitle-
> ment. Closely related is the notion of sacrifice for group interests and group
> solidarity so central to ubuntu(ism); the importance of sacrifice for every
> advantage or benefit, which has significant implications for reciprocity and
> caring within the communal entity.

Clearly, Mokgoro's rendering of the understanding of *ubuntu* as it
relates to traditional law gives us a very different conceptualisation of
the law than even the one embodied in the Kantian ideal of the social
contract. One question that was raised in the seminar was, should
ubuntu, as defined by Mokgoro, function at the highest level of the
legal imaginary, as the material of the experiment in the imagination
of what the 'we' of South Africa should be constituted to be. Further, by
keeping the emphasis on freedom in *ubuntu*, this other understanding
of the founding principle of law could even be inclusive of dignity and
explain why dignity is so important in the Constitution of South Africa,
without forcing dignity to do more work that it can do, at least when it
is grasped as a metaphysical fact, a postulate of reason and not an
attribute of persons. We will not try to answer the sweeping nature of
that first question. Yet, it is clear that *ubuntu*, as it is defined by
Mokgoro, as a founding principle of law, would not have the same
kind of one-to-one correspondence of right and duty that it does
under social contract theory. Obligation, and even a legally imposed
duty, can go beyond that allowable under social contract theory, since
the enhancement of a just community is crucial to the freedom of all in
that community and for the quality of life more generally. Responsibility
could thus entail the acceptance of measures that would be deemed
unfair under traditional Western conceptions of the social contract that
usually start with fairness, even if they disagree about the content of
fairness. Thus, for example, beneficiaries of racism in South Africa could
be held to a duty to correct it that might be formally unfair, such that
they would be expected, for example, to pay higher electricity bills than
blacks. Thus, they would not be treated equally, at least under a so-
called neutral theory of equality and fairness. Mokgoro clearly does not
want to limit the use of *ubuntu* to a vague spirit that pervades the
Constitution. She had forthrightly and correctly argued, to our mind,
that the founding principles of the Constitution and the ideals they
uphold must be made explicit in actual legal decisions. It is important
to remember here our earlier discussion of responsibility and freedom in
which the creative power of the individual is both deepened and
enhanced by being in a community that takes support for people ser-
iously. This sort of enhancement may not be reduced to any self-inter-
ested benefit on the individual level in any immediate sense. The idea is
that in a just community the shared force will realise our shared human-
ity, which is of course a benefit beyond price.

But it is not only its ability to defend a notion of obligation that goes
beyond social contract that might make *ubuntu* important. It is also in

its emphasis on the just quality of the community and the enhancement of that just quality that distinguishes *ubuntu* from other notions of community that reduce it to an imagined social contract between already individuated persons. In her opinion, in the *Khosa* case, Mokgoro did not justify her decision through the use of *ubuntu*, yet her conclusions in the case reflect an *ubuntu*-inspired jurisprudence. The fate of the people in this case recalled the following words of Weil's, quoted by Christodoulidis in another context: 'You do not interest me. No man can say these words to another without committing a cruelty and offending against justice.'[38] The facts of the *Khosa* case were a clear example of where the state through the law, through parliamentary legislation, confirmed that claim. The message was that, if you are not a citizen of this country, 'you do not interest me', or at least interest me 'enough', to care for your well-being.[39]

In this decision, the Court had to confront a challenge to a certain provision of the Social Assistance Act 59 of 1992. The applicants in both matters were Mozambique citizens who were permanent residents in South Africa. In the case of the first applicant, the mother, applied for child support grants for her children under the age of seven and another grant, a care dependency grant, for a child aged 12 who suffered from diabetes. The second applicant applied for an old-age grant. The applicants in both matters were denied the grants because they were not citizens of South Africa. In a decision to uphold the validity of an order of the High Court, Mokgoro ruled that the High Court's order should indeed be upheld and the Court itself had the responsibility to read the words 'permanent resident' into the challenged sections of the Social Security Act. The applicants argued that sections 26, 27 and 28 of the Constitution use the word 'everyone' in the first two cases and the words 'every child' in the third case, and that delimiting access to social service grants violated the Constitution on its face in which it is written that everyone is eligible.

Mokgoro obviously could have limited the reach of her decision to the group before her, which were both Mozambicans. There is a tragic past that the South Africa of apartheid rule had with Mozambique. Many of the freedom fighters of the African National Congress, including members of a guerilla army formed by Mandela, fled to Mozambique and based their operations there. The result was an ongoing set of military interventions into Mozambique that violated the integrity of the country and to this day continues to make life in Mozambique difficult. One classic example is that a relatively large amount of

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[38]   E Christodoulidis 'Reconciliation as potentiality', unpublished paper read at a conference on 'Time, reconciliation and the law', Glasgow, May 2004, copy on file with authors; The quote is from Simone Weil's essay 'On human personality' in R Rees (ed) *Selected essays* 1962 9-34.
[39]   As above.

Mozambican land is still heavily mined. The mines were installed by the South African government under apartheid and now those lands are of little industrial or agricultural use. Due to this tragic past, Mokgoro could have made a special exception for Mozambican refugees, but she chose not to rest her decision on that past or the special responsibility that might grow out of it. Instead, she took the message of the Constitution to heart because the relevant sections gave the rights to 'everyone', and that it was this word that demanded interpretation.

There might be something else at play in her decision that is more important than the pure legal discussion — something beyond law and legal language, something beyond rights that Weil captured as follows:[40]

> At the bottom of the heart of every human being, from earliest infancy until the tomb, there is something that goes on indomitably expecting, in the teeth of all experience of crimes committed, suffered, and witnessed, that good and not evil will be done to him. It is this above all that is sacred in every human being . . . This profound and childlike and unchanging expectation of good in the heart is not what is involved when we agitate four our rights. The motive which prompts a little boy to watch jealously to see if his brother has a slightly larger piece of cake arises from a much more superficial level of the soul. The word justice means two very different things according to whether it refers to the one or the other level. It is only the former one that matters.

A certain politics and ethics might be at play, a concern with protecting and enhancing lives, striving for a society where no one, but at the very least the state, is not allowed to say 'you do not interest me'. The inspiration for this politics and ethics could be the notion of *ubuntu* at least hinted at in the following excerpt from Mokgoro's judgment:[41]

> Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.

Mokgoro argues strongly that the grants in all cases should be ordered and that it was not enough to accept the compromise that was offered by the respondents, that they would allow these particular Mozambicans access to the grants. Mokgoro accepted the applicants' argument that the refusal of these grants denied them the right to life and dignity under the Constitution. There is a deep sense in which, for Mokgoro, the humanity of the residents could not be denied because they were not citizens and in that sense her argument, in our mind, rightfully appeals to dignity. To quote Mokgoro again:[42]

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40   S Weil 'Human personality' in Rees (n 38 above) 10; Burns 'Justice and impersonality: Simone Weil on rights and obligations' 1993 49 *Laval théologique et philosophique* 480.
41   *Khosa* (n 1 above) para 74.
42   Mokgoro J in *Khosa* (n 1 above) para 47.

> This Court has adopted a purposive approach to the interpretation of rights. Given that the Constitution expressly provides that the Bill of Rights enshrines the rights of 'all people in our country', and in the absence of any indication that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word 'everyone' in this section cannot be construed as referring only to 'citizens'.

Mokgoro explicitly rejects the 'American' solution in this problem, which is to treat 'citizens' differently than 'non-citizens'. Indeed, the respondents made the argument that many 'developed' countries, and not just the United States, made distinctions between 'citizens' and 'non-citizens' in the granting of social welfare grants. Mokgoro distinguished her own decision from the US Supreme Court by arguing that the reasonableness by which differentiations and exclusion in legislations are judged in South Africa is a much higher standard of judicial review then the one used by the US Supreme Court, which is based on rationality. In the United States, this rationality standard is used in all cases except those involving suspect classification or in the case of gender, which operates under an intermediate standard of review. But what makes Mokgoro's decision particularly important for us is that she not only emphasises the wrong to the individuals; she also insists that the purposive nature of the South African Constitution is rooted in the promotion of a just community, a just community which again is irreducible to a social contractual understanding of the relationship between rights and duties.

Here we sound again Mokgoro's note that our responsibility to our community is not simply because it protects our entitlements. Instead, we are responsible for the quality of that community and the promotion of a just community becomes a goal for everyone in South Africa, even if it demands assuming what seems to be an unfair imposition of requirements not simply to make up past wrongs, but to achieve a justice that ultimately enhances everyone's power, if power is understood through the ethical force field of *ubuntu*. Again, we are returned to the idea that freedom is indivisible.

We think that the best understanding of her argument, if it proceeds through *ubuntu*, is that permanent residents, through their actual engagements with South Africa, have become a part of the ethical interactions that make up the country and that they, as a result, should be considered part of the promise for justice offered by the Constitution.[43] The purposiveness of the Constitution of South Africa, which explicitly seeks 'to free the potential of each person', is simultaneously working to free the potential of the community toward justice. In this

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[43]   The judgment explicitly declines to address the position of other excluded groups, such as temporary residents, asylum seekers and illegal immigrants, hinting instead that such groups can legitimately be excluded from social assistance benefits. See *Khosa* (n 1 above) para 59.

sense, the purposiveness is about the kind of community the Constitution promotes as integral to the freeing of that potential. A just community for Mokgoro is a strong community, and a strong community strengthened by the capability and potential of individuals, certainly. But by promoting the indivisibility of freedom, the community established keeps itself from being diminished by the denial of humanity to anyone who is thrown in its lot with it. Thus, what is lost in terms of the burden placed on citizens to sustain those who are not citizens is well made up for Mokgoro by the promotion of a just community which is the only kind of community under *ubuntu* that can strengthen all of us together. Here we have a classic example of some citizens having to assume a responsibility, which might seem under a more liberal notion of fairness to be unjust, because they are taking on additional burdens on behalf of others in the community, without receiving any apparent reciprocal benefit. Yet, the situation is viewed as one where assuming such extra burdens is in the end in their moral interest because who they are as free individuals is inseparable from the freedom guaranteed 'to everyone'. Indeed, one can even read Mokgoro's insistence that the Constitutional Court should itself read in the words 'permanent residents' into the challenged sections of the social legislation as an *ubuntu*-inspired understanding of the role of the Constitutional Court.

The Constitutional Court is also responsible in its service as part of South Africa to promote justice for everyone. Thus, the Court should not just relinquish its responsibility to make sure that the change takes place now so that the destitute individuals should get their grants (although of course Mokgoro is very concerned that they do get their grants), but instead the change should be enforced by the Court in its responsibility to bring into being a just and equitable community. If the Court was simply to turn back the legislation to the legislature, not only would the individuals involved be harmed, but the Court would be diminished in its responsibility to be just in the name of the community itself. As we have written, Mokgoro did not use the word *ubuntu* here, but when she writes that extra burdens must be assumed by citizens and that others who do not have those burdens still have equal right to access to social benefits, she is not only promoting a fair community but, as she writes, a caring community. And this close connection between a just and caring community is part and parcel of her understanding of what the *nomos* of the new South Africa demands of its citizens:[44]

> At the time the immigrant applies for admission to take up permanent residence, the state has a choice. If it chooses to allow immigrants to make their homes here, it is because it sees some advantage to the state in doing so. Through careful immigration policies it can ensure that those

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[44] *Khosa* (n 1 above) para 65.

admitted for the purpose of becoming permanent residents are persons who will profit, and not be a burden to, the state. If a mistake is made in this regard, and the permanent resident becomes a burden, that may be a cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here. Immigration can be controlled in ways other than allowing immigrants to make their permanent homes here, and then abandoning them to destitution if they fall upon hard times. The category of permanent residents who are before us are children and the aged, all of whom are destitute and in need of social assistance. They are unlikely to earn a living for themselves. While the self-sufficiency argument may hold in the case of immigrants who are viable in the job market and who are still in the process of applying for permanent resident status, the argument is seemingly not valid in the case of children and the aged who are already settled permanent residents and part of South African society.

Crucial to the debate on whether or not *ubuntu* can be operationalised in the Constitution are two questions about constitutionalism itself. As John and Jean Comaroff have written:[45]

> The Constitution of the Republic of South Africa, adopted in 1996, has been accorded hallowed status in the formation of the postcolonial polity. Translated into all official languages under the legend 'One *law* for One *nation*' — the italics are in the original — the text is shelved, in many homes, alongside family bibles and books of prayer. Yet, almost from the start, there have been doubts about its ability to constitute either *One* Nation or *One* Law; these italics are ours. Even its comprehensibility has been questioned: a mass-circulation black newspaper in Johannesburg, for example, has referred to it as a Tower of Babel, pointing out that its vernacular versions are utterly opaque — and, hence, babble to those whom it was meant to enfranchise.

Through their careful ethnographic work, the Comaroffs have pointed to how contradictions between the 'one' people of the Constitution and the many peoples of South Africa's indigenous legal systems cannot be reconciled by any of the current ideals of liberal multiculturalism, including the liberal ideals read into the South African Constitution itself. The Comaroffs point to how 'on the ground' struggles are constantly disrupting any easy liberal solution to what they rightly, in our mind, designate as claims to poly-sovereignty: actual claims to self-government in current law being made by different peoples in South Africa. Our first point is that we agree with the Comaroffs, that the Constitution has not and should not be fitted into a liberal mode that belies the complexity of actual struggle, yet simultaneously this should not imply a rejection of constitutionalism altogether. The Comaroffs clearly not only embrace constitutionalism, but they have defended it as a substantive rather then proceduralist form of democratic jurisprudence. The jurisprudence is democratic in that the court is actually participating in the configuration of values and ideals. These values

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45   J & J Comaroff 'Reflections on liberalism, policulturalism and ID-ology: Citizenship and difference in South Africa' *New Social Forms Seminar Series*, University of Stellenbosch Department of Sociology and Social Anthropology (15 August 2003).

and ideals both become embodied in law and also symbolically rein-
force visions of what kind of polity the new South Africa hopes to
become. Indeed, from the beginning of his work on the tribal legal
systems, John Comaroff has emphasised the importance of aesthetically
informed political practices of tribal intuitions, including those related
to law-making practices, such as community conciliation and the like.
Obviously, we need to look more into how the operation of tribal law in
South Africa has appealed to a very different notion of law, including
the 'law of law' then the one we associate with modern legal systems
justified by one version or another of the social contract. What we want
to emphasise here is that the Comaroffs continually point us to the
importance of remembering that the constant effort to make sense of
the Constitution should itself be seen as a political struggle.

In a recent decision, *Port Elizabeth Municipality v Various Occupiers*,[46]
the Constitutional Court had to decide whether the municipality acted
lawfully when it evicted residents from privately owned land within the
municipality. The municipality responded to a petition signed by 1 600
people in the neighbourhood seeking an eviction order from the South
Eastern Cape Local Division of the High Court. The High Court granted
the order, after which the occupiers took the matter on appeal to the
Supreme Court of Appeal. The Supreme Court upheld the appeal and
set aside the eviction order. The municipality then applied to the Con-
stitutional Court for leave to appeal against the decision of the Supreme
Court. In a decision by Sachs J, the Court did not grant leave to appeal.
Sachs placed the question of eviction within a historical context, refer-
ring to the 'pre-democratic' era where the law would have responded
to illegal squatting in a drastic manner, which led to not only the
dignity of black people being assaulted, but also to the creation of
large well-affluent white urban areas that co-existed alongside black
areas where blacks lived in poverty and insecure social conditions.[47]
In a new democratic era under a supreme Constitution with an
entrenched Bill of Rights, squatting was decriminalised and evictions
were made subject to a number of requirements. A significant feature
of the new era is that homeless people must be treated with dignity and
respect. However, he added that it is not only the dignity of the poor
that is affected when evicted and forcibly removed; the whole society is
demeaned by such actions. Sachs argued that courts had a new role to
play in balancing illegal eviction and unlawful occupation, that they are
called upon to go beyond their 'normal functions, and to engage in
active judicial management'.[48] He highlighted the Constitution's

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[46] *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC)
      (*PE Municipality*).
[47] *PE Municipality* (n 46 above) paras 8-10.
[48] *PE Municipality* (n 46 above) para 36.

requirement that everyone must be treated with 'care and concern' within a society based on human dignity, equality and freedom. He argued that cases must be decided not on generalities, but in the light of their own particular circumstances.[49] With explicit reference to *ubuntu*, he said the following:[50]

> The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

In this opinion, Sachs seems to have come closer to Mokgoro than he appeared to be in the seminar, in that we can read him to allow *ubuntu* to be an important ethical directive in the sense of the law of law underlying the entirety of the Constitution.

8   End remarks

Some contemporary advocates of agonism, a word embraced by Arendt, who argued that we must allow for radical plurality as the very basis of democratic politics, have resisted the ideal of constitutionalism itself as against this agonism. The critique that has become well known is that the law and the Constitution can only carry a poison that induces a kind of sclerosis of the agonal energies of politics.[51] What was raised in the seminar was not this critique of the life dissipating effects of constitutionalism, but instead a recognition that is precisely the depth of the challenge to South African sovereignty: Poly-sovereignty could at least potentially spur new and innovative interpretations of the Constitution.

There is no reason in principle that *ubuntu*, as it is understood as a founding principle of the law of law, cannot be operationalised. What would it mean if both dignity and *ubuntu* were configured together as operational principles as well as founding principles? We want to at least raise the suggestion here that *ubuntu* would not be translated as dignity has into an individual right because it goes beyond the notion of individual entitlement. The legal system of South Africa does not give standing only to individuals who have been harmed, but also to those individuals and communities who want to promote the public good. Therefore, even the idea of standing, so different than the one in the United States, can best be interpreted through *ubuntu*. We understand

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[49]   *PE Municipality* (n 46 above) para 31.
[50]   *PE Municipality* (n 46 above) para 37.
[51]   See S Wolin *Tocqueville between two worlds: The making of a political and theoretical life* (2003).

that in this essay we are only beginning to think of how *ubuntu* is being operationalised, but we also want to suggest that *ubuntu*, understood as a principle that could be operationalised, might well serve to promote ethically sound interpretations of difficult (at least for traditionally liberal jurisprudences) clauses of the Constitution, such as the limitations clause. After all, the limitations clause imposes a limit on when individuals can pursue their rights. How can we understand that limit? It is difficult to understand that limit, indeed, in the traditional liberal framework, even one inspired by Immanuel Kant, which reduces all rights and duties to a one-to-one correspondence in the social contract. Thus, it at least deserves much more exploration as to how *ubuntu* could be operationalised in the Constitution.

More importantly, it would provide a nuanced jurisprudence that would not only include African or South African values and ideals as important to the new South Africa, as a matter of fairness to those whose ideals have been marginalised, but also because those principles, ideals and values may well provide with solutions to dilemmas in South Africa that are not solvable by liberalism. It could be argued that certain aspects of customary law and features of the African Charter on Human and Peoples' Rights (African Charter) are concrete manifestations of *ubuntu*. Pieterse notes the influence of *ubuntu* in the humanist and collective emphasis in the customary law areas of restorative justice, the extended family, the notion of belonging and property.[52] He also relates the inclusion of social, economic and cultural rights alongside civil and political rights; the inclusion of the right to development; the protection of peoples' rights and the concept of duties in the African Charter to *ubuntu*. These rights, as well as the harmonisation of rights and responsibilities, illustrate the interdependence of individuals and communities and underscore the notion that individual rights cannot be meaningfully exercised in isolation of broader community rights.[53]

Perhaps the most empowering aspect of *ubuntu* is that, by taking its interactive ethic seriously, we should not shy away from the actual attempt to operationalise this powerful ideal because of fears of failure to do so adequately. Indeed, the very spirit of *ubuntu* might suggest to us that, while such failures are to be expected, the true enactment of this sort of ethic is itself constructed through the ongoing participation of the community in such struggles, including failures of operationalisation and efforts to resolve them, to create a new South Africa.

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[52]   Pieterse (n 3 above) 449.
[53]   Pieterse (n 3 above) 456-457.